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Summary record of the 1665th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
1981, vol. I

paragraph 1 (*b*), was akin to the first sentence of article 3, paragraph 1, of the European Convention on State Immunity, which read:

> A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if, before claiming immunity, it takes any step in the proceedings relating to the merits.

That sentence seemed to embody the idea that if a State voluntarily participated in proceedings it had to accept the consequences of such participation.

41. Again, the second sentence of article 3, paragraph 1, of the European Convention read:

> However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it has taken such a step, it can claim immunity based on these facts if it does so at the earliest possible moment.

That sentence served a useful purpose because, in the European Convention, there were a number of situations of fact in which the State could not claim immunity and other situations in which it could not always know beforehand whether or not it could claim immunity. In practice, such situations might very well arise in connection with the draft articles under consideration, in which that sentence should be taken into account.

42. Mr. SUCHARITKUL (Special Rapporteur) said that a number of pertinent points had been made concerning Sir Francis Vallat's suggestion that articles 8 to 11 should be approached from the point of view that the subject-matter under discussion was that of consent. Mr. Reuter had pinpointed the problem by saying that paragraphs 1 and 2 of article 8 contained a clear statement of principle, while paragraph 3 dealt with different ways of expressing consent. He himself had gone on from article 8, subparagraph 3 (*c*), to give in article 9 another example of a way of expressing consent. It was because voluntary submission was well-known that he had singled it out in a separate provision. Nevertheless, voluntary submission was only one of several ways of expressing consent by conduct, and it might be better described by using the words "participation in the proceedings".

43. Any overlapping between articles 8 and 9 could certainly be eliminated—for example, by deleting article 9, subparagraph 1 (*c*). Those two draft articles might also be merged under the heading "*expressis verbis*", as suggested by Mr. Ushakov. Moreover, article 9, paragraph 2, might be worded positively and placed somewhere in article 6, article 7 or article 8 to make it clear that failure to appear in proceedings before a court could not be construed as consent. He would also take account of the parallel between article 9, paragraph 3, and article 11, paragraph 4, to which Mr. Quentin-Baxter had drawn attention.

The meeting rose at 1 p.m.

1665th MEETING

Wednesday, 3 June 1981, at 10.10 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, 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 (*concluded*) (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 (*concluded*)

ARTICLE 8 (Consent of State),

ARTICLE 9 (Voluntary submission),

ARTICLE 10 (Counter-claims), *and*

ARTICLE 11 (Waiver)[2] (*concluded*)

1. Mr. SUCHARITKUL (Special Rapporteur), summing up the discussion of draft article 9, said that he appreciated the comments made by Mr. Calle y Calle, which had provided further clarifications of the line of thinking he (the Special Rapporteur) had pursued in his third report (A/CN.4/340 and Add.1). He would make every effort to incorporate the drafting suggestions made by Mr. Evensen, Mr. Jagota, Mr. Ushakov and Mr. Quentin-Baxter in the redraft which he would prepare. He was grateful to Mr. Reuter and Mr. Ushakov for raising an interesting point concerning the stage in legal proceedings when active participation by a State or one of its authorized representatives was considered as consent to submit to jurisdiction.

2. He could accept Mr. Reuter's suggestion that the ways of expressing consent should be rearranged in chronological order: before the dispute arose, when a certain stage had been reached in the legal proceedings, or after the dispute arose. In that connection, he said that Mr. Reuter's understanding of paragraph 61 of the third report had been correct: the paragraph had been intended to refer to the form of consent and to the requirement of the expression of consent that had to be satisfied in accordance with the test established by the court concerned. It had nothing to do with the interpretation of consent given in a treaty, an international agreement or a contract; that matter had been dealt with in other paragraphs of the report.

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[1] *Yearbook ... 1980*, vol. II (Part One).

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

3. He was of the opinion that draft article 9 could now be referred to the Drafting Committee, for consideration in the light of the Commission's discussion.

4. The CHAIRMAN suggested that draft article 9 should be referred to the Drafting Committee.

It was so decided.

5. Mr. SUCHARITKUL (Special Rapporteur) said that draft article 10, on counter-claims, followed on logically from draft article 9, on voluntary submission, since there could be no counter-claim against a State unless and until that State had submitted to the exercise of jurisdiction by instituting proceedings before the court concerned. The question to be decided in respect of counter-claims was the extent to which they could operate. He had indicated in the report that State practice was changing and that there was now a tendency to equate the effects of counter-claims against a State and the effects of counter-claims by a State. The effect of a counter-claim by a State was, of course, the same as if the State had intervened in proceedings on the merits.

6. Referring to draft article 11, he said that in the practice of many countries waiver was almost identical to other forms of consent, except that it was perhaps more dignified. A waiver of immunity thus had the same effect as submission to the exercise of jurisdiction. In the past, formalities in the courts of territorial States had sometimes been quite rigid, and waiver had had to be effected by a State expressly *in facie curiae*. At present, however, the trend was to consider that a State was bound by an undertaking given in advance in an express provision of a treaty, an international agreement or a contract. Since there was some overlapping between an expression of consent by waiver and an expression of consent given in a treaty or a contract, counter-claims and waiver might be treated simply as different, but equally important, forms of the expression of consent.

7. Mr. USHAKOV, referring to the Commission's discussion of the recent evolution of practice regarding the jurisdictional immunities of States, said that while there were divergent trends, all were based on the principle of State immunity. Even the 1972 European Convention on State Immunity[3] mentioned in its preamble "a tendency to restrict the cases in which a State may claim immunity before foreign courts", and therefore recognized implicitly the principle of immunity as the basis of its provisions.

8. In his opinion, that convention reflected a tendency which, while real, was none the less peculiar to western countries, or, at least, to some of them. In one of his statements on the topic, Mr. Jagota (1656th meeting) had rightly noted that there were also contrary tendencies, followed especially by developing countries and socialist countries. Perhaps the Commission should seek to determine which was the dominant tendency. At all events, the tendency which characterized the position of the western countries stemmed from their reaction to the attitude of developing countries, which, to defend their interests, now invoked for their own benefit the concept of absolute State sovereignty, particularly in cases of the nationalization of enterprises.

9. Article 10 was acceptable in principle, since a State which had initiated a legal proceeding before the courts of another State must allow for the possibility of a counter-claim. In the other cases of submission, the situation was, however, less clear. In particular, the expression "in which a State intervenes" (in paragraph 1) should be made more explicit, since the notion of counter-claim referred solely to the case in which a State had brought an action and in which another party made a claim in return.

10. With regard to article 11, he had some doubts concerning the possibility of making any express statement of rules on waiver as such, and thought that it would be preferable to make a distinction between waiver, which was general in scope, and the lifting of immunity, which was limited in scope and did not affect the absolute immunity of the State. Thus, the 1961 Vienna Convention[4] provided, in its article 32, that the immunity from jurisdiction of diplomatic agents enjoying immunity might be waived by the sending State. That immunity was attributed to the State as a subject of international law, and the State could waive it, not for itself, but for one of its organs or agents. It was more accurate to say that the State lifted the immunity enjoyed by the agent in question but did not waive it for itself in general. It would be preferable, therefore, to refer to lifting of immunity, since the draft articles concerned only the cases in which a State caused immunity to cease solely with respect to a precisely defined matter or action.

11. In sum, he agreed in principle with the two draft articles, although he had some general reservations in their regard.

12. Mr. RIPHAGEN said that it might be necessary to insert a saving clause in draft article 10 to take account of the fact that, in many cases, the procedural rules of national courts, some of which were more restrictive than others, placed limitations on the admissibility of counter-claims.

13. The relationship between the four paragraphs of draft article 10 would, in his view, have to be made clearer. Paragraph 1 laid down a number of conditions for the admissibility of a counter-claim from the point of view of immunity. The "facts" referred to in subparagraph 1 (*b*) might, however, be relevant to various legal relationships and the use of the words "the same legal relationship or facts" was, therefore, a

[3] See 1663rd meeting, footnote 5.

[4] See 1654th meeting, footnote 4.

potential source of confusion. When read in the light of subparagraph 1 (*c*), paragraph 2 seemed to indicate that a counter-claim would be admissible only if the relief in question was a matter of amount, not a matter of difference of kind—which would, moreover, not necessarily have the effect of set-off. The wording of those two paragraphs should therefore be tidied up.

14. The Drafting Committee would probably also be able to tidy up the wording of paragraph 3, which was the same as that of subparagraph 1 (*c*) and gave rise to the same difficulty in respect of paragraph 2. Did paragraph 3 mean that paragraph 2 was also applicable in the case of voluntary submission? Was subparagraph 1 (*a*) also applicable in the case of voluntary submission? It seemed to him that the answer to that second question should be yes, because subparagraph 1 (*a*) referred to counter-claims that would be admissible if jurisdiction could be exercised if separate proceedings had been instituted. That should be indicated somewhere in the text of article 10. It should also be made clear whether paragraph 2 would apply if a counter-claim operated as a set-off with respect to amount.

15. Mr. FRANCIS said that Mr. Ushakov had rightly pointed out that the practice of the socialist and developing countries with regard to jurisdictional immunities differed from that of the developed countries. The developing countries, which regarded privileges and immunities as a means of protecting their sovereignty, were faced with a problem because there was now a growing tendency in the developed countries to restrict the scope of such immunities. He was not entirely sure that the reciprocal basis of State immunity would provide a complete answer to that problem. The only other alternative was thus the elaboration by the Commission of draft articles on jurisdictional immunities that would take account of the realities of the present-day world and be acceptable to all countries.

16. In his view, the reference in draft article 10, paragraph 1, to the intervention of a State in legal proceedings in a court of another State might usefully be qualified by a reference to "merits" and to cases where immunity was not claimed. He hoped that the Special Rapporteur still held the view he had expressed at an earlier meeting, namely, that "a rider should perhaps be incorporated in paragraph 4 of draft article 10 to the effect that there was an implied condition that the principal claim arose out of the same transaction or legal relationship as the counter-claim" (1657th meeting, para. 8). Such a rider would bring that paragraph into line with paragraphs 78 and 79 of the Special Rapporteur's report.

17. He agreed with the distinction that had been drawn by Sir Francis Vallat (1664th meeting) between express consent and implied consent and said that, in his opinion, article 11, on waiver, could be included in article 8, because an express waiver would amount to a direct expression of consent.

18. Mr. JAGOTA said that all members of the Commission were well aware of the reasons why the Commission had been requested to prepare draft articles on the question of the jurisdictional immunities of States and their property and how sensitive that question could be in practice. In that connection, he referred to the statement he had made at the 1656th meeting, when he had said that the world now had two separate legal regimes, one operating mainly in the United States of America, the United Kingdom and most of Europe, and the other operating in the socialist and the developing countries.

19. The regime of the socialist and developing countries was the traditional one that had prevailed in international law until the 1970s. However, a new trend had emerged in recent years, primarily as a result of increased trading activities which were carried on not only by developed countries *inter se*, but also by the socialist countries and developing countries, in pursuit of rapid economic growth. Indeed, the current trend in the socialist States seemed to be not to claim immunity in respect of the commercial activities of States or State trading organizations. Such trading organizations thus had the legal capacity both to sue and to be sued, even in foreign courts.

20. While the distinction between sovereign and non-sovereign or commercial acts of State had not yet been recognized by the developing countries, it might eventually be so recognized, because those countries' trading organizations and supply agencies were being subjected to the exercise of the jurisdiction of foreign courts, both in developed countries and in other developing countries. For the time being, however, the developing countries were particularly anxious to ensure that their policies should not be subject to review by other countries and that their property, particularly funds deposited in banks in other countries, should not be subject to seizure.

21. In view of those trends and of the expectations of the international community, the Commission had been right to decide not to follow the model of the European Convention on State Immunity, which proceeded from the exceptions to immunity (arts. 1 to 14) to the general principle of immunity (art. 15), and to move instead from the general principle to the exceptions. That would help to make the draft articles acceptable to as many members of the international community as possible.

22. It made no real difference to him whether draft articles 10 and 11 were combined or left as separate provisions. That was a matter for the Drafting Committee to decide.

23. Since he had not been convinced by the argument contained in paragraph 80 of the Special Rapporteur's report, he was not sure that the distinction which the Special Rapporteur had drawn between counter-claims against the State and counter-claims by the State would serve any useful purpose in article 10. He would

therefore appreciate it if the Special Rapporteur would explain the basis for that distinction, which seemed to imply that a counter-claim against the State was restricted to the amount of the State's claim, while a counter-claim by the State could exceed the amount of the principal claim. That distinction did not appear in article 1, paragraph 2, of the European Convention on State Immunity. Should there be some basis for the distinction, it might well serve as a useful tool for legal advisers to Governments in cases where counter-claims were possible.

24. It seemed to him that the only specific points that were being made in draft article 11 were that waiver must either be effected expressly *in facie curiae* or in advance in a treaty, an international agreement or a contract. Paragraphs 3 and 4 of that draft article were general provisions that could also apply to draft articles 8 and 9. He therefore suggested that article 11 should be examined by the Drafting Committee in relation to other ways of expressing consent.

25. Mr. CALLE Y CALLE considered that draft articles 10 and 11 were complete and required only a few drafting improvements. He thought it logical that the State which renounced its immunity by instituting an action before a foreign court should also accept the jurisdiction of that other State with regard to a possible counter-claim. Similarly, the State which brought a counter-claim before a court of another State recognized the jurisdiction of the latter in respect of the principal claim.

26. In article 10, paragraph 1, however, the expression "in which a State intervenes" was ambiguous, since it was so general that it could also refer to intervention of the State before the court in order to invoke its immunity and so avoid its jurisdiction. It would therefore be desirable to eliminate the notion of intervention or to state its meaning in more precise terms.

27. Article 10, subparagraph 1 (*a*), referred to the nature of the claim and permitted the exercise of the jurisdiction of the court seized if, by its nature, the matter of the counter-claim fell within that jurisdiction as defined by the relevant draft articles. He noted that the European Convention on State Immunity laid down, in article 1, a different point of departure to achieve the same result. If the Commission's draft articles were to reflect the tendency towards the reduction of immunities on which the European Convention was already based, the "present" articles mentioned in article 10, subparagraph 1 (*a*), would have to contain a list of instances in which immunity would not apply.

28. He observed that paragraph 2 referred to defensive counter-claims brought against a State, and that paragraph 4 defined the scope of submission in terms corresponding to those of article 1 of the European Convention.

29. Article 11, devoted to waiver, distinguished between two types of express waiver: waiver *in facie curiae* or waiver by prior assent, in a treaty, an international agreement or a contract in writing. Paragraph 3 was concerned with the implicit waiver deriving from the conduct of the State (a notion also used in the 1972 European Convention), with, however, a restriction concerning which he would like the Special Rapporteur to indicate to what specific situation it referred.

30. Mr. DÍAZ GONZÁLEZ said that he wished to comment on a phenomenon noted by several members of the Commission, namely the existence of several trends of opinion within the Commission. The explanation of that situation lay in the fact that contemporary international law could not be codified and developed according to the same principles as classical international law. That meant that the Commission's draft articles must be a reflection of present-day trends and take account of the various legal systems represented in the Commission.

31. At the beginning of the century, the new States of Latin America had been victims of acts of aggression on the part of various Powers, which had cited the principle of jurisdictional immunity of States as the main reason for their action. Those Powers had feigned complete ignorance of domestic law to concern themselves with matters relating not to acts performed in the exercise of public authority, but to private or semi-private acts. However, the jurisdictional immunity of States could exist only when there was respect for sovereignty, which was itself based on the principle of the legal equality of States. That was why one of the current tendencies, which was quite widespread, was to distinguish between acts performed in the exercise of public authority and acts which a State performed *jure gestionis*, or as an individual. French jurisprudence, which made such a distinction, recognized jurisdictional immunity only with regard to acts of the former category.

32. The Commission had been led to consider that consent was a fundamental element of the draft articles submitted by the Special Rapporteur. Whatever its form, such consent was, and must be, voluntary. It was for each State to decide, of its own will whether or not to submit to the jurisdiction of another State. However, will did not create law; it recognized it. Will could only have legal effects if it was manifested in the forms provided for by positive law, which in the case in question meant domestic law. Once the principle that consent of the State was essential was accepted, it was necessary to specify the means whereby such consent should be expressed as a manifestation of will, as well as the exceptions to that principle. It was essential to elaborate general rules which took account of current trends in the practice of States. The Special Rapporteur's draft articles contained the necessary elements for the elaboration of such rules. That task could be entrusted to the Drafting Committee.

33. A rule of international law could not be drafted on the basis of one trend alone; for that reason, the information provided by members of the Commission concerning the procedures to be observed in particular legal systems for a manifestation of will to be regarded as implying reliance on, or waiver of jurisdictional immunity would be very useful.

34. Sir Francis VALLAT, referring to observations made by a number of speakers, said that nationalization could be as much a tool or weapon of the developed countries as of the developing countries. The consequences of nationalization, combined with extensive application of State immunity, in the developed countries could be very serious. For example, in a developed country, a very large oil corporation which, while not nationalized, had very close links with the State, could easily be made an entity of that State. Such a measure would have serious consequences for many developing countries if an unduly extensive application of State immunity was allowed. The nationalization of banks could also have serious consequences, particularly when the banks in question were those dealing with large private accounts, which inevitably had contractual relations having effect in the territory of other States. If such banks became part of a State entity and were accorded immunity from suit in other States in respect of all contractual interests, the consequences for the financial world would be very serious.

35. Consequently, nationalization should not be regarded as a phenomenon occurring solely in the developing countries, but as one which could also occur in the developed countries, with serious effects on the interests of developing countries.

36. Mr. SUCHARITKUL (Special Rapporteur), summing up the Commission's consideration of draft articles 10 and 11, said that a general consensus appeared to have emerged concerning the principle of consent to the exercise of jurisdiction by the court of another State and the various methods of expressing such consent. He hoped to be able to take full account of all the points raised in redrafting the articles for consideration by the Drafting Committee.

37. Referring to observations made by Mr. Jagota, he said that the division of counter-claims into those made by a State and those made against a State was quite useful from the analytical point of view. A counter-claim by a State was an act whereby a State submitted to the jurisdiction of the court of another State, whereas a counter-claim against a State was a direct consequence of an earlier submission to jurisdiction by the State itself. However, as Mr. Aldrich had pointed out, a discrepancy existed between the effects of those two types of counter-claim as far as the question of immunity was concerned. That discrepancy should be eliminated—although section 1607 of the *Foreign Sovereign Immunities Act of 1976*[5] indicated a trend away from that direction in United States legislation.

38. With regard to comments made by Mr. Calle y Calle, he said that the European Convention on State Immunity provided States with the possibility of raising a plea of immunity after they had taken steps in proceedings. Moreover, under some national legislations such a claim could be entered at any point up to the time of judgement.

39. With regard to the question of State intervention, he said that while some terminological amendment might be required, the provision in question was useful, particularly in cases where proceedings were instituted not against a State directly, but against an agency of the State. It would be too simple to infer consent on the part of a State which was far removed from the venue of the proceedings if no provision were made for the possibility of justified State intervention.

40. In the light of the debate in the Commission, he was prepared to regroup draft articles 8, 9, 10 and 11 into one or two draft articles for consideration by the Drafting Committee.

41. The CHAIRMAN suggested that draft articles 10 and 11 should be referred to the Drafting Committee.

It was so decided.

The meeting rose at 12.40 p.m.

1666th MEETING

Thursday, 4 June 1981, at 10.10 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, 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.

Visit by a Member of the International Court of Justice

1. The CHAIRMAN welcomed Mr. Ago, Member of the International Court of Justice and former member of the International Law Commission, whose presence confirmed the longstanding relationship of respect and friendship between the Court and the Commission. He requested Mr. Ago to convey to all the Members of the Court and to its Registrar the best wishes of the Commission.

2. The Commission had the honour of counting among its former members a number of Judges of the

[5] See 1656th meeting, footnote 5.