



General Assembly

Fifty-seventh session

Official Records

Distr.: General
27 November 2002

Original: English

Sixth Committee

Summary record of the 19th meeting

Held at Headquarters, New York, on Thursday, 24 October 2002, at 10 a.m.

Chairman: Mr. Prandler (Hungary)

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The meeting was called to order at 10.10 a.m.

Agenda item 154: Convention on jurisdictional immunities of States and their property (*continued*)
(A/57/22)

1. **Mr. Stewart** (United States of America) said that his country supported the proposal to authorize the Ad Hoc Committee to meet for one week in the first quarter of 2003, on the grounds that the substantial progress made in 2002 seemed to have brought an acceptable text of the draft articles within reach and a final effort to achieve agreement was therefore worthwhile. The topic of State immunity was an increasingly important and rapidly developing area of international law. Despite differences in domestic laws, an international consensus was emerging that States and State enterprises could no longer claim absolute, unlimited immunity in foreign courts, especially for their commercial activities.

2. As for the outstanding substantive issues that needed to be addressed, he affirmed his delegation's belief that the nature, and not the purpose, of a given transaction must be the factor determining whether it was commercial. States should not be permitted to hide behind nominally separate State enterprises to shield themselves from liability, nor should jurisdiction over contracts of employment permit local authorities to intrude into the internal working of consulates and embassies, or to compromise diplomatic and consular immunities. Post-judgement measures of constraint should not be limited to property with a connection to the claim or instrumentality that was the object of the original proceedings.

3. The ultimate form of the agreed articles must await the outcome of negotiations on their substance. The proposed two-step approach deserved careful consideration, because it was doubtful whether striving for a binding convention would be wise at the current juncture.

4. **Mr. Medrek** (Morocco) said the era of globalization had brought unprecedented growth in international commercial relations and in the number of cases brought against States and their property. As a result, there was a pressing need for a uniform instrument setting out clear international rules on the jurisdictional immunities of States and their property. The Working Group had made significant progress on the five substantive issues still to be resolved, and had

also succeeded in narrowing the divergencies on other outstanding issues, thus laying the groundwork to enable the draft articles to be examined as a whole for the first time. Since the elaboration of a universal legal regime for jurisdictional immunities could not be postponed indefinitely, it was now time to arrive at a consensus on the outstanding issues. For that purpose, he supported the proposal by the Chairman of the Ad Hoc Committee that it should hold a second session to continue its work, and he agreed with the representative of Japan that such a session should last for one week.

5. For the sake of achieving a balanced solution, and fashioning a legal instrument which would meet the concerns of all parties, his delegation was prepared to agree to a model law, but only on a provisional basis. A model law would be no substitute for a convention, since only a convention could stem the proliferation of differing national laws on the subject, ensure observance of the agreed rules and introduce the vital elements of uniformity, legal certainty and homogeneity. The current diversity of practice was not beneficial to international trade, and he hoped that during its next session the Ad Hoc Committee would be able to devise a generally acceptable instrument in the light of the trends which had emerged during previous debates.

6. **Mr. Štefánek** (Slovakia) said the question of jurisdictional immunities was essentially a practical one, since the absence of generally accepted international rules on the subject was creating considerable legal uncertainty. His country had suffered from the lack of such rules, having lost ownership of a building housing one of its diplomatic missions to private persons under a restitution procedure. The host State should not have tolerated such an outcome. Although his own delegation preferred the draft articles to be adopted in the form of an international convention, the discussion at present should focus on resolving outstanding substantive issues, rather than on the form which a future legal instrument should take. He supported the recommendation to reconvene the Ad Hoc Committee, which in his view would need two weeks to complete its work successfully.

7. As for the definition of a commercial transaction, he believed it would be simplest merely to delete paragraph 2 of draft article 2. The discussion of "purpose" and "nature" was largely an artificial

exercise, and practice, supported by the jurisprudence, would resolve the issue in a satisfactory manner. That approach had been in fact recommended by the International Law Commission in 1999. However, his delegation was willing to continue working on the criteria for determining the commercial character of a transaction with those delegations wishing to retain the definition.

8. He welcomed the progress made by the Ad Hoc Committee on reducing the number of substantive issues still outstanding, and narrowing down the alternatives for the remaining ones. It was also encouraging that the second reading of the draft articles in their entirety had now been completed. Thanks to the flexibility and constructive spirit shown by many delegations, it could now be hoped that the next session of the Ad Hoc Committee would be the last.

9. **Mr. Szénási** (Hungary) commended the work done by the Ad Hoc Committee. The Working Group had made substantial progress, and he particularly welcomed the fact that it had been able to agree on the definition of a State for the purpose of the draft articles. His delegation agreed with the representative of Japan that Member States should contribute actively to the work of the Sixth Committee on the topic, and stood ready to assist in bringing the work to a conclusion. As to the form of the instrument to be adopted, his delegation could agree to the two-step approach adopted the previous year to the question of State responsibility. For that purpose, it would be necessary to have a General Assembly resolution endorsing the draft articles. At a later stage, following due reflection on current practice and on developments in customary international law, the topic could be taken up again.

10. At the Council of Europe, the Committee of Legal Advisers on Public International Law (CAHDI) had decided to keep the question of jurisdictional immunities of States and their property on its agenda, and Hungary was actively promoting the preparation of a document setting out the law and practice of States in that field. It was also planning a comprehensive report on the subject. The work of the Council of Europe would, he believed, contribute to the successful completion of the work under way in the Sixth Committee. His delegation supported the reconvening of the Ad Hoc Committee early in 2003 for one week, and was fully prepared to take part in its work.

11. **Mr. Panevkin** (Russian Federation) emphasized the importance attached by his country to the preparation of the draft articles, and welcomed the efforts of the Ad Hoc Committee to achieve consensus. The draft articles prepared by the International Law Commission were broadly acceptable in both structure and content, and had formed a sound basis for the subsequent work of the Ad Hoc Committee. With a constructive approach, it should be possible to reach consensus on the outstanding issues.

12. Turning to the text of the draft articles in the report of the Ad Hoc Committee (A/57/22), he said that his delegation had no objection to the proposed definition of a State in draft article 2. A useful and important clarification had been made by including political subdivisions which were entitled to perform acts in the exercise of sovereign authority, and were acting in that capacity. As for the definition of a commercial transaction in draft article 2, his delegation preferred Alternative A for paragraph 2, which referred not only to the nature but also to the purpose of the transaction. The additional qualifying element would require courts to take account of the public and governmental purposes of a particular transaction.

13. In the text of draft article 10, his delegation preferred Alternative A for paragraph 3, because it drew a distinction between the State as such, and State enterprises and other entities that were established by the State to perform exclusively commercial transactions and had an independent legal personality. Alternative A had the merit of defining more clearly the legal position of a State enterprise. It also reduced the risk of claims against State enterprises, and attempts to distrain their property, in connection with transactions to which the State was a party.

14. With regard to draft article 11 on contracts of employment, his delegation preferred the reference, in Alternative B for paragraph 2 (a bis), to a “diplomatic agent” and a “consular officer”. The language used in Alternative A would lead to an unwarranted broadening of the range of individuals in respect of which a State could claim immunity in employment disputes. The version in Alternative B was, moreover, closer to the language of the exclusion in paragraph 2 (a), whereby State immunity would extend to employment disputes involving employees recruited for duties closely connected with the exercise of State authority.

15. It would be preferable to delete subparagraph 2 (e) of draft article 11. That would substantially reduce the scope for an employer State to put pressure on an employee to enter into a written agreement to preserve its immunity in employment disputes.

16. He supported the notion of separating the problems of the immunity of States and their property from pre-judgement and post-judgement measures of constraint, as proposed in draft articles XY and 18.

17. With regard to draft articles 13 and 14, his delegation was prepared to take a flexible approach to the question of defining the issues on which a State could not rely on immunity.

18. He preferred to retain the bracketed language in draft article 18 (c), in particular, the finding, for the purpose of post-judgement measures of constraint, that the property concerned had a connection either with the claim that was the object of the proceeding or with the agency or instrumentality against which the case was brought.

19. He supported the proposal that the Ad Hoc Committee should be reconvened for the purpose of resolving outstanding issues and producing a document based on consensus. His delegation would prefer such a document to take the form of a convention, which would make it possible to frame clear and uniform rules on the subject and would strengthen the legal obligations of the parties. However, his delegation would also consider other interim solutions, such as a model law, if that would pave the way towards a treaty.

20. **Mr. Anwar** (Indonesia) said that cooperation among States was a prerequisite for the attainment of durable prosperity for all mankind. The just and fair treatment of States and their property was an important element in that respect, and an international code on the subject would be crucial to future relationships among States.

21. The work of the Ad Hoc Committee was pertinent, both because it had smoothed out differences in views and forged a common understanding on issues and because it had possibly generated enough momentum for the completion of a draft text in the near future. It was incumbent upon all Member States to redouble their efforts to develop acceptable legal principles guaranteeing the cardinal precepts governing the immunities of States and their property. His delegation appreciated the progress made on the five

substantive issues and the agreement reached on two of them, and was in favour of extending the mandate of the Ad Hoc Committee for a further year, so that it could finalize its deliberations on the draft articles and recommend what form they should ultimately take.

22. Flexibility would be required if common ground were to be achieved on the criteria for determining whether a contract or transaction was commercial in character. As the Japanese representative had stated, the debate on that subject had been abstract and philosophical, although no great disparity existed in the practice of States. Inability to break the deadlock would call into question States' commitment to finding a solution and the time had come to finish the work on that topic. His delegation accorded great importance to the form to be given to the instrument containing the draft articles and would prefer an international treaty in order to introduce legal order into that field.

23. **Mr. Dhakal** (Nepal) emphasized the need to resolve the outstanding issues, because lack of harmony in the existing rules and norms regarding State practices and in the customary rules of international law generated difficulties and uncertainties. The Ad Hoc Committee should strive to reach consensus on the five highly sensitive outstanding issues, leaving consideration of the format of the instrument until later. It was vital that a generally acceptable instrument be elaborated in a timely manner and that the remaining sticking points should be settled on a consensual basis. For that reason, the Ad Hoc Committee should be allowed to meet for one week early in 2003.

24. **Mr. Oo** (Myanmar) said that he was encouraged by the substantial progress made by the Ad Hoc Committee on the five substantive issues previously identified by the working group of the Sixth Committee. The question of the jurisdictional immunities of States and their property was an area where the boundary lines between the overlapping domains of public international law, private international law, commercial law and corporate law should be clearly delineated with a view to establishing a legal regime that facilitated application, enforcement and dispute settlement. A good way to deal with such a complex legal subject would be first to lay down general rules of State immunity and then to list justifiable exceptions to them.

25. One of the attributes of statehood, sovereignty, entailed State immunity from the jurisdiction of another State. Yet when States engaged in commercial activities in the territory of other States, the enterprises or entities concerned were in a different legal position in that they were a legal person and, as such, they had the right to sue or be sued. In Myanmar, the State-owned Economic Enterprises Law of 1989 provided that enterprises constituted under that law could enter into legal agreements and sue or be sued in their corporate name. States did not and could not claim jurisdictional immunity in that area.

26. His delegation concurred with the formulation of draft article 3, which upheld the sanctity of diplomatic and consular privileges and immunities. Draft article 14, dealing with intellectual and industrial property, an interesting legal issue of growing importance because of the globalization process and e-commerce, was basically well drafted, but it should be supplemented and refined in order to make it consistent with recent developments and the provisions of a number of other conventions and agreements. Despite the progress already made, much more work was needed in order to give the draft convention the balance and comprehensiveness it required in order to be an effective international legal instrument.

Agenda item 155: Report of the United Nations Commission on International Trade Law on the work of its thirty-fifth session (*continued*) (A/C.6/57/L.15)

27. **The Chairman** drew attention to draft resolution A/C.6/57/L.15 on the enlargement of the membership of the United Nations Commission on International Trade Law.

28. **Mr. Kanu** (Sierra Leone) expressed his delegation's support for the draft resolution. The Commission, which was a technical and expert body, had greatly furthered the progressive development and codification of international trade law.

29. **The Chairman** said that he took it that the Sixth Committee wished to adopt draft resolution A/C.6/57/L.15 without a vote.

30. *Draft resolution A/C.6/57/L.15 was adopted.*

The meeting rose at 11.20 a.m.