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Convention on jurisdictional immunities of States and their property

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Report of the Chairman of the Working Group

Chairman: Mr. Gerhard **Hafner** (Austria)

I. Introduction

1. By paragraphs 1 and 2 of its resolution 53/98 of 8 December 1998, the General Assembly,

(a) Decided to establish at its fifty-fourth session an open-ended working group of the Sixth Committee, open also to participation by States members of the specialized agencies, to consider outstanding substantive issues related to the draft articles on jurisdictional immunities of States and their property adopted by the International Law Commission, taking into account the recent developments of State practice and legislation and any other factors related to the issue since the adoption of the draft articles, as well as the comments submitted by States in accordance with paragraph 2 of General Assembly resolution 49/61 of 9 December 1994 and paragraph 2 of General Assembly resolution 52/151 of 15 December 1997, and to consider whether there were any issues identified by the working group upon which it would be useful to seek further comments and recommendations of the Commission;

(b) Invited the International Law Commission to present any preliminary comments it might have regarding outstanding substantive issues related to the draft articles by 31 August 1999, in the light of the results of the informal consultations held pursuant to General Assembly decision 48/413 of 9 December 1993 and taking into account the recent developments of State practice and other factors related to the issue since the adoption of the draft articles, in order to facilitate the task of the working group.

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2. At the fifty-fourth session of the General Assembly, the Sixth Committee, at its 2nd meeting, on 27 September 1999, elected Mr. Gerhard Hafner (Austria) Chairman of the Working Group.

3. The Working Group held four meetings, on 8 and 9 November 1999.

4. The Working Group had before it the draft articles on the topic, submitted by the Commission to the General Assembly in 1991; comments submitted by Governments, at the invitation of the General Assembly, on different occasions since 1991 (A/54/266, A/53/274 and Add.1, A/52/294, A/47/326 and Add.1-5, A/48/313, A/48/464 and A/C.6/48/3); document A/C.6/49/L.2, containing the conclusions of the chairman of the informal consultations held in 1994 in the Sixth Committee pursuant to Assembly decision 48/413; as well as chapter VII of the report of the International Law Commission on the work of its fifty-first session[1] and the report of its Working Group on Jurisdictional Immunities of States and their Property annexed thereto.

5. The discussions of the Working Group revolved around the following points, which are reflected in the first four chapters of the present report, namely: (1) possible form of the outcome of the work on the topic; (2) the five outstanding substantive issues identified in the report of the Working Group of the International Law Commission, namely, (a) concept of a State for purposes of immunity; (b) criteria for determining 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; and (e) measures of constraint against State property; (3) the appendix to the report of the Working Group concerning the existence or non-existence of immunity in the case of violation by a State of *jus cogens* norms; and (4) future course of action to be taken with regard to the topic.

6. The present report also contains a final chapter V with the Chairman's suggestion regarding further considerations.

II. Possible form of the outcome of the work on the topic

7. A number of delegations were of the opinion that a convention should be the final outcome of the work on the topic. A convention, they felt, would make it possible to limit the proliferation of different national laws on the topic and would introduce the necessary elements of uniformity, legal certainty, consistency and clarity of the relevant rules.

8. Some other delegations considered that the elaboration of a convention would be the ideal goal, but they also felt that it would be more realistic to aim towards a model law, given the divergent views of States and the controversial nature of some of the issues still to be resolved. In their view, a model law could serve as a compromise between those who sought a convention on the topic and those who did not think that there was a need for regulation in this area. Furthermore, a model law approach presented certain advantages. It was a flexible instrument that could provide guidance to national legislatures and judicial organs and might facilitate the resolution of the controversial issues still pending.

9. The view was also expressed that, in a less divided world, a model law should not necessarily be perceived as a secondary means of codification, as it could serve as a reflection of customary law on the matter.

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

10. Some delegations could accept a model law only as an interim measure until such time as a convention might be adopted.

11. Other delegations were opposed to the elaboration of a model law. In their view a model law did not carry sufficient legal weight and presented uncertainties as to its legal nature as well as potential inconsistencies in its application by States.

12. The question was raised as to how long it would take to transform the draft articles prepared by the Commission into a model law and whether that task should be performed by the Commission itself or by the Working Group of the Sixth Committee.

III. The five outstanding substantive issues

A. Concept of a State for purposes of immunity

13. General support was expressed for the approach suggested by the International Law Commission to merge subparagraphs (b) (ii) and (b) (iii) in paragraph 1 of draft article 2, dealing respectively with "constituent units of a federal State" and "political subdivisions of the State" and to replace the words "sovereign authority" by "governmental authority".

14. Some drafting suggestions were made.

15. Some delegations suggested that the beginning of the new subparagraph (b) (ii) should read "political subdivisions of the State, including, in particular, constituent units of a federal State".

16. The suggestion was also made that the qualifier "federal" should be removed in the expression "constituent units of a federal State" as it might unduly restrict the phrase and exclude entities such as confederations and unions.

17. It was also proposed to replace the word "entitled" by the word "authorized" or "empowered" both in subparagraph (ii) and new subparagraph (iii) (former iv), in order to better indicate that, originally, only the State and its property enjoy immunity.

18. As regards the bracketed phrase "provided that it was established that such entities were acting in that capacity", some delegations were in favour of deleting it, as it might unduly authorize foreign courts to pass judgement on aspects of the public law of other States. The view was also expressed that such a phrase was better placed in the commentary rather than in the paragraph itself. Other delegations were in favour of keeping in the paragraph the bracketed words as an appropriate qualifier of the immunity. Some felt that this qualifier should also exist in new subparagraph (iii) (former iv) relating to "agencies or instrumentalities of the State". Attention was drawn, however, to the fact that the verbal tense used in the phrase might lead to confusion as to its interpretation. The remark was also made that the wordings of subparagraphs (ii) and (iii) should be consistent.

B. Criteria for determining the commercial character of a contract or transaction

19. Some delegations supported the Commission's suggestion contained in paragraph 60 of the report of its Working Group, namely that paragraph 2 of draft article 2 should be deleted. This, they said, would conform to the example set by several national laws

on jurisdictional immunities which did not lay down any criteria for distinguishing between commercial and non-commercial transactions, leaving it to the courts to select and apply any such criteria. Several delegations that would, in principle, be in favour of "nature" as a sole criterion of distinction, or of "nature" supplemented by the purpose test, felt that the Commission's suggestion was a good way out of the difficulties posed by the issue, particularly since, in practice, the distinction between the nature and the purpose test might be less significant than was at first thought.

20. Some other delegations considered that to eliminate the criteria provided in paragraph 2 was to eliminate the very core of the draft articles. In their view, if the purpose of the transaction was not profit as such but only the advancement of the public interest, then the transaction was not commercial even if its nature might lend itself to another interpretation. To delete paragraph 2 did not solve the problem and it only transferred down the line the decision as to whether a specific transaction was commercial or not and consequently whether the State enjoyed or did not enjoy immunity.

21. Some delegations were in favour of alternative (e) described in paragraph 59 of the report of the Commission's Working Group, which laid primary emphasis on the nature test supplemented by the purpose test, with some restrictions on the extent of "purpose" or with some enumeration of "purpose".

22. In the view of other delegations, alternative (g) in paragraph 59 of the above-mentioned report, which would follow the approach of the Institut de Droit International, was the most acceptable.

23. Some support was also expressed for the possible basis of a compromise suggested by the Chairman of the 1994 informal consultations (A/C.6/49/L.2, para. 6), namely to give States the option of indicating the potential relevance of the purpose criterion under their national law or practice by means of either a general declaration or a specific notification to the other party in relation to a particular contract or transaction.

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

24. Three main positions were maintained in connection with this issue.

25. Some delegations supported in principle the suggestion made by the Commission to add to current paragraph 3 of draft article 10 the clarification contained in paragraph 80 of the report of the Commission's Working Group. Some of these delegations, however, were of the view that further elements of clarification should be added namely: (a) that the authorization by the State to the State enterprise or other entity to act as its agent as well as the guarantee by the State of the liability of the State enterprise or other entity should be very specific, and should be reflected in a legally valid document; and (b) that beyond the strict limits of the authorization or scope of the guarantee, the liability fell on the State enterprise or other entity and not on the State.

26. Other delegations supported the formulation contained in paragraph 80 of the report of the Commission's Working Group provided that such formulation would entirely replace current paragraph 3 of draft article 10.

27. Some other delegations were in favour of deleting altogether paragraph 3 of draft article 10 and of returning to the original formulation in the first reading, which did not contain that paragraph. They felt that paragraph 3 went beyond the normal scope of the other paragraphs of the draft article. Furthermore, even with the proposed clarification

by the International Law Commission, some necessary exceptions had been omitted from paragraph 3, such as the possible undercapitalization of State enterprises and the possibility of piercing the corporate veil.

28. In connection with the possibility of piercing the corporate veil of a State enterprise, the remark was made that such course of action was conceivable, if at all, only in wartime, when the security of a State was at stake, but never in peacetime.

D. Contracts of employment

29. As regards subparagraph (a) of paragraph 2 of draft article 11, a number of delegations supported the amendment suggested in paragraph 104 of the report of the Commission's Working Group, namely that the words "closely related to" should be deleted and replaced by the expression "persons performing functions in the exercise of governmental authority". That amendment, in their view, would reduce the vagueness and ambiguity inherent in the wording and bring clarity and precision to the provision. Other delegations preferred to retain the existing wording. In their view this would reflect better the standards set in their own national legislation. Furthermore, it would maintain the necessary flexibility for the foreign State by shielding from the jurisdiction of the State of the forum activities which, although not in the exercise of governmental authority, were closely connected thereto. It would more adequately protect the mission from undue intrusion into its internal functioning.

30. A number of delegations supported the Commission's suggestion in paragraph 105 of the above-mentioned report to add a non-exhaustive list of the categories of employees to which the general rule in paragraph 1 of draft article 11 would not apply. In their view, this would be useful and provide guidance to national courts. Other delegations felt that the list was not necessary and that this was an issue for the national courts to decide.

31. Some delegations were of the view that if the list was to be retained, more emphasis should be placed on the fact that it was non-exhaustive and that other categories of personnel/employees, for example members of a peacekeeping or peace-enforcement force, might also be included.

32. Other delegations considered that it was preferable to include the list in the commentary to the draft articles rather than in the main text of the provision.

33. As regards subparagraph (c) of paragraph 2 of draft article 11, there was widespread support for the Commission's suggestion in paragraph 106 of the report of its Working Group to delete this provision as contrary to the principle of non-discrimination based on nationality.

34. As regards subparagraph (d) of paragraph 2 of draft article 11, a number of delegations expressed the view that the provision might also present some problems with regard to the principle of non-discrimination based on nationality, in particular regarding employees permanently residing in the forum State. There was general agreement, however, that paragraph (d) should be retained but that wording should be added to meet the concerns of delegations regarding employees residing permanently in the forum State.

E. Measures of constraint against State property

35. Several delegations supported the distinction contained in paragraph 126 of the report of the Commission's Working Group, between pre-judgement and post-judgement measures of constraint. They found such a distinction useful and likely to help the Sixth Committee to sort out the difficulties inherent in the issue. Such a distinction was based on the fact that State immunity should be broader in respect of pre-judgement measures of constraint than in respect of measures taken with a view to executing a judgement.

36. Some delegations expressed doubts as to whether the distinction between pre- and post-judgement measures of constraint, as indicated by the Commission in paragraphs 127-128 of the above-mentioned report, would make much difference in practice.

37. Some other delegations were opposed to the notion of "pre-judgement measures of constraint". They viewed it as a possible source of abuse and of unwarranted attachments of the property of the State.

38. As regards post-judgement measures of constraint, different views were expressed in connection with the three alternatives described in paragraph 129 of the report of the Commission's Working Group.

39. Several delegations expressed their preference for alternative I. In their view it was the most effective way of executing the judgement and at the same time it represented a good balance between the interest of the defendant State to have a reasonable time to comply with the judgement and the interest of the claimant State to obtain prompt compliance with the judgement in its favour. Furthermore, this alternative was flexible enough to grant the defendant State the freedom to determine property for execution. In this connection, it was suggested that the language in subparagraph (1) concerning the right of a State during the grace period either to comply with the judgement or to indicate property earmarked for execution of the judgement should be clarified.

40. Other delegations expressed their preference for alternative II. In their view it offered a greater degree of flexibility than alternative I, taking into account that the paragraph was dealing with measures of execution against a State. Delegations found that this alternative might be a good basis for making progress on the topic and a more realistic approach towards enabling States upholding the concept of absolute immunity to proceed to a gradual shift in their position.

41. Some other delegations had reservations about this alternative. They felt that the initiation of State-to-State dispute-settlement procedures was out of place in a process which should ensure prompt execution of the judgement. It might lead to the reopening of the substantive issues involved in the claim and to the undue delay of the satisfaction of the claim of the entity which had been awarded a judgement in its favour. It might even, in practice, confine the possibility of obtaining satisfaction to those States having the resources to engage in lengthy and costly dispute-settlement procedures.

42. It was clarified in the course of the discussion that paragraph (ii) of alternative II limited the dispute-settlement procedure to the specific issue of execution of the judgement and not to the merits of the case, which would have already been decided.

43. Some delegations considered alternative III as the most appropriate one. Those delegations took into account the delicate and complex aspects of the issues involved in the execution of a judgement against a State, in particular the matters of public policy that might have influenced the conduct of a State against which a judgement was handed

down. In their view, it would be better to leave the matter of execution of the judgement to State practice.

44. Other delegations found this alternative unacceptable. They believed that provisions on the execution of judgement had to be an integral part of the draft articles. Otherwise, the recognition of exceptions to State immunity in the draft articles, and the judgements against a State resulting therefrom, would constitute a futile exercise.

45. Some delegations expressed a preference for article 18 of the draft articles as originally drafted.

IV. The appendix to the report of the International Law Commission's Working Group

46. The Working Group considered whether, in addition to the five outstanding substantive issues referred to in the preceding paragraphs, it should also take up the matter described in the appendix to the report of the International Law Commission's Working Group, namely the question of the existence or non-existence of immunity in the case of violation by a State of *jus cogens* norms of international law.

47. It was generally agreed that this issue, although of current interest, did not really fit into the present draft articles. Furthermore, it did not seem to be ripe enough for the Working Group to engage in a codification exercise over it. In any case, it would be up to the Sixth Committee itself, rather than the Working Group, to decide what course of action, if any, to take on the issue.

48. In this connection, the view was also expressed that the issue raised by the appendix, rather than being a Sixth Committee matter, seemed to fall within the purview of the Third Committee of the General Assembly, particularly in connection with non-impunity issues dealt with by that Committee.

V. Future course of action to be taken with regard to the topic

49. The Working Group also considered possible ways in which work on the draft articles could proceed in the future.

50. It was generally agreed that the International Law Commission had amply fulfilled its mandate regarding the topic by preparing the draft articles and the report of its Working Group submitted this year to the General Assembly. The responsibility lay now with the General Assembly to continue to deploy efforts to bring to fruition the Commission's work. It was therefore generally considered that there was no need for the topic to be referred back to the Commission unless a very specific mandate or concrete questions were elaborated.

51. It was generally considered that further efforts on the topic should continue in the Sixth Committee and, more specifically, in the framework of its Working Group. Those efforts should aim at solving the five outstanding substantive issues and some other possible issues which might arise in the context of the draft articles, in order to elaborate an instrument on the topic.

52. A view was expressed that, in order to facilitate the solution of the outstanding issues, it was advisable to take a decision on the form of the outcome of the work on the topic before resuming consideration of those issues. The view was also expressed,

however, that the decision on the form of the outcome would primarily depend on the results of the discussion on the substantive issues and consequently could only be taken at a later stage.

53. Some delegations thought that, in order to give more time to Governments to reflect on the issues involved, the Working Group should be reconvened only at the fifty-sixth session of the General Assembly.

54. A great number of delegations, however, were of the view that, in order to maintain the current momentum on the topic, the Working Group should resume its work at the fifty-fifth session of the General Assembly and that it should be given more time to carry out its work. Five full working days was mentioned by some delegations as an appropriate time frame for an effective discharge of the Working Group's mandate.

VI. Chairman's suggestion regarding further considerations

A. Concept of a State for purposes of immunity

55. It might be worthwhile to follow the suggestion of the International Law Commission to merge "political subdivisions of the State" and "constituent units of a federal State" into one paragraph.

56. With regard to the bracketed text suggested by the International Law Commission, it might be useful to restrict immunity to cases where at the time of the dispute it was clearly established that the act had been performed in the exercise of governmental authority.

57. It would also be necessary to ensure consistency of the wording used in subparagraphs (ii) and (iii) of subparagraph (b) of paragraph 1 of draft article 2.

B. Criteria for determining the commercial character of a contract or transaction

58. The discussion in the Working Group has revealed continued divergent views regarding the criteria for determining the commercial character of a contract or transaction. At the moment it appears that agreement on the criteria will be extremely difficult to reach, and might require a long time to achieve. The only alternative in order to reach agreement sooner rather than later appears to be to delete reference to the specific criteria as suggested by the International Law Commission in 1999.

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

59. In order to clarify the issue which paragraph 3 of draft article 10 intends to address, it might be useful to separate the issue of the legal capacity of the State enterprise from questions which arise, *inter alia*, in connection with undercapitalization or misrepresentation of the entity's financial position.

60. A further set of issues related to this provision concerns the relationship between the State and the relevant State enterprise.

61. These various issues (and perhaps others which might arise) ought to be dealt with separately in order to facilitate agreement on this issue.

D. Contracts of employment

62. Consideration might be given to dropping the words "closely related to" in subparagraph (a) of paragraph 2 of draft article 11, although a contrary view was also expressed.

63. As to the list of the different Conventions, a broadening of the categories was considered necessary. Furthermore, in order to meet the needs of delegations which emphasized the retention of the expression "closely related to", it might be useful to reconsider these categories. In any case, it is certainly necessary to stress the non-exhaustive character of the list.

64. As to subparagraph (c) of paragraph 2 of draft article 11, a trend towards deleting the subparagraph emerged in the discussions.

65. As to subparagraph (d) of paragraph 2 of draft article 11, it was considered desirable not to apply this exemption to nationals of the employer State having their permanent residence in the forum State.

E. Measures of constraint against State property

66. In view of the existing divergent practice of national courts and legislation on this matter, the International Law Commission submitted various alternatives, including a distinction between pre-judgement and post-judgement measures of constraint. In the course of the discussions in the Working Group, all the alternatives suggested and combinations thereof met with support as well as opposition. Hence no clear trend on the issue emerged. It is therefore not possible at the current stage to draw any firm conclusions that might lend themselves to wider support on this issue. But the exchange of views in the Working Group was useful because it revealed the wide spectrum of positions held by States, which will need to be taken into account in the further deliberations on this matter.

F. The appendix to the report of the International Law Commission's Working Group

67. In the light of the discussions held in the Working Group of the Sixth Committee, it does not seem advisable to include this matter among the issues to be covered by the forthcoming considerations on the topic.

G. Future course of action to be taken with regard to the topic

68. The discussions in the Working Group of the Sixth Committee revealed that progress seems feasible towards achieving an instrument on this topic. In order to maintain and intensify the momentum obtained in those discussions, it seems advisable to continue further attempts towards elaborating an instrument on the topic "Jurisdictional immunities of States and their property".