

## IV. Jurisdiction

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### **Convention on Jurisdictional Immunities of States and their Property**

Further to *Aust YBIL* 1994, vol 15, p 434, the following is a statement made by the Australian Delegation in the Sixth Committee of the UN General Assembly under this item on 11 November 1994:

Mr Chairman,

My delegation remains of the view that a widely accepted Convention on Jurisdictional Immunities of States and their Property would be an important contribution to international law and of considerable practical benefit, particularly in international commerce. Dealings between States and foreign natural and juridical persons are commonplace. Jurisdictional immunities of States and their property are one of the areas of international law with which domestic courts and tribunals are frequently called upon to deal. An international Convention establishing universally applicable principles would bring predictability, stability, and hopefully also simplicity, to an area of international law in which there has always been lack of uniformity and a considerable measure of uncertainty. Achievement of a successful Convention would also benefit the process of codification and progressive development of international law generally.

The question is whether a widely supported Convention on this subject is attainable. The Working Groups held within the framework of the Sixth Committee during the 47th and 48th sessions of the General Assembly were not able to resolve the fundamental differences of opinion which exist with respect to a few key provisions of the International Law Commission's draft Articles, although in the view of my delegation the Working Groups were profitable, and went some way towards identifying and clarifying the issues involved. It was the hope of my delegation that the informal consultations held this year might be able to build on the progress that had been made, and to succeed in identifying potential solutions to the major outstanding issues. We regret that this hope has not been fulfilled.

Mr Chairman,

In the informal consultations, five issues were considered. These were:

1. the concept of a State for the purposes of immunity, in Article 2(1)(b) of the International Law Commission's draft Articles;
2. the criteria for determining the commercial character of a contract or transaction, dealt with in Article 2(1)(c) and Article 2(2);
3. the concept of a State enterprise or other State entity in relation to commercial transactions, in Article 10(3);
4. contracts of employment, in Article 11; and
5. measures of constraint against State property, in Articles 18 and 19.

In relation to the first, third and fourth of these issues, it is the impression of my delegation that, although no specific proposals have yet been agreed upon, the possible bases of compromise identified by the Chairman of the Working Group, Ambassador Calero, *if further explored*, could well prove fruitful.

On the other hand, we are unfortunately still some distance from agreement on Article 2(2) dealing with the criteria of "nature" and "purpose" for characterising a transaction as commercial, and on the question of measures of constraint, especially Article 18.

As regards the question of the criteria for determining the commercial character of a contract or transaction, the main division of opinion remains between those States which emphasise the nature of a transaction as the criterion for determining its commercial character, and those States who consider that the purpose of the transaction should also be taken into account. While my delegation would prefer to see the nature criterion applied as the sole test, we have no objection in principle to the purpose test being applied by a court in subsequent litigation if the parties know before the contract is entered into that this will be the case, and have agreed to enter into the transaction on this basis.

The Chairman of the informal consultations has suggested that a possible basis of compromise would be to give the State concerned the option of indicating that purpose is a relevant criterion under its national law and practice *either* by means of a general declaration in relation to the Convention *or* by means of a specific notification to the other party in relation to a particular contract or transaction, *or* a combination thereof. My delegation considers that this would be a compromise which addresses the concerns both of those States which want the purpose of a transaction to be taken into account, and those States which are concerned at the uncertainty that this would engender. In light of the detailed discussions of this provision in the informal consultations and in the Working Groups at the two previous sessions, my delegation would agree that if compromise can ever be achieved on this issue, this is the approach most likely to succeed. However, at the end of the informal consultations, it was clear that not all delegations could accept this formulation. Furthermore, even amongst those delegations which could accept the basic approach suggested by the Chairman, there may be a further issue dividing us. My delegation considers that it should always be open to the parties expressly to agree whether or not a transaction is commercial. On the other hand, other delegations were of the view that if purpose is otherwise a relevant criterion, the parties should not be able to agree to the contrary. Obstacles therefore remain to the achievement of general agreement on Article 2(2).

The position with respect to measures of constraint against State property in Article 18 seems even more difficult. There was clearly no agreement on this issue, as the Chairman of the informal consultations has indicated. The principal concern of our delegation is to ensure that where judgment is given against a foreign State in accordance with the draft Articles, the judgment is in fact satisfied. Under the International Law Commission's draft Articles, the conditions for execution are so restrictive as to exclude the possibility of enforcement proceedings in many cases. One possibility considered in the informal consultations was to delete the connection requirement for cases of interim or prejudgment attachment. This is a compromise which my delegation could support, but again there was no general agreement.

However, my delegation does not insist that a strengthening of measures of constraint is the only possible solution. Measures of constraint can only be effective where the defendant State has appropriate assets in the territory of the forum State. My delegation therefore consider that a satisfactory solution might also be achieved by incorporating in Article 18 additional elements for ensuring that judgments are effective, such as an obligation to comply with a judgment given in accordance with the draft Articles, the possibility of recognition and enforcement of judgments in third States, and appropriate disputes settlement procedures. However, we recognise that in the informal consultations there was also no general agreement on these proposals.

Mr Chairman,

In its decision 48/413 of 9 December 1993, the General Assembly decided that it would at this session, in light of the results of the informal consultations, give full consideration to the recommendation of the International Law Commission and that an international conference of plenipotentiaries be convened to conclude a Convention on this subject.

My delegation continues to be firmly of the view that a date for a diplomatic conference should not be set until all outstanding issues of principle have been settled. If it has not been possible for the remaining key issues to be resolved at three successive sessions of the General Assembly, there can be little prospect of a solution being found in the limited time that would be available at a diplomatic conference, given especially that the diplomatic conference would need to address in detail each of the other provisions of the draft Articles.

At the same time, my delegation does not consider that it would be profitable to convene further informal consultations at the next session of the General Assembly. The issues have now been discussed exhaustively, and all avenues of compromise have been explored. If there were at present any possibility of achieving general agreement, we believe that it would have been found.

In our view, the inability to identify generally acceptable solutions to all issues has not been due to any lack of good will on the part of all delegations. Rather, it is a reflection of the nature of the subject matter. There have always been significant divergences in the practice of States in relation to foreign State immunity, which has been continuously evolving, since last century. It may be that if this evolution is permitted to continue a little longer, a point might be reached at some time in the near future when there will be sufficiently good prospects for a successful Convention on this topic.

My delegation therefore believes that the goal of a Convention should not be abandoned, and that this item should be examined again by the Sixth Committee in a few years' time, with a view to ascertaining whether there have been any developments in the intervening years...