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JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Comments and observations received from Governments

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CZECHOSLOVAKIA

[Original: English]

[29 June 1988]

I. GENERAL COMMENTS

The Czechoslovak Socialist Republic has studied with great attention the draft articles on jurisdictional immunities of States and their property prepared by the International Law Commission. It has noted that the draft articles represent an interesting basis for the further work on the codification of this topic, the importance of which need not be emphasized, inter alia, in view of the special place occupied by economic co-operation in the relations among States.

Czechoslovakia considers that the draft articles should unequivocally confirm State immunity as a corollary to one of the fundamental principles of international law, the principle of sovereign equality of States. Cases when a State and its property do not enjoy immunity are very rare and should be specifically enumerated in the draft articles in such a manner as to provide for the strengthening of legal certainty in inter-State relations. It is necessary to work out a regulation that will prevent attempts - which have become more frequent, particularly in recent years - at restricting the immunity of States and their property through unilateral acts.

II. SPECIFIC COMMENTS ON VARIOUS PROVISIONS

It would be appropriate to join the provisions of articles 2 and 3 in one article, since both deal with the question of interpretation of terms used continuously throughout the draft articles. It would moreover be appropriate to define in this combined article the term "State property". From the terms defined in articles 2 and 3, i.e. the terms "court", "commercial contract" and "State", the first and the last one are used in all parts of the draft articles and their definition undoubtedly is rightly placed in part I. The terms "commercial contract", however, is used only in one place, namely in article 11. The definition contained in article 2, paragraph 1 (b), along with the provision of article 3, paragraph 2, should therefore not be separated from the text of article 11.

As for the definition of the term "State", Czechoslovakia is not convinced that the definition under article 3, paragraph 1 (c), excludes from the scope of the term "State" those juridical persons to whom State property has been entrusted for administration and who, however, have an independent legal personality different from that of a State, who act in their own name, have their own material liability and do not guarantee the State's obligations; vice versa, the State does not guarantee their obligations. Czechoslovakia considers it essential for this fact to be unequivocally expressed in the draft.

In determining whether a contract is commercial, reference should be made, in the view of Czechoslovakia, not only to the nature of the contract, but also to its purpose. It is proposed that paragraph 2 of article 3 be included in article 11 and its text read as follows:

"In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made to the nature of the contract, as well as to its purpose if, in the practice of that State, that purpose is relevant to determining the non-commercial character of the contract."

The text of article 6, entitled "State immunity", is acceptable with the exception of its concluding part in square brackets "and the relevant rules of general international law". Should this part of the text of article 6 not be deleted in the second reading of the draft articles, the object of the codification work would not be achieved, that is to adopt an unequivocal legal regulation of the immunity of a State and its property in the form of an international convention and to contribute thus to the creation of necessary legal certainty in the given field of State-to-State relations. Exceptions from immunity must be specifically listed by the convention. A reference to exceptions subject to the relevant rules of general international law is not acceptable for Czechoslovakia.

"Exceptions to State immunity" is a more suitable title for part III than "Limitations on State immunity".

Czechoslovakia does not consider it legitimate that the courts of one State be entitled to decide on the attribution of an act of natural or juridical persons to another State on the basis of international law, as it is envisaged in article 13. Moreover the wording of this article admits that a State may not enjoy immunity for the same act for which its diplomatic agent does enjoy immunity according to article 31 of the Vienna Convention on Diplomatic Relations. In view of the above, Czechoslovakia is of the opinion that article 13 should be deleted from the draft.

The wording of article 14, paragraph 2, leads to the unacceptable implication that the rights of another State relating to ownership or use of property may be affected without that State having the possibility of defending its rights in a court proceeding as a party to that proceeding. In Czechoslovakia's view the Commission should arrive at a solution that would eliminate such possibility.

In articles 18, 21 and 23 it is more appropriate to use the term "commercial" than the term "non-governmental" which is in square brackets.

In article 19 it is more precise to use the wording contained in the second brackets: "civil or commercial matter". The expression "commercial contract" in the first brackets has a narrower meaning.

Czechoslovakia is opposed to the inclusion of article 20 in the draft. Measures of nationalizations constitute an unequivocal expression of the sovereignty of a State and, as such, are not subject to the jurisdiction of the courts of other States. The text of article 20, which is, moreover, included in

part III, dealing with [limitations on] [exceptions to] State immunity, is not quite clear and allows different interpretations. For the aforesaid reasons, Czechoslovakia proposes its deletion from the draft articles.

The wording in brackets "or property in which it has a legally protected interest", in the first sentence of article 21, would have too far-reaching implications and would exclude property belonging to a private person from being subject to execution if the State had any material right on it, for instance lien, or a right corresponding to easement. In Czechoslovakia's view this part of the text should be deleted from the draft.

The condition stipulated in article 24, paragraph 1 (d), "if permitted by the law of the State of the forum and the law of the State concerned", needs not be always clear in practice, for instance, if the legal regulations of the given State do not say anything specific about the service of process. This may also apply to the service of process under paragraph 1 (d) (i), "by registered mail addressed to the head of the Ministry of Foreign Affairs of the State concerned requiring a signed receipt". It would seem appropriate to delete this condition, not mentioning it specifically under (i), and to formulate the provision under (ii) approximately as follows: "by any other means specified by the regulations on the service of process of the State of the forum, unless it is in conflict with the right of the State concerned".
