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Chairman: Mr. Tomka ..... (Slovakia)

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The meeting was called to order at 10.25 a.m

Organization of work

1. **The Chairman**, following a discussion of the organization of work in which the representatives of the United States of America, the Russian Federation and the Islamic Republic of Iran participated, suggested a schedule for the Committee's consideration of agenda item 152 (Measures to eliminate international terrorism). He took it that the Committee wished to proceed accordingly.

2. *It was so decided*.

Agenda item 144: Convention on jurisdictional immunities of States and their property (A/52/294)

3. **Mr. Saguier Caballero** (Paraguay), speaking on behalf of the States members of the Rio Group, said that the intensification of relations between States and between States and individuals made it necessary to adopt clear rules concerning jurisdictional immunities of States and their property, which would help to prevent disputes. For that reason, he expressed particular satisfaction at the decision taken by the General Assembly in paragraph 1 of its resolution 49/61, of 9 December 1994, to convene an international conference of plenipotentiaries to consider the articles on jurisdictional immunities of States and their property and to conclude a convention on the subject. The draft articles prepared by the International Law Commission constituted an excellent basis for the conclusion of such a convention; while the complexity of the topic and the diversity of national perspectives on sovereign immunities would continue to give rise to difficulties, the possible conciliatory formulas proposed by the Chairman of the informal consultations held pursuant to General Assembly decision 48/413 of 9 December 1993 (A/C.6/49/L.2) were worthy of detailed analysis. In that connection, he expressed appreciation for the skilful efforts of Ambassador Carlos Calero-Rodrigues, which had laid the groundwork for resolving the existing differences. A balance must be struck between international cooperation, State responsibility and respect for States' domestic jurisdiction. In accordance with General Assembly resolution 49/61, he reaffirmed his delegation's willingness to work with others in preparing for the international convention on jurisdictional immunities of States and their property and to consider all proposals that might contribute to the success of the conference. In that connection, it would be very useful to establish a working group of the Sixth Committee at the fifty-third session of the General Assembly; the working group would consider outstanding substantive issues and organize the preparatory work for the conference, taking into account the results of consultations and any new proposals which might be submitted. Lastly, he believed that 1999, the year in which the United Nations Decade of International Law would conclude, would be a very timely occasion for the holding of the conference, and that United Nations Headquarters appeared to be the most appropriate venue.

4. **Mr. Alabrune** (France) expressed appreciation for the work of the International Law Commission and noted with interest the draft articles on jurisdictional immunities of States and their property, which provided a useful and acceptable basis of work; he reaffirmed his support for the elaboration of a convention on the topic. Currently, any State could determine unilaterally the immunities which other States enjoyed in its territory. Some States, especially those which had a common-law system, had enacted their own laws in the matter. Others, like his country, which had a civil-law tradition, relied on judicial precedent. The essentially national origin of the immunities regime and the variety of national authorities which could establish it meant that different rules were applied in similar situations and that disparities might increase. The elaboration of a universally applicable international convention had as its aim to eliminate disparities by conferring the same rights and obligations on all States.

5. In its resolution 49/61 of 9 December 1994, the General Assembly had decided that consideration of the draft articles on jurisdictional immunities of States and their property prepared by the International Law Commission would be resumed at the current session; however, the time allotted to that important item in 1997 precluded the holding of a substantive debate. His Government had accepted the time constraints on condition that consideration of the draft convention be included in the agenda of the Assembly's next session. At the current session, the Committee should establish a working group to consider, over a period of two weeks, the possibility of convening a diplomatic conference. Otherwise, delegations would not be sufficiently prepared to enable a real convergence of views to take place, which would be in the interest of all.

6. With regard to the draft articles, there was a need to clarify some of the definitions contained therein, such as "constituent units of a federal State" (art. 2, para. 1 (b) (ii)); such units should not be entitled to invoke State immunity without a prior declaration by the federal State to which they belonged. Moreover, he failed to grasp exactly what was meant by "political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State" (art. 2, para. 1 (b) (iii); that provision might result in excessive growth in the number of bodies which could determine the commercial character of a

transaction, based not only on its nature but also on its purpose, so that jurisdictional immunities might apply to commercial contracts concluded for specifically public ends (art. 2, para. 1 (c), and para. 2).

7. The provisions concerning personal injuries and damage to property (art. 12) should also be clarified, taking into account, in particular, the draft articles on State responsibility. With regard to State immunity from measures of constraint (art. 18), he sought clarification of the meaning and exact scope of the provision that a State could not invoke immunity from execution where it had "allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding" (art. 18, para. 1 (b)). In general, it seemed that a State would have difficulty in waiving immunity from execution in cases where the property had no connection with the claim which was the object of the proceeding, and that it would also be difficult to waive such immunity in a proceeding involving the rights of a State in immovable property (art. 13).

8. Moreover, the article concerning ships owned or operated by a State should also refer to aircraft and space objects. It would also be desirable to list the vessels owned or operated by a State to which jurisdictional immunities applied (art. 16). Lastly, listing the specific categories of property to which jurisdictional immunities applied (art. 19) posed the risk of excluding other categories of property to which such immunities might also apply.

9. **Mr. Fukushima** (Japan) recalled that three years had passed since the General Assembly had adopted resolution 49/61, that many States had not expressed views on the item and that the deadline for the submission of comments had passed. His Government valued the pragmatic approach reflected in the current draft articles of the Convention on jurisdictional immunities of States and their property, which facilitated the achievement of consensus on the range of activities to which immunity should or should not be applied. Three years earlier, notwithstanding the efforts made by the Chairman of the informal consultations, Mr. Carlos Calero-Rodrigues, differences of views had remained on several questions, notably the criteria to be used in determining the commercial character of a contract or transaction, and measures of constraint. In his view, in determining whether a contract or transaction was a commercial transaction, reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account. In order to avoid arbitrary interpretations, there should be a list of the categories of contracts or transactions for which immunity could be invoked. With regard to measures of constraint against the property of a State, he believed that reference should be made primarily to the property against which measures of constraint might be taken and the degree of connection between such State property and the dispute in question.

10. With regard to the programme of work on the draft articles, in its resolution 49/61 of 9 December 1994, the General Assembly had decided to resume consideration, at its fifty-second session, of the issues of substance, in the light of the comments submitted by States. Since most Governments had not submitted comments, it would be difficult to proceed as scheduled, particularly to make the necessary arrangements at the current session for convening the international conference of plenipotentiaries. However, his delegation, which was convinced of the need for and importance of concluding the convention, believed that it would be time-consuming to refer the draft articles to the International Law Commission again; his delegation wished to assure other Sixth Committee delegations that Japan would cooperate actively with them in an effort to establish a consensus in the light of comments to be submitted by Governments.

11. **Ms. Jacobson** (United States of America) said that, before convening a conference to elaborate a convention on the jurisdictional immunities of States and their property, and in order not to doom the conference to failure, it was necessary to make sure that the widest possible agreement could be reached, as called for in General Assembly resolution 49/61. The codification of the principles of customary international law relating to sovereign immunity should reflect the most modern and progressive developments of the law and incorporate clear rules of restrictive immunity. Her delegation noted with gratification that progress had been made in several areas, notably with respect to article 2, paragraph 1, of the Commission's draft articles (A/46/10); however, a number of issues had yet to be reconciled, such as the criteria for determining commercial activity and measures of constraint. Her delegation saw little chance of consensus in the near future on the issues in question, unless some States reconsidered their positions substantially; consensus must await the further development of State practice and customary international law.

12. The criteria for determining the commercial character of a transaction, particularly as reflected in article 2, paragraph 1 (c), were of utmost concern to her Government. The clear trend in customary law was acceptance of a nature-only test. In the informal consultations, her Government had indicated a readiness to agree in principle to certain exceptions to that rule, i.e., where the parties agreed in writing that the contract or transaction was not commercial, and where the parties agreed in writing that the court might consider the government purpose for entering into the

contract or transaction in determining its commercial character. Other Governments had felt, however, that those compromises were insufficient. The former Chairman of the Commission, Mr. Carlos Calero-Rodrigues, had suggested that a court should take purpose into account where the defendant State had at the time of becoming a party to the convention filed a declaration stating that under its law purpose was a criterion; or had notified the other party of such practice at the time of entering into the contract or transaction. Her delegation could not agree to that position for two reasons: firstly, it stopped the clear trend in customary law towards acceptance of the nature-only test; secondly, a general declaration provided insufficient notice to private parties that their contract with foreign States might be judicially unenforceable. Lastly, the provision would require the court of the forum State to apply the law of sovereign immunity — a fundamental jurisdictional issue — of the litigating State. Without a clear and unequivocal position that incorporated the nature-only test, her Government would not be able to accept the convention. It understood and respected the views of other States but believed that only time, and with it greater State exposure to domestic judicial systems that had adopted the nature-only test, would produce a compromise that all could accept.

13. Since there was still not a sufficient basis for compromise on measures of constraint (article 18 of the Commission's draft), more work was needed in that area as well before a conference was convened.

14. The current wording of draft article 11 (Contracts of employment) failed to address the major labour-employment issues facing diplomatic missions. Her delegation had raised before its concerns over the conflict between local labour laws and the ability of diplomatic facilities to perform their mission. Lawsuits against foreign States for actions relating to downsizing, reorganization and closing of diplomatic and consular facilities, and the withdrawal of diplomatic missions from participating in bankrupt mandatory social security systems for their locally hired personnel, had soared over the past two years. Informal consultations in the Sixth Committee next year on that subject might be useful in bridging the gap between the current scope of article 11 and State practice.

15. A better way of ensuring the widest possible agreement on key issues at an eventual conference would be for the Sixth Committee to continue its work on the convention after an appropriate period of further reflection. Convening a conference prematurely would jeopardize the goal of successfully concluding a convention; consequently, action on the question of a conference should be deferred to a future session of the Assembly.

16. **Mr. Duan Jielong** (China) said that the International Law Commission had considered the question of the jurisdictional immunities of States and their property for 13 long years before preparing a set of draft articles on the subject (A/46/10). The Sixth Committee had then set up a working group to consider the draft, but had as yet been unable to reach a consensus on a final draft. That underscored the fact that the issue in question was an important and complex topic of international law, in which fundamental national interests were at stake. There had always been two rival doctrines on the subject: some advocated absolute immunity, unless the State concerned voluntarily waived its immunity, while others advocated restrictive immunity and maintained that, under certain circumstances, foreign courts could exercise judicial jurisdiction over a State and its property even if the State concerned had not explicitly waived its immunity. So far, neither school of thought had achieved dominance in the theory of international law or in international practice. In international practice, a State would inevitably engage in international trade transactions on its own behalf; some such transactions were for profit, whereas others were carried out for the purpose of promoting social and public interests, such as the purchase of food for disaster relief. In the case of transactions for profit, the State concerned should not claim jurisdictional immunities abroad; in the case of transactions in the public interest, it was inappropriate for a foreign court to exercise jurisdiction over the State concerned without its explicit prior waiver of immunity. Sometimes individuals or enterprises of some States suing the enterprise of another State would name the latter State as co-defendant, and sometimes they would simply sue only the State to which the enterprise belonged, and the court trying the case would assert jurisdiction over the State concerned. His country believed that as an independent legal person, any enterprise must, whatever its ownership, assume responsibility for its business activities; accordingly, the commercial transactions entered into by a State enterprise on its own behalf and within the scope of the law could not and should not entail any liability for the State. If one were to accept the argument that whenever a transaction entered into by a State enterprise on its own behalf gave rise to a dispute the State to which the enterprise belonged could be named as a co-defendant, there would be legal chaos and there could be abusive use of domestic jurisdiction over other countries, which would adversely affect inter-State relations.

17. There were many crucial issues that had yet to be resolved: for example, the criteria for determining whether a transaction was commercial in nature, whether waiver of immunity from legal proceedings necessarily meant giving up immunity from measures of constraint, and under what

circumstances was State property subject to measures of constraint. Thus far, fewer than 10 countries had enacted laws dealing specifically with jurisdictional immunities of States and their property; all other States dealt with the issue in accordance with the general principles and practice of national civil law; it was therefore necessary to elaborate an international convention on the issue based on a broad consensus.

18. In the first place, when determining the nature of a transaction, it was necessary to take into consideration the purpose of the transaction, because transactions of a State were often conducted not for profit but for the public interest; treating all international transactions of a State as commercial transactions without regard to their purpose could lead to an abuse of national jurisdiction that would adversely affect relations between States. Secondly, there was a need to distinguish between a State and State enterprises: unless the State specifically authorized a State enterprise to enter into a commercial transaction on its behalf, the State clearly should not incur any liability in connection with the transactions of such enterprise. Thirdly, regarding measures of constraint against State property, it should be recalled that such property was composed of many parts, each of which performed distinct functions and was managed by different agencies; most types of State property and agencies carried out social management and public interest functions. Clearly, in the event of a judgement that was unfavourable to a State, measures of constraint on its property should be confined to the part of State property that was closely related to the legal proceedings; that would prevent a lawsuit from jeopardizing the State's social management and public interest functions. Moreover, his delegation was opposed to the adoption of measures of constraint, such as the seizing or freezing of State assets, before a final judgement was passed.

19. His delegation had no objection to the convening of a diplomatic conference at an appropriate time to conclude an international convention on the question. However, the immediate task should be to try to settle the basic differences through consultation and discussion.

20. **Mr. Verweij** (Netherlands) said that although considerable progress had been made during the debates, differences of substance still remained. Further careful study of the details of contemporary State practice would be appropriate. Before convening a diplomatic conference to negotiate a convention there must be reasonable prospects of reaching the broadest possible agreement, for if the Convention did not have the support of a large number of States or if agreement could not be reached, the codification process in that area would be adversely affected. Consequently, there was no need to rush into convening a diplomatic conference. Moreover, because of time constraints it had not been possible to consider the issue in detail. The Committee should concentrate its energies on preparations for the conference that was to be held in Rome in 1998 on the creation of an international criminal court. There were three key issues: firstly, it was necessary to clarify the distinction between *acta jure imperii* and *acta jure gestionis*; secondly, it was necessary to determine which entities could, from the legal standpoint, enjoy jurisdictional immunity and, lastly, it was necessary to establish the extent of immunity from execution.

21. **Ms. Sucharipa** (Austria) said that the Chairman's conclusions (contained in document A/C.6/49/JI/CRP.1-5), would help to narrow the differences standing in the way of the adoption of a universally acceptable and effective international instrument on immunities of States. Although the working group had made highly commendable progress, it was not yet possible to reach a compromise acceptable to a wide majority. Furthermore, it was possible that some States might change their perception of the issue and it would therefore be useful to allow for additional time before deciding to convene a diplomatic conference; that decision should be taken at the fifty-third session of the General Assembly so as not to lose the momentum towards the building of broad consensus. As to the definition of the term "State", his delegation supported the compromise proposed by the Chairman on the basis of articles 27 and 28 of the European Convention on State Immunity, which had proved to be sufficiently flexible to adapt to the different constitutional structures of Member States.

22. Concerning the definition of the term "commercial transaction" Austria primarily applied the criterion of nature to determine the character of a transaction. However, in view of the fact that the issue continued to give rise to great controversy her delegation welcomed the Chairman's proposal which was flexible and at the same time provided a higher degree of legal certainty, in particular for private parties. Her delegation could go along with a provision according to which a State which did not make a declaration or notification clarifying the potential relevance of the purpose criterion under its national law and practice, would be assumed to accept the application of the nature criterion in determining the character of a transaction.

23. Her delegation was of the view that article 10, para. 3, proposed by the International Law Commission (A/46/10) ensured that State immunity could not be applied to State enterprises as defined by the provision. It continued to support the text proposed by the Commission, particularly in view of the increasing tendency, worldwide, towards

privatization and increased commercial autonomy of State-owned enterprises.

24. On the question of contracts of employment, her delegation reserved its position until further clarification was provided, especially with regard to the term "closely related to the exercise of governmental authority". In regard to article 11, para. 2 (b), the Chairman's proposal was acceptable.

25. Her delegation was conscious of the difficulty in finding an adequate and acceptable balance between the interest of the State in minimizing interference with its activities and the legitimate interests of a party in obtaining satisfaction from a State based on a valid judgement. Thus draft articles 18 and 19 required more extensive consideration. In that regard there was considerable merit to the Chairman's proposal calling for greater emphasis on voluntary compliance by a State against which satisfaction was sought, based on a valid judgement. His suggestions envisaging international dispute settlement procedures concerning the implementation of judgements and possible measures of constraint against State property merited further consideration. A distinction could, perhaps, be drawn between judgements directly against a State and those against other types of entities.

26. In order to reach a compromise with regard to pre-judgement measures, various criteria and conditions could be inserted which would restrict the property subject to such measures. Pre-judgement measures could be restricted to those against earmarked property, property connected with the object of disputes or property situated in the forum State. Although her Government had thus far opposed such limitations it could go along with the inclusion of one or other of the conditions in the interest of achieving a generally acceptable solution.

27. With regard to measures of constraint in case a State failed to satisfy a binding and final judgement within a limited period, Austria could agree that measures of constraint could be taken against specific property situated in the territory of the forum State. Her delegation would submit a proposal for a reformulation of article 18.

28. Austria was traditionally in favour of introducing international mechanisms of dispute settlement, in particular legally binding mechanisms, into international instruments. However, in the context of the draft articles under consideration, rules governing the settlement of disputes had to be closely interconnected with the specific requirements arising out of proceedings involving States and their property.

29. Her delegation wished to stress the importance of the elaboration of a convention on State immunities, and believed that it should be possible to overcome the still existing divergencies of opinion and to find a widely acceptable compromise. It therefore suggested that consideration of the topic should be resumed at the fifty-third session of the General Assembly.

30. **Mr. Saguier Caballero** (Paraguay) said that his country had followed with interest the studies on the topic "jurisdictional immunities of States and their property" which had culminated in the draft articles prepared by distinguished legal experts and it supported the adoption of a convention on the issue and the convening of a special conference at which Paraguay would join in approving the convention.

31. He said that a Geneva court had admitted a lawsuit against his country, dismissing the exception taken on grounds that the court was not competent to rule owing to State immunity and lacked jurisdiction, as demonstrated by Paraguayan defence attorneys. It should be noted that the country of the forum which had accepted the suit against the State of Paraguay used the same arguments as the latter to defend its position when it sued in the United States by private parties. Nevertheless, he was confident that justice in Switzerland, a country with a deep-rooted democratic tradition, would reject the suit, especially considering the official note dated 15 April 1997 addressed to the Paraguayan Foreign Ministry stating that the Swiss Federal authorities in charge of foreign relations had sent a communication to the Court of Justice of the Republic and Canton of Geneva drawing attention to the fraudulent nature of the issue.

32. Paraguay supported the basic concept that States enjoyed immunity from the jurisdiction of the courts of other States and the measures of constraint which they might adopt. While there might be exceptions, they should be fully justified and in conformity with the convention, and the applicability of State immunity and measures of constraint should not be left to the interpretation given a general reference to international law.

33. Paraguay was fully in agreement with the definitions proposed by the Rapporteur and with the criterion for determining the nature of a transaction. A State could not wait until the proceedings taking place in a foreign court were over to decide whether to invoke its immunity. The immunity should be immediately recognizable and to that end, it might be advisable to strengthen the powers of the executive branch, which was in charge of foreign relations. It was not a question of going back to the old principle of absolute immunity, but neither should that principle be totally watered down to the point where exceptions to the rule took precedence over the rule itself. Therefore, it was necessary to establish precise rules in order to prevent abuses by either party.

34. States should not enjoy impunity, but neither should a State be subject to the jurisdiction of another State without justification. The State of Paraguay found itself in that situation: it was being sued by nine banks in Switzerland which had acquired fraudulent credits from a bank which had gone under. At the request of the Government of Paraguay, the Attorney-General of the Republic and the Canton of Geneva had launched a criminal investigation of that attempt to defraud the Republic of Paraguay: its purpose was to establish the participation of those banks and of the officials of the countries that had provided the money that had gone into the pockets of private individuals. He pointed out that to counter just such situations, it was urgent to put together an international agreement that would regulate State immunity in a rational manner without making it tantamount to impunity. Justice should prevail, being based on a balanced and clear set of rules that respected the dignity and sovereignty of States.

35. **Mr. Varso** (Slovakia) said that the General Assembly, in its resolution 49/61 of 9 December 1994 on the convention on jurisdictional immunities of States and their property had decided "... to resume consideration at its fifty-second session of the issues of substance in the light of the above-mentioned reports and the comments submitted by States thereon, and to determine at its fifty-second or fifty-third session, the arrangements for the conference, including the date and place, due consideration being given to ensuring the widest possible agreement at the conference".

36. The delegation of Slovakia favoured postponing the discussion of substance on the item until the fifty-third session of the General Assembly in order to allow enough time to consider it in the Sixth Committee.

37. His country considered that the codification and progressive development of rules governing the jurisdictional immunities of States and their property were important for the international community and could help to clarify the relevant judicial arrangements. Moreover, the fact that some States had elaborated and adopted very detailed internal regulations on the subject should not impede adoption of the convention, especially since the legislation of many other States did not contain any such regulations. The draft articles prepared by the Commission provided a sound basis for the codification process which would lead to the elaboration and adoption of the multilateral convention.

38. His delegation thought that the outcome of the discussion at the fifty-third session would indicate how to proceed subsequently in respect of the draft articles. There were two possibilities: to refer the draft to the International Law Commission so that it could amend its provisions in accordance with the instructions received from States or, before convening the conference, to establish a working group to rework the text with a view to garnering the broadest possible agreement of States.

Agenda item 146: United Nations Decade of International Law (*continued*)

(c) Draft guiding principles for international negotiations (*continued*)

39. **The Chairman** announced that Uruguay had joined the list of sponsors of draft resolution A/C.6/52/L.4.

The meeting rose at 11.45 a.m.