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Convention on jurisdictional immunities of States and their property

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Report of the Secretary-General

Addendum

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Italy

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General remarks

1. The Government of Italy has attached special importance to the work of the International Law Commission (ILC) on the present topic since its inception. As recalled by the ILC in its *travaux préparatoires*, the Italian judiciary has been in the forefront since the beginning of the last century in the development of the so-called restrictive immunity doctrine, now generally followed by State practice.

2. We have on previous occasions had the opportunity to commend the ILC for the draft on the present topic it submitted to the General Assembly in 1991. It should also be stressed that the ILC draft was the result of a study which had been carried out during a period in which the institutional and economic settings on the international landscape were far different from now. This explains why the provisions contained in that draft have required further work since 1991. This additional work has been useful, particularly in identifying the main issues on which general agreement is still to be found. The ILC should be praised for the contribution it provided to that effect in chapter VII of the report on the work of its fifty-first session¹ and in the report of its Working Group on the topic annexed thereto. It has given guidance to the discussions that took place in the Working Group of the Sixth Committee on this topic during the fifty-fourth and fifty-fifth sessions of the General Assembly.

3. Two major indications have emerged from the above discussions. First, the substantive outstanding issues touch upon the very core of the present topic, namely: (a) definition of the State for purposes of immunity; (b) definition of the commercial character of a contract or transaction; (c) concept of a State enterprise or other entity in relation to commercial transactions; (d) contracts of employment; (e) measures of constraint against State property. Secondly, the positions among delegations on many key provisions bearing on the above issues remain divergent, while the relevant case law in many countries is still evolving. We therefore think that more substantive work is still

to be done in order to adjust the existing text to the recent developments of State practice and legislation. Accordingly, Italy looks forward to the first meeting of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property established pursuant to paragraph 3 of General Assembly resolution 55/150, of 12 December 2000.

4. As to the form of the end product of the work on this topic, the elaboration of a convention would be the ideal outcome. However, if disagreement on the outstanding issues were to persist and prevent the drafting of more precise and detailed provisions, aiming at a convention might prove a counterproductive exercise. At the current stage, where State practice in many countries is still evolving, a model law, or a set of guidelines, might still serve the purpose of providing general terms of reference to national legislatures and judicial organs.

Definition of the State for the purposes of immunity

5. With reference to the report of the Chairman of the open-ended Working Group of the Sixth Committee established under General Assembly resolution 54/101 of 9 December 1999 (A/C.6/55/L.12, hereinafter "Report"), Italy favours the drafting changes introduced in article 2, paragraph 1 (b), of the 1991 ILC draft, merging former subparagraphs (ii) and (iii). We consider the new language most appropriate insofar as it makes clear that the various organs of the State, its political subdivisions, its agencies or instrumentalities, as well as the constituent units of a federal State, fall within the definition of the State for purposes of immunity if it is established that, not only they are entitled to perform acts in the exercise of sovereign authority, but also that they are acting in that capacity.

Definition of the commercial character of a contract or transaction

6. A general international rule has been formulated through a century-long State practice to the effect that a State cannot invoke immunity from jurisdiction if it engages in a commercial transaction with a foreign natural or juridical person. We find it of paramount importance that this rule, which is codified in article 10 of the 1991 ILC draft, will not be nullified by an ambivalent definition of "commercial transaction" in article 2, paragraph 1 (c).

7. Italy considers the “nature test” to be in principle the sole criterion for determining the commercial character of a contract or transaction. In a spirit of compromise we can support at the current stage alternative I proposed by the Chairman of the Working Group (see Report, para. 25) consisting of the deletion of paragraph 2 of article 2.

Notes

¹ *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10 (A/54/10).*

Concept of a State enterprise or other entity in relation to commercial transactions

8. As stated on previous occasions, Italy considers article 10, paragraph 3, of the 1991 ILC draft superfluous, if not confusing. Accordingly, we share the view of those delegations that favour its deletion. However, consideration could also be given to alternative II on item 3 as proposed by the Chairman of the Working Group (see Report, para. 37) provided that the issue of the under-capitalization of a State enterprise is addressed in the new text.

Contracts of employment

9. Italy favours the revised text of article 11, paragraph 2, as proposed by the Chairman of the Working Group (Report, para. 49), since it accommodates the concerns expressed by our delegation on previous occasions. As to the suggestion to add in that provision a list of persons enjoying diplomatic immunity, it might prove to be useful *ex abundante cautela*.

Measures of constraint against State property

10. Italy has been among those delegations that have advocated the introduction in the draft of a distinction between pre- and post-judgement measures of constraint. The rationale of this distinction lies in the fact that immunity from pre-judgement measures is broader than that from measures taken with a view to executing a judgement.

11. In the light of the above, Italy supports the addition of article XY (preceding article 18) on pre-judgement measures of constraint, as well as of new article 18 bis (see Report, para. 88). As to article 18 on post-judgement measures, without prejudice to our position on the wording of the final text, we favour alternative I and the deletion of the words currently within square brackets.