Document:-
A/CN.4/SR.1946

Summary record of the 1946th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
1986, vol. I

57. With regard to draft article 2, paragraph 1 (*e*), the desire to clarify the meaning of the words "property, rights and interests" was understandable, but it was doubtful whether any efforts in that direction would prove productive. The article dealt with elements of a patrimonial nature and it was probably that notion that should be retained.

58. In draft article 3, paragraph 1 (*b*) (ii), it would be preferable to say "determination with the force of *res judicata*". Furthermore, it would be necessary to make the French translation of the word "functions" uniform, for while the expression "judicial functions" had been correctly rendered as *fonctions judiciaires* in the introductory clause of paragraph 1 (*b*), the term "administrative ... functions", in paragraph 1 (*b*) (v), had been translated not as *fonctions administratives*, but as *pouvoirs administratifs* ... .

59. He had no objection to a list of international legal instruments in draft article 4, but it was somewhat strange to place conventions which were being implemented on the same footing as others which, although quite old, still had not entered into force. Moreover, item (v), in its present form, did not refer to any convention at all. Since the relevant convention was the one mentioned in item (iv), the two items should be merged.

60. Such relatively minor drafting problems could be resolved easily, but other matters were more important. With regard to draft article 2, for example, he would point out that the text on which the Commission was working was intended to state rules of international law: therefore the Commission could not confine itself to adopting paragraph 1 (*e*) and paragraph 2. Many other definitions would have to be included in that article.

61. While it was true that the law referred to in paragraph 1 (*e*) of article 2 was usually the internal law of the State invoking immunity from jurisdiction for property in respect of which it had a patrimonial right, that was not always the case. The internal law of the forum State, the *lex rei sitae* and, in some cases, even international law might well be involved. Some international instruments directly determined the attribution of a patrimonial right. Hence it would be unwise to refer expressly to internal law.

62. Draft article 3, entitled "Interpretative provisions", was not supposed to have the same purpose as draft article 2, entitled "Use of terms"; but the way in which article 3, paragraph 1 (*a*), was drafted suggested that it was intended to define the term "State". It would therefore be necessary to amend the introductory clause of paragraph 1 (*a*) and say: "The provisions of the present articles applicable to the State also apply to ...". The list of the entities in question would then follow.

63. Finally, draft article 3 called for certain more general observations. For a long time, the rule of State immunity had been nearly absolute. Gradually, however, a large number of States had come to make a distinction between acts *jure imperii* and acts *jure gestionis*. Some countries had considered that entities which were not really the State did not enjoy any immunity. The draft articles that the Commission was endeavouring to formulate should be designed to enable such entities to benefit from jurisdictional immunities when they exercised authority similar to that of the State. In considering the use of terms and the way in which some terms had been translated, however, he could not help wondering whether the Commission was actually following that course. The words "governmental authority", for example, had been incorrectly translated into French as *autorité souveraine*. Municipalities were not sovereign, but, like the State, they had public or governmental authority and, in exercising such authority, they must benefit from the same immunities as the State.

Programme, procedures and working methods of the Commission, and its documentation

[Agenda item 9]

MEMBERSHIP OF THE PLANNING GROUP OF THE ENLARGED BUREAU

64. Mr. YANKOV, speaking on behalf of Mr. Barboza, Chairman of the Planning Group, proposed that the membership of the Group should be as follows: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Jacovides, Mr. Jagota, Mr. Mahiou, Mr. Malek, Mr. Ogiso, Mr. Reuter, Mr. Roukounas, Sir Ian Sinclair and Mr. Tomuschat. The Group was open-ended and other members of the Commission would be welcome to attend its meetings.

It was so agreed.

The meeting rose at 1.10 p.m.

1946th MEETING

Thursday, 15 May 1986, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/388,[1] A/CN.4/396,[2] A/CN.4/L.398, sect. E, ILC(XXXVIII)/Conf.Room Doc.1)

[Agenda item 3]

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

ARTICLE 2 (Use of terms), paras. 1 (*e*) and 2

ARTICLE 3 (Interpretative provisions), para. 1

ARTICLE 4 (Jurisdictional immunities not within the scope of the present articles) *and*

ARTICLE 5 (Non-retroactivity of the present articles)[4] (*continued*)

1. Mr. BOUTROS GHALI said that the text being elaborated by the Commission was destined to become a convention of public international law, which would be translated into perhaps 50 languages. Many of the countries which would accede to it had legal systems that were not based on the common law or on Roman law. Thus the jurists, judges and other persons in different countries who would have to analyse, interpret and apply the provisions of the future convention might not have a full knowledge of the common law or of Roman law. It was therefore essential to define the expressions used in the draft articles precisely.

2. Mr. FRANCIS said that he concurred with the Special Rapporteur's remark in his eighth report (A/CN.4/396, para. 36, *in fine*) that:

> The notion of "State property" has to be expanded to cover not only the relation to the State through ownership, but also the connection through operation and use, for it has become more and more apparent that the test of the nature of the use is a valid one for upholding or rejecting immunity in respect of property in use by the State.

3. At the same time, the Commission should bear in mind its own precedents, in particular the definition of "State property" in article 8 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.[5] Unless the text of paragraph 1 (*e*) of draft article 2 was brought into line with those precedents, confusion would result. There could, of course, be some difference between the concept of State property for the purposes of immunity and the same concept for the purposes of succession of States. Thus the definition in paragraph 1 (*e*) of draft article 2 differed from that in article 8 of the 1983 Vienna Convention; in particular, the words "operated or otherwise used" had been introduced after the word "owned". Paragraph 1 (*e*) also had to be read together with paragraph 2 of the same article, which safeguarded the meaning ascribed to the term "State property" in the internal law of any State or by the rules of any international organization.

4. He firmly believed that the concept of State property must be based on the sure foundation of the internal law of the State concerned. There was, however, some room for flexibility, for example when property was in dispute. That point could be illustrated by the example of a gift sent by the head of one State to the head of another State. If accepted, the gift became the property of the recipient; but if it was returned, it did not necessarily become once again the property of the donor State. In some countries, the law specified that the gift should go to charity.

5. He urged that paragraph 1 (*e*) of article 2 be referred to the Drafting Committee as it stood, except for the unnecesary word "otherwise" before "used by a State", which should be deleted, as suggested by Mr. McCaffrey (1945th meeting).

6. In regard to draft article 3, he agreed that the term "State", as a term of art used in international law and, more broadly, in international relations, did not require definition. Items (i) to (iv) of paragraph 1 (*a*) went into too much detail. The Commission should also consider bringing the language into line with article 21 of the 1969 Convention on Special Missions and article 50 of the 1975 Vienna Convention on the Representation of States, both of which dealt with the status of the head of State and persons of high rank. The provisions of items (ii) and (iv), if reduced to bare essentials, could be combined to produce an adequate reformulation of paragraph 1 (*a*).

7. It might be possible to dispense with paragraph 1 (*b*) if the question of quasi-judicial functions were covered elsewhere. If it were not, some elements of item (v) would have to be retained and the rest of paragraph 1 (*b*) could be transferred to the commentary.

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[1] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (*a*) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (*b*) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—paragraph 1 (*a*) and commentary thereto: *ibid.*, p. 100; paragraph 1 (*g*) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (*c*) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (*d*) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (*e*) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (*f*) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (*g*) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

Part III of the draft: (*h*) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (*i*) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (*j*) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (*k*) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (*l*) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*; (*m*) articles 19 and 20 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1985*, vol. II (Part Two) pp. 60 *et seq.*

Part IV of the draft: (*n*) articles 21, 22, 23 and 24: *ibid.*, pp. 53-54, footnotes 191 to 194; revised texts: *ibid.*, pp. 57-58, footnote 206.

[4] For the texts, see 1942nd meeting, paras. 5-8.

[5] A/CONF.117/14.

8. In draft article 4, he suggested that the provisions of subparagraphs (*a*), (*b*) and (*c*) should be made into separate paragraphs.

9. Mr. YANKOV said it was evident that the present topic involved to a much greater degree than other topics the relationship between international law and internal law. Jurisdiction was, of course, one of the most important attributes of the State and the question of immunity and the rules of international law thereon could affect State sovereignty.

10. He had doubts about the words "according to its internal law" in paragraph 1 (*e*) of draft article 2, which were unduly restrictive and at the same time somewhat confusing. In many instances, the applicable law would not be the law of the foreign State concerned; the exercise of property rights, for example, would normally be governed by the *lex situs*. It was therefore necessary to reconsider those words. In addition, the unnecessary word "otherwise" before "used by a State" should be deleted, as suggested by Mr. McCaffrey (1945th meeting).

11. In draft article 3, he found most of the provisions of paragraph 1 (*a*) either unnecessary or likely to create confusion. For example, it was difficult to conceive of a State otherwise than as including "the central Government and its various organs or departments" (item (ii)). In the case of a federal State, referred to in item (iii), it was obvious that no foreign court could challenge the legal personality of the State's political subdivisions. It would therefore seem wise not to include any definition of the expression "State", which would only create more problems than it was intended to solve.

12. Paragraph 1 (*b*), dealing with the expression "judicial functions", should not create any problems of substance but was couched in language that was not very clear. The formula "administration of justice in all its aspects" in item (iii) was very broad and certainly covered the contents of other items, in particular items (i) and (ii). Perhaps the best course would be to confine the wording of paragraph 1 (*b*) to essentials, leaving out most of the details contained in the various items of the subparagraph.

13. In draft article 4, he was not satisfied with the enumerative method used and did not find the listing of conventions in items (i) to (vi) helpful. He would be inclined to delete the article because the absence of its provisions would not detract materially from the draft. The position in regard to immunities provided for by existing conventions would be the same whether article 4 was included or not.

14. Mr. RAZAFINDRALAMBO said that what was defined in paragraph 1 (*e*) of draft article 2 was not "State property" as might be inferred from the inverted commas in which those words appeared, but merely "property". In his view the terms "property, rights and interests", which were used several times in article 15, expressed perfectly clear concepts and could not be interpreted in different ways. He did not see why the expression "otherwise" should be deleted. A State could certainly use property in different capacities, for example as owner, as possessor or as a mere user.

15. In the same subparagraph, the reference to "internal law" had rightly been contested by several members of the Commission. The ownership and possession of property was not necessarily governed by internal law, whether that of the plaintiff State or that of the forum State. In the case of movable property, for example, the law applicable was the *lex situs*. Hence the words "according to its internal law" should be replaced by "under the appropriate rules of law"; that formula had the merit of covering all the rules applicable to all kinds of property, rights and interests.

16. With regard to paragraph 2 of article 2, Mr. Tomuschat's proposal (1945th meeting) that the wording should be amended to emphasize the primacy of international law over internal law was interesting.

17. Draft article 3, paragraph 1 (*a*), raised the question whether it was necessary to include a separate reference to the sovereign or head of State and whether they could not be mentioned in item (ii) together with the central Government. It had been proposed that the list of elements forming an integral part of the State should be shortened, retaining only the central Government, political subdivisions, State organs and para-State organs. The last two elements were assimilated to the State for the purposes of jurisdictional immunities only on condition that they were acting in the exercise of the sovereign authority of the State, which excluded the decentralized bodies. But it was not sufficient for them to have prerogatives of governmental authority. The proposed criterion was for distinguishing administrative acts from purely private acts; it was not a criterion for the exercise of the sovereign authority of the State.

18. In the French text of paragraph 1 (*b*), the word "functions" had been translated first as *fonctions* and later as *pouvoirs*. Although the term "judicial functions" seemed entirely appropriate, what they included should be specified, since they played a key part in the definition of the term "court". Paragraph 1 (*b*) should be simplified by retaining only the essential elements, namely the function of judging, that was to say adjudication of litigation, and also the function of prosecution, particularly in criminal cases. It would indeed be inconceivable for a State enjoying immunity from criminal jurisdiction not to be exempted from appearance before an entity assuming the functions of criminal prosecution, such as the public prosecutor or the head of his department. Hence it could not be said that judicial functions were "the functions exercised by an impartial and independent court". That would unduly restrict the extent of the immunity of States from criminal jurisdiction and even from administrative jurisdiction.

19. Moreover, under some legal systems, measures of execution could be ordered by an authority other than a judge. If the draft articles gave the term "court" too narrow a meaning and if the expression "judicial functions" was interpreted too vaguely, a State might have difficulty, under such a system of law, in obtaining recognition of its immunity from measures of execution.

20. On the question whether draft articles 4 and 5 should be retained or deleted, he had no fixed opinion and would accept the view of the Commission.

21. Mr. CALERO RODRIGUES said that most of the provisions under discussion were useful, although it was doubtful whether all of them were absolutely necessary. In any case, much redrafting would be required.

22. As to the definition of "State property" in paragraph 1 (*e*) of draft article 2, the main need was to adjust the language to that of articles 15 and 22 and possibly article 21 if it were retained. In the form in which it was likely to emerge from the Drafting Committee, article 22 would refer to State property as property which was owned by a State or was in its possession or control, or in which the State had a legally protected interest.

23. The language used in paragraph 1 (*e*) was not consonant with the general principles of the law of property in many countries. For example, the Civil Code of Brazil drew a distinction between property or ownership, and possession, use and other rights. The term "interests" was difficult to understand in the context. The important point was the relationship between a thing and a person. Ownership conferred the widest range of rights; possession was one of the elements of ownership, and the possessor could be someone other than the owner. There were also other rights, such as that of use, which could be shared by several persons. The word "operated" had no precise legal meaning and the corresponding words used in French and Spanish were likewise unsuitable.

24. He was also dissatisfied with the concluding words "according to its internal law". Rights over immovable property were usually governed by the law of the country in which the property was situated—*lex situs*—whereas title to intellectual property was often established by international conventions, that was to say by international law. It would therefore be preferable to delete the reference to internal law in paragraph 1 (*e*).

25. He agreed with Mr. Boutros Ghali that definitions were often necessary because the future convention would be used under a variety of different legal systems by persons not necessarily familiar with the terminology employed by the Commission. For a definition to meet that situation, however, it must serve to resolve ambiguities, which paragraph 1 (*e*) did not. The Commission should re-examine the definition carefully, and in articles 15, 21 and 22 refer simply to "State property". Alternatively, article 22, and perhaps article 15, could state what was meant by State property and then the definition in paragraph 1 (*e*) of article 2 could be deleted. Nothing but confusion would result from using language in article 2 which differed from that used in articles 15 and 22. He therefore suggested that the Drafting Committee should be invited to examine paragraph 1 (*e*) of article 2 together with articles 15, 21 and 22.

26. In draft article 3, paragraph 1 (*a*) needed redrafting, and the items in that subparagraph should be rearranged in a more logical order, as suggested by Mr. Mahiou (1945th meeting). There appeared to be no need for a separate reference to the "sovereign or head of State"; whatever his functions might be, the head of State was part of the Government. Moreover, there was another article in the draft (art. 25) dealing with the immunities of a sovereign or head of State when not performing official functions.

27. With regard to paragraph 1 (*b*) of article 3, dealing with the expression "judicial functions", he agreed that the formula "administration of justice in all its aspects", in item (iii), covered all the content of the other four items. It was necessary to retain the essential elements of item (v), because in many countries judgments were not executed by court officials, so that their enforcement was not part of the administration of justice. The text of item (v) should, however, be made much shorter.

28. He had serious doubts about draft article 4. As drafted, it did not seem very useful. Too many examples were given and the one in item (vi) was clearly out of place, since there was no reference to immunities in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

29. He saw no need for draft article 5. The principle of non-retroactivity was already covered by a rule of international law stated in article 28 of the 1969 Vienna Convention on the Law of Treaties. Thus the rule of non-retroactivity was a general rule of the law of treaties and would apply regardless of whether article 5 was included in the draft or not.

30. Mr. LACLETA MUÑOZ, referring to draft article 2, paragraph 1 (*e*), said that the wording used to define the expression "State property" and that used in draft articles 21 and 22 should be concordant.

31. As it stood, paragraph 1 (*e*) had certain defects. First, it was difficult to see how rights could be "owned" by a State. The sentence could be drafted less clumsily, at least in Spanish. It might read: *Se entiende por "bienes de Estado" los bienes que son propiedad de un Estado así como los derechos e intereses que éste puede usar o disfrutar* ("State property means property owned by a State and rights and interests which that State is entitled to exercise or enjoy"). The term "otherwise" was also not satisfactory: the adverb "lawfully" would be more correct. The expression "according to its internal law" was obviously too restrictive. It could be replaced by the words "according to the applicable law; or, if the adverb "lawfully" was included, the word "law" need not be qualified and it would be possible simply to say "in accordance with a legal system". Thus amended, paragraph 1 (*e*) would read as follows:

> "State property means property owned by a State in accordance with a legal system and rights and interests which that State is lawfully entitled to exercise or enjoy."

32. Paragraph 2 of article 2 was satisfactory. Its drafting could in no way call into question the primacy of international law over internal law.

33. In draft article 3, paragraph 1 (*a*), the head of State should perhaps be mentioned as the highest representative of the State, but the words "in his public capacity" should be added. The 1969 Convention on

Special Missions had been much criticized for mentioning only the head of the mission, without referring to the mission itself. The Commission should not commit the opposite error by omitting all reference to the head of State from the draft articles on jurisdictional immunities.

34. In paragraph 1 (*a*) (ii), it would be preferable to replace the expression "central Government", which implied that there were other types of government, by the words "Government of the State". In paragraph 1 (*a*) (iii), the phrase "in the exercise of its governmental authority" had been translated into Spanish as *en el ejercicio del poder público*. Although that phrase did not express the concept of sovereignty, it was perfectly acceptable, since governmental authority could only derive from the sovereignty of the State.

35. In the list of the constituent elements of "judicial functions" in paragraph 1 (*b*), "administration of justice in all its aspects", which clearly included all judicial functions, should come first. Paragraph 1 (*b*) (v) was nevertheless useful and should be retained.

36. As international conventions were never acceded to by all States, it would be no use enumerating all the relevant conventions in draft article 4; and above all, conventions which were being effectively applied should not be put on the same footing as those which had not yet entered into force. The first part of the text should therefore be reformulated. For example, it might read: "The fact that the present articles do not apply to jurisdictional immunities provided for in ...". After listing a certain number of conventions, the text would continue "relating to diplomatic missions, consular missions ...". Finally, draft article 5 was not really indispensable.

37. Mr. JAGOTA said that, since the various aspects of State property had been elaborated in articles 15, 16, 18, 19 and 21 to 24 of the draft, he saw no need to retain the definition of "State property" in draft article 2, paragraph 1 (*e*). If that definition were to be retained, however, it would be preferable not to delete the phrase "according to its internal law", in order to be consistent with article 8 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.[6] A body of State practice would also emerge and help to promote consistency in the law. Depending on the decision taken on those two points, the Drafting Committee might also wish to consider whether paragraph 2 of article 2 was necessary.

38. The interpretative provisions of draft article 3 were more flexible than the terms defined in draft article 2, which was both an advantage and a disadvantage. The first term dealt with in article 3 was "State", which had never been defined in any convention except when qualified by an adjective, as in "sending State", "receiving State" or "host State". If it were now decided to adopt such a provision, the question of its precise scope would arise and, specifically, whether it would cover entities that might not enjoy full sovereignty, such as those formerly known as protectorates or associated States. Such entities had treaty-making capacity and complete autonomy in internal matters, but might not be Members of the United Nations. That was not just a theoretical possibility, as was clear from article 305 of the 1982 United Nations Convention on the Law of the Sea. His own view was that it would be preferable not to define the term "State" in too much detail. The entities in question would be covered by the word "includes" in paragraph 1 (*a*) of article 3, and the matter could be left to State practice. Possibly a suitable reference could be included in the commentary.

39. He was not sure whether the definition of "judicial functions" in paragraph 1 (*b*) of draft article 3 was necessary, but would not oppose its retention. A number of drafting changes would, however, be required. In particular, he would suggest for the Drafting Committee's consideration that a new clause relating to judicial measures of constraint be added to paragraph 1 (*b*) or that an appropriate reference to such measures be made in the commentary.

40. It would be useful to retain draft article 4, although its drafting too required consideration, as did that of draft article 5, particularly the opening clause.

41. Mr. USHAKOV proposed that paragraph 1 (*e*) of draft article 2 be amended to read:

> " 'State property' means property, rights and interests which, at the time of the act that gave rise to proceedings in a court of another State, belonged to the State according to its internal law."

Among State property, he distinguished between property situated in the territory of the State claiming ownership, which raised no problem; property situated in international territory, whether on the high seas or in outer space, for example, which did not concern the Commission in the present instance; and property situated in the territory of another State. Article 15 as provisionally adopted by the Commission provided that, in the case of a dispute concerning ownership by a State of property situated in the territory of another State, the competent court of the latter State could exercise jurisdiction. The applicable law, in his view, was that of the former State.

42. Supposing that an action was brought against an agency of Aeroflot in Switzerland which had an account with a Swiss bank, if the competent Swiss court ordered a drawing on that account and the ambassador of the Soviet Union claimed that the money deposited in the account did not belong to the Aeroflot agency but to the Soviet State, the court would have to refer to Soviet law to determine whether Aeroflot was or was not, under that law, a legal person separate from the Soviet State. If it was a separate legal person, the court would be justified in ordering the drawing. Another example would be that of a Soviet ambassador in Switzerland who was given a gift of great value. On being dispossessed of the gift in question by the Soviet Government, the ambassador could apply to the Swiss courts, asserting that he had received the gift in his personal capacity. There again, the Swiss court would have to refer to Soviet law to determine whether, under that law, a Soviet ambassador was entitled to retain, for his personal use, gifts of a certain value which he had received.

[6] A/CONF.117/14.

43. In conclusion, he observed that, in the French text of paragraph 1 (*e*) of article 2, the word *biens* was used in two different senses. He suggested that the paragraph should refer to *propriété d'un Etat* rather than to *biens d'un Etat*, but feared that the word *propriété* might not be accepted legal terminology.

44. Mr. DÍAZ GONZÁLEZ said that many of the doubts he felt about paragraph 1 (*e*) of draft article 2 had already been referred to by Mr. Calero Rodrigues and Mr. Lacleta Muñoz. He shared their views and, in particular, endorsed the comments made by Mr. Lacleta Muñoz about the drafting problems that arose in Spanish. The fact remained, however, that one could not speak of ownership of rights. Since, in any case, a State could exercise its rights and manage its interests only within the limits imposed on it by law, he suggested that, in paragraph 1 (*e*), the words "according to its internal law" should be replaced by "according to law". It would then be for the Drafting Committee to find the best form of words, having regard to the diversity of legal systems and official languages.

45. In draft article 3, paragraph 1 (*a*) (i), he thought it would be sufficient to refer to the head of State, an expression which covered the notion of "sovereign". He supported the proposal made at the previous meeting by Mr. Mahiou regarding the subdivisions of paragraph 1 (*b*). In paragraph 1 (*b*) (iv), he would prefer the words *fases del proceso judicial* (stages of legal proceedings) to the words *fases de los procedimientos judiciales*.

46. He had doubts about the usefulness of draft article 4, which in his opinion should be redrafted so as to distinguish between conventions that had entered into force and those that were not yet being applied, as proposed by Mr. Calero Rodrigues. Perhaps the reference to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents should be retained.

47. Draft article 5 also seemed unnecessary, in so far as no legal instrument had ever been retroactive unless otherwise expressly so provided.

48. Mr. McCAFFREY, referring to a point raised by Mr. Ushakov in connection with draft article 2, paragraph 1 (*e*), noted that many members of the Commission favoured the replacement of the reference to internal law by a reference to the law of the forum and considered that the forum State should apply its rules of private international law in making determinations. Courts throughout the world had decided that an autonomous body of rules of private international law was needed to decide the matters in question because the whole issue in a case could turn on who owned the property and whether a State could, by claiming an ownership interest, trigger an automatic reference to its internal law that would be unfair to the other party to the action.

49. Supposing, for instance, that a member of the staff of the Embassy of the United States of America in Moscow had a claim in respect of a right or interest in housing, should that claim be determined in accordance with United States law? Or, supposing that a patent had been granted to a company which had then been nationalized, what law should apply in determining who owned the patent: the law of the forum State or the law of the State claiming ownership of the patent? In decided cases on the latter point, the law of the forum State had been applied. The universal rule was that the *lex situs* governed questions of ownership of real property. Obviously that must be so; it would be futile for a United States court to seek to pronounce on questions of title to property located in Switzerland when it could not enforce its decision. In the circumstances, the only solution was to omit from paragraph 1 (*e*) of article 2 all reference either to internal law or to the law of the forum.

The meeting rose at 1 p.m.

1947th MEETING

Friday, 16 May 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Jagota, Mr. Koroma, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Co-operation with other bodies

[Agenda item 10]

1. The CHAIRMAN informed the Commission that a letter had been received from the Director of Legal Affairs of the Council of Europe, inviting the Commission to be represented at a meeting of the European Committee on Legal Co-operation to be held from 26 to 30 May at Strasbourg. He understood that the Commission had in the past declined invitations to attend meetings held during its sessions. If there were no objections, therefore, he would take it that members agreed that the Secretary of the Commission should be asked to reply to the effect that, as the Commission was in session, it would unfortunately be unable to be represented at the meeting.

It was so agreed.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/388,[1] A/CN.4/396,[2] A/CN.4/L.398, sect. E, ILC(XXXVIII)/Conf.Room Doc.1)

[Agenda item 3]

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[1] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1986*, vol. II (Part One).