Document:-
A/CN.4/SR.1920

Summary record of the 1920th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
1985, vol. I

agents. Similarly, property such as a ship or aircraft could be under the control of a State through the captain or crew of the ship or aircraft in question. But article 21 was not intended to cover the assets of companies in such a way as to entitle them to immunity from arrest, attachment or execution.

35. As to the scope of the draft articles, the intention was that they should cover attachment, arrest and execution where ordered by a court of law or tribunal, but not decrees of an executive or legislative nature under which property was nationalized or requisitioned.

36. Mr. FRANCIS, referring to draft article 24, paragraph 1 (*c*), said that Mr. Reuter seemed to have suggested that property of a central bank should be immune from attachment. He would be grateful for further clarification on that point.

37. Mr. REUTER, after remarking that the precise meaning of the English term "property"—incidentally, well rendered in French by the word *biens*—still had to be decided, said that he had not adopted any position on paragraph 1 (*c*) of draft article 24 and that his comments had been intended chiefly for the Special Rapporteur. Taken literally, the term "property" obviously covered money (banknotes, gold specie, currency in the general sense of the term) but also applied to other items, such as buildings. He did not know whether it was common for a central bank to own a building in a foreign country, but such a situation was not inconceivable. If the term "property" had a general meaning, it would follow that immunity applied to all of the central bank's property and, consequently, to property of which the State was not necessarily the direct owner. In most countries the central bank had a legal personality separate from that of the State. If it agreed with the relevant terms of article 24, the Commission was preparing to recognize the immunity of entities which were not, properly speaking, the State, an attitude to which he had no objection.

38. Whereas his position with regard to State immunity was more restrictive than that of other members, his views regarding the immunity to be accorded to entities which, while possessing a personality separate from that of the State, none the less enjoyed some of its sovereign rights were more flexible.

39. By replacing the term *biens* by the term *fonds*, which applied to all forms of money, the Commission would be subscribing to the idea put forward by Mr. Yankov, namely that certain types of State property preserved their character as public property even when in hands other than those of public authorities. He was not in favour of extending State immunity in an unlimited manner and under all possible conditions, but he thought that immunity should be extended to entities under public law which were associated with the exercise of sovereignty. When it had considered part 1 of the draft articles on State responsibility, the Commission had accepted the idea that the State should be held responsible for acts committed not only by itself, but also by persons possessing the attributes of public authority. Since the exercise of public power was the source of State immunity, it was right and proper that organizations partaking of public authority should also enjoy immunity.

40. In conclusion, he explained that in his previous statement he had confined himself to reviewing the choices open to the Special Rapporteur and to the Commission in the event that it rejected the draft article submitted by the Special Rapporteur.

41. Chief AKINJIDE said that he wholeheartedly supported paragraph 1 (*c*) of draft article 24, which he regarded as extremely important. In the case of his own country, for instance, the majority of its foreign currency reserves were held abroad and only the absolute minimum was retained in Nigeria for foreign exchange purposes. He had been involved in litigation in which such moneys, held by the Central Bank on behalf of the Government of Nigeria, had been attached and, on one occasion, virtually all its assets in the United Kingdom had been frozen overnight under the wide-ranging terms of a Mareva injunction.[5] The same kind of thing had occurred in Frankfurt when an injunction had been granted to a creditor even before judgment had been delivered. It was therefore highly appropriate to include such an all-encompassing provision in the draft.

42. Mr. THIAM said that he, too, was in favour of limiting immunity from execution, but he shared the views expressed by Mr. Reuter on the subject of the immunity to be accorded to entities exercising public authority.

43. Sir Ian SINCLAIR noted that the opening clause of draft article 24 read: "Notwithstanding article 23 and regardless of consent or waiver of immunity". Bearing in mind the terms of draft article 23, he wondered to what extent that clause might not be incompatible with the existing codification conventions, all of which provided that, once a separate waiver of immunity from jurisdiction had been given, there was no restriction on the property that could be affected in relation to the execution. If there were to be so many types of property in respect of which consent and waiver could not operate, what would be left?

The meeting rose at 1.05 p.m.

[5] See *Trendtex Trading Corporation Ltd.* v. *Central Bank of Nigeria* (1977) (*The All England Law Reports, 1977*, vol. 1, p. 881).

1920th MEETING

Friday, 5 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, 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. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/376 and Add.1 and 2,[1] A/CN.4/388,[2] A/CN.4/L.382, sect. D, ILC (XXXVII)/Conf.Room Doc.1 and Add.1)

[Agenda item 4]

Draft articles submitted by the Special Rapporteur[3] (*continued*)

Article 21 (Scope of the present part)

Article 22 (State immunity from attachment and execution)

Article 23 (Modalities and effect of consent to attachment and execution) *and*

Article 24 (Types of State property permanently immune from attachment and execution)[4] (*continued*)

1. Mr. BALANDA thanked the Special Rapporteur for the extensive and instructive documentation he had provided and for constantly taking account of the developing countries' interests. Stability in international relations depended on balanced international law, such as that the Commission was elaborating through the study of the various topics on its agenda. The topic under consideration was an extremely important one, as shown by the Special Rapporteur's seventh report (A/CN.4/388) and, in particular, part IV of the draft articles. Since the principle of State sovereignty lay at the heart of the question of jurisdictional immunities, the Commission had to proceed very cautiously. It must not follow the pattern of internal law too closely or place States on the same footing as private individuals, since State activities were always intended to promote the general interest.

2. At the previous meeting, Mr. Reuter had, in discussing the legal capacity of States engaging in activities in the territory of other States, come to the conclusion that there were as yet no rules of international law to govern that situation and that capacity to acquire immovable property, for example, was governed by bilateral agreements based on reciprocity. Mr. Reuter had rightly pointed out that State sovereignty formed the basis of jurisdictional immunities. The Commission should therefore agree that all activities by the State and its decentralized administrative agencies had to enjoy the protection provided by jurisdictional immunity and should also take account of governmental activities, bearing in mind their purpose. As he himself had already stated (1917th meeting), development activities should be regarded as governmental activities, with all the consequences deriving therefrom. The Special Rapporteur had, moreover, noted that

> ... The question of jurisdictional immunities relates, in this property connection, to the nature of the use of State property or the purpose to which property is devoted rather than to the particular acts or activities of States which may provide a criterion to substantiate a claim of State immunity. (A/CN.4/388, para. 9.)

Immunity from jurisdiction or from execution thus did not mean that a State would not be held responsible for its acts. Immunity did not do away with State responsibility or with the obligation to provide compensation.

3. The articles contained in part IV of the draft were generally acceptable, subject to drafting improvements. In draft article 21, for example, the words "from attachment, arrest and execution" did not cover confiscation and they should therefore be replaced by the more general expression "from any measure of constraint or forced execution, such as attachment, arrest and execution".

4. In draft article 22, paragraph 1, the words "State immunity from attachment, arrest and execution" should also be replaced by the words "State immunity from any measure of constraint or forced execution, such as attachment, arrest and execution". For the sake of precision, a more general term than the word "order" should be used in paragraph 1, for the word "order" applied to pre-judgment attachment, but not to execution, which was the result of a court decision. The words "as an interim ... measure" in the same paragraph would require further clarification. Subparagraph (*a*) should be amended to read: "the State concerned has consented thereto". Subparagraph (*b*) was entirely acceptable. Interpreted *a contrario*, that provision implied that property in use by the State in commercial governmental service enjoyed immunity from execution and it thus met his concern about the protection of the interests of certain countries. Subparagraph (*d*) raised the question whether the property was identified by the State or by a court. An answer to that question should be given either orally by the Special Rapporteur or in the commentary.

5. With regard to draft article 23, he had serious doubts about the soundness of the view that consent, once given, could not be revoked or withdrawn (*ibid.*, para. 86, *in fine*). In the interests of the stability of international relations, it made sense that a State

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[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1985*, 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.*

[4] For the texts, see 1915th meeting, para. 4.

should not be able to withdraw the consent it had given in a particular case; but if it had consented to submit to measures of execution under a bilateral or multilateral agreement and could not then withdraw such consent, it would be mortgaging its sovereignty. States had to be allowed to change their minds. Since it should, moreover, be an obligation, not an option, for a State to give its consent in writing, article 23, paragraph 1, should begin with the words "A State shall be bound to give its consent in writing ...".

6. He appreciated the Special Rapporteur's attempt in draft article 24 to protect certain types of property—to which others might well be added—from any form of attachment or execution. Reference should be made in paragraph 1 (*a*) not only to international organizations of a universal character, but also to international organizations of a regional character.

7. In the title of draft article 25,[5] it would be better not to distinguish between personal sovereigns and other heads of State, since what mattered in that context was the function performed. It seemed, moreover, to be a contradiction in terms that a sovereign might hold private immovable property on behalf of the State, as provided in paragraph 1 (*a*). He also suggested that the word "private" should be added before the word "property" in paragraph 2.

8. Draft article 26[6] referred to certain periods of time, which should be defined more precisely. Paragraph 4 contained a rule that was liable to interfere with the application of the procedural law of some countries. It went into too much detail concerning the internal law of States, whereas a mere reference to such law would be enough. Another solution would be to spell out the rule in even greater detail and invite future States parties to amend their legislation accordingly. In conclusion, he said it was quite clear that the purpose of article 26 was to enable the authorities of a State which had waived immunity from execution to be informed of the content of the judgment rendered and to take any steps the judgment might require, thereby avoiding delays that would be detrimental to the parties' interests.

9. Mr. USHAKOV said he wished to make it clear from the outset that he disagreed almost entirely with the proposals which the Special Rapporteur had made in his seventh report (A/CN.4/388) and which were tantamount to saying that immunity in respect of State property did not exist. States were sovereign in their territory and outside it, on an equal footing with other States: hence the principle, which formed the basis of State immunity, that a State could not be subjected to another State's governmental authority, unless, of course, it had consented thereto. In the case of measures of attachment or execution, that principle was all the more important in that governmental authority would be exercised by force. But it would, in his view, be inconceivable that force might be used—in the case in point, by taking measures of attachment or execution—against the property of a State without the latter's consent. Until now, it had been a principle of international law that State property enjoyed absolute and unlimited immunity from such measures unless the State concerned had expressly consented to waive such immunity. The articles of part IV of the draft appeared to challenge that principle.

10. Referring to draft article 22, he noted that State property should be protected not only from court orders, but also from any decision which might be taken on the orders of an authority of another State, such as the head of State. The concept of State property thus had to be defined more clearly, since the formulae used in draft articles 21 and 22, namely "property in its possession or control" and "property in the possession or control of a State", were confusing. According to article 8 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts,[7]

> ... "State property of the predecessor State" means property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

State property could therefore be defined only by reference to the internal law of States, as could ownership, which should not be confused with acquisition. It also had to be determined exactly what property was being dealt with and how it happened to be in the receiving State's territory: it might have been imported or acquired on the spot in accordance with the internal law of the receiving State. Under Swiss law, for example, other States were not allowed to acquire land in Swiss territory. A receiving State might or might not allow imports of certain types of property, but, if it did allow them, it had to accept the consequences.

11. In his view, the only exception to the rule of immunity of State property was the case where the State concerned expressly consented to measures of execution. It would thus serve no purpose and would only present difficulties to try to list all the forms of consent in draft article 23. The words "*inter alia*, in an agreement, oral or otherwise" could simply be added at the end of article 22, paragraph 1 (*a*): any list of the methods of expressing consent should, in any case, incorporate the words "*inter alia*" to indicate that it was not limitative. Paragraph 1 (*d*) of article 22 raised the question who would identify the property. In his view, only the State concerned could do so; the mere fact of its consent indicated that it owned the property in question. Paragraph 1 (*c*), which appeared to be inoffensive, was in fact dangerous. Since civil proceedings would be lengthy, the attachment of property which would revert to the State at the end of the proceedings could not be allowed. Paragraph 1 (*b*) undermined the immunity of State property, for it would be difficult to distinguish between property in commercial service and other property, particularly in the case of funds. To provide that the foreign State could, through its courts, determine what use was made of the property in question was to assume that immunity did not exist. Such an approach was unacceptable.

[5] For the text, see 1915th meeting, para. 4.

[6] *Ibid.*

[7] A/CONF.117/14.

12. Draft article 24 was also based on the hypothesis of non-immunity, since all property other than the types of property listed therein could be attached or taken in forced execution.

13. He was at a loss to understand the purpose of draft article 25. If property was not State property, it had to be private property. In the case of diplomatic staff, however, such matters would be governed by diplomatic law; any difficulty that might arise if a head of State spent private holidays in a foreign country would be a matter for international courtesy rather than for international law.

14. Mr. TOMUSCHAT, paying tribute to the Special Rapporteur for his excellent seventh report (A/CN.4/388), said it was one of the basic premises of international law, as laid down by the PCIJ in *The "Lotus"*,[8] that no State could invoke its sovereign powers in the territory of another State. Although the exercise of sovereign powers had been permitted in some cases under international treaties and, in particular, the 1961 and 1963 Vienna Conventions on diplomatic relations and on consular relations, there was no rule of international law enjoining the territorial State to tolerate commercial activities by a foreign State. The foreign State could engage in such activities not as an entity vested with sovereign powers, but as a legal person which could invoke internal law and avail itself of economic opportunities under that law. It was thus bound to comply with all the relevant substantive rules and also to accept the machinery set up to enforce those rules.

15. Article 21 was, to his mind, perhaps the most objectionable of the draft articles. As had already been noted, the scope of the article had been stretched to cover situations which at first glance could not possibly be thought to involve State immunity. There was no reason, for instance, why an ordinary corporation set up for business purposes should benefit from immunity from attachment and execution simply because a State exercised economic control over it or had some sort of interest in it. By referring to property of which a State was not the owner, draft article 21 appeared to include a wide range of other legal subjects in its scope *ratione personae*, in clear derogation from the general purpose of the draft articles, namely that only a foreign State, as defined in draft article 3, paragraph 1 (*a*), should benefit from immunity. If the State was not the owner, there must necessarily be a third person who was and, given the wide definition of a foreign State contained in draft article 3, such a third person must almost by necessity be a private person, whether natural or legal.

16. Mr. Reuter (1919th meeting) had, moreover, rightly pointed out that, in the technical sense State property within the meaning of draft article 21 differed from State property under draft article 2, paragraph 1 (*f*). In the territory of another State, a State generally had no rights by virtue of its own internal law. An autonomous concept of State property would therefore have to be evolved or the definition in draft article 2 would have to be changed.

17. Article 21 did not really provide for a variety of modalities of execution and enforcement, for it referred to attachment, arrest and execution "by order of a court". In his own country, however, the attachment of movable property was carried out by an execution officer specifically appointed for the purpose and he assumed that the same was true in other countries as well.

18. The wording of draft article 22, paragraph 1 (*b*), and that of draft article 23, paragraph 1 (*a*), differed considerably and should be harmonized. Only the first criterion, namely the commercial requirement, should be retained, since the retention of the second requirement, namely that property used for commercial purposes should be unconnected with governmental service, would amount to an implicit revision of article 2, paragraph 1 (*g*). It would, moreover, never be enough to determine that any specific assets had been the object of a commercial transaction, since the assumption was that such assets could still—and precisely through the commercial transaction—serve some governmental purpose. Since Governments were, however, always bound to promote the common good, practically no ground would be covered by article 22, paragraph 1 (*b*). In any event, he was not at all sure that the words "non-governmental service" had been used elsewhere in the draft articles.

19. Account also had to be taken of paragraph 2 of article 3 of the draft, which provided that, in classifying a contract as commercial or non-commercial, reference should be made not only to the nature, but also to the purpose, of the contract in question. In draft article 22, paragraph 1 (*b*), the element of purpose would be further emphasized.

20. The purpose of draft article 23 was to determine the manner in which consent could be expressed; but, in his view, it would be a truism to explain that a waiver could be made in writing. It would, however, be important to determine whether consent could be oral and whether it must be explicit.

21. He had some doubts about the use of the words "provided that the property in question ..." at the end of article 23, paragraph 1, since they implied that the intention was to restrict the sovereign freedom of States to waive their immunity to the field of commercial transactions. Draft article 24 seemed to establish a new category of rules of *jus cogens*, as pointed out by Sir Ian Sinclair (*ibid.*), but article 23 went much beyond the reasonable limitations set in article 24. It would not permit States, even if they consented to do so, to forgo immunity from execution if and when the assets at stake did not exactly serve commercial purposes. There appeared to be no justification for such a rule, which might even hamper States in their dealings with each other or with private corporations. Accordingly, article 23 should in his view be reduced to the essential proposition that a waiver could be contained not only in an inter-State instrument, but also in a private contract.

22. From the point of view of legal clarity and certainty, it would also be appropriate to make consent subject to a far-reaching condition of validity. The cases covered by article 24 were easily identifi-

[8] Judgment No. 9 of 7 September 1927, *P.C.I.J., Series A, No. 10.*

able. The same could, however, not be said of the borderline cases arising from the distinction between assets used for commercial purposes and other property. Indeed, the purpose of a waiver could well be precisely to remove doubts as to whether property belonged to one category or the other. Under article 23 as it now stood, consent could always be challenged as not meeting the requirements of paragraph 1 (*a*). Article 23 might also deprive the consent referred to in article 22, paragraph 1 (*a*), of any significance because consent would always be confined to property used in commercial service, as provided in article 22, paragraph 1 (*b*).

23. With regard to article 24, paragraph 1 (*a*), he agreed with Mr. Thiam (*ibid.*), and Mr. Balanda that the property of regional international organizations should also be protected. Paragraph 1 (*b*) raised the question whether, in the case where a foreign State sent military aircraft which it had bought in another country back to the manufacturers for a general overhaul and then refused to pay the bill, the creditor could make an application for arrest in order to induce its State client to pay its debt. He could see no objection to such a procedure, but the problem might also be dealt with through the exercise of a right of retention.

24. Mr. FLITAN congratulated the Special Rapporteur on his seventh report (A/CN.4/388), which was equal to the difficulty of the topic and provided an overview of the draft articles. Immediately upon taking up the topic, the Commission had been divided as to whether immunity should be absolute or restricted. Numerous arguments had been put forward in support of both positions, but what mattered now was to adopt a pragmatic approach. Relations between States had a tendency to develop and cases in which one State was present in the territory of another were becoming more and more frequent. In order to promote co-operation between States, an equitable balance had to be established between their respective interests. The Commission's task was thus to prepare a draft which would be acceptable to the largest possible number of States and help to promote international co-operation. The successful completion of that task would depend on whether the two positions, opposed though they might seem, could be brought closer together. It must be borne in mind that a State not only granted jurisdictional immunities, but enjoyed them as well, and the interests of a State which granted jurisdictional immunities could not be regarded as more important than those of a State which enjoyed such immunities. The Commission might therefore have provided for too many exceptions to the rule of the jurisdictional immunity of States in part III of the draft. As he had noted in connection with the consideration of draft articles 14 and 15 at the Commission's thirty-fifth session, the effect of the exceptions to State immunity provided for in the draft was almost to render the principle of immunity devoid of content.[9] Part IV of the draft was entirely appropriate in that it seemed to restore the balance by establishing, in respect of certain types of property, the principle of permanent and absolute immunity which neither consent nor waiver could modify.

25. Referring to the distinction that Chief Akinjide had drawn (1917th meeting) between developed, developing and socialist countries, he noted that, from the point of view of their development, countries could be divided into only two categories, that of developed countries and that of developing ones. To add a third category of socialist countries was to introduce the criterion of a country's economic, social or political régime. A socialist country could just as easily be a developed country as a developing one.

26. Draft article 21, which defined the scope of part IV of the draft, would have to be re-examined, primarily from the point of view of form. Unlike other members of the Commission, he did not think that the the article had to be confined to State immunity in respect of property. As the Special Rapporteur explained in his seventh report (A/CN.4/388, para. 4), it was incorrect to refer to "property immunity", since it was ultimately always a State and not property that enjoyed immunity, whether immunity from jurisdiction or immunity from attachment, arrest and execution. According to article 1, moreover, the articles of the draft, including article 21, applied to "the immunity of one State and its property". Article 21 should therefore be drafted in general terms on the basis of the wording of article 1, and might read:

> "The present part applies to the immunity of one State and its property in respect of the circumstances in which the courts of another State may order attachment, arrest and execution."

27. The title of draft article 22 referred only to attachment and execution, while the text referred to attachment, arrest and execution. In the French version, moreover, the title of the article referred to immunity *de l'Etat*, whereas the title of part IV of the draft referred to immunity *des Etats*.

28. The words "In accordance with the provisions of the present articles" at the beginning of paragraph 1 of article 22 were superfluous and could be deleted. The words "property in which a State has an interest" required further clarification, especially as to the nature of the interest and its importance. The words "property ... is protected by the rule of State immunity from attachment, arrest and execution" in the same paragraph were not sufficiently in line with two other provisions of the draft articles. First, according to article 7, paragraph 2, a proceeding before a court of a State was considered to have been instituted against another State so long as the proceeding sought to compel that other State to bear the consequences of a determination by the court which might affect its rights, interests, properties or activities. Secondly, article 6, paragraph 1, indicated not that property was "protected", but only that a State was "immune from the jurisdiction of another State"; the Commission might borrow that wording, which did not imply any idea of compulsory protection, in drafting paragraph 1 of article 22. A possible "order of a court", as referred to in paragraph 1, was, moreover, not a decisive element, since the problem

[9] *Yearbook ... 1983*, vol. I, p. 81, 1768th meeting, para. 4.

of attachment could arise before an order was issued, for example at a preliminary stage in proceedings in which the State objected to jurisdictional immunity.

29. In paragraph 1 (*a*) of article 22, it would be appropriate to include a safeguard clause stating that article 24 placed restrictions on the content of that subparagraph. The words "such" and "in question" in that subparagraph were superfluous. As to paragraph 1 (*b*), the Drafting Committee would have to decide whether the word "and", which was used in the phrase "in commercial and non-governmental service", should be retained or deleted. The wording of paragraph 1 (*d*) could be much simpler if express reference were not made to the identification of the property. It would be enough to state that the property had to be allocated for satisfaction of a final judgment or payment of debts incurred by the State.

30. Paragraph 2 of article 22 required only a few drafting amendments, which he would submit to the Drafting Committee.

31. In the title of draft article 23, the words "Modalities and effect of" could be deleted and the words "attachment and execution" should be replaced by the words "attachment, arrest and execution". Paragraph 1 of that article should begin with the words "Pursuant to the provisions of article 22, paragraph 1 (*a*)", thereby establishing a link between the two articles. In view of the importance of consent to attachment, arrest or execution, it would be logical to maintain the requirement that consent should be given in writing and not to allow oral consent. Paragraph 1 (*a*), which dealt with property forming part of a "commercial transaction", could be deleted; there was no need to include a reference to such property in article 23, which was directly related to article 22, paragraph 1 (*a*), which provided that the State concerned could consent to attachment, arrest or execution against the property in question.

32. Draft article 24 required only a few drafting changes. For example, the words "permanently immune" in the title should be replaced by the words "absolutely immune" or "totally immune", since time was not the decisive factor in that context. If the Commission decided to list the three principal forms of attachment, the word "arrest" should be added to the title. The words "Property of a central bank" in paragraph 1 (*c*) should, as already suggested, be replaced by the words "Funds of a central bank". The five categories of property referred to in paragraph 1 (*a*) to (*e*) were actually only a minimum list of the types of property that enjoyed absolute immunity from attachment, arrest and execution.

33. As to the term "State property", he pointed out that draft article 2, paragraph 1 (*f*), contained a definition that should meet the concern expressed by Mr. Ushakov.

The meeting rose at 1 p.m.

1921st MEETING

Monday, 8 July 1985, at 3.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Balanda, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/376 and Add.1 and 2,[1] A/CN.4/388,[2] A/CN.4/L.382, sect. D, ILC (XXXVII)/Conf.Room Doc.1 and Add.1)

[Agenda item 4]

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

ARTICLE 21 (Scope of the present part)

ARTICLE 22 (State immunity from attachment and execution)

ARTICLE 23 (Modalities and effect of consent to attachment and execution) *and*

ARTICLE 24 (Types of State property permanently immune from attachment and execution)[4] (*continued*)

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[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.*

[4] For the texts, see 1915th meeting, para. 4.