UNITED NATIONS

General Assembly

FORTY-SIXTH SESSION

Official Records

SIXTH COMMITTEE
25th meeting
held on
Wednesday, 30 October 1991
at 3 p.m.
New York

SUMMARY RECORD OF THE 25th MEETING

Chairman: Mr. AFONSO (Mozambique)

CONTENTS

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued)

This record is subject to correction.
Corrections should be sent under the signature of a member of the delegation concerned within one week of the date of publication to the Chief of the Official Records Editing Section, Room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate document for each Committee.

Distr. GENERAL
A/C.6/46/SR.25
6 November 1991

ORIGINAL: ENGLISH

91-56935 5081S (E)

11 f

The meeting was called to order at 3.05 p.m.

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued) (A/46/10, A/46/405)

1. Mr. GISLASON (Iceland), speaking on behalf on the Nordic countries, noted that the International Law Commission had taken into account many of the comments submitted by the Nordic countries on the draft articles on jurisdictional immunities of States and their property as adopted on first reading. In the course of 1992, the Nordic delegations would be prepared to consult on any outstanding problems. The material prepared by the Commission was sufficiently well--grounded to enable them to endorse its recommendation that a conference be convened in order to conclude a convention that would provide a pragmatic basis for the resolution of differences which might arise between States in the field of State immunity.

2. Mr. TUERK (Austria) said his delegation supported the idea of convening an international conference of plenipotentiaries to examine the draft articles on jurisdictional immunities of States and their property. The subject-matter required a great deal of expertise which could necessitate the participation of various government departments, in particular, Ministries of Justice. Furthermore, a concerted effort by representatives of Governments within a strictly limited period of time would offer much better prospects for success than an endeavour by a working group of the Committee which might have to go on intermittently for some time. In that connection, he referred to the long-standing tradition of the Austrian capital as the venue of United Nations codification conferences.

3. He suggested that the existing draft articles should be submitted to Governments for comments before 1 July 1992. At the next session of the General Assembly, a working group of the Committee could be established in order to consider those comments, and a conference could then be convened for the spring of 1993.

4. The International Law Commission had been very successful in bridging the gap between the two main schools of thought - absolute versus restricted State immunity. The draft articles provided an excellent basis for the work of a codification conference but had certain shortcomings which would need to be remedied. Provisions would also need to be drafted on the settlement of disputes. Austria would regard a codification conference as a success only if its results were acceptable to all segments of the international community.

5. With regard to article 2, paragraph 2, his delegation reiterated its preference for the exclusion of the criterion of purpose when determining whether a contract or transaction was a "commercial transaction" under paragraph 1 (c) of that article. A restriction on the nature of a transaction could avoid possible subjective interpretations which might in certain cases aim at escaping legal action. In respect of article 7, his delegation would

(Mr. Tuerk, Austria)

prefer to delete the reference to a written contract in paragraph 1 (b), since that reference gave a State the possibility of relinquishing a right under international law by way of a contract which was subject only to municipal law.

6. His delegation was very disappointed that the article on cases of nationalization had been deleted; it strongly believed that the draft articles should contain a general reservation concerning matters regarding the extraterritorial effects of measures of nationalization. Many legal systems, including that of Austria, were based on the principle of territoriality and therefore measures of confiscation, including nationalization, could not be extended to property situated outside the territory of the confiscating State.

7. As to the title of part III of the draft articles, his delegation continued to prefer the use of the term "limitations on State immunity"; however, the compromise formulation of the Commission should meet the concerns of both schools of thought on State immunity.

8. With regard to part IV of the draft articles, his delegation would prefer the formulation of article 18 adopted on first reading, since it supported the concept that allowed measures of execution against the property of other States even without their express consent. In its view, immunity from execution should not become the last bastion of State immunity. Accordingly, no further conditions should be attached to the possibility of taking measures of execution) the requirement *in* paragraph 1 (c) of article 18 that there be a connection with "the claim which is the object of the proceeding in or with the agency of instrumentality against which the proceeding was directed" should be dropped. The restriction contained in the first part of paragraph 1 (c) should suffice.

9. With regard to article 19 and especially paragraphs 1 (d) and (e), his delegation suggested that the expression "property" be supplemented by the term "public" to make it clear that the article related only to property belonging to the State.

10. Regarding the miscellaneous provisions and in particular article 20, his delegation noted with satisfaction that the hierarchy of the various forms of service of process had been dispensed with; with respect to translations, it continued to advocate the deletion of the phrase "if necessary" in paragraph 3, particurerly as it was not clear who was to decide whether the translation of a document was necessary. His delegation believed that a document should in any case be accompanied by a translation if it was not written in the official language, or one of the official languages, of the State concerned.

11. The draft articles still lacked A provision concerning the obligation of the forum State to compensate the winning party for the costs of legal proceedings. Such a provision was a necessary corollary to the exemption of the foreign State from providing any security, bond or deposit in order to guarantee the payment of judicial costs,

(Mr. Tuerk, Austria)

12. Austria, as an upstream as well as a downstream State, situated on one of Europe's main fluvial arteries, had always been particularly interested in the law of the non-navigational uses of international watercourses. The fundamental political changes in Europe over the past two years had had a direct impact on all aspects of relations between States of that region and had led to a new awareness of the *urgent* need for developing a new regime governing the non-navigational uses of the Danube common to all riparian States. Austria had consistently favoured a regime on international watercourses that would allow for sufficient flexibility. The legal rules to be developed should contain a *framework* of principles rather than too many detailed norms, leaving it ultimately to the States concerned to conclude bilateral or multilateral agreements based on those principle8 and building upon them. It was not easy to strike a balance between the two conflicting concepts of shared water resources and State sovereignty. In numerous bilateral agreements concluded with neighbouring States dealing with complicated water rights issues, Austria had tried to find solutions which adequately took into account the legitimate interests of all parties concerned and had been guided by the concept that tho uses of a watercourse in areas close to the border required negotiations or at least contacts with the neighbouring States concerned while non-navigational uses outside such border areas required such negotiations or contacts only if those uses significantly affected the neighbouring State. That procedure corresponded to the concept of an equitable use of international watercourses and good-neighbourly relations.

13. His delegation endorsed the definition of a "watercourse" in article 2 (b) and also agreed with the manner in which the question of groundwater had been dealt with. In connection with article 10, his delegation agreed that special regard should be given to the requirements of vital human needs. Articles 26, 27 and 28 emphasised the duty of States to cooperate; that duty was the fundamental principle which should guide the entire codification effort.

14. Mr. BOWETT (United Kingdom) stressed the importance his Government attached to the work of the International Law Commission, *an* importance which was unlikely to diminish in the years ahead.

15. Speaking on the subject of jurisdictional immunities of States and their property, he expressed his Government's gratitude to the Commission and its Special Rapporteur for the work done on that difficult topic, The final adoption by the Commission of the set of draft articles on the topic was no small achievement.

16. The United Kingdom's basic position *on* the subject, as set out by his delegation in previous years, was that in the light of contemporary State practice the old rule of absolute immunity was obsolete; persons dealing with a foreign State in a non-sovereign capacity and finding themselves in dispute with that State should be able to have the dispute settled by the ordinary processes of law. Generally speaking, the draft articles before the Committee

(Mr. Bowett, United Kingdom)

accepted that position, and his delegation therefore welcomed the Commission's approach.

17. Certain difficulties remained, however, in the implementation of that approach, and it was yet to be seen whether the approach was acceptable to Member States generally. His Government hoped to be able to give sympathetic consideration to the Commission's recommendation that a plenipotentiary conference should be convened with a view to concluding a convention on the subject. The question of that proposal's practicability depended, however, on the views of other States; there had to be a fair measure of support for the Commission's approach before a reasonable prospect of success could be assured.

18. He proposed to illustrate the difficulties in the implementation of the Commission's approach by three points. The first was the definition of a "commercial transaction". While his delegation entirely agreed with the Commission's adoption of the nature of the contract or transaction as the primary test in article 2, paragraph 2, it considered the secondary test - that of the purpose of the transaction - to be mistaken and likely to lead to great uncertainty. In the first place, the purpose of the transaction might not be clear to the private party. For example, if a State purchased computer hardware, how was the supplier to know whether the State intended to use it for organizing the logistics of its army or the bus and railway timetables of the various private enterprises which provided the country's transport system? His delegation had no quarrel with the Commission's *concern* to provide an adequate safeguard and protection for developing countries (A/46/10, para. (26) of the commentary to art. 2), but wondered whether it might not be more appropriate for the State to specify, in the contract or as part of the transaction, that it was acting for a sovereign rather than a commercial purpose. To indicate in the commentary that the secondary test would apply only when it was the practice of the particular State to apply it was not very helpful, evidence of State practice being, as *everyone* knew, often difficult to obtain.

19. The second point concerned immunity from measures of constraint (art. 18). His delegation failed to see why, in that article, the State was not treated like a private party for purposes of execution as a general rule, the special cases of article 19 apart. Its concern related particularly to article 18, subparagraph 1 (c), which allowed State property specifically in use *or* intended for use for other than non-commercial purposes to be attached if the property had a connection with a claim which was the object of the proceeding or with the agency or instrumentality against which the proceeding was directed. Such an approach seemed excessively restrictive, and his delegation would favour the deletion of the second part of the subparagraph.

20. The third point concerned the retention of the concept of "segregated State property" in article 10, paragraph 3. True, the term as such was not used and the original proposal - former article 11 bis - had disappeared. But the basic idea that a State's immunity was not affected by proceedings

(Mr. Bowett, United Kingdom)

relating to a commercial transaction entered into by a State enterprise or other entity with separate legal personality and capable of bringing suit and owning property in its name still remained. Implicit in that approach seemed to be the idea that, for the purposes of execution, only the property of such a State enterprise or entity but not the property of the State in general could be attached. If that was indeed the point, it should, in his view, have been stated rather more clearly; and if it was, he fully shared the concern expressed at an earlier meeting by the representative of Germany. What would prevent a State from organizing its commercial activities through such separate agencies or entities but making sure that they owned very little property which could be used to satisfy a judgement? Given that the State's own property could not be attached, the judgement creditor would be left with an unenforceable judgement. If the agency operated as a separate entity, the private party was entitled to be told in clear terms that it was not contracting with the State, and perhaps also to have some means of knowing what were the capital resources of the State entity. If, alternatively, the agency operated on behalf of the State, the Immunity it enjoyed in principle was forfeited because of the commercial nature of the transaction. In that event, it was difficult to see why only the property of the agency and not that of the State could be attached. He was somewhat puzzled by the logic of article 10, paragraph 3, and would welcome clarification.

21. In conclusion, he said that he had annexed to the text of his statement as informally distributed to the members of the Committee certain detailed comments his delegation wished to make on articles 16 to 23, which had undergone substantive changes during their second reading by the Drafting Committee and their adoption by the Commission. Those comments were intended to supplement the written observations submitted by his Government in 1988 in response to the Secretary-General's request (A/CN.4/410) as well as its subsequent statements in the Sixth Committee.

22. Mr. NATHAN (Israel) said that the question of how much jurisdictional immunity States enjoyed had until recently been a controversial one in judicial practice and scholarship: some defended the doctrine of absolute immunity while others were in favour of the restrictive theory, based upon the distinction between acta iure imperii and acta jure gestionis. In other words, the rule par in parem non habet jurisdictionem would not apply when the State engaged in commercial activities. That distinction currently dominated the practice in most national courts and was embodied in such instruments as the 1972 European Convention on State Immunity, and was to become the basis of the draft articles prepared by the Commission. His delegation agreed with that basic approach, which had already been adopted some time before by an Israeli court.

23. In summary, when a State engaged in commercial transactions, it divested itself of its sovereign character in regard to those transactions and should not therefore be entitled to sovereign immunity in respect thereof. Commercial transactions of a State were in many cases performed by State-controlled enterprises having their own legal personality, and the

(Mr. Nathan, Israel)

Commission had - correctly in the view of his delegation - adopted the position, in article 10, paragraph 3, that as far as such transactions were concerned, no question of State immunity was involved, as such enterprises could not be considered the alter ego of the State.

24. Article 3 (a) provided that the term "court" meant "any organ of a State . . . entitled to exercise judicial functions". The draft articles did provide for immunity from all forms of execution, but in some States offices entrusted with execution were not considered courts and most of their functions were not judicial functions; that situation should no doubt be considered in the final text.

25. Article 7, which dealt with the manner in which consent to exercise of jurisdiction was to be given by the State, should spell out the stage of the proceedings expressed at which consent by declaration or written communication should be given, and the proper authority to make such declaration or communication.

26. With regard to article 8, paragraph 4, he noted that to enter an appearance was a technical term of civil procedure; in some States, there was no provision for the entering of appearance, and the defendant became involved in the action upon filing a statement of defence.

27. Article 10, paragraph 1, one of the central provisions of the draft articles, provided that the State could not invoke immunity in a proceeding arising out of a commercial transaction; however, the words "arising out of" might be too narrow and should possibly be replaced by such words as "relating to" in order to broaden the scope of the provision.

28. In article 10, paragraph 3, the formulation "State enterprise . . . established by the State" might not be sufficiently precise, as such enterprises were not necessarily established by the State. It might perhaps be specified, too, how independent legal personality was to be proved. Article 16, paragraph 7, might be of assistance in that connection.

29. With respect to article 11, paragraph 2 (c), the labour laws of the State of the forum were of territorial application irrespective of the employee's nationality, so a test of nationality or habitual residence seemed unnecessary.

30. Article 16, paragraph 6, might be superfluous: if immunity could not be invoked and the State appeared in court, the same scope of defences was available to it as to any private individual, and no enumeration was necessary. Similarly, in article 17, the enumeration of supervisory functions of the court in regard to arbitration proceedings was not exhaustive and might well be replaced by a general reference to all supervisory functions of the court of whatever nature.

31. Mr. BELLOUKI (Morocco) said that in completing its work on jurisdictional immunities of States and their property the International Law Commission had shown its ability to deal successfully with in complex topics and had managed to reconcile the sovereign interests of States in a world of growing interdependence. The rule of international law enabling a foreign State to claim immunity from the jurisdiction of the State of the forum, as contained in the draft articles, formed an acceptable basis for the codification of the relevant law in an international convention. The question of dispute settlement was particularly important if the envisaged international instrument was to be legally unassailable.

32. In article 2, his delegation considered that paragraph 1 (b) (v) should he deleted, as there was a danger of confusion between the immunity of the State and that of its representatives.

33. In article 3, paragraph 2, mention should be made of Heads of Government - who in many countries held the real power - and of Ministers for Foreign Affairs.

34. Article 5 was the key provision of the draft articles. His delegation welcomed the deletion of the reference to "the relevant rules of general international law", since it had tempered a somewhat narrow conception of the immunity of States and their property, which the draft articles had appeared to limit unduly in certain grey areas where the acts of the States were not clearly performed in the *exercise* of their sovereign authority.

35. The manifold involvement of States in various areas of international economic life had given rise to acta jure imperii and acta jure gestionis, but those two concepts needed to be interpreted so as not unduly to deny the State its sovereign authority or ignore the legal consequences thereof. In addition, the immunity of States and their property from execution and enforcement measures was of great importance for developing countries in particular, as much of their property was used for public purposes.

36. Mr. de SARAM (Sri Lanka) said that the draft articles on the jurisdictional immunities of States and their property formulated by the Commission were a formidable achievement and, when they eventually entered into force, would go far towards removing the uncertainties experienced by individuals and entities engaged in commerce and other transactions of a privat.e-law nature when, although convinced of the righteousness of their claims, they came up abruptly ayainst the walls of jurisdictional immunity.

37. In a fieid of law described by an earlier speaker as "often chaotic", concepts or labels such as jure imperii or iure gestionis might not always clarify and could even confuse. Hence, the test for determining whether the draft articles were or were not reasonable might well be whether they were fair and workable from the point of view of those engaged in international trade and other international transactions of a private-law nature.

(Mr. de Saram, Sri Lanka)

38. The question did, however, arise whether some further review of the draft articles would not be helpful before a conference was finally convened. Such further review would require the following steps: sending the draft articles to Governments for their observations; the collection, and evaluation of their replies; a collective review by the United Nations (or, preferably, the Commission) of the points made, and a decision on the changes necessary in the draft articles, followed by formulation of new draft articles. More generally, in view of past efforts and achievements, it might be useful to proceed to prepare a convention in two phases, first codifying what had already been achieved, and then preparing a supplementary convention to deal with any unresolved elements. It would also be helpful if an opportunity could be provided for a further review of the articles from the standpoint of language and editing and for bringing the various language versions into concordances a convention should leave nothing to be desired from the point of view of clarity. In that connection he recalled that prior to the most recent codification conference in Vienna a working group had met in New York on several occasions to clarify organizational aspects of the conference and its rules of procedure, to very good effect. Perhaps similar arrangements might be made before a conference on jurisdictional immunities was convened; that might also provide an opportunity for undertaking the editorial refinement and linguistic concordance he had already mentioned.

39. Lastly, it would be helpful if the final clauses to be included in the proposed convention were appended in some form to the draft articles when they were transmitted to Governments. His delegation concurred with the suggestion of an earlier speaker that an article on the settlement of disputes should be included. It might also be advisable to have an appropriate and not too cumbersome additional article on a procedure for review of the convention.

40. Mr. PAL (India) said that the draft articles on jurisdictional immunities of States and their property adopted by the Commission were of great importance. While it was universally agreed that the State enjoyed immunities in respect of its governmental functions, it was equally agreed that no immunity should be enjoyed in respect of commercial transactions. There was no clear agreement, however, on what constituted a commercial contract or on the criteria to be employed in defining it. Furthermore, with increasing numbers of States engaging in commercial activities through specifically designated agencies or instrumentalities, the question arose as to the immunities to be accorded to States in cases concerning such commercial agencies or instrumentalities. Other potentially controversial issues included the question of posting suitable bonds by way of security; that of seeking certification from the Foreign Ministries of States regarding the commercial nature or otherwise of the contract involved; and that of the employment by diplomatic missions of persons recruited locally within the country of accreditation.

(Mr. Pal. India)

41. It was a noteworthy feature of the draft articles adopted by the Commission that. they provided a definition of a commercial transaction and specified that, in determining whether a contract or transaction was a commercial one, reference should be made not only to its nature but also to its purpose (art, 2, para. 2). Other significant features relating to the controversial points he had mentioned were article 10, paragraph 3; article 11; and articles 18 and 19. The draft articles thus made a significant contribution by clarifying the scope and nature of State immunity in litigation concerning commercial activities. It was also to be noted that they did not provide any obligation for the State to post a bond in connection with court proceedings before a foreign court, often a matter of great concern to developing countries, and did not exclude the possibility of States providing certification, if they so chose, in accordance with their law and practice.

42. The Commission was to be commended for finalizing a set of articles based on pragmatism and progressive thinking which would undoubtedly contribute to the development of international commercial transactions, keeping in view the interests of the developing countries. His delegation would therefore be inclined to support the idea of convening a plenipotentiary conference *with* a view to adopting an international convention on the subject.

43. Mr. PETROV (Bulgaria) said his delegation was pleased that in the draft articles on jurisdiction* immunities of States and their property, the Commission had largely sought inspiration from the provisions of the European Convention on State Immunity of 1972, and had been able to reconcile the concept of absolute immunity and that of restricted immunity of States; a synthesis of the two theories should prove to be a workable solution.

44. In the past, because of the existonce of State segregated property in Bulgaria, his delegation had favoured the concept of absolute immunity of the Stats, asserting that a State always acted in exercise of its imperium. That concept had now been abandoned, as could be seen from the Constitution and the laws on commerce and foreign investments recently passed by the Bulgarian Parliament as a basis for the sweeping legislative *reform* currently taking place in Bulgaria aimed at building a free market economy. His delegation therefore accepted the distinction made in the draft articles between act8 *jure imperii* and acts *jure gestionis* of a State.

45. Article 2 provided a satisfactory definition of such important concepts as "State" and "commercial transaction"; with regard to paragraph 2, his delegation would have preferred that the nature of a transaction be taken as the only criterion for its commercial character but accepted the definition worked out by the Commission.

46. Most of the general principles set out in part II of the draft were already embodied in article 8 of the Bulgarian Code of Civil Procedure. His delegation had no objections to articles 10 to 17, which largely reflected

(Mr. Petrov, Bulgaria)

current State practice, However, it would prefer to see article 16 redrafted along the lines of article 96 of the 1982 United Nations Convention on the Law of the Sea. It agraed that article 22 should be redrafted to provide for an obligation on the part of a State acting as plaintiff to provide security, bond or deposit to guarantee the payment of judicial costs or expenses. His delegation believed that the Commission should have addressed the question of the settlement of disputes. It would favour a decision to convene an international conference of plenipotentiaries but was also prepared to support a decision that further consideration of the draft articles should be entrusted to a working group within the Committee,

The meeting rose at 4.35 p.m.