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Summary record of the 1716th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
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39. Mr. QUENTIN-BAXTER said that, in view of the definition contained in articles 2 and 3, he believed, as did Mr. Calero Rodrigues, that article 6 could for the time being be regarded as stating the general rule of State immunity. However, the question of whether the rule was specified in article 6 or article 7 was ultimately unimportant.

40. One practical problem posed by the current draft articles, which had not arisen in respect of the drafts on diplomatic and consular immunities, was that the immunities concerned situations which might arise, without the prior knowledge of anyone in the receiving State, in the innumerable instances in which one State found that another State had manifested itself in some way. The very absence of a balancing of sovereignty or jurisdiction with immunity tailored to the particular situation illustrated the importance of having rules. In that regard, the Commission had, at the outset, made a conscious decision to confine itself to jurisdictional immunities as described in article 3.

41. Throughout its consideration of the draft, the Commission would be confronted with the problem of how far it could go in attempting to provide some direction that would help to unify the practice of national courts. Even within the jurisdiction of a single State, judicial opinions could vary widely. As a number of members had indicated, paragraphs 2 and 3 represented a courageous attempt by the Special Rapporteur to give some guidance in that regard, but in doing so he was entering a very difficult area. Anyone familiar with the common law system would be aware of the enormous difficulties posed by the notions of ownership, possession and control, but he was instinctively opposed to any attempt to deal with the question at the level of national courts or other government organs. The aim of international codification must always be to state principles succinctly and clearly. Accordingly, at the present stage the Commission must endeavour to state the quintessence of the rule, rather than pinpoint situations which were so different that it would be impossible to take account of all of them.

The meeting rose at 1.05 p.m.

1716th MEETING

Friday, 28 May 1982, at 10.05 a.m.

Chairman: Mr. Paul REUTER

Jurisdictional immunities of States and their property (*continued*) (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*)

ARTICLE 7 (Obligation to give effect to State immunity)[4] (*concluded*)

1. Mr. MALEK said that he subscribed entirely to the opinion expressed at the previous meeting by Mr. Ushakov, that it was neither possible nor desirable to give a definition of the term "State". It was true that nowhere in any of its sets of draft articles had the Commission defined that term. From the outset of its work, it had adopted an unvarying attitude in that connection: in view of the theoretical and practical difficulties inherent in any definition of the concept of State, it had acquired the habit of using the word "State" in the sense attributed to it in international law, in the sense commonly accepted in international practice. Thus, in its observations concerning the draft Declaration on Rights and Duties of States which it had drawn up at its first session in 1949, it had stated its conclusion that no useful purpose would be served by an effort to define the term "State", and its impression that it had not been called upon to set forth in that draft Declaration the qualifications to be possessed by a community in order that it might become a State.[5]

2. Admittedly, the Commission had attempted, in the commentary to article 2 of the draft articles on diplomatic intercourse and immunities,[6] to define the category of States which could establish diplomatic relations: it had held that faculty to be reserved for "independent States" and members of a federation empowered by the federal constitution to establish diplomatic relations. Thus, the adjective "independent" was used only in the commentary; on the other hand, its use by the Commission when preparing a draft convention at a time, some quarter of a century ago, when the terms "sovereign" or "sovereignty" had been in quite common legal use, represented considerable progress in contemporary thinking on the concept of the State—in other words, a more realistic conception of the idea of sovereignty. The Commission rarely used the words "sovereign", "sovereignty", or even "sovereign authority", in its work, seeming to do so only when it felt they would greatly improve the

[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: *Yearbook ... 1981*, vol. II (Part Two), pp.153-154, footnotes 655-658; (*c*) art. 6 and the commentary thereto, provisionally adopted by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (*d*) arts. 7 to 10, revised at the Commission's thirty-third session: *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671.

[4] For the text, see 1714th meeting, para. 6.

[5] *Yearbook ... 1949*, p. 289, document A/925, para. 49.

[6] *Yearbook ... 1958*, vol. II, p. 90, document A/3859, chap. III, para. (4) of the commentary.

clarity of texts. Thus, for example, article 1 of the 1958 Convention on the Territorial Sea and the Contiguous Zone stipulated that "The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea...".[7] In that context, the term "sovereignty" was very helpful, for it gave the text greater clarity and precision than could any other term, such as "competence", "political authority" or "territorial authority".

3. For that reason, he wondered what real function was fulfilled by the expressions "sovereign" and "as a sovereign authority" in draft article 7, paragraphs 2 and 3 respectively. If those expressions were really necessary or useful in that article, why might not the same be true with respect to, say, article 6, where it would then be possible to state that "a State, in its capacity as a sovereign State, is immune from the jurisdiction of another State...", and to all the other articles? If the Commission wished to affirm the principle of sovereignty in draft article 7, it would be better advised to do so in a special provision, to which he would willingly subscribe; if it wished to make the observation that jurisdictional immunity of States derived directly or indirectly from the principle of sovereignty, it would similarly be better advised to do so in a special provision, which he would be no less willing to support.

4. He proposed, and urged the Special Rapporteur to accept, the deletion from paragraph 2 of draft article 7 of the expression "sovereign", and from paragraph 3, the words "acting as a sovereign authority", which were entirely unjustified technically and not very apt politically. Whatever its reception, he wished that proposal to be entered in the summary record of the meeting and, perhaps, in the Commission's report to the General Assembly.

5. As a national of a small State of whose fate everyone was aware, he would prefer the term "sovereignty" to be used only when absolutely necessary. He would also prefer to see the accent placed less on the concept of sovereignty than on effective respect for a State's territory, population, frontiers, heritage, and civilization—in short, genuine respect for the State as such.

6. Mr. SUCHARITKUL (Special Rapporteur) expressed his deep gratitude for all the proposals made by members of the Commission concerning points of substance and drafting amendments. He would certainly bear in mind the view expressed by a number of members that the draft in general should be as succinct as possible and should not go into detail regarding points of private international law or internal law.

7. Referring to observations made at the previous meeting by Mr. Ushakov and at the present meeting by Mr. Malek, he said that, from the very outset, it had been his practice to avoid defining the term "State". Even terms of convenience, such as "territorial State" and "foreign State', had been dispensed with when it had become clear that there was no need to identify States in different terms. His original intention in that regard had simply been to give an indication of the type of definitional problems with which the Commission would have to deal.

8. He was grateful to Mr. Ushakov (1714th meeting) for pointing out the necessity of defining the word "jurisdiction" in order to limit the scope of the topic. The time had perhaps come for the Drafting Committee to think of assisting the Commission with the definition of "jurisdiction" and with the drafting of article 3, subparagraph 1 (*b*).

9. Mr. Ushakov's comments on matters such as the existing international conventions enumerated in draft article 4 and the Commission's discussion of that article might prove of assistance to the Drafting Committee in its consideration of the scope of the articles, as defined in draft article 1. That would be particularly the case with respect to the nature of questions relating to immunity.

10. Of the many suggested improvements to draft article 6, he welcomed in particular those relating to the phrase "in accordance with the provisions of the present articles". He wished to make it clear that that phrase would apply to all the articles in all parts of the draft.

11. Mr. McCaffrey (*ibid.*) and other members of the Commission had referred to the substantive question of the immunities of property. In that connection, he pointed out that immunity from execution would be dealt with in Part IV of the draft. From the outset, he had envisaged the possibility of changing the title of the draft to remove any reference to property. Property itself could not be the beneficiary of immunities, but was simply the object of rights. Only the State could be the proper beneficiary of State immunities.

12. Referring to observations made by Mr. Jagota (*ibid.*) and Mr. Al-Qaysi (1715th meeting) with regard to draft article 7, paragraph 1, he said that that paragraph, as another expression of the rule of sovereign immunity, was necessary to indicate that the right to sovereign immunity was not absolute but was rather, as Mr. Riphagen had pointed out (1708th meeting), a relative right, which required a corresponding obligation. In effect, the paragraph in question was vital to the draft since it stated what the obligation entailed. The importance of such a provision had been emphasized by Mr. Quentin-Baxter (1709th meeting). The problem had been to indicate clearly the nature of the obligation. In that regard, Mr. Flitan had said (1715th meeting) that it was sufficient for the State to take appropriate measures and had referred, in that connection, to article 59 of the Vienna Convention on Consular Relations. However, the obligation to give effect to State immunity was more far-reaching than that provision, in that it was a mixture of an obligation of conduct and an obligation of result. Clarification as to the point at which the obligation to give effect to State immunity was breached had been provided (*ibid.*) by Mr. Ogiso, Mr. Ni, Mr. Koroma and Mr. Riphagen.

[7] United Nations, *Treaty Series*, vol. 516, p. 206.

The obligation was, by definition, an obligation of conduct and was violated upon the issuing of a writ or the institution of proceedings by the organs or representatives of one State against another. However, in some legal systems, the State might not have the power to intervene once proceedings had been initiated by a private individual. Since the Commission could not interfere in the internal law of States, it was for States themselves to determine how they would perform their obligation to prevent the impleading of a foreign State. That was why it was necessary to specify in what case a foreign State was impleaded, as was done in the closing lines of paragraph 1.

13. Paragraph 2 was designed to shed further light on that point, and paragraph 3 was made necessary by the absence of a definition of the term "State", in order to indicate the beneficiaries of immunity. Referring to the observations made by Mr. Malek regarding paragraph 3, he suggested that the word "official" might replace the word "sovereign".

14. He expressed the hope that, in the light of the proposals made by members of the Commission, the Drafting Committee would be able to arrive at a generally acceptable wording for draft article 7. He proposed that the draft article should be referred to the Drafting Committee for consideration, together with the other relevant provisions of draft articles 2 and 3.

It was so decided.[8]

ARTICLE 8 (Consent of State),

ARTICLE 9 (Expression of consent) *and*

ARTICLE 10 (Counter-claims)

15. Mr. SUCHARITKUL (Special Rapporteur) said that he intended to introduce draft articles 8, 9 and 10 together, for they formed a whole.

16. Mr. USHAKOV, speaking on a point of order, said that, as he had had occasion to emphasize, he would prefer the draft articles to be introduced and examined one by one.

17. The CHAIRMAN said that account should be taken of Mr. Ushakov's remark. Since, however, articles 8 to 10 really did form a whole, he suggested that, in order to save time, each member of the Commission might, if he so wished, refer to them all during a single statement. On that understanding, he invited the Special Rapporteur to introduce draft articles 8, 9 and 10, which read:

Article 8. Consent of State

1. [Subject to part III of the draft articles] Unless otherwise provided in the present articles, a State shall not exercise jurisdiction in any legal proceeding against another State [as defined in article 7] without the consent of that other State.

2. Jurisdiction may be exercised in a legal proceeding against a State which consents to its exercise.

Article 9. Expression of consent

1. A State may give its consent to the exercise of jurisdiction by the court of another State under article 8, paragraph 2, either expressly or by necessary implication from its own conduct in relation to the proceeding in progress.

2. Such consent may be given in advance by an express provision in a treaty or an international agreement or a written contract, expressly undertaking to submit to the jurisdiction or to waive State immunity in respect of one or more types of activities.

3. Such consent may also be given after a dispute has arisen by actual submission to the jurisdiction of the court or by an express waiver of immunity, [in writing, or otherwise] for a specific case before the court.

4. A State is deemed to have given consent to the exercise of jurisdiction by the court of another State by voluntary submission if it has instituted a legal proceeding or taken part or a step in the proceeding relating to the merit, without raising a plea of immunity.

5. A State is not deemed to have given such consent by voluntary submission or waiver if it appears before the court of another State in order specifically to assert immunity or its rights to property and the circumstances are such that the State would have been entitled to immunity, had the proceeding been brought against it.

6. Failure on the part of a State to enter appearance in a proceeding before the court of another State does not imply consent to the exercise of jurisdiction by that court. Nor is waiver of State immunity to be implied from such non-appearance or any conduct other than an express indication of consent as provided in paragraphs 2 and 3.

7. A State may claim or waive immunity at any time before or during any stage of the proceedings. However, a State cannot claim immunity from the jurisdiction of the court of another State after it has taken steps in the proceedings relating to the merit, unless it can satisfy the court that it could not have acquired knowledge of the facts on which a claim of immunity can be based, in which event it can claim immunity based on those facts if it does so at the earliest possible moment.

Article 10. Counter-claims

1. In any legal proceedings instituted by a State, or in which a State has taken part or a step relating to the merit, in a court of another State, jurisdiction may be exercised in respect of any counter-claim arising out of the same legal relationship or facts as the principal claim, or if, in accordance with the provisions of the present articles, jurisdiction could be exercised, had separate proceedings been instituted before that court.

2. A State making a counter-claim in proceedings before a court of another State is deemed to have given consent to the exercise of jurisdiction by that court with respect not only to the counter-claim but also to the principal claim, arising out of the same legal relationship or facts [as the counter-claim].

18. Mr. SUCHARITKUL (Special Rapporteur) proposed that draft articles 8, 9 and 10 should be submitted again to the Drafting Committee and should be considered jointly, since they all dealt with the same subject-matter and had been recast in order to follow a more logical sequence.

19. The provisions of draft article 8 had been based on Soviet legislation, according to which action could be taken only with the consent of the foreign State or diplomat concerned.[9] Under Indian legislation, the consent of the host Government had first to be obtained.[10]

[8] For consideration of the texts proposed by the Drafting Committee, see 1749th meeting, paras. 46-56.

[9] See 1708th meeting, footnote 10.

[10] Sect. 86 of the Indian Code of Civil Procedure, 1908 (*ibid.*, footnote 31).

The provision was a necessary one. As Mr. Calero Rodrigues had pointed out (1711th meeting), there was clearly an absence of consent when a State raised a plea of immunity. Conversely, when consent was given, the question of immunity did not arise. Draft article 9 defined the various ways in which consent could be expressed, including the waiver of State immunity. The question of counter-claims, as dealt with in draft article 10, was a procedural matter, as noted by a number of members of the Commission. It was impossible to go into great detail because of the many different systems existing in different countries. Although the rules contained in draft articles 8 to 10 were of an ancillary nature, they were nevertheless necessary.

20. Mr. AL-QAYSI said that the restructuring of draft articles 8, 9 and 10 represented an improvement, since the provisions were now clearer and the former overlapping had been reduced considerably. If draft article 7 could be seen as a logical progression from draft article 6, then draft articles 8 to 10 represented a logical progression from both of those provisions. Article 6 stated the general principle of State immunity, draft article 7 laid down the obligation to give effect to that principle and draft articles 8, 9 and 10 specified the conditions under which the jurisdiction of one State could be exercised over another State.

21. The requirement of consent would seem to have been very delicately balanced in the two paragraphs of draft article 8. Under normal circumstances, a State could not exercise jurisdiction over another State without its consent and jurisdiction might be exercised against a State which consented to its exercise. That phraseology would seem to have been adopted specifically in order to emphasize the relationship between the element of consent and State immunity, rather than the exercise of territorial jurisdiction. As the Special Rapporteur had pointed out in his fourth report (A/CN.4/357, para. 16), while the consent of a State was not necessarily the foundation of jurisdiction, its absence had been put forward as an essential element of State immunity. Conversely, the presence of consent excluded, removed or extinguished immunity, without itself constituting a basis for jurisdiction, as that was determined by the relevant rules of competence of the court concerned. In that sense, consent would seem to be a purely permissive condition for the exercise of jurisdiction.

22. The relationship between consent and State immunity appeared to have given rise to difficulties for some members of the Commission. The point was indeed very subtle and, though somewhat abstract, was not without value for the structuring of the draft articles. The question of how certain modes of expressing consent, such as waiver or voluntary submission, could be considered as other than true exceptions to the general rule of State immunity when they led to the same result as the exceptions could best be answered within the framework of part III of the draft articles, dealing with exceptions to State immunities.

23. According to the provisions of part III, an exception meant a situation in which, regardless of the notion of consent, a State was not immune from the exercise of local jurisdiction in respect of a certain conduct because, for example, of the nature of that conduct. Accordingly, in such instances the absence of consent did not constitute immunity. The general rule stated in part II was that the immunity of a foreign State was accompanied by a corresponding duty to refrain from subjecting that State to local jurisdiction. That duty could not be said to have been violated if the State possessing immunity had, by expression or conduct, consented to be subjected to the exercise of local jurisdiction. In the former case, jurisdiction was exercised—that is, non-immunity was established—regardless of any permissive condition, because of the nature of the act. In the latter case, it was the permissive condition, namely the extinction of the right of State immunity, which opened the door for the exercise of jurisdiction without necessarily offending the duty correlated to the right. When article 8 was seen in that light, the apparent contradiction disappeared and the words "Subject to part III of the draft articles" contained in square brackets in paragraph 1 and "Unless otherwise provided in the present articles" in the same paragraph became all the more necessary. In that regard, his initial preference was for the wording in square brackets, as it conveyed the intended meaning more precisely.

24. While he found draft article 9 generally acceptable, he felt that there was some repetition in the way in which concepts were expressed. Paragraphs 2 and 3, for example, contained references both to submission to the jurisdiction of the court and to express waiver of immunity. In addition, some notions contained in the earlier text,[11] such as the reference to interests in property, had disappeared, for no apparent reason. Conversely, a number of terms, such as "treaty" in paragraph 2, had appeared, although they had earlier been acknowledged to be unnecessary. In that connection, he recalled that, in the Vienna Convention on the Law of Treaties, a treaty was defined, in article 2, subpara.1 (*a*), as an international agreement.

25. Although a number of members of the Commission had pressed for economy in drafting, that objective should not be pursued at the expense of clarity. At the current stage, the important consideration was to ensure that the texts of the draft articles did not conflict with one another. There was great benefit in producing, on first reading, a clear text, however long, since the Commission always had the possibility of shortening articles after hearing the views of Governments.

26. Mr. EL RASHEED MOHAMED AHMED too thought that the phrase "Unless otherwise provided in the present articles ..." should be deleted from article 8 since it did not have any specific meaning and, in any event, a reference to the exceptions to State immunity was afforded by the phrase between square brackets reading "Subject to part III of the draft articles".

[11] See *Yearbook ... 1981*, vol. II (Part Two), p. 155, footnote 663.

Moreover, as the Special Rapporteur had pointed out, article 9 did not deal with exceptions to the general rule, as did article 8, but prescribed the modalities for expressing consent.

27. One point of concern to him related to the word "jurisdiction", which, according to the definition laid down in article 2, subparagraph 1 (*g*), covered only the judicial aspects of the matter. An amplified meaning of that term was, however, given in article 3, subparagraph 1 (*b*) (iv). The point might be raised that article 8 did not cover the latter provision, and it might be suggested that there was therefore no need to provide for consent in that particular instance. In his view, that was neither the Special Rapporteur's intention nor the import of article 8 itself.

28. Mr. McCAFFREY said he agreed entirely that there was probably no sovereign immunity in the case of the establishment of legal title to property. Under the Anglo-American system, that was a well-recognized principle, and it applied in probate and other proceedings which were referred to as *in rem* proceedings. The omission of the word "property" in draft article 6 and in the whole of the earlier part of the draft gave rise to a difficulty, since, if the draft was to be divided into two basic parts, the first dealing with the immunity of the State from the jurisdiction of another State and the second with the immunity of the State's property from execution, a problem could arise regarding the use of State property as a basis for jurisdiction rather than for the satisfaction of a resulting judgement. In that connection, there had once obtained in the United States of America a practice whereby a defendant was, in effect, compelled to enter the jurisdiction to defend a case by attaching his property as a basis for quasi *in rem* jurisdiction. In such proceedings a personal action was brought against a defendant, using property as a basis of jurisdiction. In *Shaffer* v. *Heitner* (1977),[12] the United States Supreme Court held that, subject to certain possible exceptions, such proceedings would no longer be allowed, since actions against property were actually actions against the person's rights in the property and the requisite relationship between the person and the forum must therefore be present before the court could exercise jurisdiction over the property. That technique was also available in certain civil law jurisdictions, for instance, under the German and Austrian Codes of Civil Procedure, which allowed the attachment of property of inconsequential value as the basis of jurisdiction in what was essentially an *in personam* action. It was, of course, also one of the bases of jurisdiction that had created problems in regard to the 1968 European Convention on jurisdiction and the enforcement of civil and commercial judgements.[13] He raised that point in the hope that it would be taken into account when deciding whether property should or should not be dealt with in that sense.

29. With regard to article 8 itself, he agreed with the underlying principle, but wondered whether it would not be possible to frame the draft article in one paragraph. In his view, paragraph 2 would suffice on its own and, inasmuch as it stated a principle rather than an exception, its proper place was in part II of the draft, rather than part III. Noting that, in article 8, paragraph 1, the phrase between square brackets reading "as defined in article 7" related to the expression "in any legal proceeding against another State", he said that some consideration could appropriately be given,within the context of article 8, to making the definition in article 7, paragraph 2, more general. That would not only serve the purposes of article 7, paragraph 1, but would also enable one idea to be used throughout the draft.

30. Lastly, he agreed that immunity and the exceptions thereto were essentially on the same footing. In addition, immunity should be regarded as not extending to certain situations such as trading and commercial activities. Also, it certainly did not extend to a situation where a State had consented to the exercise of jurisdiction over it. That point was appropriately dealt with in the context of part II of the draft.

31. Mr. USHAKOV said that he would limit his remarks to draft article 8. Although that article appeared in part II of the draft articles, entitled "General Principles", he wondered whether the principle it stated really concerned general consent. If that was the case, it should be stressed that general or customary international law was always based on general consent, as stipulated in article 53 of the Vienna Convention on the Law of Treaties, and that rights and obligations existed only by consent. In that case, the expressions "[Subject to part III of the draft articles]" and "Unless otherwise provided in the present articles" would be entirely pointless. After all, if part III was to contain exceptions to the principle of State immunity, could those exceptions be treated as such without the consent of States? The Commission could establish rules only if it was convinced that the overwhelming majority of States consented to them. Similarly, to retain the expression "Unless otherwise provided in the present articles", would be to indicate that a State was bound to exercise its jurisdiction in proceedings against another State when that other State had not given its consent.

32. If, on the other hand, general consent was not involved, the principle underlying article 8 was that every State was master of its own rights and could waive them if it wished. That possibility was implicit in each and every convention and was so in particular in the Vienna Convention on Diplomatic Relations, the Convention on Special Missions and the Vienna Convention on Consular Relations. Article 32 of the Vienna Convention on Diplomatic Relations admittedly provided, in paragraph 1, that "The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 may be waived by the sending State", but that was rather in order to indicate that the immunities of diplomatic agents rested not with the agents

[12] *United States Reports*, vol. 433 (Washington, D.C., 1979), p. 186.

[13] EEC, *Supplement to Bulletin No. 2-1969 of the European Communities* (Luxembourg), p. 18.

themselves but with the State, which alone could take decisions concerning them. He therefore did not believe it necessary expressly to establish a rule of that kind.

33. Furthermore, the wording of article 8 was very vague: which jurisdiction was involved? It should probably be specified, as in article 31 of the Vienna Convention on Diplomatic Relations, that the reference was to civil, administrative, and even criminal jurisdiction. The word "jurisdiction" in article 6 should be similarly qualified.

34. With reference to Mr. McCaffrey's remark that, for example, civil proceedings could be instituted even against property—that was the case when the State was not expressly named—he believed that it would be useful to indicate, in the present part of the draft articles, that a State and its property enjoyed jurisdictional immunity. After all, there was already a provision within that part, namely article 9, paragraph 5, which spoke of "rights to property".

35. The CHAIRMAN, speaking as a member of the Commission, said that he did not share Mr. Ushakov's point of view on article 8. It was, by and large, true that the consent of States lay at the origin of the rules of international law, but that was the case not only for the rules embodying States' immunity but also for those embodying their non-immunity. Each of those groups of rules was on the same level as the other. According to Mr. Ushakov, there was a primary rule, that of State immunity, and it was only through a second expression of consent that exceptions could be made to that rule. His own position could be illustrated by borrowing an example from an entirely different area, the law of the sea, where there were rules relating to the determination of the outer limits of the territorial sea and the continental shelf. Implementation of the law of the sea, as it had been codified in the four conventions of 1958, had raised the question whether there was a primary rule, that of equidistance, which would automatically have determined the outer limits of those maritime areas, and a secondary and exceptional rule, that of special circumstances. In a well-known and relatively recent decision,[14] already accepted as part of case law, an arbitral tribunal had declared that there was only one rule, the rule of equidistance-special circumstances. In his view, the article under examination set forth a rule whose wording was perhaps imperfect but whose purpose was obviously to be a reminder that jurisdictional immunity and the exceptions thereto were of equal standing and derived from the same phenomenon, the development of international relations on the basis of the consent of States.

36. With regard to property, Mr. Ushakov seemed to be seeking affirmation of a rule that the principle of State immunity went together with a principle of immunity of property. For his own part, his willingness to acknowledge the existence, for property, of immunity from execution was matched by his doubts concerning the existence of a rule of immunity with regard to the establishment of legal title to property. There was case law on that matter, too. As a simple example of the kind of situation in question, it might be assumed that foreign States had been granted the right to acquire property in a country according to local law and that, after one such State had acquired a diplomatic residence in that country, a dispute arose over its possession of legal title under local law. Though it was true that a country must have the assurance, particularly in such a case, that its possession would not be disturbed, it could hardly be accepted that legal title to the property should no longer be established by a local jurisdictional authority because it was claimed by a foreign State. That would be going too far. The Commission would probably have to revert to that question when it examined article 9.

37. Mr. USHAKOV, referring to the opinions expressed by the Chairman speaking as a member of the Commission, agreed that the rule of immunity and the exceptions to it were on the same footing from the point of view of consent. The point at issue, however, was States' freedom to do with their right to immunity as they saw fit, and to submit to the jurisdiction of a particular court. In his view, that faculty, which was not mentioned in other conventions, need not be mentioned in the draft articles, for it was self-evident.

38. In the event of a dispute concerning title to property, it was important to distinguish between the question whether that property was State property or private property and the questions arising subsequently. Once the first question was settled and if State property was involved, the State concerned enjoyed jurisdictional immunity. That being so, the institution of proceedings was dependent on the ownership of the property. According to article 5 of the draft articles on the most-favoured-nation clauses,[15] most-favoured-nation treatment was "treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State". In that provision, things were taken into consideration only in so far as they belonged to the State; failing that link between State and things, the treatment was granted not to the things, but to the State. It was with that in mind that he suggested the inclusion in article 6 of a reference to State property.

39. Mr. KOROMA wondered whether draft article 8 would suffer if the words "in any legal proceeding" were deleted. He made that comment in the light of article 2, subparagraph 1 (*g*), which defined the term "jurisdiction", and of article 3, subparagraph 1 (*b*), which amplified that definition, and bearing in mind the need for symmetry and consistency, he would also refer to article 1, which made no mention of legal proceedings. The Special Rapporteur might have a special

[14] *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, decision of 30 June 1977 (United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), pp. 45-46, para. 70).

[15] See *Yearbook ... 1978*, vol. II (Part Two), p. 21.

reason for retaining the words in question, however, and he would welcome his explanation.

40. Mr. SUCHARITKUL (Special Rapporteur), replying to points raised, said that it was still the practice in certain countries to resort to seizure of property as a basis of jurisdiction. A case decided by the House of Lords in 1981, "*I congreso del Partido*",[16] illustrated the fact that, in the United Kingdom, jurisdiction could be founded not only on seizure, arrest and attachment of property, such as a ship; Admiralty jurisdiction *in rem* was so wide that it could even be invoked against a sister ship which had had nothing to do with the cause of action, but happened to belong to the same fleet as the one that had committed or was responsible for the tortious act. It would, however, be preferable not to introduce the question of property into the draft at the present stage, since the meaning of jurisdictional immunities of States would be clouded by the inclusion of the concept of what was an inanimate object—property—as opposed to a legal fiction such as a beneficiary of State immunity. He agreed with Mr. Ushakov, however, that most-favoured-nation treatment—since it was treatment, as opposed to a right—could be extended to property.

41. With regard to the drafting points raised, he said that Mr. El Rasheed Mohamed Ahmed's suggestion would be taken into consideration. The wording proposed by Mr. Koroma had in fact been used at an earlier point, but Mr. Calle y Calle had argued,[17] very convincingly, that article 8 should not be shortened, since to refer to jurisdiction against a State, rather than over or in respect of it, was not very friendly. It might also be advisable in the interests of clarity to retain the reference to legal proceeding.

42. The CHAIRMAN suggested that the Drafting Committee should be considered as being still seized of draft article 8 and that the Commission should turn to the consideration of draft article 9.

It was so decided.

43. Mr. USHAKOV, referring to the words "under article 8, paragraph 2", appearing in article 9, paragraph 1, said he wondered how a State could give its consent to the exercise of jurisdiction by the court of another State under a provision according to which jurisdiction could be exercised in legal proceedings against a State which consented to its exercise. In other words, a State could give its consent by virtue of its own consent. According to the same paragraph, the State could give its consent either "expressly" or "by necessary implication from its own conduct in relation to the proceeding in progress". Normally, "implicitly" was contrasted with "expressly", but here the contrast was with the conduct, as possible evidence of tacit consent. In his view, that concept should not be mentioned in the article itself, but in the commentary to it. Qualifying conduct as consent should be avoided. Under article 45 of the Vienna Convention on the Law of Treaties, a State might no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty if it must, by reason of its own conduct, be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation. Nothing in that provision said that the conduct of the State implied on its part consent not to invoke a particular cause or ground. It would therefore be preferable, in the case of the article under examination, to specify in the commentary that the fact that a State initiated proceedings before the court of another State meant that it was consenting to submit to the jurisdiction of that court.

44. The case of express consent, which related to a certain action before a court, should be distinguished from cases where there was no express consent. According to article 9, paragraph 2, the consent could be given in advance. That rule was valid for express consent, but it was not applicable to the consent implied by conduct to which reference was made in paragraph 1. As a result, paragraph 1 should not constitute a general paragraph and the provisions of article 9 relating to express consent should be separated from the provisions concerning what was another form of consent. The wording of paragraph 2 was lacking in other respects. It was not satisfactory to provide that consent could be given in advance by an express provision by which a State expressly undertook to submit "to the jurisdiction", for a State did not agree to submit to the jurisdiction in general, but to the jurisdiction of a particular court. It was not correct to add that the State could thus undertake "to waive State immunity", since, in agreeing to submit to the jurisdiction of a court, it was not waiving State immunity in general; to specify that it waived State immunity "in respect of one or more types of activities" was ill-advised, since in principle a specific case was involved and the concept of types of activities should therefore be defined.

45. Since paragraph 3 declared that "consent may also be given after a dispute has arisen", he wondered whether a State could give its consent even several years after that event. The remainder of the paragraph, which specified how that consent could be given, was descriptive in nature and did not set forth specific rules. Paragraph 4 described the conditions under which a State was "deemed to have given consent" to the exercise of jurisdiction by the court of another State. He wondered by whom the State was "deemed to have given consent" and why it should be so deemed. The concept of the right to property, referred to in paragraph 5, was, as Mr. Reuter had stressed, entirely separate from that of immunity. In his own view, the question of the establishment of title to property should be set aside. It appeared from the terms "or any conduct other than an express indication of consent", contained in paragraph 6, that the express indication of consent was considered to be a form of conduct. It was true that all express consent resulted from conduct, but

[16] See 1708th meeting, footnote 34.

[17] *Yearbook ... 1981*, vol. I, p. 78, 1657th meeting, para. 17.

it was not the same conduct as that referred to in paragraph 1.

46. His remarks concerning article 9, although numerous, related essentially to drafting matters. They did not mean, therefore, that he did not find the article generally acceptable. With regard to articles 9 and 10, it should be noted that they contained neither general rules nor general principles, but exceptions. The fact that a State gave its consent to the exercise of jurisdiction by the court of another State constituted an exception to the principle of immunity. It was therefore entirely wrong to include those articles in the part of the draft devoted to general principles.

47. Mr. FLITAN said that he considered the complexity of the topic of State immunity to require provisions as detailed as article 9. He also believed, as he had already indicated (1715th meeting), that in its work on the topic the Commission should draw on certain existing multilateral conventions. It was with these two considerations in mind that he proposed the addition to article 9 of a paragraph specifying that waiver of jurisdictional immunity for a civil or administrative action should not be held to imply waiver of immunity from the execution of the judgement, for which a separate waiver was necessary. Models for such a provision were to be found in article 31, paragraph 4, and article 61, paragraph 4, of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.

The meeting rose at 1 p.m.

1717th MEETING

Tuesday, 1 June 1982, at 3 p.m.

Chairman: Mr. Paul REUTER

Jurisdictional immunities of States and their property (*continued*) (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*)

ARTICLE 8 (Consent of State) *and*

ARTICLE 9 (Expression of consent) (*concluded*) *and*

ARTICLE 10 (Counter-claims)[4] (*continued*)

1. Mr. NI said that, in view of the rule enunciated in article 6, however incomplete and subject to improvement it might be, and the provisions of article 7, paragraph 1, article 8 was by no means indispensable. The approach adopted by the Special Rapporteur in part II of the draft articles (General Principles) had been made abundantly clear in his third report (A/CN.4/340 and Add.1, para. 45), which stated that article 6 enunciated the rule of State immunity, while article 7 set out its correlative, the corresponding obligation of restraint on the part of the territorial State, as well as a third element of State immunity, namely, the notion of "consent". In his presentation of the draft articles on consent, the Special Rapporteur had said[5] that the existence of consent could be viewed as an exception to the principle of State immunity and had been so viewed in some national legislation and regional conventions, but that, for the purposes of the draft articles, he preferred to consider consent as a constituent element of State immunity. Articles 6, 7 and 8 as they now stood were in line with the approach adopted by the Special Rapporteur.

2. The meticulous work the Special Rapporteur had done and the logical sequence in which he had presented articles 6, 7 and 8 were greatly appreciated, but the proposition that the notion of consent, or rather, lack of consent, was an ingredient or constituent element of State immunity was not readily understandable, and the arguments adduced by the Special Rapporteur in paragraphs 16 and 19 of his fourth report (A/CN.4/357) were not necessarily conclusive. The question whether consent or lack of consent was an element of State immunity was, however, academic, and it should not prevent the Commission from drafting articles on jurisdictional immunity.

3. Although article 8 was entitled "Consent of State", paragraph 1 merely repeated what had already been stated in substance in article 6, paragraph 1, and article 7, paragraph 1. It was only paragraph 2 that dealt with the substance of the question, namely, the fact that jurisdiction could be exercised in a legal proceeding

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[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: *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (*b*) arts. 2 to 5, in *Yearbook ... 1981*, vol. II (Part Two), p.153-154, footnotes 655-658; (*c*) art. 6 and the commentary thereto, provisionally adopted by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (*d*) arts. 7 to 10, revised at the Commission's thirty-third session: *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671.

[4] For the texts see 1716th meeting, para. 17.

[5] *Yearbook ... 1981*, vol. I, pp. 110-111, 1663rd meeting, para. 3.