

Government response to advisory report no. 44 of the Advisory Committee on Issues of Public International Law (CAVV) on the accession of the Netherlands to the UN Convention on Jurisdictional Immunities of States and Their Property

Introduction

On 29 June 2023, following the plenary debate in the House of Representatives on 13 June 2023 on the bill for a Kingdom Act approving the UN Convention on Jurisdictional Immunities of States and Their Property, the Minister of Foreign Affairs asked the Advisory Committee on Issues of Public International Law (CAVV) to prepare an advisory report outlining its views on accession to the Convention, in particular in the light of and including an assessment of:

1. the amendment proposed by Democrats '66 (D66), the Labour Party (PvdA) and the Green Left Alliance (GL) on making a reservation to article 11, paragraph 2 (c) and (d) of the Convention;
2. the risks arising from differences in interpretation between courts in States Parties to the Convention, in particular regarding the term 'commercial purposes' in articles 18 and 19 of the Convention, and whether a declaration or reservation in respect of these articles should be made as a result of these risks; and
3. the international debate on the confiscation of Russian assets and, in this context, the relationship between their confiscation and state immunity.

The CAVV finalised its advisory report on the Netherlands' accession to the UN Convention on 22 December 2023.

Comments

First, the government wishes to express its appreciation for the CAVV's analysis. The CAVV points out that it previously published an advisory report (no. 17) on the UN Convention in 2006 and that, in the present advisory report (no. 44), it therefore limited itself to answering the three supplementary questions from the government's request for advice instead of re-examining the entire Convention. In 2006, the CAVV was of the opinion that the Kingdom of the Netherlands should become party to the Convention. Regarding the question in the current request for advice as to how the CAVV views the accession of the Kingdom of the Netherlands to the UN Convention, the government accordingly interprets the new advisory report as indicating that the CAVV remains of the opinion that the Kingdom of the Netherlands should become a party to the Convention. On the issue of making a reservation to article 11 of the Convention, the advisory report endorses the government's position as articulated in the parliamentary papers relating to the approval of the Convention. In addition, the report is in line with the government's position on the term 'commercial purposes' in articles 18 and 19 of the Convention. Finally, the CAVV concludes that the debate on the confiscation of Russian assets need not affect the Netherlands' accession to the Convention. The government has tailored its comments to the structure of the CAVV's advisory report and below examines the CAVV's conclusions and recommendations on a chapter-by-chapter basis.

Reservations and (interpretative) declarations made on accession to the UN Convention

The CAVV notes that the UN Convention only mentions one possible reservation in article 27, paragraph 3 (concerning the referral of disputes to the International Court of Justice), but that this does not mean that reservations to other provisions are not permitted.

Reservations to the Convention are thus possible to the extent that they are compatible with the object and purpose of the Convention. This is consistent with the general rules of treaty law as laid down in the Vienna Convention on the Law of Treaties. The government therefore supports this reasoning.

Because other States Parties to the Convention may object to a reservation – or to a reservation presented as a declaration – the CAVV believes that it is important to give due

consideration to the underlying reasons for making the reservation or declaration. The government agrees with this approach.

Article 11 of the UN Convention

In its discussion of the amendment proposed by D66, PvdA and GL, which proposes making a reservation to article 11, paragraph 2 (c) and (d) of the Convention, the CAVV focuses on whether it is necessary or desirable to make a reservation to these provisions in order to protect the legal status of local staff at embassies, consular posts and permanent representations to international organisations.

The general rule articulated in article 11 is that states cannot invoke immunity in respect of employment disputes, since a state that acts as an employer is in principle on an equal footing with private parties. However, in order to protect its sovereign interests, a foreign state that is acting as an employer can invoke immunity for certain acts, for example in the case of decisions concerning the recruitment, renewal of employment or reinstatement of an individual (subparagraph (c)) and in the case of decisions interfering with security interests (subparagraph (d))

Article 26 of the UN Convention provides that the rights and obligations of states under the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations continue to apply in full. The CAVV notes that both conventions provide a general framework for the application of article 11 but that they do not impose any direct restrictions on the forum state.

The CAVV concludes, on the basis of both the text of the UN Convention and its *travaux préparatoires* and of the case law of the European Court of Human Rights (ECtHR), that the exceptions listed in article 11, paragraph 2 (c) and (d) should be interpreted strictly. The government agrees with this conclusion.

Although article 11, paragraph 2 (c) provides that states can invoke immunity in relation to decisions concerning the recruitment, renewal of employment or reinstatement of an individual, employees can go to court to challenge working conditions or other procedures relating to the performance of an employment contract. Moreover, employees can be awarded damages if it can be shown that a state acted on unlawful grounds in the context of the employment relationship. The government therefore shares the CAVV's opinion that the court of the forum state has sufficient scope to protect employees and that the immunities granted to the foreign state under article 11, paragraph 2 (c) of the UN Convention are necessary to take account of the policy freedom of foreign states. The government agrees with this and notes that it is consistent with the government's position as reflected in its Memorandum of Reply,¹ which emphasised that sending states are in principle free to recruit staff to work at embassies, consular posts and permanent representations.

Article 11, paragraph 2 (d) provides that states can invoke immunity in cases where a proceeding relating to the dismissal or termination of employment of an individual would interfere with the security interests of the employer state.

The CAVV explains that the reason it recommended a reservation in 2006 was the fact that the UN Convention does not specify whether the court in the forum state can – or should – assess whether a specific invocation of security interests is plausible and/or whether the court can or should make a proportionality assessment.² Although the UN Convention does not provide a definitive answer on this issue, the CAVV notes that an obligation on the part of the court to make such an assessment can now be inferred from the case law of the ECtHR. The government wishes to qualify the CAVV's opinion in this regard.

The government recognises that the ECtHR has ruled on human rights grounds that it is up to the court of the forum state to assess whether a foreign state can invoke security

¹ Memorandum of Reply, 29 September 2022, Parliamentary Papers, House of Representatives 2022/2023, 36 027 (R2160), no. 6.

² CAVV, *Advisory report on the United Nations Convention on Jurisdictional Immunities of States and Their Property*, Advisory report no. 17, 19 May 2006 (in Dutch).

interests. However, when performing such an assessment, the court cannot take the foreign state to task, since that state is not obliged to provide any further explanation concerning its security interests.

The government agrees with the CAVV's reasoning that a reservation in respect of article 11, paragraph 2 (c) and (d) does not seem an obvious course of action given that the court of the forum state already has sufficient scope to protect employees in both scenarios.

The term 'commercial purposes' in articles 18 and 19 of the UN Convention

Article 18 concerns immunity from pre-judgment measures of constraint, and article 19 concerns immunity from post-judgment measures of constraint. Whereas article 19 provides for an exception to immunity for foreign assets that are used for commercial purposes, article 18 does not provide for such an exception. This is not consistent with Dutch legal practice. On acceding to the Convention, the Kingdom of the Netherlands will therefore make a reservation to article 18 extending the application of the exception in respect of assets intended for commercial purposes under article 19 to article 18, as indicated in the Explanatory Memorandum on the approval of the Convention. The government notes that the CAVV supports the government's intention to make this reservation to article 18 of the UN Convention. The CAVV already recommended doing so in 2006, and the government has taken this recommendation on board. It obviously cannot be ruled out that other States Parties to the Convention may object to such a reservation.

This does not alter the fact that the Convention does not provide a definition of the term 'commercial purposes' with a view to determining whether there is an exception to the immunity from execution of foreign state assets. In its advisory report, the CAVV notes that Dutch case law focuses on the intended or future use of assets when interpreting the term, while foreign courts sometimes place more emphasis on their (known) present use. Although there is international agreement on the rule that assets with a commercial purpose are in principle susceptible to attachment, the case law on the practical application of this criterion is not uniform. The CAVV does not necessarily regard this as problematic, particularly since the question of whether or not the property of a state has a commercial purpose largely depends on the facts the court assesses in the light of all the circumstances of the case and the available evidence. The government agrees with this and therefore endorses the CAVV's conclusion that a reservation or declaration in respect of articles 18 and 19 of the UN Convention regarding the interpretation of the term 'commercial purposes' is unnecessary.

The government welcomes the CAVV's comment on the requirement set out in article 19 (c) of the UN Convention to the effect that post-judgment measures of constraint may only be taken against property 'that has a connection with the entity against which the proceeding was directed'. The CAVV supports the resulting connection requirement and therefore advises against making a reservation to this provision. In doing so, however, it also warns against applying this requirement too strictly, and notes that the Annex to the Convention appears to favour a broad interpretation. The government agrees with this, not least because it is advisable to allow the attachment of the assets of a foreign state entity in cases where that entity possesses, controls or has a legal interest in those assets.

The CAVV also notes that there is an apparent conflict between the rule laid down in article 19 (c) of the UN Convention and the one laid down in article 11 of the European Convention on State Immunity. The UN Convention offers broader scope for execution. However, only a few states are parties to the European Convention, and the CAVV therefore sees no reason to attach much importance to this issue. The government wishes to note as follows in this regard. Since article 26 of the UN Convention provides that nothing in the UN Convention affects the rights and obligations of states that are parties to other agreements relating to matters dealt with in the UN Convention as between the parties to those agreements, the provisions of the European Convention will have priority in relations between states that are parties to both the UN Convention and the European Convention. The government recognises that the wording in the Explanatory Memorandum on the approval of the UN Convention, which indicates that the provisions of the UN Convention are compatible with those of the European Convention, is therefore incorrect on this point in so far as the scope of immunity from execution is concerned. At the same

time, however, permitting execution in respect of the property of a foreign state that is used for commercial purposes, as laid down in the UN Convention, is consistent with Dutch legal practice, while the European Convention only applies to relations between the Netherlands and five other countries that have not ratified the UN Convention.³ The European Convention has precedence in the Netherlands' relations with these countries, even if the UN Convention enters into force at a certain point. At present, there is no conflict between the European Convention and the UN Convention, since the latter has not yet entered into force.

The government notes the importance, as endorsed by the CAVV, of adopting a decision at regional level aimed at preventing potential incompatibility between the UN Convention and the European Convention. Since there are only five states that are parties to the European Convention but not (yet) to the UN Convention, the government believes that it would make more sense to approach those states specifically regarding their potential denunciation of the European Convention following the entry into force of the UN Convention, as opposed to adopting such a decision following consultations within the Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI).

Confiscation of foreign state assets

The CAVV notes that it understands the question concerning the possible confiscation of property as a question about the lawfulness, in the light of state immunity law, of confiscating foreign state property that is located in the Netherlands in cases where a foreign state has committed a serious violation of international law.

The CAVV defines confiscation as a measure, usually judicial but potentially also administrative in nature, that results in a loss of property for the benefit of the state. In Dutch law, confiscation is in principle a property sanction under criminal law that is imposed by the courts. However, it cannot be ruled out that the Netherlands will at some point allow administrative confiscation – subject to judicial review – in exceptional cases, especially in the case of the property of foreign states that have committed serious breaches of peremptory norms of international law (*jus cogens*). It is this specific situation that the government is interested in.

The CAVV points out that the UN Convention does not regulate confiscation of a purely administrative nature, which is not subject to judicial review and therefore does not require a prior judgment. To the extent that administrative confiscation is subject to judicial review, the UN Convention provides that immunity from execution precludes confiscation, except in the case of property that has a commercial purpose. Central bank assets usually do not fall under this exception and are therefore not susceptible to confiscation.

Pursuant to the UN Convention and customary international law, Russian state assets enjoy immunity as assets that serve a public purpose. Such assets cannot be attached unless there is a justification for doing so, such as a countermeasure in the case of a (serious) violation of international law. Such situations are covered by the laws of state responsibility rather than immunity law. The same applies to the use of the interest generated by state assets.

Conclusion

The government wishes to thank the CAVV for its clear advisory report, which confirms that there are no legal obstacles to the accession of the Netherlands to the UN Convention with a reservation to article 18.

³ Belgium, Cyprus, Germany, Luxembourg and the United Kingdom are parties to the European Convention but are not (yet) parties to the UN Convention.