

UNITED NATIONS  
GENERAL  
ASSEMBLY



Distr.  
LIMITED  
A/CN.4/L.389  
11 July 1985  
Original: ENGLISH

INTERNATIONAL LAW COMMISSION  
Thirty-seventh session  
6 May - 26 July 1985

CHAPTER V

Draft report of the International Law Commission

CHAPTER V

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Table of contents

	<u>Paragraphs</u>
A. Introduction .....	1 - 8
1. Historical review of the work of the Commission .....	1 - 8

CHAPTER V

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

A. Introduction

1. Historical review of the work of the Commission

1. The topic entitled "Jurisdictional immunities of States and their property" was included in the current programme of work of the International Law Commission by the decision of the Commission at its thirtieth session, in 1978,<sup>1/</sup> on the recommendation of the Working Group which it had established to commence work on the topic and in response to General Assembly resolution 32/151 of 19 December 1977.

2. At its thirty-first session, in 1979, the Commission had before it a preliminary report<sup>2/</sup> on the topic submitted by the Special Rapporteur, Mr. Sompong Sucharitkul. The preliminary report gave a historical sketch of international efforts towards codification and examined sources of international law and possible contents of the law of State immunities, including the practice of States, international conventions, international adjudications, and opinions of writers as source materials. The report also made an inquiry into initial questions, definitions, the use of the inductive approach to the study of the topic, the general rule of State immunity and possible exceptions to the rule itself.

3. During the discussion of the preliminary report, it was pointed out that relevant materials on State practice, including the practice of the socialist countries and developing countries, should be consulted as widely as possible. It was also emphasized that another potential source of materials would be found in the treaty practice of States, which indicates consent to some limitations on jurisdictional immunity in specific circumstances. In that connection, the Commission, at its thirty-first session, decided to seek further information from Governments of Member States of the United Nations in the form of replies to a questionnaire. It was noted that States know best their own practice, wants and needs as to immunities in respect of their activities and that the

---

<sup>1/</sup> Yearbook ... 1978, vol. II (Part Two), pp. 152-155, document A/33/10, paras. 179-190.

<sup>2/</sup> Yearbook ... 1979, vol. II (Part One), p. 227, document A/CN.4/323.

views and comments could provide an appropriate indication of the direction in which the codification and progressive development of the international law of State immunity should proceed.<sup>3/</sup>

4. Following the preliminary report, the Special Rapporteur submitted the second report<sup>4/</sup> for the consideration of the Commission at its thirty-second session, in 1980,<sup>5/</sup> in which he introduced six draft articles: "Scope of the present articles" (article 1); "Use of terms" (article 2); "Interpretative provisions" (article 3); "Jurisdictional immunities not within the scope of the present articles" (article 4); "Non-retroactivity of the present articles" (article 5); "The principle of State immunity" (article 6). The first five constituted Part I, entitled "Introduction", while the sixth was placed in Part II, entitled "General principles". The Commission referred draft articles 1 and 6 to the Drafting Committee. At the same session, the Commission provisionally adopted, on the recommendation of the Drafting Committee, draft article 1, entitled "Scope of the present articles", and article 6, entitled "State immunity".

5. In his third report,<sup>6/</sup> submitted at the thirty-third session of the Commission, in 1981, the Special Rapporteur proposed the text of the following five draft articles: "Rules of competence and jurisdictional immunity" (article 7); "Consent of State" (article 8); "Voluntary submission" (article 9); "Counter-claims" (article 10); and "Waiver" (article 11). The five draft articles contained in the third report were placed in Part II, entitled "General principles", following draft article 6 already provisionally adopted. The Commission referred draft articles 7 to 11 to the Drafting Committee. At the same session, in the light of the discussion in the Commission, the Special Rapporteur prepared and submitted for the consideration of the Drafting Committee

---

<sup>3/</sup> The materials received were originally organized by the Secretariat in a systematic order (and published in English, French, Russian and Spanish) as follows: Part I consisted of Government replies to the questionnaire (A/CN.4/343 and Add.3-4); Part II contained materials that Governments had submitted together with their replies to the questionnaire (A/CN.4/343/Add.1); Part III contained materials submitted by the Governments which had not replied to the questionnaire (A/CN.4/343/Add.2). The materials now appear in a volume of the United Nations Legislative Series (hence in either English or French), Materials on jurisdictional immunities of States and their property (United Nations publication, Sales No. E/F.81.V.10), hereafter referred to as "Materials on jurisdictional immunities ...".

<sup>4/</sup> Yearbook ... 1980, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1.

<sup>5/</sup> The Commission discussed the second report at its 1622nd to 1626th meetings. See Yearbook ... 1980, vol. I, pp. 195-204 and pp. 214-220.

<sup>6/</sup> Yearbook ... 1981, vol. II (Part One), p. 125, document A/CN.4/340 and Add.1.

a revised version of his original five draft articles (draft articles 7 to 11), which he reduced to four articles as follows: "Obligation to give effect to State immunity" (article 7); "Consent of State" (article 8); "Expression of consent" (article 9); and "Counter-claims" (article 10).<sup>7/</sup> Owing to lack of time, the Drafting Committee was unable to consider these articles at the thirty-third session.

6. In his fourth report,<sup>8/</sup> submitted at the thirty-fourth session of the Commission, in 1982, the Special Rapporteur dealt with Part III of the draft articles, entitled "Exceptions to State immunities", and proposed two draft articles: "Scope of the present Part" (article 11); and "Trading or commercial activity" (article 12). The Commission decided to refer to the Drafting Committee articles 11 and 12. It further decided that article 6, already provisionally adopted, should be re-examined by the Drafting Committee in the light of the discussions of the rest of the draft articles constituting Part II of the draft articles, and further decided that the Drafting Committee should also examine the provisions of articles 2 and 3 relevant to the problems of definition of "jurisdiction" and "trading or commercial activities".<sup>9/</sup> At the same session, the Commission, on the recommendation of the Drafting Committee, provisionally adopted the text of draft articles 2 (subparagraph 1 (a)), 7, 8 and 9, as well as the text of a revised version of draft article 1.<sup>10/</sup> The Drafting Committee re-examined the text of article 6 as provisionally adopted and, while not proposing a new formulation thereof, agreed to re-examine the article at its subsequent session.

7. In his fifth report,<sup>11/</sup> submitted at the thirty-fifth session of the Commission, in 1983, the Special Rapporteur proposed three additional draft articles for inclusion in Part III of the draft. They were "Contracts of employment" (article 13); "Personal injuries and damage to property" (article 14);

---

<sup>7/</sup> Ibid., vol. II (Part Two), pp. 157-158, document A/36/10, para. 226.

<sup>8/</sup> A/CN.4/357 and Corr.1.

<sup>9/</sup> See Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 10 (A/37/10, para. 198).

<sup>10/</sup> Ibid.

<sup>11/</sup> A/CN.4/363 and Corr.1 and Add.1 and Add.1/Corr.1.

and "Ownership, possession and use of property" (article 15). The Commission also had before it a memorandum on the topic submitted by one of the members (A/CN.4/371). After the conclusion of its debate on the topic, the Commission decided to refer draft articles 13, 14 and 15 to the Drafting Committee.<sup>12/</sup> The Commission, on the recommendation of the Drafting Committee, provisionally adopted draft articles 2 (subparagraph 1 (g)), 3 (paragraph 2), 10, 12 and 15.<sup>13/</sup> At the same session, on the basis of the discussions in the Commission, the Special Rapporteur prepared and submitted to the Drafting Committee revised versions of draft article 13,<sup>14/</sup> "Contracts of employment", and draft article 14,<sup>15/</sup> "Personal injuries and damage to property". Owing to lack of time, the Drafting Committee was not in a position to consider these articles or the question of the re-examination of draft article 6.

8. In his sixth report,<sup>16/</sup> submitted at the thirty-sixth session of the Commission, in 1984, the Special Rapporteur proposed five draft articles and thereby completing Part III of the draft. They were "Patents, trademarks and intellectual properties" (article 16); "Fiscal liabilities and customs duties" (article 17); "Share-holdings and membership of bodies corporate" (article 18); "Ships employed in commercial service" (article 19, alternative A and alternative B); and "Arbitration" (article 20). The Commission decided to refer to the Drafting Committee articles 16, 17 and 18 for consideration.<sup>17/</sup> Owing to lack of time, the Commission was not in a position to conclude its deliberations on article 19 or to take up article 20. It decided to consider those articles the following year at its thirty-seventh session.<sup>18/</sup> However, in the light of the preliminary discussions held in the Commission on article 12, the Special Rapporteur prepared and submitted a revised version of draft article 19 (Ships employed in commercial

---

<sup>12/</sup> See Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 10 (A/38/10), para. 94.

<sup>13/</sup> Ibid., para. 95.

<sup>14/</sup> Ibid., note 52.

<sup>15/</sup> Ibid., note 53.

<sup>16/</sup> A/CN.4/376 and Add.1 and 2.

<sup>17/</sup> See Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 10 (A/39/10), para. 205.

<sup>18/</sup> Ibid.

service).<sup>19/</sup> At the same session, on the recommendation of the Drafting Committee, the Commission provisionally adopted draft articles 13, 14, 16, 17 and 18.<sup>20/</sup> With regard to the provisional adoption of draft article 16 by the Commission, the Special Rapporteur submitted the text of paragraph 2 of draft article 11 to the Commission.<sup>21/</sup> The Commission decided to refer paragraph 2 of article 11 to the Drafting Committee.<sup>22/</sup>

---

<sup>19/</sup> Ibid., para. 214, note 185.

<sup>20/</sup> Ibid., para. 206.

<sup>21/</sup> Ibid., para. 207, note 182.

<sup>22/</sup> Ibid., para. 207.