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CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Report of the Working Group

Chairman/Rapporteur: Mr. Carlos CALERO-RODRIGUES (Brazil)

1. By its resolution 46/55 of 9 December 1991, the General Assembly, after noting that the International Law Commission had completed at its forty-third session the second reading of the draft articles on jurisdictional immunities of States and their property, 1/ recognized the desirability of the conclusion of a convention on the subject as well as the importance, for the successful completion of such a convention, of the promotion of general agreement. The Assembly accordingly decided, in paragraph 4 of the same resolution, to establish at its forty-seventh session an open-ended working group of the Sixth Committee to examine, in the light of the written comments of Governments, as well as views expressed in debates at the forty-sixth session of the Assembly:

> "(a) Issues of substance arising out of the draft articles, in order to facilitate a successful conclusion of a convention through the promotion of general agreement;
>
> "(b) The question of the convening of an international conference, to be held in 1994 or subsequently, to conclude a convention on jurisdictional immunities of States and their property".

2. Further to the above decision of the General Assembly, the Sixth Committee, at its second meeting of the current session, held on 18 September 1992, elected Mr. Carlos Calero-Rodrigues (Brazil) Chairman of the Working Group.

3. The Working Group held 10 meetings, between 25 September and 6 November 1992.

4. It had before it, in addition to the draft articles adopted by the International Law Commission at its forty-third session, the written comments and observations submitted by 19 States on the draft articles (A/47/326 and Add.1-5), as well as various informal papers and suggestions.

5. The Working Group conducted its debate in two phases. After holding an organizational meeting, it devoted a first round of discussions to the main issues concerning the draft articles. Those issues were identified by the Chairman as follows: first, the definitions contained in article 2 on "Use of terms", particularly the definition of the terms "State" and "commercial transaction"; secondly, the question of State immunity from measures of constraint in connection with proceedings before a court (part IV of the draft); and thirdly, the cases in which State immunity cannot be invoked, as provided for in part III of the draft.

6. The exchange of views which took place during that phase of the proceedings is summarized in the minutes of the second, third, fourth and fifth meetings, which are reproduced in annex I to the present report.

7. In a second stage, the Working Group explored ways of reconciling the divergences of views identified during the first phase of the proceedings. In this context, the Chairman made the proposals reflected below.

8. Although none of these proposals has as yet elicited general support, and although several have given rise to objections or reservations, the Working Group feels that they deserve serious consideration in order to determine whether they could pave the way towards compromise solutions.

Use of terms (article 2)

9. The Chairman suggested that there be inserted in subparagraph 1 (b) (ii) the following words after "constituent units of a federal State":

> "... not covered by subparagraph (iii), provided that the federal State submit to the depositary of the present instrument a declaration signifying that they shall be entitled to invoke the immunity of the State;".

10. This proposal, based on article 28 of the European Convention on State Immunity, sought to reconcile the position of those who, in the light of the constitutional features of certain federal States, favoured the retention of an express reference to constituent units of a federal State and the concerns of those who viewed the formulation of the International Law Commission (ILC) as too sweeping and as a potential source of uncertainty. Under the new text, the reference to constituent units would be retained but in a flexible way, and the element of uncertainty would be eliminated. The declaration would be strictly for the purposes of the future convention. The new clause would have to be read in the light of paragraph 3 of article 2.

11. As regards subparagraph 1 (b) (iv) of article 2, the Chairman proposed that the latter part of the text from "to the extent that" be replaced by:

"whenever performing acts in the exercise of the sovereign authority of the State;". 2/

12. It was noted in this connection that the ILC definition of the term "State" encompassed agencies and instrumentalities of the State and other entities "to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State". In their written comments some Governments had viewed the issue as not being simply one of entitlement. In their opinion, the entity ought to be actually performing acts in the exercise of the sovereign authority of the State. The proposed text was intended to convey this idea.

13. With respect to subparagraph 1 (c) of article 2, the Chairman proposed that the present subparagraphs (i) and (iii), be replaced by the following:

"(i) any contract or transaction of a commercial, industrial, [trading] or professional nature into which a State enters or in which it engages otherwise than in the exercise of the sovereign authority of the State, including a contract or transaction for the sale of goods or supply of services, but not including a contract of employment of persons;".

14. This reformulation, combining subparagraphs (i) and (iii), which overlapped, and highlighting an important characteristic of commercial transactions, aimed at removing, at least in part, the element of circularity present in the definition of the expression "commercial transaction" and providing a non-exhaustive list of such transactions.

15. As regards paragraph 2 of article 2, the Chairman proposed that the present text be replaced by one of the following alternatives:

"2. Notwithstanding the provisions of paragraph 1 (c), a contract or transaction shall not be considered commercial if the parties have so agreed when entering into the contract or transaction."

"2. Notwithstanding the provisions of paragraph 1 (c), a court, in determining whether a contract or transaction is a 'commercial transaction', shall take into account the purpose of the contract or transaction if, at the time of its conclusion, the State which is a party to it has expressly reserved that possibility."

16. In support of these proposals, it was pointed out that the debate in the Sixth Committee and the written comments of Governments indicated that views were divided on whether the commercial character of a transaction should be determined on the sole basis of the nature of the transaction or also by reference to its purpose. Some Governments were of the view that the parties should know from the start the type of transaction they were entering into; they were furthermore concerned that it would be very difficult for a court of the forum State to determine, as envisaged in paragraph 2, the practice of the defendant State. The proposals reproduced in paragraph 15 above sought to

reconcile those concerns and the developing countries' attachment to the "purpose" test by requiring the State to specify, in the contract or as part of the transaction, that it was reserving the possibility of having the purpose test applied.

17. While this proposal met with a measure of support, concern was expressed that it was likely to have a negative impact on the readiness of the trading partners of developing countries to enter into transactions with those countries.

18. Also in relation to paragraph 2 of article 2, the Chairman drew attention to a proposal which had been communicated to him by the Special Rapporteur of the Commission for the topic. The proposal sought to replace paragraph 2 of article 2 by the following:

> "2. In determining whether a contract or transaction is a 'commercial transaction' under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but in the exceptional circumstances where the contract or transaction is made for the purpose of humanitarian assistance including the procurement of food supplies to relieve a famine situation or the supply of medicaments to combat a spreading epidemic, such a contract or transaction may be regarded as 'non-commercial'."

19. In support of this proposal, attention was drawn to paragraph (26) of the commentary to paragraph 2, where the Commission had stated that the criterion of the "purpose" of a transaction appeared reasonable under exceptional circumstances, such as the procurement of food supplies to relieve a famine situation or the supply of medicaments to combat a spreading epidemic in developing countries. The proposed reformulation had the further advantage of leaving less leeway for subjective interpretations as to the practice of the defendant State and of reducing the risk that private parties might be placed in an uncertain and disadvantageous position.

20. The delegations which preliminarily commented on this proposal expressed appreciation for it but noted that it did not resolve the uncertainty problem and considered the alternatives reflected in paragraph 15 above to be more promising.

State immunity from measures of constraint in connection with proceedings before a court (part IV of the draft)

21. The Chairman suggested, in relation to article 18 (State immunity from measures of constraint), the deletion of the second part of subparagraph 1 (c) from the words "and has a connection", and the insertion of a new paragraph reading as follows:

"No interim or pre-judgement measures of constraint, such as attachment and arrest, shall be taken against the property of a State mentioned in paragraph 1 (c) unless the property has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed."

22. This proposal was intended to strike a balance between the position of those for whom only commercial State property having a link with the underlying claim or with the agency or instrumentality concerned should be subject to measures of constraint and the position of those who objected to the requirement of such a link. The proposal differentiated between interim and pre-judgement measures of constraint (which would be subject to the requirement in question) and post-judgement measures of constraint (in relation to which the said requirement would not apply). It would thus give courts greater latitude than did the ILC draft with respect to the enforcement of a judgement once the absence of State immunity under the convention had been established and the private party had successfully proved its claim, thereby alleviating concerns that the regime of limited immunity embodied in the convention would be ineffective in practice if the enforcement of a judgement was rendered too difficult. At the same time, in the case of pre-judgement or interim measures imposed by a court at an early stage in a proceeding on the basis of a preliminary finding of absence of immunity, the requirement of a link would be maintained. Some delegations, while opposing pre-judgement attachment, did not object to the link with the underlying claim.

23. The Chairman further suggested that a new paragraph be inserted, to read as follows:

"No measures of constraint shall be taken against the property of a State before that State is properly notified and given adequate opportunity to comply with the judgement."

24. In support of this proposal, the remark was made that it was reasonable to give the State concerned time to comply with the judgement and to select the property to be used for its satisfaction so as to avoid the unexpected seizure of property, which could disrupt the State's activities and create tensions in international relations.

25. The Chairman also suggested, on the one hand, that provision be made in the text for the obligation of States to satisfy a judgement and, on the other hand, that the question of the execution of judgements in third States be dealt with in the draft.

Cases in which State immunity cannot be invoked (part III of the draft)

26. The Chairman submitted proposals on article 10 (Commercial transactions) and article 11 (Contracts of employment).

27. As regards article 10, he proposed that paragraph 1 be reformulated as follows:

"A State cannot invoke immunity before a court of another State which is otherwise competent in a proceeding which relates to a commercial transaction between the State and a foreign national or juridical person".

28. Attention was drawn to the fact that a number of Governments had in their written observations queried the meaning of the phrase "applicable rules of international law", which they viewed as imprecise. The proposal reflected in paragraph 27 above sought to solve this difficulty by formulating the requirement of the existence of jurisdiction in the same way as had been done in other articles of the draft (for instance, articles 11, 12 and 13), i.e., by using the phrase "a court of another State which is otherwise competent". As indicated in paragraph (3) of the commentary to article 6, the first prerequisite to any question involving jurisdictional immunity was that valid jurisdiction, primarily under internal law rules existed and, in the ultimate analysis, that the assumption and exercise of such jurisdiction did not conflict with any basic norms of public international law. In the absence of valid jurisdiction, there was no necessity to proceed to initiate, let alone substantiate, any claim of State immunity. This idea was conveyed by the phrase "a court of another State which is otherwise competent". This phrase had not given rise to criticism, and had therefore been used in the simplified version of paragraph 1 of article 10 proposed by the Chairman.

29. With respect to article 11, the Chairman suggested that the following words be added at the end of paragraph 2 (b):

"... without prejudice to the possible recourse available to the employee in the State of the forum for monetary compensation against wrongful dismissal".

30. In support of this proposal, it was recalled that, under paragraph (10) of the commentary to the article, the intention behind paragraph 2 (b) of article 11 was that a State could invoke immunity from jurisdiction of the court of the forum State in respect of recruitment of an individual but not in respect of monetary compensation for wrongful dismissal. The phrase proposed for inclusion at the end of paragraph 2 (b) was intended to clarify this point. Some delegations considered the proposal addition to be an improvement. Concern was however expressed by others that the process whereby the wrongful character of the dismissal would be established might encroach on the immunity of the State, as provided in paragraph 2 (b) of article 11.

Question of State enterprises

31. The Chairman suggested that paragraph 3 of article 10 be eliminated and that the following new provision be included in the draft, possibly as paragraph 2 of article 5 or as a new article of part V.

"Jurisdiction shall not be exercised over a State and its property by the courts of another State in a proceeding, not related to acts performed in the exercise of sovereign authority, involving a State enterprise or other entity established by the State which:

(a) has independent legal personality;

(b) is capable of suing or being sued; and

(c) is capable of owning, controlling, and disposing of property."

32. This proposal aimed at expressing in the clearest possible terms the distinction, for purposes of immunity, between the State and certain enterprises or entities established by the State and having an independent legal personality. Such a distinction would be recognized not only in respect of commercial transactions entered into by the enterprise but also in relation to any other activities of the enterprise, provided that the exercise of the sovereign authority of the State was not involved.

33. The above proposal did not address the question of under-capitalization of State enterprises, which had been raised by some delegations. In that regard, the Chairman had received after the conclusion of the debate a proposal from the Special Rapporteur of the Commission for the topic - which he found it useful to include in the report - that there be added either to article 10, paragraph 3, or to the Chairman's proposal on article 2, paragraph 1 (b) (iv), the following language:

> "maintaining a proper balance sheet or financial record to which the other party to the transaction can have access in accordance with the internal law of that State or the written contract."

34. In support of that proposal, it was explained that the question of under-capitalization might also arise with respect to a transaction between private companies, for example, if a parent company tried to escape from liability arising out of a transaction conducted by its subsidiary in an unfair manner. There were a number of cases in the United States of America where the other party to such a transaction was entitled "to pierce the corporate veil" in the court and pursue the liability of the parent company. However, it was doubtful whether one could assimilate the State automatically to the parent company in the above hypothetical case, since it did not seem appropriate to assume that the Government which was responsible for the good order and moral standing of the society would act in such an unfair manner as the private company. Since some delegations might object to giving the private party to the transaction the opportunity to sue the State in order "to pierce the corporate veil", it would seem to be more acceptable to include a provision aimed at increasing the financial transparency of a State enterprise.

Other questions

35. The view was expressed that the draft articles should contain provisions on aircraft and space objects.

36. Several members endorsed the suggestion made by a number of Governments in their written comments that provisions should be included on the settlement

of disputes. A specific proposal in this respect is reproduced in annex II to the present report.

37. Some members warned against providing for excessively elaborate procedures, on which consensus might be difficult to achieve.

Conclusions

38. The Working Group is of the opinion that the exchange of views which took place at the current session contributed to the clarification of existing positions. A view was expressed that since the draft articles had been drafted by the International Law Commission, the next proper course of action would be to hold a diplomatic conference to adopt a convention on the subject. However, the prevailing view was that consideration of issues of substance arising out of the draft articles should continue in order to facilitate a successful conclusion of a convention through the promotion of general agreement and, further, that the Sixth Committee should recommend to the General Assembly at its current session that two weeks be set aside at the beginning of the forty-eighth session for concentrated work (at least 10 to 12 meetings), within the Working Group, on the issues referred to in paragraph 4 of resolution 46/55.

Notes

1/ Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10 (A/46/10), chap. II.

2/ There is a discrepancy between the French version and the other versions of paragraph 1 (b) (iv) of article 2, as adopted by the Commission. While all versions except the French cover agencies and instrumentalities of the State and other entities "to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State", the French text contains no reference to entitlement and merely says "dans la mesure où ils agissent ..." (to the extent that they perform).

Annex I

MINUTES OF THE SECOND, THIRD, FOURTH AND FIFTH MEETINGS OF THE WORKING GROUP HELD, RESPECTIVELY, ON 29 SEPTEMBER AND 7, 9 AND 14 OCTOBER 1992

Second meeting

ARTICLE 2

Use of terms

Paragraph 1 (a)

There were no fundamental objections raised.

Paragraph 1 (b) (i)

There were no comments.

Paragraph 1 (b) (ii)

There were no objections to the substance of the subparagraph.

A number of delegations however felt that the provision was too sweeping and expressed sympathy with the Swiss proposal that a provision might be drafted on the basis of article 28 of the European Convention on State Immunity, confirming that individual States in a federal State did not enjoy immunity while authorizing the federal State to formulate a declaration indicating that those individual States could invoke the provisions of the convention. Delegations expressed interest in the proposal and wished to have time to study it.

The Chairman drew the tentative conclusion that while there was no substantial objection to admitting that the constituent units of a State could be included in the definition of a State for the purpose of the draft, the current text could be made more generally acceptable on the basis of the Swiss proposal.

Paragraph 1 (b) (iii) and (iv)

It was noted that the draft covered, in paragraph 1 (b) (iii), political subdivisions "which are entitled to perform acts ...", and, in paragraph 1 (b) (iv), agencies and instrumentalities "to the extent that they are entitled to perform acts ...". Questions were raised as to the justification for treating differently in two separate subparagraphs the political subdivisions of the State and the agencies or instrumentalities of the State.

In support of this differential treatment, the remark was made that political subdivisions formed part of the State apparatus stricto sensu; agencies and instrumentalities did not authorize - but might be authorized, within limits - to perform acts in the exercise of the sovereign authority of the State.

Some delegations expressed support for the United States' view that the issue in subparagraphs (iii) and (iv) was not simply one of "entitlement" of political subdivisions and agencies or instrumentalities to perform acts in the exercise of the sovereign authority of the State, and that these entities must also in fact be performing such acts. In support of this approach, it was stated that it might be easier for a court to determine the factual question whether a political subdivision or an agency or instrumentality was performing an act in the exercise of the sovereign authority of a State than to assess whether the entity in question was "entitled" to perform such an act - an assessment which would require a review of the internal law of the defendant State.

Some delegations found the expression "sovereign authority of the State" unclear. It was proposed that it be replaced by "when performing acts on behalf of the State".

One delegation felt that one of the problems with the way the two subparagraphs were drafted was that a determination of whether a political subdivision or an agency or instrumentality was entitled to act in the exercise of the sovereign authority of the State would have to be made at an early stage of a legal proceeding, such as at the time of service of process. This might create difficulties for the courts since they had not yet had an opportunity to decide the question of jurisdiction.

The Chairman stated that subparagraphs (iii) and (iv) would have to be reverted to at a later stage.

Paragraph 1 (b) (v)

The Chairman recalled that Morocco had suggested that the subparagraph be deleted. In the Working Group, this provision did not give rise to objections.

Paragraph 1 (c)

Some delegations felt that the definition as a whole was unclear and involved an element of circularity.

As regards the Swiss proposal which sought to reduce the element of circularity by replacing the term "commercial transaction" by "contract or other juridical act of a commercial nature", it was remarked that the concept of "juridical act" was not necessarily clearer than that of "commercial transaction", and that the elimination of the term "commercial" would extend the scope of the subparagraph by including therein all contracts or transactions for the supply of services, whether commercial or not.

The suggestion was made to provide, instead of a definition, a non-exhaustive list of types of commercial transactions - a result which could be achieved by replacing the word "means" by "includes" in the chapeau of paragraph 1 (c). It was pointed out that any change in the definition of a "commercial transaction" in article 2 should be considered in close connection with article 10.

Paragraph 2

The Chairman stated that the debate in the Sixth Committee and the written comments of Governments indicated that views were divided on whether only the "nature" or also the "purpose" of the transaction should determine its commercial character.

Some delegations felt that the reference to the "purpose" of the transaction would create great uncertainty. They observed that the parties should know from the start the type of transaction they were entering into and that it would furthermore be very difficult for a court of the forum State to determine, as envisaged in paragraph 2, the practice of the defendant State. However, in the light of the Commission's concern to provide an adequate safeguard for developing countries, attention was drawn to a proposal whereby room would be made for the purpose test by requiring 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. This proposal met with a measure of support.

Several delegations, however, emphasized the importance of the purpose test. As for the idea of requiring the State to indicate that it was acting for a sovereign purpose, one delegation suggested that it be coupled with the idea that the non-inclusion of such a clause would not automatically rule out the possibility for the State to invoke immunity on the basis of the purpose of the transaction.

The Chairman stated that paragraph 2 would have to be reverted to at a later stage.

Third meeting

PART IV. STATE IMMUNITY FROM MEASURES OF CONSTRAINT IN CONNECTION WITH PROCEEDINGS BEFORE A COURT

Article 18. State immunity from measures of constraint

The Chairman summarized the comments on this article as follows. At the general level, some States supported the article while others found it difficult to accept. With respect to specific issues, there were a number of proposals. First, some favoured a distinction between "pre-judgement or interim measures" and "measures of execution". There was support for making enforcement easier once a judgement had been entered against a State. Secondly, it was suggested that a provision should be included to enable the

enforcement of a judgement in a third State. Thirdly, comments were also made suggesting a provision establishing the obligation of a State to satisfy a judgement rendered against it. Such a provision might make it easier to deal with enforcement and lessen the need for recourse to measures of constraint.

Paragraph 1 (a)

As regards paragraph 1 (a), the question was asked why the modes of expression of consent to measures of constraint were limited to the three means provided for in the subparagraph and why the subparagraph did not simply provide for State consent in whatever form and whenever given.

The Chairman's reply was that the Commission's intention might have been to avoid uncertainties.

Paragraph 1 (c)

The view was expressed that the article should start from the premise that where there was no immunity from jurisdiction, a State was to be treated like a private party for purposes of execution and all of its property used for other than government non-commercial purposes ought to be available for execution in the absence of a specific reason for exempting such property. It was therefore suggested that the requirement of a connection between the property and the claim or the agency or instrumentality concerned should be deleted. It was also stated that the limitations contained in paragraph 1 (c) were unnecessary since the types of property enjoying immunity from execution were listed in article 19.

On the other hand, the comment was made that part IV balanced part III on the exceptions to immunity from jurisdiction and was an essential element of the compromise within the Commission between the proponents of the restrictive and the absolute theories of immunity. It was also noted that the requirement of a connection between the claim and the property was inspired by the United States Foreign Sovereign Immunities Act, which reflected the restrictive theory of immunity. Others, while supporting the inclusion of such a provision, doubted that it would help to solve the problems of subparagraph 1 (c).

The Chairman said that a proposal similar to the one contained in the European Convention on State Immunity providing for the obligation of a State against which judgement was given to satisfy the judgement might provide a good basis for a compromise. This would give the State concerned time to make arrangements for the satisfaction of the judgement and avoid the strain in international relations and the economic repercussions which might result from abrupt seizure of State property. This view was supported by some delegations.

As regards the phrase "intended for use", which some members viewed as involving an element of uncertainty, the Chairman explained that the phrase aimed at preventing interpretations whereby the property would only be immune from measures of constraint if it was actually being used for government non-commercial purposes at the time of the proceeding.

With reference to the comment that situations in which a State agency or instrumentality was under-capitalized should not be ignored, the Chairman suggested that the issue be dealt with in connection with article 10, paragraph 2, concerning State enterprises.

Article 19. Specific categories of property

The Chairman noted that the comments on this article primarily called for the refinement and further clarification of the various subparagraphs of article 1, particularly paragraphs 1 (a) and (c).

As regards paragraph 1 (a), the question was raised as to whether it was intended to cover bank accounts, for example embassy bank accounts, which contained mixed funds or funds used for different purposes, some of which were not government non-commercial purposes.

As regards paragraph 1 (c), the meaning of the term "monetary authority" was queried and the question was raised as to whether the immunity of central bank property should be limited to property used for monetary purposes.

The Chairman explained that the reference to "monetary authority" was intended to cover bodies which performed the functions of "central banks" under another name.

The question was also raised as to whether the subparagraph was intended to refer to one institution performing the functions of a central bank, howsoever named, or whether it could embrace several institutions.

Within the Working Group, some members questioned the need for article 19 in view of the protection afforded by the previous article to State property used for government non-commercial purposes. The illustrative list contained in the article elaborated on the concept of property used for government non-commercial purposes referred to in the previous article, and this type of explanation was usually provided by the Commission in the commentary. The comment was made that the singling out of certain categories of property might create the impression that the categories left out did not enjoy immunity. It was also said that paragraph 1 (a) might encourage States to mingle funds used for commercial purposes with funds used for government non-commercial purposes, such as embassy bank accounts, and thereby shield the commercial funds from measures of constraint which these funds would otherwise be subject to under the draft articles.

On the other hand, the view was expressed that article 19 was very necessary as it reinforced the protection enjoyed by certain types of State property and avoided any misunderstanding regarding the immunity of such property.

The Chairman stated that as long as there was general agreement on the types or categories of property which should enjoy immunity from execution, there should not be strong opposition to maintaining article 19. He explained that in the Commission some members were in favour of deleting the article but had not insisted on their position, to satisfy those who saw merit in the retention of the article.

The Chairman summarized the main problems raised as follows: (1) is the article necessary? (2) should all central bank property enjoy immunity or only property used for monetary purposes? and (3) to what extent does immunity extend to bank accounts containing mixed funds or funds used for both commercial and government non-commercial purposes?

Fourth meeting

PART III. PROCEEDINGS IN WHICH STATE IMMUNITY CANNOT BE INVOKED

Title

The remark was made that the title proposed by the Commission, although it seemed neutral, tilted the scale in favour of the supporters of the "Limitations" alternative. It was pointed out that the existence in general international law of the principle of sovereign immunity was generally recognized and that the term "exceptions" was to be found in the legislation of States supporting the restrictive theory of immunity. It was added that the compromise reflected in the existing title had been coined by the Commission in total disregard of part II of the draft, which upheld the principle of sovereign immunity.

The Chairman confirmed that the existing title represented a pragmatic compromise which sought to shunt the divergence of views existing within the Commission. He referred in this connection to the observations of Mr. Ogiso and to the fact that titles within draft articles were not considered as having legal value.

Article 11. Contracts of employment*

General remarks

The Chairman pointed out that Belgium, France and India supported the article while China and the Islamic Republic of Iran advocated its deletion.

In favour of deletion, it was pointed out that judicial decisions and State practice were too scarce in this area to warrant the envisaged exception

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* Article 10 was left aside for discussion at a later stage.

and that labour disputes could be solved more expeditiously and at far less cost through diplomatic channels than through litigation.

In support of the retention of the article, mention was made of the recent judicial practice of several States which reflected the courts' desire to protect the weaker party and was based on equity concerns. Article 11 was viewed as usefully detailing what was said in article 10.

Title

It was suggested that the existing title be replaced by "Labour disputes".

Opening phrase of paragraph 1 ("Unless otherwise agreed between the States concerned")

The remark was made that agreements of the type envisaged were probably quite exceptional and that the phrase in question seemed to cast doubt on the generally recognized principle of State immunity.

The Chairman pointed out that such agreements did exist and that States were free to depart from any norm of international law which was not a preemptory norm. Concern was however expressed that the absence of a parallel clause in a number of provisions of the draft might give rise to a contrario interpretations. The inclusion of a clause of general application was viewed as a way of solving the problem.

Paragraph 2 (a)

The Chairman recalled that Belgium had entered a general reservation on this provision. Cameroon had emphasized that it would be difficult to determine whether the proposed criterion was met and Turkey had suggested that more account be taken of the nature of the administrative contract. The Chairman also drew attention to the judicial decisions listed in paragraph 20 of Mr. Ogiso's note.

Some members supported the retention of paragraph 2 (a) in its original form. Others felt that the current drafting was dangerously vague and could encourage the tendency of courts, as reflected in the judicial decisions cited by Mr. Ogiso, to except from the scope of application of the exception provided for in article 11, professions which seemed to have little to do with the exercise of governmental authority (librarians, translators, etc.). It was accordingly suggested that the drafting be tightened, particularly as the State practice was not clear enough to draw a line between fields of activity belonging under the rubric "exercise of governmental authority" and private law activities.

Attention was drawn to the approach reflected in the relevant legislation of Australia, under which immunity cannot be invoked in relation to the employment of a member of the diplomatic staff of a mission, a consular office, a member of the administrative and technical staff of a mission and a consular employee.

Paragraph 2 (b)

The Chairman recalled that, in the view of Australia, jurisdiction should be permitted in cases of unfair dismissal, it being understood that remedies other than monetary compensation should be excluded. Views along the same lines had been expressed by Spain. He added that Mr. Ogiso's note referred to the possibility of including at the end the phrase "without prejudice to the possible recourse available to the employee in the State of the forum for monetary compensation against wrongful dismissal", an addition which could cover the suggestion of Turkey to add the word "discharge".

Mr. Ogiso's suggested addition met with the agreement of some members. Support was expressed for the idea that the immunity should relate more to the type of remedies available than to the subject-matter of the proceeding.

The remark was however made that, to arrive at a decision of wrongful dismissal, courts would have to go into the merits of the case - which would negate State immunity.

It was suggested that the issue be dealt with in a new paragraph drafted in the form of a saving clause ("Nothing in paragraph 2 (b) affects the right of the employee to bring an action for wrongful dismissal, provided the remedy sought is limited to monetary compensation").

Paragraph 2 (c)

The Chairman pointed out that some Governments had expressed doubts on the test of nationality or habitual residence. In his opinion, however, some link, in whichever way expressed, must exist between the individual and the State of the forum for the exception to apply. It had furthermore been suggested to replace "habitual resident" by "permanent resident", a phrase borrowed from the Convention on Diplomatic Relations. Finally, attention had been drawn by Uruguay to the problems which might arise in the context of certain systems of regional integration.

In the Working Group, several members objected to the criterion of habitual residence.

Paragraph 2 (e)

The remark was made that the "subject to" phrase created an exception to what was an exception to an exception and was therefore quite confusing. It was suggested that it be transferred to a separate provision.

Article 12. Personal injuries and damage to property

The Chairman recalled that the article had been supported by Bulgaria and Austria but had given rise to reservations on the part of Czechoslovakia. China and the Islamic Republic of Iran, for their part, felt that the issue could better be solved through diplomatic channels. The United States, although not questioning the need for the article, had indicated that it favoured the retention of immunity for claims based upon the exercise or performance of, or the failure to exercise or perform a discretionary function. As for Uruguay, it had taken the position that it should not be possible to invoke jurisdictional immunity in the case of transfrontier damage. In this connection, the Chairman indicated that the Commission had only dealt with what happened in the territory of the forum State, the question raised by Uruguay being left to the law on State responsibility or international liability.

In support of the deletion of the article, it was said:

(1) That in the case envisaged in article 12, diplomatic envoys enjoyed immunity under the Vienna Convention and that it would not be proper to place States in a less favourable position than that of their diplomatic envoys;

(2) That article 12 did not make a distinction between sovereign acts and private acts and was therefore a complete negation of the principle of immunity, which was inconsistent with even the restrictive theory;

(3) That the question of attribution belonged in the law of State responsibility and that it would be contrary to the principles of sovereignty and sovereign equality to allow domestic courts to attribute a wrong to a State;

(4) That compensation for personal injury or damage to property could be sought through diplomatic channels or through insurance.

Article 13. Ownership, possession and use of property

The Chairman explained that several comments by Governments favoured the article. A question was raised as to whether the article covered proceedings to enforce compliance with regulations regarding the use of property, such as environmental protection. The Chairman recalled that that specific question had not been discussed in the Commission, but that he felt the article covered that interpretation.

As regards the question of referring to both "right or interest" in the draft, the Chairman explained that in some common-law countries both terms were used.

A question was raised in regard to the effect of the phrase "the determination of". In response to the question, the view was expressed that the phrase confined the article to proceedings in which the very existence of a right or interest in matters enumerated in subparagraphs (a) to (c) are in question. It was proposed that the phrase concerned be deleted to avoid unjustifiably restricting the scope of the article. The remark was made that the elimination of that expression would have the effect of expanding the scope of the article.

Article 14. Intellectual and industrial property

The Chairman recalled that one Government had supported the deletion of the article and another had interpreted it as permitting bilateral agreements between States to establish non-judicial dispute resolution mechanisms.

The question was raised as to why intellectual and industrial property should be treated separately from property in general, as covered by article 13.

The remark was made that the expression "property, which enjoys a measure of legal protection" was unclear. It was suggested that this language should be changed to indicate that the property should enjoy legal protection.

Article 15. Participation in companies or other collective bodies

The Chairman recalled that there were few comments on the article, and no objections.

Article 16. Ships owned or operated by a State

The Chairman recapitulated the comments on the article as follows: (1) The article had been drafted in the negative and it would be preferable to change this to a positive formulation; (2) the article should be reformulated along the lines of article 96 of the Law of the Sea Convention; (3) paragraphs 3 and 6 could be deleted; (4) aircraft were not covered by the draft articles; (5) questions were raised as to the status of ships and cargo which were used for mixed purposes, some of which were not governmental non-commercial.

Within the Working Group, it was suggested that the whole article be deleted since the subject of ships was complicated and involved a number of issues not touched upon in the provision. It might be preferable to replace the article by a provision indicating that the draft articles did not apply to ships.

Some members favoured the deletion of paragraphs 3 and 6.

Article 17. Effect of an arbitration agreement

The Chairman recalled that:

(1) Some Governments supported the deletion of the article as unnecessary;

(2) Some suggested broadening its scope to include all civil or commercial matters;

(3) It was suggested that the expression "a court of another State which is otherwise competent" be replaced by the formula used in the European Convention on State Immunity, namely, "a court of another State in the territory or according to the law of which the arbitration has taken or will take place".

Within the Working Group, the view was expressed that, since the enumeration of the supervisory functions of a court regarding arbitration proceedings was not exhaustive, it might be preferable to replace it by a general reference to "all supervisory functions of a court of whatever nature". The view was also expressed that national court jurisdiction over arbitral proceedings included the enforcement of the agreement, award and execution against a State.

The Chairman felt that the most important question was whether the article should be limited to arbitration relating to a commercial transaction or be expanded to have a wider application.

Fifth meeting

WORKING GROUP ON THE CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Article 2: Use of terms (resumed from the second meeting)

The remark was made that under paragraph (10) of the commentary, the phrase "various organs of government" in subparagraph (b) (i) of paragraph 1 was intended to cover the legislature and the judiciary. In the Russian version, however, the equivalent of the phrase in question covered only the executive branch of the State. An alternative formula would therefore have to be found.

A view was expressed that subparagraph (b) (ii) lent itself to extremely broad interpretations, as pointed out by Switzerland (see A/C.6/46/SR.23, para. 106); that subparagraphs (b) (iii) and (iv) were somewhat controversial; that subparagraph (c) was acceptable but in need of streamlining; and that paragraph 2 reflected a possible compromise.

Article 12 (resumed from the fourth meeting)

The current text was viewed as too broad in scope. It was suggested that the cases be spelled out in which the provision did not apply and in particular that moral injury should be excluded. The whole question might, it was noted, be left to the commentary.

Article 16 (resumed from the fourth meeting)

The view was expressed that consideration should be given to the possibility of covering aircraft and space objects.

Article 17 (resumed from the fourth meeting)

It was suggested that the words "in accordance with its domestic laws" be inserted after "If a State" since not all domestic legal systems grant to foreign nationals the same access to the courts as is available to the State's own nationals.

It was further suggested that the text be rephrased so as to broaden its scope beyond differences relating to a commercial transaction.

Article 10*

Paragraph 1

Some members agreed with the observations of Brazil (see A/47/326) that the term "commercial transactions" was too broad and should be replaced by "commercial contracts".

The Chairman recalled that the phrase "the applicable rules of private international law" had been viewed by several Governments as calling for clarification.

Attention was drawn in this connection to the explanations provided by the Commission in paragraph (4) of the commentary, the essence of which was that, in order to avoid excessive assertion of jurisdiction, one should refer to the rules on conflicts of law. Mention was further made of the previous Special Rapporteur's proposal to tighten the link between the transaction and the forum State by requiring that the contract must have been entered into or performed or intended to be performed, in whole or in part, in the territory of the forum State. a/

Some members agreed with the Commission's approach. Others observed that, failing indications on the content of the "applicable rules of private

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* Consideration of this article had been deferred at the fourth meeting.

international law", paragraph 1 was exceedingly vague, particularly in the absence of a satisfactory definition of the term "commercial transaction".

It was suggested that the required nexus be clarified by providing examples along the lines of the United States Foreign Sovereign Immunities Act, which recognized an exception to immunity in cases "in which the action is based upon a commercial activity carried on in the United States by the foreign State; or upon an act performed in the United States in connection with a commercial activity of the foreign State elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign State elsewhere and that act causes a direct effect in the United States" (sect. 1605 (a) (2)).

Paragraph 3

Some members wondered if the current drafting of paragraph 3 correctly reflected the relationship between that paragraph and paragraph 1. It was noted in particular that the words "shall not be affected" were unclear.

The Chairman pointed out in this respect that, as indicated in paragraph (9) of the commentary, paragraph 3 took account of the existence of State enterprises, i.e., commercial enterprises established by the State but endowed with independent legal personality. The paragraph sought to separate the State from such enterprises. While the latter could, subject to the conditions provided for in the text, be sued and be held liable, the State itself retained its immunity.

Some members observed that, in the light of the above explanations, paragraph 3 might be unnecessary.

The Chairman referred to the explanation given by the Special Rapporteur when he proposed the inclusion of a provision on State enterprises, as follows. A State enterprise was not to be included in the agencies or instrumentalities of a State. The State enterprise was subject to the same rules and liabilities that applied to a natural or juridical person and could not invoke immunity from jurisdiction. Thus, the State could not be sued, in principle, in the court of another State in relation to the commercial transaction performed by the State enterprise. Sometimes, however, a State enterprise concluded a commercial contract on behalf of the Government or executed a particular commercial transaction as the alter ego of the State. In such a case, the commercial transaction might be regarded as a transaction between the State and a foreign natural or juridical person and the State could not invoke immunity.

The Chairman also noted that a number of Governments had raised the problem of State enterprises which did not have adequate capital to assume the liabilities relating to a commercial transaction. In such cases, the private party might be left without a remedy because the immunity of the State was not affected. It was suggested that greater transparency was needed regarding the problem of under-capitalization of State enterprises.

In this context, the view was expressed that the under-capitalization of a State enterprise did not alter the principle that a State should not be liable for the acts of a State enterprise which the State had nothing to do with and might not have even known about. The arguments concerning under-capitalized State enterprises only considered the interests of private litigants. The existence of State-owned enterprises with distinct legal personality was not limited to a few States. In fact, these entities existed in practically all States, including developed countries, with various economic systems. State enterprises sometimes dealt with private entities which could not fulfil their financial obligations. In such cases the State enterprises were left without a remedy. If the argument concerning under-capitalization was valid, State enterprises should also be protected.

The comment was made that the widespread existence and practice of State enterprises underlined the importance of finding a solution. It was a misperception of the problem to speak of cases in which the State had no connection or involvement with the commercial transaction of the State enterprise. The problem arose when a State enterprise was grossly under-capitalized and continued to function with the financial backing of the State.

At the practical level, paragraph 3 was viewed as useful to prevent abuse of judicial proceedings or frivolous litigation. Private parties often sued the State enterprise and the foreign State for matters relating to the activities of the State enterprise. The State was often required to pay substantial legal fees to defend itself in a case which had nothing to do with the State.

The suggestion was made to redraft paragraph 3 to indicate clearly that a State should not be joined in such an action, as follows: "A proceeding which relates to a commercial transaction engaged in by a State enterprise or other entity established by a State which has an independent legal personality shall not be regarded as a proceeding concerning that State." There was some support for this proposal in the light of the practical difficulties and the substantial financial costs incurred by States in such situations, which were not uncommon. However, the point was also made that in some cases it may be justifiable for a private party to sue both a State enterprise and its parent State, as it may be unclear whether the enterprise is independent or operating as part of the State; the litigant may need to ask the court to determine the proper defendant as a preliminary issue.

The comment was made that paragraph 3 was of more practical relevance at the stage of execution of judgements and should be clarified to indicate that when a judgement is entered against a State enterprise, the property of the State retains its immunity. This was important in cases in which the property seized was not separated from the property of the State. The immunity of State property should not be affected by the suit against the State enterprise.

Concern was expressed, however, that paragraph 3 would allow a State to establish a separate entity with no assets to operate in the commercial field with impunity. This issue was viewed as a real one which called for a solution.

As for the implications of a deletion of paragraph 3, the view was expressed that the provision was really a double guarantee in cases where a private party that had dealt with a State enterprise sued both the enterprise and the State. In such a case, the court might have doubts as to whether the State could be properly sued and paragraph 3 would provide useful guidance. It was also remarked that the principle stated in paragraph 3 was not limited to commercial transactions and should be reflected as a general principle in part II or as a saving clause in part V.

From the debate, it was concluded that nothing in the instrument should permit a party to benefit unfairly merely because the other party might be a State-created entity. Conversely, it was important to avoid a party being disadvantaged in dealing with an entity enabled to conduct transactions merely because of the backing of the State.

Settlement of disputes

It was noted that a number of Governments had supported the inclusion of provisions on the settlement of disputes in the future convention and that the attention of the Sixth Committee should be drawn to this issue.

Notes

a/ Yearbook of the International Law Commission, vol. II (Part One) (United Nations publication, Sales No. E.87.V.8 (Part II)), document A/CN.4/396, para. 14.

Annex II

PROPOSAL ON SETTLEMENT OF DISPUTES

PART V

DISPUTE SETTLEMENT

Article 23

Disputes in respect of a proceeding instituted before a domestic court

(1) Any dispute between two or more States Parties concerning the interpretation or application of this Convention in respect of a proceeding instituted before a court of one of the parties to the dispute against the other party or parties to the dispute shall be submitted to the International Court of Justice on the application of one of the parties to the dispute or by special agreement.

(2) If the dispute is submitted to the International Court of Justice on the application of one of the parties to it, that party shall request that the case be dealt with by the chamber of summary procedure formed in pursuance of Article 29 of the Statute of the Court.

(3) The States Parties to this Convention agree that disputes to which this article applies shall be dealt with by the chamber of summary procedure formed in pursuance of Article 29 of the Statute of the International Court of Justice and that oral proceedings shall be dispensed with.

(4) A State against which a proceeding has been instituted before a court of another State shall not submit a dispute to the International Court of Justice pursuant to paragraph (2) unless:

(a) Default judgement has been given against it by the court of the other State; or

(b) The dispute arises out of the rejection by the court of the other State of a claim of immunity under this Convention.

(5) In a case to which paragraph (4) (b) applies, the State may not raise any question before the International Court of Justice which has not first been the subject of a decision by the court of the other State.

(6) Where a dispute is submitted to the International Court of Justice pursuant to paragraph (2), proceedings before the municipal court and measures of constraint in connection with such proceedings shall be suspended pending the judgment of the International Court of Justice.

Article 24

Other disputes

Any dispute between two or more States Parties concerning the interpretation or application of this Convention (other than a dispute to which article 23 applies) which is not settled by negotiation shall be submitted to the International Court of Justice on the application of one of the Parties to the dispute or by special agreement unless the parties agree on a different method of peaceful settlement of the dispute.
