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Summary record of the 36th meeting
Held at Headquarters, New York, on Friday, 19 November 1999, at 10 a.m.

Chairman: Mr. Mochochuko . . . . . (Lesotho)

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The meeting was called to order at 10.25 a.m.

Agenda item 152: Convention on jurisdictional immunities of States and their property
(A/C.6/54/L.12)

1. **Ms. Flores** (Mexico), speaking on behalf of the member States of the Rio Group, said that five years had elapsed since the General Assembly had considered the draft convention on jurisdictional immunities of States and their property, during which States had been able to reflect in depth on the importance of the topic. The interest displayed by Member States showed the desire to move towards the adoption of definite and generally accepted rules which would prevent the occurrence of conflicts in practice. However, greater efforts should be made to overcome the differences which persisted regarding the topic.

2. The members of the Rio Group were committed to continue working for the success of the Plenipotentiary Conference, which would require considerable political will and sufficient time to elucidate pending issues.

3. Although it was 22 years since the International Law Commission (ILC) had authorized the study of the topic of jurisdictional immunities of States, the goal had not been reached and there was no reason to wait any longer. It was important to maintain the impetus of the process resumed in 1999 and to translate it into a frank, ongoing and open dialogue in order to overcome differences. The Rio Group would continue to participate openly in that process and was prepared to support any initiative that would lead in the near future to a binding instrument on the subject.

4. **Mr. Kawamura** (Japan), referring to the concept of a State for purposes of immunity, fully endorsed the suggestion made by the Chairman of the Working Group (A/C.6/54/L.12). Indeed, many delegations had expressed support for the idea of merging the paragraphs dealing with political subdivisions of the State and constituent units of a federal State. With regard to the bracketed part of paragraph 1 (b) (ii) of article 2, he believed that some restrictions should be introduced in order to make it widely acceptable.

5. On the subject of the criteria for determining the commercial character of a contract or transaction, a divergence of views still remained but it might be unrealistic to assume that States would change their practice in order to reach a common position. His delegation strongly believed that the ILC approach of deleting references to specific criteria deserved serious consideration. Indeed, as pointed out by several delegations, including that of Japan, the distinction between the nature and purpose tests was less significant in practice than might be implied by the long debate about it.

6. With regard to the concept of a State enterprise or other entity created by the State in relation to commercial transactions, his delegation believed that it was important not to confuse the problems which were not within the scope of paragraph 3 of draft article 10.

7. In connection with contracts of employment, he endorsed the suggestion made by the Chairman of the Working Group to delete the words “closely related to” in subparagraph (a) of paragraph 2 of draft article 11. However, in order to meet the concerns expressed by some delegations which had opposed the deletion of those words, it was necessary to reconsider the categories of employees to whom paragraph 1 of draft article 11 would not apply. It was also necessary to stress the non-exhaustive character of the list of categories.

8. The issue of measures of constraint against State property was a difficult one and intensive discussions would be needed to find a compromise solution.

9. On the question of the existence or non-existence of immunity in case of violation by a State of *jus cogens* norms of international law, his delegation supported the suggestion of the Chairman of the Working Group that the discussion should be deferred.

10. **Mr. Win** (Myanmar) said that the definition of “commercial transaction” given in paragraph 2 (c) of the draft was highly important, because in such a transaction a State could not exercise its jurisdictional immunity. Commercial transactions could include loan agreements as well as commercial and industrial contracts. Most Member States had domestic laws on the creation of State-owned enterprises. Myanmar had promulgated a law on the subject in 1989, at the time when it had adopted the market economy system. The law allowed the reorganization of existing State-owned enterprises and the creation of new ones. In practice, those enterprises could conclude various kinds of contracts, with foreign investors or local investors, and the contracts varied depending on the commercial transaction concerned. In that sphere, the State could

not invoke jurisdictional immunity. The commercial transaction was limited to the parties which had concluded the contract.

11. Discussions should be held on the issues relating to aviation, so that a draft article could cover sea and air transport. With regard to draft article 17 on arbitration agreements concluded between a State and a foreign natural or juridical person, in that case the State could not invoke its jurisdictional immunity.

12. **Mr. Thaore** (Burkina Faso) said that some very important aspects of the topic still remained unresolved. The system of immunities should establish a balance which, without jeopardizing the interests of the host State, would offer the necessary guarantees for the undisturbed and secure performance of the diplomatic function. With regard to the legal arrangements to be adopted on the subject at the international level, a model law would be flexible and easily applicable. However, that flexibility could be at the expense of the necessary uniformity. In addition, application of a model law might conflict with the ability of some States to impose on others specific procedures and measures. The developing countries would have no certainty regarding the provisions that would be applied to them. A model law did not provide sufficient leeway to resolve the many conflicts already existing.

13. **Ms. Dickson** (United Kingdom) said that the report of the ILC Working Group (A/54/10, annex) revealed that fundamental differences of views still existed. The fact that ILC was unable in some cases to offer a solution and opted to leave the question aside, for example in relation to measures of constraint, was clear evidence of the problems to be confronted. There was still a large division among States on the approach that should be adopted towards the outstanding central issues and even the form of any future instrument.

14. Although the United Kingdom believed that international regulation of jurisdictional immunities of States was desirable, it believed that the necessary consensus had still not been reached for the preparation of a convention on the subject. However, since there were States which wanted a legal instrument on jurisdictional immunities, it shared the view expressed by various delegations in the Working Group that an appropriate way to meet that desire would be to draft a model law. The question should therefore be referred back to ILC with a request that it should reformulate its draft articles into a model law on the basis of the comments made by its Working Group.

15. **Mr. Witschel** (Germany) referred to the five outstanding core issues reviewed within ILC and the Working Group of the Sixth Committee. With regard to the definition of the concept of the State, his delegation welcomed the ILC proposal to bring the concept of the State for purposes of immunity into line with the concept of the State for purposes of State responsibility, by attributing to the State the conduct of entities exercising government authority. It also believed that it was very important to find an appropriate solution to the question of the constituent units of federal States. With regard to the determination of the commercial character of a contract or transaction, it would be preferable to remove any reference to the nature and purpose tests, in line with article 2 of the 1999 draft of the Institute of International Law on contemporary problems concerning jurisdictional immunity of States.

16. His delegation supported the intention of ILC to draft a short rule on the question of State enterprises. It should not be possible to invoke State immunity in claims relating to commercial transactions performed by State enterprises where the enterprises acted as authorized agents of a State or where the State acted as guarantor of a liability of such an enterprise. The equally difficult question of contracts of employment could best be tackled by providing a non-exhaustive list of employees performing functions in the exercise of government authority, which the courts would apply consistently. Lastly, the general distinction between pre-judgement and post-judgement measures of constraint was a useful one.

17. During the discussion in the Working Group of the Sixth Committee, it had not been possible to settle any of the outstanding issues or to resolve the differences. It seemed that the time was not yet ripe to draft a convention on jurisdictional immunities of States. Against that background of substantial differences, a model law might be an appropriate way out of the current deadlock. During the discussion in the Working Group, almost half of the delegations had been in favour of or at least open to the idea of a model law as an appropriate format for the draft articles. His delegation hoped that the future work of the Working Group of the Sixth Committee at the fifty-fifth session would make it possible to formulate appropriate comments and to refer the draft, together with the

comments, to ILC so that it could reformulate the draft articles into a model law.

18. **Mr. Janda** (Czech Republic) said that in the twentieth century the long-established doctrine of sovereign immunity had been the subject of continuous debate and extensive analysis. The political and economic transformations of that century had altered the traditional concept of State responsibility, demonstrating that the classical rule of absolute immunity had become outmoded and required reconsideration. Yet so far the only international convention of a general nature on the subject was the 1972 European Convention on State Immunity, concluded within the framework of the Council of Europe. Nevertheless, the codification of the relevant norms was of the utmost importance for the international community, since lawsuits and controversies on questions of immunity had been multiplying before national courts.

19. The draft articles on jurisdictional immunities of States and their property represented a good basis for the codification. One might have misgivings about individual provisions and definitions, but in general the ILC draft reflected the modern trend towards weakening of the principle of absolute sovereignty and strengthening of the restrictive immunity approach. His delegation was convinced that the draft could be used as a primary source for the elaboration of a general convention. If the continuity of the Working Group was maintained and it was given more time in the future, the elaboration of a general multilateral instrument on jurisdictional immunities was not an unrealistic goal.

20. **Mr. Stefanek** (Slovakia) said that the results of the recent session of the Working Group of the Sixth Committee were not very encouraging. There were still many divergent positions, particularly concerning the criteria for determining the commercial character of a contract or transaction. His delegation supported the suggestion of the Chairman of the Working Group to delete all reference to specific criteria in order to reach agreement. The question could be left to the discretion of the courts.

21. His delegation reiterated its preference for a legally binding instrument — in other words, a convention. The adoption of a convention could significantly contribute to the harmonization of national laws and practice, which were still very divergent. While a large number of States had abandoned the doctrine of absolute immunity, others continued to apply it, in accordance with the principle *par in parem non habet imperium*. The absence of a global convention created considerable legal uncertainty. Consequently, the issue of jurisdictional immunities of States and their property should not be excluded from the ongoing process of codification and development of international law. With regard to the future course of action, work should continue within the framework of the Working Group of the Sixth Committee during the fifty-fifth session of the General Assembly but more time should be allocated to the Working Group.

22. **Mr. Kulyk** (Ukraine) said that the deliberations in the Working Group had clearly proved the importance attached by the majority of Member States to the codification of the rules of international law in the field of jurisdictional immunities. That task could have far-reaching practical consequences. Ukraine believed that it was feasible to achieve a solution acceptable to all and that the conclusion of an international instrument could be a realistic goal. The ILC Working Group had made valuable suggestions on possible compromise solutions.

23. Ukraine strongly favoured the elaboration of an international convention on jurisdictional immunities, since it believed that such an instrument would limit the differences in approaches to the subject at the national level, substantially contribute to the uniformity of the relevant rules and regulations, promote consistency in international commercial transactions and provide States and private parties with legal certainty on a wide range of issues, thus encouraging international trade. The approach of a model law might create a presumption that the international community was unable, or lacked the political will, to undertake an effective codification of the norms of international law on jurisdictional immunities. It would be a major setback for the process of codification and progressive development of international law and would not be conducive to the strengthening of the role of the United Nations in that area.

24. Adoption of a model law might be a solution that would make it possible to remove the item from the Sixth Committee's agenda, but its legal weight would undoubtedly be far from sufficient to prevent uncertainties, inconsistencies and disparities in States' practice. If an international instrument did not provide

clear solutions to the issues on which there were divergent approaches, or at least indicate a way to find a solution, it could be considered as merely perpetuating current practices.

25. His delegation believed that, in order to maintain the current momentum, the discussion in the Working Group should be continued at the fifty-fifth session of the General Assembly. It also considered that efforts should not be limited to finding solutions to the five key outstanding substantive issues, but that other issues should also be considered which Member States might deem appropriate to bring to the attention of the Working Group in the context of all the articles of the draft. However, that meant that sufficient time should be allocated for the future meetings of the Working Group. His delegation was ready to contribute to the search for balanced solutions and, to that end, would be prepared to reconsider some of its positions, where appropriate.

26. **Mr. Alabrune** (France) said that a convention was the only suitable format for dealing with the question of jurisdictional immunities of States and their property; a model law, which was not legally binding, would not achieve the goal of reducing the multiplicity of rules applied by the different States. France did not agree that a model law would be a realistic solution, in view of the absence of consensus; if the divergencies were considerable, it would not be useful to have an instrument which would leave open a whole series of possibilities, since that would be no different from the situation currently prevailing. It seemed more logical to try to reduce the differences and to elaborate a binding instrument which would codify customary law and standardize the applicable rules. France also did not agree that a model law would best meet the needs of the developing States: on the one hand, an instrument of that kind would not be useful for States which had no rules on the subject and, on the other hand, it would not reduce the wide variety of legal situations. Many States had also expressed the view that in a large number of cases it would be easier to adopt a convention than a model law. Lastly, adoption of a convention would be the best way of responding to the requests made in General Assembly resolutions 46/55 and 49/61, which mentioned the holding of a diplomatic conference for the purpose of adopting a convention. For that reason, France welcomed the Sixth Committee's decision to reconvene the Working Group on jurisdictional immunities of States and their property during the fifty-fifth session of the General Assembly.

27. With regard to the content of the future convention, France noted the Rapporteur's belief that certain proposals of ILC could apparently resolve some of the outstanding disagreements — for example, in the case of differences regarding the criteria for determining the commercial nature of a contract — and would also make it possible to focus the discussion of States' measures of constraint. France still had questions about the term "political subdivisions of the States", although it had been used in the draft articles since 1991. It reaffirmed its support for the concept of government enterprises, distinct from the concept of the State, since the State could not be held responsible for an action by a government enterprise, which had a distinct legal status and was not acting in the exercise of government authority. Although the existence of legal fictions protecting the State had to be taken into account, that was not a widespread situation and it should not prevent the future convention from dealing with the question of government enterprises.

28. France believed that jurisdictional immunity for contracts of employment should be limited to officials whose functions were "closely related to" public service, since it did not seem desirable for immunity to extend to all contracts of employment of officials involved in the operation of a public service, which was a rather broad concept. Such immunity should be reserved for officials exercising a particular responsibility within the public service.

29. **Mr. Verweij** (Netherlands) said that there were still considerable differences of opinion and that for the time being it was impossible to reach consensus on a legally binding draft convention. His delegation believed that a model law would have more chances of success. It therefore believed that ILC should prepare a draft model law on the basis of the comments submitted by Member States.

30. **Mr. Hoffmann** (South Africa) said that no real progress had been made and that there were still insuperable differences in the way of the elaboration of a draft convention. His delegation therefore considered that the most realistic approach would be to prepare a model law; that could be done by ILC. A model law could provide the necessary guidance so that countries such as South Africa could update their legislation and bring it into line with the practice of other States.

Draft resolution A/C.6/54/L.19

31. **Mr. Kawamura** (Japan), introducing the draft resolution entitled "Convention on jurisdictional immunities of States and their property", announced some revisions. The title of the document would read: "Japan: draft resolution". The text of the third preambular paragraph would read: "*Having considered* the oral report made to the Sixth Committee by the Chairman of the open-ended working groups of the Committee established under its resolution 53/98,". Paragraph 3 would read: "*Decides* that the open-ended working group of the Sixth Committee established under its resolution 53/98 will continue its work at its fifty-fifth session to consider the future form of, and outstanding substantive issues related to, the draft articles on jurisdictional immunities of States and their property adopted by the International Law Commission at its forty-third session[4];". A footnote 4 would be inserted reading: "*Yearbook of the International Law Commission, 1991*, vol. II (Part Two), document A/46/10, para. 28."

32. With reference to paragraph 3, delegations agreed that the Working Group should hold seven meetings over five days, immediately after the conclusion of the deliberations on the ILC report, on the understanding that over that period some meetings would be devoted to the consideration of other items on the agenda of the Sixth Committee. The Secretariat should take note of that agreement, so that it could be taken into account in the programme of work of the Sixth Committee for the fifty-fifth session of the General Assembly. It was to be hoped that the draft resolution would be adopted without a vote.

33. **Mr. Witschel** (Germany), speaking in explanation of position, said that the fact that paragraph 4 of the draft resolution mentioned the title of the item did not prejudge the format for the draft articles on jurisdictional immunities of States and their property.

34. **The Chairman** said that, if he heard no objection, he would take it that the Sixth Committee wished to adopt draft resolution A/C.6/54/L.19, as orally revised, without a vote.

35. *It was so decided.*

36. **The Chairman** said that the Committee had concluded its consideration of agenda item 152.

Agenda item 158: **Establishment of an international criminal court** (*continued*) (A/C.6/54/L.8/Rev.1)

37. **The Chairman** announced, before the Committee took a decision on the various draft resolutions submitted, that the references to the Bureau or to coordinating delegations would be changed and that corrigenda would be issued shortly.

38. **Mr. Verweij** (Netherlands) introduced draft resolution A/C.6/54/L.8/Rev.1 on the establishment of an international criminal court and said that it was essentially similar to General Assembly resolution 53/105 and that its main purpose was to enable the Preparatory Commission to meet in 2000 at United Nations Headquarters. After recapitulating all the provisions of the draft resolution, he noted in particular that the fifth preambular paragraph was new and that the most important provision of the text was in paragraph 3. He expressed the hope that the draft resolution would be adopted without a vote.

39. **Mr. Mikulka** (Secretary of the Committee) read out the statement of conference-servicing implications of draft resolution A/C.6/54/L.8/Rev.1, which had been prepared by the Programme Planning and Budget Division of the Secretariat. It was anticipated that in 2000 the Preparatory Commission would hold two three-week sessions and one two-week session. Each session would have two meetings a day, one in the morning and one in the afternoon, with interpretation in the six official languages. It was estimated that for each of the three sessions, there would be 200 pages of pre-session, 350 pages of in-session and 150 pages of post-session documentation in the six official languages. The conference-servicing requirements for the Preparatory Commission were estimated at $2,521,100 on a full-cost basis. The extent to which the Organization's permanent capacity would need to be supplemented by temporary assistance resources could be determined only in the light of the calendar of conferences and meetings for the biennium 2000-2001. However, provision had been made under section 2 (Conference services) of the proposed programme budget for the biennium 2000-2001 not only for meetings programmed at the time of budget preparation but also for meetings authorized subsequently, provided that the number and distribution of meetings were consistent with the pattern of meetings of past years. Consequently, should the General Assembly decide to adopt draft resolution A/C.6/54/L.8/Rev.1, no

additional appropriations would be required for the biennium 2000-2001.

40. **Mr. Obeid** (Syrian Arab Republic), speaking in explanation of position, said that the Secretariat should add to the fourth preambular paragraph of the draft resolution a footnote referring to the document containing resolution F of the Conference. He welcomed the reference in the fifth preambular paragraph to related working groups, especially the working group on aggression.

41. **Mr. Diab** (Lebanon), speaking in explanation of position, said that he especially welcomed the fifth preambular paragraph, because it was essential to formulate a definition of aggression in all its aspects.

42. **The Chairman** said that, if he heard no objection, he would take it that the Committee wished to adopt draft resolution A/C.6/54/L.8/Rev.1 without a vote.

43. *Draft resolution A/C.6/54/L.8/Rev.1 was adopted without a vote.*

44. **The Chairman** announced that the Committee had concluded its consideration of agenda item 158.

Agenda item 153: United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law (*continued*) (A/C.6/54/L.14)

Draft resolution A/C.6/54/L.14

45. **Mr. Hanson-Hall** (Ghana) introduced the draft resolution entitled "United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law" and expressed the hope that it would be adopted without a vote.

46. **Mr. Fruchtbaun** (Solomon Islands), speaking in explanation of position, said that his delegation had not joined in the consensus on the draft resolution because of the meagre resources allocated to the United Nations Programme for the Teaching, Study, Dissemination and Wider Appreciation of International Law. In view of the importance of the Programme, it should have more resources.

47. **The Chairman** said that, if he heard no objection, he would take it that the Committee wished to adopt the draft resolution without a vote.

48. *It was so decided.*

49. **The Chairman** said that the Committee had concluded its consideration of agenda item 153.

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session

Draft resolution A/C.6/54/L.7/Rev.1

50. **Mr. Franco** (Colombia) introduced the draft resolution entitled "Report of the International Law Commission on the work of its fifty-first session" and expressed the hope that it would be adopted without a vote.

51. **The Chairman** said that document A/C.6/54/L.21 contained a statement of the programme budget implications of the revised draft resolution A/C.6/54/L.7/Rev.1, prepared by the Secretary-General in accordance with rule 153 of the rules of procedure of the General Assembly.

52. The United States representative had requested a vote on paragraph 10 of the draft resolution.

53. **Ms. Lehto** (Finland), speaking in explanation of vote before the vote on behalf of the European Union, regretted that paragraph 10 was to be put to a vote. In the view of the European Union, that paragraph struck the right balance between the various positions. The European Union agreed with the text of paragraph 10.

54. **Mr. Ahipeaud** (Côte d'Ivoire), speaking in explanation of vote before the vote, said that his delegation agreed with the content of paragraph 10. However, in the French version, the word "tiendra" should be replaced by the word "tiendrait".

55. *At the request of the representative of the United States of America, a recorded vote was taken on paragraph 10 of draft resolution A/C.6/54/L.7/Rev.1.*

In favour:

Algeria, Andorra, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Belarus, Belgium, Bolivia, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Cameroon, Canada, Chile, China, Colombia, Congo, Côte d'Ivoire, Croatia, Cuba, Czech Republic, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Haiti, Hungary, Iceland, India, Indonesia, Iran (Islamic Republic of), Ireland,

Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Lao People's Democratic Republic, Lebanon, Libyan Arab Jamahiriya, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Malta, Mexico, Monaco, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, San Marino, Saudi Arabia, Senegal, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, Sudan, Swaziland, Sweden, Syrian Arab Republic, The former Yugoslav Republic of Macedonia, Togo, Trinidad and Tobago, Turkey, Uganda, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Venezuela, Viet Nam, Zambia.

Against:

United States of America.

Abstaining:

Guinea, Mali, Tunisia, Ukraine.

56. *Paragraph 10 of the draft resolution was adopted by 111 votes to 1, with 4 abstentions.*

57. **Ms. Wilson** (United States of America), speaking in explanation of vote, said that her delegation had voted against paragraph 10 because of its programme budget implications. Paragraph 7 was unclear, since it gave the impression that a consensus had been reached. The question of transboundary damage should be studied without delay.

58. *Draft resolution A/C.6/54/L.7/Rev.1 as a whole was adopted.*

59. **Mr. Holmes** (Canada) expressed concern about the budget implications of paragraph 10 and regretted that the proposal to reduce the Commission's session by one week to offset the additional costs had not been accepted.

60. **Mr. Manongi** (United Republic of Tanzania), speaking in explanation of vote, said that the holding of a split session would inevitably have financial implications for the United Nations as regards the possibility of inviting participants from developing countries, because of the extra travel costs which would be involved.

The meeting rose at 12.30 p.m.