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Summary record of the 1663rd meeting

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sation. Such compensation was mentioned twice in article 14 because, in the first case, compensation was inevitable: the immovable State property of the predecessor State was situated outside its territory and could not, therefore, be physically divided among the successor States.

23. Mr. Tabibi's remarks concerning immovable State property of the predecessor State situated outside its territory were relevant, but the example that he had given to illustrate them came under the situation treated in article 11. He himself had drawn attention to the problem in question in connection with article 11. Just as the Commission should supplement article 11, it should supplement article 13 to cover the case mentioned by Mr. Tabibi.

24. However, article 13 concerned the separation of part or parts of the territory of a State, a process which should take place within the context of the self-determination of peoples. In that case, the predecessor State could not be deprived of State property situated in the territory of a third State. It would have to be seen how far the part of the territory that separated had contributed to the creation of the property in question. If that part could show proof of its contribution, it would be right for the property to pass to the successor State. It was, however, unlikely that any such demonstration of proof could be made, for article 13 assumed the existence of a unitary State, and a part separating from the territory of such a State would not necessarily have enjoyed any degree of autonomy before its separation. On the other hand, in the case referred to in article 11 a colony was not considered to be an integral part of the territory of the metropolitan State, and enjoyed a degree of autonomy which might have enabled it to contribute to the acquisition of immovable State property abroad.

25. Consequently, the Drafting Committee should either seek appropriate wording for the text of article 13 or provide the necessary explanations in the commentary.

26. The CHAIRMAN suggested that articles 13 and 14 should be referred to the Drafting Committee.

*It was so decided.*²

The meeting rose at 11.10 a.m.

² For consideration of the texts proposed by the Drafting Committee, see 1692nd meeting, paras. 77-82 and paras. 83-84.

1663rd MEETING

Monday, 1 June 1981, at 3.10 p.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Jurisdictional immunities of States and their property (continued)* (A/CN.4/331 and Add.1,¹ A/CN.4/340 and Add.1, A/CN.4/343 and Add.1-4)

[Item 7 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (continued)

ARTICLE 8 (Consent of State),
ARTICLE 9 (Voluntary submission),
ARTICLE 10 (Counter-claims) and
ARTICLE 11 (Waiver)² (continued)

1. Mr. SUCHARITKUL (Special Rapporteur) recalled, for the benefit of members who had not been present during the Commission's earlier consideration of his third report (A/CN.4/340 and Add.1), that draft article 7 had been referred to the Drafting Committee (1656th meeting) and that the Commission had then gone on to consider draft articles 8, 9, 10 and 11 (1657th meeting).

2. In attempting, in draft article 7, to define the concept of proceedings against a State, the Special Rapporteur had pointed out that State practice appeared to indicate that there was in normal circumstances, an assumption of fact in favour of the absence of consent. In other words, in proceedings involving the interests of a foreign State, it would be correct to assume, in the absence of any indication to the contrary, that the foreign State did not consent to submit to the jurisdiction of the territorial State. There was thus a possibility of the principle of State immunity coming into play. However, it followed as a corollary that, if there was an indication of consent, there could be no question of State immunity.

3. The existence of consent could be viewed as an exception to the principle of State immunity, and had been so viewed in certain national legislation and regional conventions; but, for the purpose of the draft articles, he preferred to consider consent as a con-

* Resumed from the 1657th meeting.

¹ Yearbook . . . 1980, vol. II (Part One).

² For texts, see 1657th meeting, para. 1.

stituent element of State immunity; immunity came into play when there was no consent, subject, of course, to other limitations and exceptions to be considered in future. Draft articles 8, 9, 10 and 11, which constituted different ways in which consent could be expressed, could thus be viewed as qualifications of the principle of State immunity.

4. Mr. FRANCIS said that it was logical for the provisions that followed draft article 7 to deal with the question of the consent of the State in respect of which immunity was claimed. With regard to draft article 8, he drew attention to the Special Rapporteur's second report (A/CN.4/331 and Add.1 para. 61), which made the important point that "With the consent of the foreign State, the judicial or administrative authorities of the territorial State will not be constrained from exercising their otherwise competent jurisdiction". It seemed to him that account should be taken of that point in draft article 8. Indeed, draft article 8 might be dangerously misleading if it was left in the very general terms in which it was now couched. Accordingly, the Commission would do well to recall the Special Rapporteur's statement in paragraph 27 of his second report to the effect that "it is in the area of trading activities that the question of jurisdictional immunities of States and their property most frequently arises", that such activities would be dealt with, in the light of State practice, in part III of the draft articles.

5. Since it should be clear from draft article 8 that no sweeping generalization was being made concerning the capacity of the territorial State to exercise jurisdiction, and the words "in accordance with the provisions of the present articles" in draft article 8, paragraph 1, did not make the text sufficiently precise, he was of the opinion that those words should be deleted and it should be indicated that draft article 8 was subject to the articles contained in part III. He agreed with Mr. Calle y Calle and other members of the Commission that the word "against" in draft article 8, paragraph 1, was unfortunate and should be replaced.

6. Mr. ŠAHOVIĆ felt that draft article 8 could be referred to the Drafting Committee, for whose benefit he wished to make some comments.

7. In his third report (A/CN.4/340 and Add.1), the Special Rapporteur had indicated the main elements which made State consent a general rule in the field of the jurisdictional immunities of States. However, paragraphs 1 and 2 of article 8 did not appear to cover all the aspects of that rule. Their defect was not that they were too general, but rather that they were insufficiently precise concerning the elements that constituted a general rule. As its title indicated, the second part of the draft should contain a set of provisions having the value of general rules, and it might be unfortunate if article 8 did not fully reflect the content of paragraphs 46, 47 and 48 of the third report which appeared under the heading "Absence of consent as an essential element of State immunity". It

would, indeed, seem advisable to deal with the absence of consent in article 8, because of the consequences of that question for the exercise of jurisdictional immunity.

8. From the drafting point of view, it might be wise to combine paragraphs 1 and 2 of the article in a single provision, so as better to express the notion of consent. Lastly, it would be preferable if the content of paragraph 3 were placed in another part of the draft concerning rules, general practice or procedure, or in other words, the rights and duties of the States involved in a problem giving rise to questions of jurisdictional immunity. That would make for a more coherent draft, particularly in the light of the structure of articles 9 to 11, which the Commission was to examine next. Article 8 should be devoted exclusively to as full a formulation as possible of the general rule of consent.

9. Mr. TABIBI said that it was quite logical for draft article 8 to follow on from draft articles 6 and 7 and enunciate the principle that a State was immune from the jurisdiction of another State unless it had consented to submit to that jurisdiction. That independent principle was not derived from the principle of the sovereignty of States. Indeed, just as the principle of sovereignty was not absolute, neither was the principle of jurisdictional immunity, to which consent constituted the basic exception.

10. In his view, the principle of consent should be very clearly stated in draft article 8, paragraphs 1 and 2. The method of expressing consent provided for in paragraph 3 might, as Mr. Šahović had suggested, be stated in a separate article. That was a matter for the Drafting Committee to decide.

11. Mr. JAGOTA said he appreciated the fact that the Special Rapporteur, in his statement at the 1656th meeting, had said that he would be dealing in due course with the question of the consent of State immunity. It was thus clear that the wording of draft article 7 did not imply absolute immunity in every respect, and that the realities of the present-day world would be borne in mind when the Commission came to elaborate the final version of the draft articles.

12. Like the wording of draft article 7, that of draft articles 8, 9, 10 and 11 was somewhat absolute. For example, draft article 8, paragraph 1, provided that "A State shall not exercise jurisdiction against another State without the consent of that other State". What would happen if a State expressly said that it did not give consent? Could the courts of another State still exercise jurisdiction—particularly if the law of that State had conferred jurisdiction on them? There could be cases where the question of a State not giving consent might not be relevant at all, especially if the immunity in question related to a particular subject-matter. He therefore assumed that when article 8, paragraph 1, was discussed by the Drafting Committee

it would be brought into line with draft article 6,³ and that the Commission would have an opportunity to consider it again once the contents of State immunity had been elaborated.

13. Account must also be taken of the fact that the concepts of consent, voluntary submission and waiver overlapped in many respects, despite the subtle distinction between express consent and voluntary submission drawn by the Special Rapporteur in paragraph 57 of his report. The Commission would therefore have to decide whether it was necessary or desirable to have separate articles on those concepts, as it now did, or whether it could combine draft articles 8 to 11 in a single provision, for example, by following Mr. Šahović's suggestion and removing substantive elements, such as paragraph 3 of article 8, and avoiding any undue repetition. In that connection, he noted that the concepts of waiver and counter-claims and the distinction between immunity from jurisdiction and immunity from execution had all been covered in article 32 of the 1961 Vienna Convention.⁴

14. Referring specifically to draft article 8, subparagraph 3 (c), he said he agreed with other members of the Commission that the words "by the State itself" were superfluous and that they could be deleted by the Drafting Committee. Moreover, if a foreign State submitted an argument on the merit of a case, even by raising a plea of State immunity, its argument did not amount to a waiver of immunity. As soon as a State contested a claim on the merit, it had submitted to jurisdiction, as was made clear in the second sentence of paragraph 56 of the report. The present wording of article 8, subparagraph 3 (c), thus contradicted the conclusion which the Special Rapporteur had reached in paragraph 56 of his report. The correct conclusion was that the State could consent to the exercise of jurisdiction by the court of another State, under article 8, paragraph 2, through its authorized representative appearing before the court in a proceeding to contest the jurisdiction of that court without raising a plea of State immunity. The words "to contest a claim on the merit" in draft article 8, subparagraph 3 (c) should therefore be deleted.

15. Mr. REUTER observed that draft article 8 gave rise only to drafting problems. However, since it referred to the exercise of jurisdiction with regard to a third State, he did not agree with either of the alternatives for draft article 7 considered earlier.

16. The notion of a proceeding which in fact implied one State or property in its control before the courts of another State was too broad. In fact, if one State voluntarily placed itself under the jurisdiction of another by acquiring assets that were subject to the jurisdiction of that other State, it would certainly be an exaggeration to assert that proceedings could not be taken against the first State without its consent as

the owner of the assets. To maintain otherwise would mean that a State which acquired property in a manner that was not in accordance with the local law, for example, *a non domino*, could not be the subject of proceedings before the courts of the State in which that property was located. In his view, while it was acceptable that no one should have the right to take measures of enforcement against the State in question, it was not acceptable that the possibility of drawing attention to the irregularity of its legal operation should be precluded.

17. To sum up, he could accept draft article 8, which was a technical provision on consent, but not draft article 7.

18. Mr. RIPHAGEN said that, in his view, draft articles 8 to 11 were essentially incomplete, and it would be difficult for the Drafting Committee to deal with them without knowing what other matters the Special Rapporteur intended to consider in subsequent draft articles.

19. Thus, while a sweeping statement had been made in article 8, paragraph 1, both article 9, on voluntary submission (which was, after all, more a matter of implied waiver than anything else), and article 10, on counter-claims, provided for the exercise of jurisdiction in cases where there was manifestly no express consent. How could a State consent to a counter-claim when it did not even know that there would be one? Furthermore, draft article 11 was drafted not in terms of jurisdiction, but, rather, in terms of waiver. Those were all drafting points, but they were bound to give rise to serious problems of substance.

20. As he had stated at the 1657th meeting, he believed that there was something like implied "pre-trial consent", which was limited to a particular kind of relations and was one of the various types of consent which had, for example, been discussed in connection with the element of consent in State responsibility—which was not the same as consent to be bound by a treaty. He did not quite see how the Drafting Committee would be able to draft articles on express consent if it did not take account of the implied "pre-trial consent" that resulted from the voluntary participation of one State in the legal life of another.

21. Mr. USHAKOV said that, in principle, draft article 8 was acceptable. However, he did not think that the wording was sufficiently precise; in particular, it should be expressly indicated whether the notion of jurisdiction referred to in the article was the general concept that covered all exercise of its sovereignty by the receiving State, or the special concept that denoted the competence of the courts. He pointed out in that context that the draft provisions proposed by the Special Rapporteur were drawn more or less directly from the 1972 European Convention on State

³ See 1653rd meeting, footnote 4.

⁴ See 1654th meeting, footnote 4.

Immunity,⁵ article 15 of which referred to the absolute or full immunity of a State from jurisdiction of the courts of another State, except in certain specific cases. He felt that the Commission should state unequivocally in the opening provisions of its draft articles that the text concerned immunity from action in the courts of the receiving State.

22. Paragraph 3 of draft article 8 concerned the way in which a State could give its consent, which it could do either expressly or by its conduct. The paragraph made it clear that the consent in question was consent to "the exercise of jurisdiction by the court of another State". However, it left a number of questions unanswered, particularly with regard to the form and the addressee of written consent and the scope of the consent given in a particular matter, which could in no circumstances be interpreted broadly. It should also be made clear that, in consenting to the jurisdiction of a court for a specific case, a State in no way implied acceptance of an authority to enforce a court judgement. Similarly, the expression "after a dispute has arisen" lacked precision, and the concept of "authorized representative" required clarification.

23. Lastly, since draft article 8, like draft article 11, concerned the express consent of a State, he would prefer those two provisions to be placed in succession before articles 9 and 10, which concerned consent by conduct.

24. Mr. ALDRICH said that, as previous speakers had noted, article 8, paragraph 1, could be understood either as creating a somewhat absolute system of consent, or, because of the words "in accordance with the provisions of the present articles", as providing for a regime of consent which was subject to other exceptions. If the paragraph was to be consistent with subsequent elements of the text, it should begin with the words "except as otherwise provided in these articles", since provision would certainly have to be made for exceptions to immunity that were completely unrelated to consent.

25. He agreed with other speakers that it would be helpful to have clarification as to whether article 8 was intended to apply solely in judicial proceedings. He understood it as having a broader application, in which case each of the paragraphs gave rise to drafting problems.

26. He noted that paragraph 3 of the article presented an exhaustive list of the ways in which consent could be expressed. Since the other articles contained in the current report all dealt, at least in part, with various types of consent, he was not sure that paragraph 3 was either necessary or desirable. If it was to be included, it, too, would occasion a number of significant drafting problems.

27. While he had no objection to its referral to the Drafting Committee, it would be difficult for that body to reach any conclusion on article 8 until it had some idea of what the major exceptions were to be. Consequently, the Committee should refrain from active consideration of the draft article for the time being.

28. Mr. QUENTIN-BAXTER said that it really was not possible to consider the four draft articles satisfactorily in isolation. Indeed, he wondered whether the nuances contained in those texts were of such fundamental importance that they must be treated in separate articles.

29. It was his understanding that the Commission was not dealing with the broad question of the area in which the rule or principle of immunity applied, but was concerned with drafting a set of articles which would apply only in judicial proceedings. The Commission was dealing with rules of international law, which were applied as such by national courts. Consequently, there was a need for considerable detail, precision and refinement. At the same time, the Commission should not lose sight of the advantages, in drafting legal instruments that were intended to have universal application, of stating provisions in broad terms which individual legal systems and States could adapt to their own circumstances. Moreover, given the substantial conceptual differences existing between the legal systems of civil law, common law and that in yet other countries, care must be taken not to produce a text which was so influenced by the practices of national courts of well-developed legal systems that it could not be adapted to other circumstances.

30. In paragraph 1 of draft article 8, it was assumed that other concepts, particularly that of voluntary submission, would be assimilated to the concept of consent. The distinction drawn by the Special Rapporteur, in paragraph 59 of the report, between the concepts of voluntary submission and consent was an extremely subtle one. There would seem to be enormous advantages, from the drafting point of view, in refraining from separating the two concepts. Furthermore, paragraph 3 of article 8 and paragraph 1 of article 9 both dealt with modalities and, in some instances, were almost identical in content. Since draft articles 8 to 11 were closely interrelated, it might be advantageous to combine them all under one rubric. The Drafting Committee would certainly be unable to draft provisions covering every possible contingency without some simplification of that kind. In any event, the Committee should consider the articles jointly.

31. Mr. SUCHARITKUL (Special Rapporteur) noted that many members of the Commission had expressed concern with regard to the approach which had been adopted in dealing with the topic of jurisdictional immunities. In that connection, he pointed out that different approaches had been adopted in the various national legislations studied. While he shared the many misgivings expressed by those members of

⁵ Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series, No. 74 (Strasbourg, 1972).

the Commission who would like to have all the draft articles at hand before giving them even preliminary approval, he did not regard such an approach as possible at present. The Commission must proceed step by step.

32. Referring to observations made by Mr. Reuter and others with regard to draft article 7, he said that he was prepared to redraft the article so as to preclude any suggestion of absolutism, while retaining the concept of full sovereignty as far as immunity was concerned. That concept must nevertheless be subject to many limitations, such as those of ownership or use of immovable property.

33. Turning to comments made by Mr. Riphagen, he said that he was sorry if he had appeared to favour assuming the absence of consent on the part of a defending State. It might have been preferable to state that consent was not to be readily assumed.

34. On the question whether the draft articles contained in the report should be dealt with jointly or separately, he shared the views expressed by Mr. Jagota and Mr. Quentin-Baxter. He had presented the articles separately because different approaches had been followed in the various legal systems studied. It was for the Commission to decide whether some or all of the articles could be combined under a single rubric without the loss of subtle distinctions.

35. As Sir Francis Vallat (1657th meeting) and other members had pointed out, it would be preferable to redraft article 8 to preclude the idea of absolute or unqualified immunity.

36. Concerning Mr. Aldrich's suggestion for an addition to article 8, paragraph 1, he said that the present wording of that provision had been adopted after lengthy consideration in the Drafting Committee at the previous session. However, he was quite prepared to accept the amendment.

37. Referring to observations made by Mr. Calle y Calle (*ibid.*), he said that the exercise of jurisdiction referred to in article 8 related only to judicial proceedings. He agreed that the expression "exercise jurisdiction against another State" might appear somewhat inimical. Perhaps it would be better to say "exercise jurisdiction in proceedings against a State as defined in article 7".

38. With reference to article 8, paragraph 3, he said that, while he agreed with the views expressed by Mr. Šahović, draft article 8 should be regarded as a general introduction to the following articles, which went into greater detail.

39. In conclusion, he said that the articles could perhaps be referred to the Drafting Committee jointly, as they had been submitted jointly.

40. Sir Francis VALLAT expressed concern regarding the piecemeal approach adopted in considering the draft articles. The Commission had already encoun-

tered difficulties as a result of following a similar approach in its consideration of the articles on State responsibility. An attempt should be made to devise a procedure which would enable the Commission to have an over-all picture of the substance of the draft; otherwise it would be very hard for it to reach even provisional conclusions concerning individual articles.

41. As far as draft articles 8 to 11 were concerned, he understood very well the concern of the Special Rapporteur regarding the different approaches adopted under the legal systems of various States. However, one fundamental consideration to be borne in mind in drafting treaties was that better results might be achieved by expressing concepts in general terms than by attempting to reflect individual legal systems.

42. Mr. CALLE Y CALLE, supported by Mr. USHAKOV, said that, for the moment, only article 8 should be referred to the Drafting Committee. Articles 9, 10 and 11 doubtless still called for a great many comments by the members of the Commission.

43. Mr. REUTER agreed that only article 8 should be referred to the Drafting Committee.

44. On the subject of consent, he wondered whether the Commission would have to deal with interventions before the courts. So far, the Special Rapporteur had only touched on the question indirectly, but he might regard consent as being quite different depending on whether it was expressed in a treaty, a contract or a procedural instrument. Perhaps the Commission would ultimately lay down a general principle whereby a procedural instrument signified consent when it necessarily implied that the State from which it emanated accepted jurisdiction. It would probably be unable to go into details, since procedure, unlike the rules governing treaties and contracts, varied widely from country to country. In extremely formal systems, such as those of common law, an instrument might have other effects than in a civil law system. To interpret the wishes of the State, the Commission might, therefore, have to rely on internal law.

45. The CHAIRMAN suggested that the Commission should refer article 8 to the Drafting Committee.

It was so decided.

Expression of sympathy on the death of Lady Waldo

46. The CHAIRMAN, announcing the death of Lady Waldo, wife of Sir Humphrey Waldo, member of the International Court of Justice and former member of the Commission, said he had sent Sir Humphrey a telegram of condolence on behalf of the Commission.

The meeting rose at 6.05 p.m.