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Summary record of the 1713th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
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State? The objective criterion proposed by the Special Rapporteur, that of the nature of the act, was of course, relevant, but it was not sufficient. Other criteria, such as purpose, must also be considered.

38. It was surprising that the Special Rapporteur should have stated in his fourth report (A/CN.4/357, para. 31) that, in the circumstances falling within any of the accepted exceptions, the rule of State immunity as an obstacle to the exercise of jurisdiction was "obviated or removed". In fact, it was never obviated since, if the act performed fell into the category of the accepted exceptions, immunity was always completely removed.

39. In the report (*ibid.*, para. 43), the Special Rapporteur also referred to the theory of implied consent "to submit to the exercise of jurisdiction by the sovereignty controlling the territory into which a foreign State has transplanted itself". In his opinion, that theory was not absolute; it could be set aside under the rules of private international law, particularly in the name of freedom of will. It was accepted that, in a legal relationship containing an element of foreign origin, the parties could refer to the jurisdiction of a State other than that where the commercial activity had taken place.

40. Referring to draft article 12, he observed that the words "In the absence of agreement to the contrary", with which paragraph 1 of that provision began, seemed to exclude the exception. The parties would thus be enabled to stipulate that, in a specific relationship, any acts of commerce they performed would enjoy jurisdictional immunity even though it might be generally accepted that jurisdictional immunity could not be invoked in such a case. To permit States to depart from that rule would be a step towards the negation of the exception it was wished to assert. With regard to the words "being an activity in which private persons or entities may there engage", it was, as Mr. Ushakov had observed (1709th meeting), difficult to envisage a State acting with or without its *imperium*; the State should be taken as such. He could readily imagine, however, that a State could act as a private person. By retaining the present wording of article 12, paragraph 1, the Commission would sustain the controversy between the act performed *jure gestionis* and the act performed *jure imperii*. That criterion had still not been definitively adopted by the courts and the relevance of certain decisions—such as that in *Montefiore* v. *Congo belge*,[12] which the Special Rapporteur had cited (A/CN.4/357, para. 66) was open to question.

41. With respect to article 12, paragraph 2, he was surprised to see a reservation made for transactions concluded between States and contracts concluded on a government-to-government basis. States and Governments could effect transactions and conclude contracts among themselves just as private persons could. If the operations in question were commercial, they fell within a sphere where an exception was recognized and there seemed no reason to exclude them from its scope.

[12] *International Law Reports, 1955* (London), p. 226.

42. The Commission should avoid delay over doctrinal problems deriving from differences between legal systems. The guiding factor should be State practice. While the principle of jurisdictional immunity no longer seemed in dispute and was accepted in practice, with a few exceptions, it must be stated in carefully-selected terms so that its expression would gain general acceptance.

43. Mr. NI was grateful to the Special Rapporteur for having introduced in his fourth report useful amendments to certain draft articles submitted in his third report.

44. With regard to article 6, many members of the Commission seemed to think that the jurisdictional immunity of States constituted a rule. Some considered, however, that the sovereignty of the territorial State was essential and that reciprocity should be the basis. The Special Rapporteur was right in proposing to keep in article 6 the words "in accordance with the provisions of the present articles" for the time being. Jurisdictional immunity was nevertheless the principle.

45. The various drafting suggestions made by such members of the Commission as Mr. Yankov, Mr. Jagota, Mr. Calero-Rodrigues and Mr. Al-Qaysi could constitute variants to be chosen at a later stage. But to say that article 6, as it stood now, implied a denial of State immunity would be an unnecessary overapprehension. It would be better not to take a final decision on the matter immediately. Unless the Special Rapporteur could find better wording or the Commission could choose a constructive proposal among those already submitted, the present formulation should not be an obstacle to the continuance of the discussion on the articles which follow. He himself thought it preferable not to modify article 6 for the time being.

The meeting rose at 6. p.m.

1713th MEETING

Tuesday, 25 May 1982, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Jurisdictional immunities of States and their property (A/CN.4/340 and Add.1,[1] A/CN.4/343 and Add.1-4,[2] A/CN.4/357, A/CN.4/L.337, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 3)

[Agenda item 6]

[1] Reproduced in *Yearbook ... 1981*, vol. II (Part One).

[2] Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).

Draft articles submitted by the Special Rapporteur (*continued*)

General comments on parts I, II and III of the draft articles[3] (*concluded*)

1. Mr. SUCHARITKUL (Special Rapporteur) said that the discussion on the topic of the jurisdictional immunities of States and their property attested to the fact that there had indeed been a need to enlarge the Commission, for the new composition was a true reflection of the healthy State of the development of international law. It was particularly gratifying to note that the Commission agreed with the general structure of the draft articles and endorsed the inductive method advocated by the General Assembly in the Sixth Committee.

2. Following the presentation of the preliminary report,[4] it had been decided that emphasis should be placed on general principles before proceeding very carefully to deal with the exceptions to immunity. At an earlier session, Mr. Reuter had stated a preference for the word "rule" rather than "principle", but the Commission had opted for the expression "general principles", which had accordingly become the title of part II of the draft. There would, however, be no difficulty in using another expression such as "general provisions" if members so wished, although "general principles" seemed both practical and useful for the time being.

3. A basic point concerned the nature of sovereign immunity. Was it a principle or was it an exception to another more fundamental principle? Mr. Thiam (1710th meeting) had rightly observed that the title to the topic meant, in effect, jurisdiction over foreign States. Since the fundamental rule was one of sovereignty, of which jurisdiction was merely an attribute, immunity signified immunity from the jurisdiction and was therefore but an exception to the general rule. The territorial State was supreme within its own territory. One school of thought held that the norm lying at the root of all other rules of international law was *pacta sunt servanda*. Nevertheless, his own view was that Mr. Thiam was more correct. Surely, sovereignty was more fundamental, for *pacta sunt servanda* was merely a rule that expressed the sovereign will of the State. Mr. Ushakov (1709th meeting) also was right in inferring that the sovereign equality of States was the basic issue.

4. With regard to the source material cited in his fourth report (A/CN.4/357), he had earlier suggested, in his preliminary report,[5] that the Commission should examine a variety of sources of international law, including not only the decisions of municipal courts but also national legislation, Government practice, the practice of agencies of all kinds, the writings of publicists, and treaties and textbooks, although he had also recognized that it was neither possible nor desirable to examine all the decisions of each and every State. Mr. Yankov (1710th meeting) had suggested that special attention should also be paid to the practice of the developing and the socialist countries, while other members had advocated that the Commission should aim at a measure of universality by drawing up rules of law that would be more harmonious in terms of the different legal systems.

5. The significant increase in the membership of the United Nations over the past twenty to thirty years had to be borne in mind. In the context of international practice as established in the nineteenth century, the first of the classic cases—*The Schooner "Exchange" v. Mcfaddon* (1812)—had been a miracle, for at the time it had been less than forty years since the United States of America had attained independence. It had in fact been an extra-European judicial decision, but had not been followed by the European courts, which had arrived independently at a similar decision. With reference to the nineteenth century, it had only been possible to examine the case law of certain European countries and the United States. Most Latin American countries had been busy struggling for independence, and it was difficult to find cases from Africa in that period. As for Asia, many countries there had been subjected to a capitulation regime. Even Japan had been obliged to sign a treaty subjecting itself to such a regime. It was scarcely possible to have a decision from Asia that recognized the principle of sovereign immunity at a time when foreign nationals were not only immune from the jurisdiction but even from the law. He had also had recourse in his research to textbooks. While there were a number in Europe, he had discovered only two in Asia, one on the legal status of aliens in China (1912)[6] and the other on the immunities of State ships (1924).[7]

6. International law was not more universal in character because, when it had first been formulated following the Peace of Westphalia (1648), international law-making had been largely the province of Europeans. That indeed was the reason for General Assembly resolution 2099 (XX) of 20 December 1965 on technical assistance to promote the teaching, study, dissemination and wider appreciation of international law. Fortunately, much progress had been made in the meanwhile and the situation had notably improved.

7. During his studentship under Sir Humphrey Waldock, then editor of the *British Yearbook of Inter-*

[3] The texts of draft articles submitted at previous sessions of the Commission are reproduced as follows: (*a*) art.1 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (*b*) arts. 2 to 5, in *Yearbook ... 1981*, vol. II (Part Two), pp. 153-154, footnotes 655-658; (*c*) art. 6 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (*d*) arts. 7 to 10, revised at the Commission's thirty-third session, in *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671.

[4] *Yearbook ... 1979*, vol. II (Part One), pp. 227 *et seq.*, document A/CN.4/323.

[5] *Ibid.*, chap. II.

[6] V. K. W. Koo, *The Status of Aliens in China* (New York, Columbia University, 1912).

[7] N. Matsumani, *Immunity of State Ships as a Contribution towards Unification of the Laws on the Subject* (London, Flint, 1924).

national Law, over a quarter of a century ago, he had been asked to assist in looking for relevant cases from Asia and other parts of the world. He had also contributed reports on cases from Asia to the *Annual Digest of Public International Law Cases* under the editorship of Sir Hersch Lauterpacht. A number of searches had been made for cases from such countries as China, Japan, Thailand and Burma. Some had been found, but not as many as would have been desirable. Of the cases brought to his notice, he had listed in his report only those which were illustrative of the points at issue, in keeping with the criterion adopted for the selection of the materials. In fact, the problem of source material had been a matter of major concern not only to him but also to the Secretariat, which had circulated to United Nations Members a questionnaire asking for source material, cases and legislation. Some thirty countries had supplied material, some of which had already been published in the Legislative Series.[8]

8. It was apparent from the cases cited that virtually every developing country had been a party to a claim for jurisdictional immunity before the courts and, in that sense, the cases afforded a measure of universality, although not necessarily from the point of view of practice. No information had been received from Spain, but Mr. Lacleta Muñoz (1710th meeting) had been able to advise the Commission that decisions on the issue had been taken only in the lower courts and not by the Supreme Court. Mr. Ogiso (1712th meeting) had also helped to supplement the information provided by confirming that judicial decisions revealed a trend towards a more restricted immunity. He himself had noted that the comparative law technique was now being used even by municipal courts which would normally have adhered to their own national precedents. Furthermore, in the common law doctrine of precedent, the English courts had become more flexible over the past decade and referred to decisions from other jurisdictions.

9. On the question of practice, the Secretariat had been of great assistance in providing him with more than thirty treaties from the USSR alone and was conducting research into a number of other treaties. Bearing in mind Mr. Yankov's remarks (1710th meeting), he had also studied decisions from the socialist countries but had found relatively few cases since the Revolution, in view of the nature of the disputes that had arisen. In Europe and the United States of America, proceedings were generally brought by private individuals and corporations. It would be difficult for an individual in a socialist country to bring proceedings against a foreign State and, where they were instituted by a State agency or State corporation, most of the cases involved arbitration or negotiation at a higher level. That provided a partial explanation for possible defects in source material, but he much regretted that it had not been possible to meet the requirement of universality in the matter.

10. While Mr. Ushakov (1709th meeting) was quite correct, legally speaking, in stipulating for a principle of international law on sovereign immunity based on the sovereign equality of States, other legal bases had also been advanced, such as independence, political co-operation, friendly relations and international comity. There was no difference of opinion on jurisdictional immunity as a principle of international law, and the only concern was to vest that principle with a universal character. "Universality" was a difficult term, and many arguments had been adduced in its name—above all else the argument that certain concessions would have to be made in order to achieve it. As a servant of the Commission, he was simply endeavouring to accommodate all views. He agreed in particular on the need to view matters from the standpoint of the territorial State, but he also believed that every territorial State had a right to claim sovereign immunity. Those were in fact two sides to the same coin: every State was both a territorial State and a beneficiary of a State immunity. By diversifying his research, he trusted that it would be possible to give a universal character to the rules of international law on the subject.

11. With reference to the statement of principle set forth in article 6, he expressed gratitude to all those members who had helped to dispel the doubts and hesitations. It was his hope that, ultimately, after all the exceptions had been examined, the principle would prove to be more than a hollow shell.

12. Mr. Riphagen (1708th meeting) had pointed out that the terms of the Commission's analysis of rights and obligations were perhaps too absolute. The Commission, in its approach to the topic, could not afford to be too absolute, since everything was relative, including immunity itself as a notional concept. Mr. Riphagen had also spoken of the existence of a grey area, a point with which many members agreed. Regrettably, he had been unable to give effect to Mr. Riphagen's suggestions by identifying areas where there was agreement on what constituted sovereign acts and on what amounted to non-sovereign acts. The existence and the minimum content of a principle of immunity posed no problems, but its scope and extent did. That accounted for a certain inconsistency in the dicta he had cited in his report and, inevitably, the conclusion had to be drawn that sovereign immunity could not be viewed as absolute.

13. Again, the theory of the dual personality of the State was not universally accepted and a number of writers found it untenable. Professor Lauterpacht had proposed the abolition of State immunity, but had suggested four exceptions: legislative acts, administrative acts, cases of diplomatic immunity, and State contracts that lay outside the jurisdiction under the rules of private international law. For his own part, he had been somewhat wary of pursuing such a line, quite apart from the difficulties inherent in identifying each and every exception. To take the case of legislative acts, for example, if the court's decision was to turn on whether there was a law on the subject, the test would become very formal and would not help at all. The same type of

[8] See footnote 2 above.

controversy that now existed would be prolonged in every case of a sovereign act. Mr. Riphagen was right to affirm that there was a minimum rule of jurisdictional immunity and, beyond it, a grey area in which immunity might or might not be granted. It was possibly in that border area that practice should be scrutinized and inductive methods should be used to see whether the Commission could reach agreement on a recommendation regarding exceptions and how to formulate them in a generally acceptable manner.

14. Mr. Ushakov (1709th meeting) had raised the question of a possible overlap between State immunity and diplomatic immunity and had referred in that connection to article 31, subparagraph 1 (*c*), of the Vienna Convention on Diplomatic Relations. From an examination of State practice, it was clear that cases involving diplomatic and sovereign immunity dated back to the early eighteenth century and writings on the subject as far back as the year 1600. Ambassadors had been granted immunity in respect of their trading activities on a twofold basis, first, on that of *ratione personae*, so that they were exempt from the civil and criminal jurisdiction and, secondly, on the basis of *ratione materiae*. A number of classic cases made it clear that immunity on the basis of *ratione personae* also applied with respect to the personal and private activities of the ambassador, but only during his term of office. That was clear, too, from the second sentence of paragraph 2 of article 39 of the Vienna Convention. A case decided in 1867 before the Cour d'Appel de Paris[9] involving a Russian diplomat had required the intervention of the Avocat Général, who had appeared as *amicus curiae* to plead absolute immunity, even for acts labelled as commercial acts under the Code de Commerce, on the grounds that the personal immunity of the diplomat remained intact. The Avocat Général had argued for immunity and the Court had accepted his argument. Italian case law had fluctuated on the application of immunity to the private and trading activities of ambassadors. In one case decided in 1922,[10] the doyen of the diplomatic corps in Rome had presented a protest against the Italian decision and, referring to that protest, the Supreme Court had, nearly twenty years later, decided to grant immunity to ambassadors even with respect to their private trading activities. At the same time, however, an Italian law was introduced prohibiting Italian diplomats and ambassadors from trading. In England, a higher court had explained in 1735 that an exception in the case of trading contained in a law of 1708[11] had never been intended to apply to ambassadors, since the legislators had not foreseen that ambassadors would engage in trading.

15. He mentioned those facts merely to underline the very strong reasons for maintaining absolute immunity in the case of the private trading activities of ambassadors. Mr. Ushakov (1710th meeting) had asked whether a commercial attaché who was acting outside the scope of his official duties would benefit from diplomatic immunity. The answer was that immunity had been waived to some extent in cases of that kind. The Commission would also have to decide whether the draft articles on State immunity overlapped with or should apply to the other conventions. There was a large body of practice not only in the judicial but also in the quasi-judicial sphere, and much would be learned from studying it. The best course, however, would be to identify each issue and tackle it as and when it arose.

16. He agreed with the views of a number of speakers that the interests of all countries, in particular the developing countries, must be taken into account. Given the circumstances in which those countries found themselves and the pressure exerted on them to sign development contracts, further consideration must also be given to the purposes, rather than simply the nature, of their activities. The interests of developing countries lay not only in asserting their territorial sovereignty, but also in asserting their sovereign immunity from foreign jurisdiction in appropriate cases. In State contract practice, developing countries were often required to sign contracts waiving their immunity beforehand in the event of disputes regarding the activities covered by the contract in question. Care should therefore be taken that the developing countries did not waive all their immunities. The developed countries, on the other hand, were more experienced, and their nationals investing in developing countries were protected by their own national legislation, by investment guarantee agreements and by bilateral treaties ensuring compensation for damages arising out of acts of the receiving State. There were many cases in which jurisdiction had been declined, not only on the grounds of lack of jurisdiction under private international law, but also on the grounds of non-justiciability or the political nature of the dispute. That again raised the question of whether immunity and jurisdiction were mutually exclusive or whether they overlapped. Practice in that regard was confusing and, as Mr. Riphagen had pointed out (1708th meeting), international law did not clearly prescribe what a State should do with regard to the extent of its own jurisdiction.

17. He had of course taken note of all the drafting suggestions made by members of the Commission and would consider them all in due course.

18. The CHAIRMAN congratulated the Special Rapporteur on a brilliant summing-up and, with reference to the situation at the present time, pointed out that article 6 had already been provisionally adopted on first reading, but could obviously be reviewed at a later stage in the light of the progress made in the Commission's work. At the previous session, articles 7 to 10 had been placed before the Drafting Committee, which had not had time to examine them. However, the Special Rap-

[9] *Tchitcherine et le Ministère public* v. *Pinet* (Sirey, *Recueil général des lois et des arrêts, 1868* (Paris), part 2, pp. 202-203).

[10] *Comina* v. *Kite (Annual Digest of Public International Law Cases, 1919-1922* (London), Case No. 202, p. 286).

[11] *Statute of 7 Anne* (1708), chap. XII: "An Act for Preserving the Privileges of Ambassadors and other public Ministers of Foreign Princes and States" (United Kingdom, *The Statutes at Large of England and of Great Britain* (London, Eyre and Strahan, 1811), vol. IV, p. 17).

porteur had included revised versions in the fourth report (A/CN.4/357) and the Drafting Committee would therefore have to take account of the new wording and the comments to be made at the present session. Accordingly, the best course might well be to concentrate on those articles first, and then take up articles 11 and 12 before referring them to the Committee.

19. Mr. USHAKOV pointed out that, at the present session, the Commission (1699th meeting, para. 19) had deemed it advisable to consider once again articles 27 to 41 of the draft articles on treaties concluded between States and international organizations or between international organizations before referring them to the Drafting Committee. It could well do the same with articles 7 to 10 of the topic under discussion, again, for the reason that the membership of the Commission had been renewed and greatly enlarged since the previous session.

20. It had to be remembered that article 6 had been adopted on first reading but was provisional in character. Indeed, the Commission was at the beginning of its work and, discounting article 1, article 6 was the real point of departure for the entire draft. He saw no disadvantage in the Drafting Committee reconsidering the article, and it would be interesting to learn the Special Rapporteur's view in that regard.

21. Mr. SUCHARITKUL (Special Rapporteur) said that he had taken note of all the suggestions for possible improvements to the text of article 6, which he understood to have been adopted provisionally so as to enable him to proceed with his examination of the topic. He was quite willing to amend the text in any way that was deemed necessary and hoped that the article would be reviewed following consideration by the Drafting Committee.

22. Mr. YANKOV said that, in the general discussion, a number of references had been made to article 11 in connection with article 6. That was a further reason why the Drafting Committee should at least consider the relationship between the two articles.

23. Mr. NJENGA, referring to the Special Rapporteur's summing-up of the discussion, said that further clarification was needed regarding the interrelationship between the subject area covered by the draft articles and questions covered by the Conventions on Consular Relations, on Diplomatic relations, on Special Missions and on the Representation of States in Their Relations with International Organizations of a Universal Character. He had understood the Special Rapporteur to say that there would be an area of overlap between the draft articles and the provisions of those Conventions. Article 31, subparagraph 1 (*c*), of the Vienna Convention on Diplomatic Relations, for example, stated that any action relating to any professional or commercial activity exercised by a diplomatic agent in a receiving State outside his official functions would not be covered by immunity. Article 43, paragraph 1, of the Vienna Convention on Consular Relations stated, equally clearly, that consular officers or employees were not amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions—functions which, to a large extent, involved promoting the trading and commercial activities of the sending State. Again, similar provisions to that contained in article 31, subparagraph 1(**c**), of the Convention on Diplomatic Relations could be found in article 57, subparagraph 2 (*a*), of the Convention on Consular Relations and in article 31, subparagraph 2 (*c*), of the Convention on Special Missions.

24. His concern was that, by dealing with the same areas in the draft articles, the Commission might be regarded as attempting to revise established provisions of diplomatic and consular law, something it had no mandate to do. Before proceeding any further, it should determine whether or not it was to deal with those very clearly defined areas.

25. Any members of the Commission who acted as legal advisers to their respective Governments were well aware that disputes involving diplomats constituted a problem area. In his own country, it would be impossible to take a diplomat to court, since to do so would require authorizations from the Ministry of Foreign Affairs and the Attorney General, and such authorizations would never be issued because of the very clear provisions of the various international conventions. In most cases, therefore, it was necessary to approach the foreign ministry of the diplomat concerned in order to obtain a satisfactory settlement.

26. In one recent case in Pakistan, mentioned by the Special Rapporteur in his report (A/CN.4/357, para. 89), namely, *A. M. Qureshi* v. *Union of Soviet Socialist Republics* (1981)[12] the issue could easily have been decided on an interpretation of the agreement establishing the trade representation office, which provided that the trade representative was responsible for carrying out State contracts in Pakistan, and could have been regarded as agreement in advance that the Pakistani courts would have jurisdiction. However, that had not been the only basis on which the courts had decided that they had jurisdiction in the case, despite the issue of a certificate by the Pakistan Minister for Foreign Affairs stating that the trade representative in question enjoyed full diplomatic privileges. In another case, *The Secretary of State of the United States of America* v. *Messrs. Gammon Layton* (1971),[13] the relevant agreement provided that any dispute would be submitted through a petition. Although that could have been regarded as a specific waiver in advance, the United States had refused to submit a petition and had sheltered behind its immunities. In both instances, the courts in Pakistan had explored the whole field of the restrictive nature of State immunities and had concluded that they had jurisdiction.

[12] See 1708th meeting, footnote 20.

[13] *Ibid.*, footnote 17.

27. Consequently, the Commission should come to an agreement if it did not wish to find itself revising established law concerning diplomatic and consular officials.

28. Mr. SUCHARITKUL (Special Rapporteur) said that, as far as the question of overlapping was concerned, the areas most directly involved were the immunity of premises of missions from search, requisition, attachment or execution. Immunity from jurisdiction had two aspects, namely, immunity from pre-trial attachment and proceedings and immunity from post-judgement attachment and execution. Article 22, paragraph 3, of the Vienna Convention on Diplomatic Relations provided that the premises of missions, their furnishings and other property thereon, as well as means of transport of the mission, were immune from search, requisition, attachment or execution. Immunity from search or requisition related to inviolability and concerned an obligation of the receiving State, whereas immunity from attachment or execution entailed immunity from intervention by the judiciary.

29. When the Commission came to deal with the immunities of State property, it would have to draw a distinction between property assigned to public uses and property set aside for commercial purposes, a question that had already been dealt with in a number of cases. In one such case, concerning the bank account of the Tanzanian Embassy,[14] the court of the receiving State had placed responsibility on the Embassy by saying that, if the Embassy wished to maintain immunity, it should divide its mixed account into two parts, one for official Embassy purposes and the other for the settlement of contracts. The court had therefore assumed jurisdiction. In that case, the receiving State had been asserting the application of *lex fori* or *lex situs*, in which connection private international law had also come into play, for the property had been considered as belonging to the territorial State and, therefore, not covered by any immunity. However, article 22 of the Vienna Convention on Diplomatic Relations provided an exception to that exception. The same was true of the Vienna Convention on Consular Relations and the Convention on Special Missions. The provisions of other conventions could also be taken into account in that regard. The area was one to which a great deal of attention must be paid. While the Conventions referred to above contained provisions for the specific matters with which they dealt, any remaining cases would have to be covered by the draft articles currently before the Commission.

30. The CHAIRMAN suggested that the Commission should consider, one by one, all the draft articles submitted by the Special Rapporteur, in other words, articles 1 and 6 and articles 7 to 12, on the understanding that, if the Commission wished to alter the wording of article 6, it would have to authorize the Drafting Committee to do so. He wondered whether the members of the Commission wished the Special Rapporteur to introduce the draft articles formally.

31. Mr. USHAKOV said that articles 11 and 12, which were quite new, had been introduced in the context of the Special Rapporteur's fourth report (A/CN.4/357), but not on a formal basis.

32. Mr. SUCHARITKUL (Special Rapporteur) said that article 6 was a compromise text which could be improved on at the present session. A number of arguments and suggestions had already been put forward and should provide an adequate basis for the deliberations of the Drafting Committee.

33. Mr. NJENGA said that, although it had already been adopted provisionally, article 6 had already been discussed extensively by the Commission in its newly constituted and enlarged form. In view of the improvements suggested and the references to the relationship with draft article 11, the best course would be to refer article 6 again to the Drafting Committee, with a view to making it more generally acceptable.

34. Mr. AL-QAYSI said that he was in general agreement with the views expressed by the Special Rapporteur and by Mr. Njenga. Article 6 had been amply debated and the general discussion indicated that there might be good reason to refer it once again to the Drafting Committee. If so, there was no need to proceed further in the Commission itself, particularly since the key words, concerning the effect to be given to State immunity, would undoubtedly be discussed in connection with articles 7 and 11. The Drafting Committee could seek to improve the wording of the article, so as to bridge the difference of opinion regarding the point of departure to be adopted. Moreover, because articles 7 to 10 had been recast by the Special Rapporteur, there was merit in Mr. Ushakov's view regarding the order in which the articles should be considered.

35. Mr. JAGOTA said that, in re-opening consideration of article 6, the Commission might create a precedent that could well be misinterpreted. The article had been discussed extensively in the general debate and would in fact have to be probed again in the course of the examination of article 11. The Special Rapporteur himself, in his fourth report (*ibid.*, paras. 27-28), had expressed doubt as to whether article 6 could be retained in its current form, which was intended to indicate that the applicable law would be that of the future convention, rather than customary law. Even the validity of that statement could be discussed in connection with article 7.

36. As he had pointed out earlier, the need to retain article 11 would depend on the wording of article 6, since the two were integrally linked. In other words, there would be no "lingering doubts" (*ibid.*, para. 28) if article 6 was drafted differently, thereby obviating the need for article 11. Indeed, article 11 appeared in effect to be an attempt by the Special Rapporteur to revise article 6. In view of the fact that the Commission was

[14] *Birch Shipping Corp.* v. *Embassy of Tanzania* (1980), *American Journal of International Law* (Washington, D.C.), vol. 75, No. 2 (April 1981), pp. 373-374.

newly constituted, the matter could indeed be referred to the Drafting Committee.

37. Mr. FRANCIS said that, when he had spoken in the general discussion (1711th meeting), it had been his understanding that the draft articles would subsequently be discussed one by one. Mr. Ushakov's main concern seemed to be the order in which they should be dealt with. In order to be consistent with its earlier agreement, the Commission should first discuss articles 1 and 6 and then proceed to articles 7 to 10.

38. Mr. McCAFFREY said he endorsed Mr. Jagota's suggestion regarding the procedure to be adopted in respect of article 6, which had been adopted only provisionally on first reading and would in any event be open for subsequent reconsideration. Moreover, it would undoubtedly continue to be examined, since it was linked with the substance of later articles, more particularly articles 7, 11 and 12. The matter should not be taken up again in the Commission at the present stage.

39. Mr. USHAKOV suggested that article 6 should be referred to the Drafting Committee forthwith and that the Commission should proceed to consider draft articles 7 *et seq.*

40. The CHAIRMAN suggested that, in view of the late hour, the discussion should be resumed at the following meeting.

The meeting rose at 1.10 p.m.

1714th MEETING

Wednesday, 26 May 1982, at 10.05 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Jurisdictional immunities of States and their property (A/CN.4/340 and Add.1,[1] A/CN.4/343 and Add.1-4,[2] A/CN.4/357, A/CN.4/L.337, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 3)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*continued*)

1. Mr. SUCHARITKUL (Special Rapporteur) said that, since draft articles 1 and 6 had already been adopted provisionally, there was no immediate need to re-examine them or to refer them once again to the Drafting Committee. Draft articles 7 to 10 had been recast and were still before the Drafting Committee, but it might none the less be useful to re-examine them, in order to afford new members an opportunity to express their views on them and thus assist the Drafting Committee. The Commission could then proceed to consider draft articles 11 and 12 (A/CN.4/357, paras. 29 and 121) in terms of their formulation.

2. Mr. NI said that, at its previous meeting, the Commission had been faced with the possibility of having to recommence consideration of the draft articles from the beginning. Ordinarily, as a new member of the Commission, he would have welcomed such a procedure, but considered that, in view of the years of labour on the topic, the Commission should move forwards rather than backwards.

3. Draft articles 1 and 6 were still open to review, an understandable situation, given the variety of opinions on them. However, the Commission could afford to leave consideration of those articles in abeyance for the time being and go on to consider the later articles; otherwise, it might find itself involved in a perpetual exchange of views. Indeed, the Commission had often been criticized for proceeding at a slow pace, and to reopen the discussion of articles 1 and 6, precisely at a time when they were not being considered on second reading, would lend weight to such criticism.

4. He agreed with the procedure suggested by the Special Rapporteur and proposed that the Commission should take up draft articles 7 to 12 and make such references to other draft articles as were appropriate.

5. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to the method of work suggested by the Special Rapporteur.

It was so decided.

ARTICLE 7 (Obligation to give effect to State immunity)

6. The CHAIRMAN invited the Special Rapporteur to introduce draft article 7, which read:

Article 7. Obligation to give effect to State immunity

PARAGRAPH 1—ALTERNATIVE A

1. A State shall give effect to State immunity under [as stipulated in] article 6 by refraining from subjecting another State to the jurisdiction of its otherwise competent judicial and administrative authorities, [or] and by disallowing the [conduct] continuance of legal proceedings against another State.

PARAGRAPH 1—ALTERNATIVE B

1. A State shall give effect to State immunity under article 6 by refraining from subjecting another State to its jurisdiction [and] or from allowing legal proceedings to be conducted against another State, notwithstanding the existing competence of the authority before which the proceedings are pending.

2. For the purpose of paragraph 1, a legal proceeding is considered [deemed] to be one against another State, whether or not

[1] Reproduced in *Yearbook ... 1981*, vol. II (Part One).

[2] Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).

[3] The texts of draft articles submitted at previous sessions of the Commission are reproduced as follows: (*a*) art.1 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (*b*) arts. 2 to 5, in *Yearbook ... 1981*, vol. II (Part Two), pp. 153-154, footnotes 655-658; (*c*) art. 6 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (*d*) arts. 7 to 10, revised at the Commission's thirty-third session, in *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671.