

Document:-
A/CN.4/L.342

**Texts adopted by the Drafting Committee: article 1, article 2, para. 1 (a), and articles 7 to 9 -
reproduced in A/CN.4/SR.1749, paras 26 and 47, and SR.1750, paras. 3 and 9**

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
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organization in question. The word “each” in the English text should therefore be deleted, since it was not necessarily each treaty that involved the organization and its member States.

35. Sir Ian SINCLAIR said that, in his view, the problem with the English version arose because the words “*d’une manière distincte*”, which could be related to the word “each”, had not been translated. He therefore suggested that in the English text the phrase “each involving an international organization” should be amended to read “each involving in a distinctive manner an international organization”.

It was so decided.

36. Mr. MAHIOU, also referring to the first sentence, asked whether it would not be best to replace the words “several treaties” by the words “two or more treaties”.

37. Mr. REUTER (Special Rapporteur) said that he preferred the existing wording; there would of course be at least two treaties—the original treaty and the constituent instrument of the organization—but, in some cases, there might also be a third treaty between the members of the international organization concerned and its partners which were parties to the original treaty.

38. Mr. USHAKOV, referring to the second sentence of paragraph 2, said that the expression “run by an international organization” did not seem particularly apt for a customs union.

39. Mr. REUTER (Special Rapporteur) suggested that, in order to meet that point, the expression in question should be amended to read “in the case where it takes the form of an international organization”.

It was so decided.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

40. Mr. CALERO RODRIGUES proposed that in the English text the words “from a number of” should be replaced by the words “from the following”.

It was so decided.

Paragraph (4), as amended, was approved.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were approved.

Paragraph (8)

41. Mr. McCAFFREY, supported by Sir Ian SINCLAIR, proposed that in the first sentence the word “third” should be deleted; read in conjunction with the last part of the concluding sentence of paragraph 7, it was confusing.

42. Mr. USHAKOV proposed that the words “third States” should be replaced by wording indicating that

the States concerned were not parties to the treaty in question.

43. Mr. SUCHARITKUL agreed with Mr. Ushakov and proposed that the same change should be made in the last line of paragraph (7).

44. The CHAIRMAN suggested that the Special Rapporteur should be invited to redraft the first sentence of paragraph (8) in the light of the comments made.

It was so decided.

45. Mr. MAHIOU pointed out that the fourth sentence of paragraph (8) should be amended in the same way as the second sentence of paragraph (2).

46. Mr. REUTER (Special Rapporteur) agreed. He suggested that the words “that manages a customs union” should be replaced by the words “that has been given its form by a customs union”.

It was so decided.

Paragraph (8), as amended, was approved.

Paragraphs (9) to (17)

Paragraphs (9) to (17) were approved.

The commentary to article 36 bis, as amended, was approved.

Commentary to article 37 (Revocation or modification of obligations or rights of third States or third organizations)

The commentary to article 37 was approved.

The meeting rose at 6 p.m.

1749th MEETING

Tuesday, 20 July 1982, at 10.05 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ
later: Mr. Paul REUTER

Draft report of the Commission on the work of its thirty-fourth session (*continued*)

CHAPTER II. *Question of treaties concluded between States and international organizations or between two or more international organizations (continued)* (A/CN.4/L.344 and Add.1-6)

C. *Draft articles on the law of treaties between States and international organizations or between international organizations (continued)* (A/CN.4/L.344 and Add.1-5)

1. The CHAIRMAN invited the members of the Commission to limit their observations to points of substance.

PART V (INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES) (A/CN.4/L.344/Add.4)

SECTION 4 (Procedure)

Commentary to article 67 (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

2. Mr. McCAFFREY suggested that the last sentence should be amended by replacing the words "to require the" by "to justify requiring the".

It was so decided.

Paragraph (3), as amended, was approved.

The commentary to article 67, as amended, was approved.

Commentary to article 68 (Revocation of notifications and instruments provided for in articles 65 and 67)

The commentary to article 68 was approved.

Section 4, as amended, was adopted.

SECTION 5 (Consequences of the invalidity, termination or suspension of the operation of a treaty)

Commentary to article 69 (Consequences of the invalidity of a treaty)

The commentary to article 69 was approved.

Commentary to article 70 (Consequences of the termination of a treaty)

3. Sir Ian SINCLAIR said that he would like the Special Rapporteur to explain what was meant by the expression "a rule regarding conflict of laws over time" in the last sentence of the commentary.

4. Mr. McCAFFREY said that he believed the expression "conflict of laws", which represented a notion of private international law, was inappropriate. He would prefer it to be replaced by an expression such as "conflict of treaty obligations".

5. Mr. REUTER (Special Rapporteur) said that in continental-law countries with a predominantly Germanic culture, the expression used was "intertemporal law". In French law, the expression "conflict of laws" was removed from the pure context of private international law to refer to conflicts of laws which took place over time; the question was, which law applied, depending on the temporal circumstances, to a situation or to effects which took place over time. However, to solve the problem completely, he proposed that the entire last sentence should be deleted.

It was so decided.

The commentary to article 70, as amended, was approved.

Commentary to article 71 (Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law)

6. Mr. McCAFFREY said that the expression "conflict of laws over time" in the third sentence raised the same problem as in the commentary to article 70. Furthermore, he did not quite see what interpretation was being referred to in the third sentence of the commentary.

7. Sir Ian SINCLAIR suggested that the second and third sentences should be deleted and that the beginning of the following sentence should be amended to read: "The Commission considered it inappropriate to make any changes to the text of article 71, not only ...".

8. Mr. REUTER (Special Rapporteur) said that he agreed to those suggestions, which made it clear that the question at issue was the interpretation of the three articles of the Vienna Convention on the Law of Treaties which dealt with peremptory norms.

The commentary to article 71, as amended, was approved.

Commentary to article 72 (Consequences of the suspension of the operation of a treaty)

The commentary to article 72 was approved.

Section 5, as amended, was adopted.

PART VI (MISCELLANEOUS PROVISIONS)

Commentary to article 73 (Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of participation by a State in the membership of an organization)

Paragraphs (1) to (12)

Paragraphs (1) to (12) were approved.

Paragraph (13)

9. Mr. McCAFFREY suggested that, in the English text, the words "to that treaty" in the first sentence should be replaced by the words "to such a treaty" and that the end of the sentence, beginning with the words "the implication being", should be deleted.

It was so decided.

Paragraph (13), as amended, was approved.

Paragraph (14)

Paragraph (14) was approved.

The commentary to article 73, as amended, was approved.

Commentary to article 74 (Diplomatic and consular relations and conclusion of treaties)

The commentary to article 74 was approved.

Commentary to article 75 (Case of an aggressor State)

The commentary to article 75 was approved.

Part VI, as amended, was adopted.

PART VII (DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION)

Commentary to article 76 (Depositaries of treaties)

Paragraph (1)

Paragraph (1) was approved.

Paragraphs (2) and (3)

10. Sir Ian SINCLAIR proposed that the last sentence in paragraph 2 should become the first sentence in paragraph 3.

It was so decided.

11. Mr. McCAFFREY, referring to the English text, proposed that in the second sentence of paragraph (3), the word “need” should be inserted after the word “what”.

It was so decided.

Paragraphs (2) and (3), as amended, were approved.

The commentary to article 76, as amended, was approved.

Commentary to article 77 (Functions of depositaries)

The commentary to article 77 was approved.

Commentary to article 78 (Notifications and communications)

12. Mr. McCAFFREY proposed that it should be made clear, at the beginning of the first sentence, that the article 78 in question was article 78 of the Vienna Convention on the Law of Treaties.

It was so decided.

The commentary to article 78, as amended, was approved.

Commentary to article 79 (Correction of errors in texts or in certified copies of treaties)

The commentary to article 79 was approved.

Commentary to article 80 (Registration and publication of treaties)

The commentary to article 80 was approved.

Part VII, as amended, was adopted.

Mr. Reuter took the chair.

CHAPTER V. Jurisdictional immunities of States and their property (A/CN.4/L.345 and Add.1)

A. Introduction (A/CN.4/L.345)

Paragraphs 1 to 10

Paragraphs 1 to 10 were adopted.

Paragraph 11

13. Mr. McCAFFREY proposed that in the last sentence the words “as various expressions of consent” should be replaced by an expression such as “on the various ways of expressing consent”.

It was so decided.

Paragraph 11, as amended, was adopted.

Paragraphs 12 to 19

Paragraphs 12 to 19 were adopted.

Paragraph 20

14. Mr. McCAFFREY proposed that, in the English text, in the last sentence, the words “In civil-law jurisdiction” should be replaced by the words “In the civil law system”.

It was so decided.

Paragraph 20, as amended, was adopted.

Paragraphs 21 and 22

Paragraphs 21 and 22 were adopted.

Paragraph 23

15. Mr. McCAFFREY proposed that the words “it was to be hoped” in the penultimate sentence should be replaced by the words “it appeared”.

It was so decided.

16. Sir Ian SINCLAIR proposed that the words “He noted that” at the beginning of the same sentence should be deleted.

It was so decided.

Paragraph 23, as amended, was adopted.

Paragraphs 24 to 33

Paragraphs 24 to 33 were adopted.

Paragraph 34

17. Sir Ian SINCLAIR proposed that the words “of the above” in the second sentence should be replaced by the words “of the article”.

It was so decided.

Paragraph 34, as amended, was adopted.

Paragraph 35

18. Mr. McCAFFREY proposed that, in the English text, the words “pleadings on the merits” in the fifth sentence should be replaced by the words “steps concerning the merits”.

19. Mr. SUCHARITKUL (Special Rapporteur) said that he believed it would be just as well simply to delete the words “pleadings on”.

It was so decided.

Paragraph 35, as amended, was adopted.

Paragraphs 36 to 42

Paragraphs 36 to 42 were adopted.

Section A, as amended, was adopted.

CHAPTER III. State responsibility (A/CN.4/L.346)

A. Introduction

Paragraphs 1 to 15

Paragraphs 1 to 15 were adopted.

Section A was adopted.

B. Consideration of the topic at this session

Paragraphs 16 to 36

Paragraphs 16 to 36 were adopted.

Paragraph 37

20. Sir Ian SINCLAIR proposed that the words "of the commitment" should be deleted.

*It was so decided.**Paragraph 37, as amended, was adopted.*

Paragraphs 38 to 40

*Paragraphs 38 to 40 were adopted.**Section B, as amended, was adopted.**Chapter III as a whole, as amended, was adopted.*

**Jurisdictional immunities of States
and their property (continued)* (A/CN.4/L.342)**
[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 1, ARTICLE 2, subpara. 1 (a), ARTICLES 7, 8 and 9

21. Mr. SUCHARITKUL (Chairman of the Drafting Committee), before introducing the draft articles on jurisdictional immunities of States and their property adopted by the Drafting Committee (A/CN.4/L.342), said that the Committee had held 23 meetings in all, during which it had adopted the texts of 55 draft articles and the annex, and reviewed 26 draft articles, on the law of treaties between States and international organizations or between international organizations. That had been the priority topic at the Commission's thirty-fourth session. The Committee had also held a preliminary discussion on the first few articles in part 2 of the draft articles on State responsibility for internationally wrongful acts. Finally, the Committee had adopted the texts of the draft articles on jurisdictional immunities which he would shortly introduce. The Committee's achievements at the present session compared favourably with those at preceding sessions; in that connection he wished to thank all the members of the Drafting Committee as well as the Special Rapporteurs concerned and those members of the Commission who had attended the Committee's meetings.

22. Unless the General Assembly requested the Commission to complete the second reading of part 1 of the draft articles on State responsibility for internationally wrongful acts, the Drafting Committee should be in a position, at the thirty-fifth session, to consider the three remaining draft articles on jurisdictional immunities of States and their property and the nine draft articles on State responsibility. To those should be added the 14 draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier which the Drafting Committee had not yet

begun. The Drafting Committee should then be able to consider such new articles as might be referred to it by the Commission in the course of its thirty-fifth session.

CONSIDERATION BY THE COMMISSIONARTICLE 2¹ subpara. 1 (a) (Use of terms: "court")

23. Turning to the draft articles on jurisdictional immunities of States and their property, he said that the Committee proposed the following new text for article 2, subparagraph 1 (a):

"(a) 'court' means any organ of a State, however named, entitled to exercise judicial functions;"

24. Although article 2, on use of terms, would have to be considered towards the end of the preparation of the draft on first reading, the Drafting Committee had deemed it appropriate, in the light of the debate in the Commission, to adopt at the present stage a provisional definition of the term "court". The definition was intended to delimit the topic under consideration, namely, to show that the jurisdictional immunities referred to in the title of the topic were immunities from the jurisdiction of the courts of a State. The expressions "organ" and "judicial functions" had been found sufficiently flexible to encompass the varied characteristics that might be attributed to them under the internal law of States.

25. The CHAIRMAN, noting that there were no comments, suggested that the Commission might adopt article 2, subparagraph 1 (a), as proposed by the Drafting Committee.

*Article 2, subparagraph 1 (a), was adopted.*ARTICLE 1² (Scope of the present articles)

26. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text and title for article 1:

Article 1. Scope of the present articles

The present articles apply to the immunity of one State and its property from the jurisdiction of the courts of another State.

The text of the article had been modified in the light of the definition of the word "court". The words "of the courts" had been added to qualify the word "jurisdiction" and the words "questions relating to" had been deleted.

27. Mr. USHAKOV said he noted that the Drafting Committee had decided to confine the scope of the draft to the immunity of one State from the jurisdiction of the courts of another State. He thought it was best for the time being to be specific, although he was not sure what the position would be with regard, for example, to prop-

* Resumed from the 1730th meeting.

¹ For the text, see *Yearbook ... 1981*, vol. II (Part Two), p. 153, footnote 655.

² For the text initially adopted by the Commission, see *Yearbook ... 1980*, vol. II (Part Two), p. 141.

erty and execution falling more with the jurisdiction of the administrative authorities.

28. While he was able to accept draft article 1, he nevertheless regretted that draft article 6,³ which stated the principle of jurisdictional immunity of States, had to remain in abeyance. He found it a little difficult to understand the attitude of other members of the Commission in that respect. They seemed to be afraid that, once the principle was enunciated, exceptions to it would no longer be possible; that seemed somewhat strange, since exceptions often proved the rule. They even feared a provision to the effect that a State should enjoy immunity from the jurisdiction of the courts of another State "save as otherwise provided for in the articles", since they felt that the exceptions provided for would not be exhaustive and that difficulties would ensue. Yet the principle existed, and it was recognized by all States; if it was not enunciated, the Commission would be failing in its task. He would therefore like an assurance that the Commission would try to state the principle; otherwise it would be pointless to talk of exceptions.

29. Sir Ian SINCLAIR said that the new text of draft article 1 proposed by the Drafting Committee did in a sense confine the scope of the topic, inasmuch as it would leave certain areas unregulated by the draft. Members would, however, probably agree that there seemed to be a dearth of reliable authority for settling the wider issue of the extent of immunity from the jurisdiction of administrative authorities, for instance, given the general principle that one State entity operating in the territory of another State was fundamentally obliged to comply with the laws of the latter. In the circumstances, he considered that the new draft article 1 was a very considerable improvement and should provide the foundation for the ensuing draft articles. Although there might be problems when it came to the chapters relating to property and execution, he did not think that they would be insurmountable.

30. Agreeing that draft article 6 raised a problem, he said that he had always taken the view that, even in its present wording, it did state a principle of immunity, to which there were exceptions. It could of course be argued that that in itself was a controversial way of presenting the topic. There was at least one school of thought according to which the whole doctrine of State immunity was an exception to an overriding principle, that of the jurisdiction of the territorial sovereign. In his view, however, the problem raised by Mr. Ushakov would solve itself as work on the draft articles proceeded. If draft article 6 were to be modified in such a way as to state that the principle of immunity applied "except as provided in the articles", the Commission would immediately be confronted with the problem of the scope and range of the exceptions that would come later in the draft. Having participated in the elaboration of the European Convention on State Immunity,⁴ he

knew how difficult it was to draw up an exhaustive catalogue of cases of non-immunity. Some flexibility therefore had to be ensured in the later draft articles in order to enable the future instrument to operate in an effective manner, having regard to the way in which the jurisprudence of the courts developed.

31. Consequently, he did not think it would be possible to take a decision on draft article 6 at the present stage of work on the topic. In his opinion, the matter would sort itself out as work progressed, and should not, in the final analysis, prove a stumbling-block. At any rate, the Drafting Committee was proceeding on the basis that draft article 6 did state a principle and that exceptions to it would be provided for. That should bring some comfort to Mr. Ushakov.

32. Mr. YANKOV said he felt bound to agree with the reasoning of Mr. Ushakov, especially in regard to the link between the new article 1 and article 6 as provisionally adopted by the Drafting Committee. Even if the restrictive scope of article 1, which confined the application of the articles to the jurisdiction of the courts, was simply regarded at that stage as a working hypothesis, it was hardly a step forward, considering its implications for article 6. As Sir Ian Sinclair had observed, the fact that some areas would remain unregulated by the draft might unnecessarily restrict the general rule on State immunity and lead to results which conflicted with customary and conventional law and the ambit of State immunity as indicated by State practice at large. Enunciating a general rule by way of exceptions might shrink the legal notion of State immunity and its application. The issue deserved further consideration, since it was easier to repair consequences at the present state than later on. Flexibility and a pragmatic approach were to be recommended, but great caution should be exercised as well.

33. He suggested that the door should be left open for considering all the implications that article 6 might have for the articles following it. Even articles 7 to 9, if seen in terms of the restrictive approach resulting from article 1 as amended and article 6, might need further consideration by the Drafting Committee and the Commission. In view of that, he was not prepared to endorse articles 7 to 9 as they stood.

34. Mr. NI, referring to the proposed definition of "court" in article 2, subparagraph 1 (a), recalled that in the Drafting Committee Sir Ian had proposed the following formulation of that definition:

" 'court' means any organ of a State, however named, entitled to exercise adjudicatory functions in civil, commercial or administrative matters".

There had been considerable discussion in the Committee about the word "adjudicatory", since in countries whose judicial system included procurators, they were considered as exercising judicial functions in the service of the courts although they never made decisions or gave judgements. The present formulation—" 'court' means any organ of a State, however named, entitled to exercise judicial functions"—was appropriate because

³ *Ibid.*, p. 142.

⁴ See 1708th meeting, footnote 12.

the term "judicial functions" did not exclude the exercise of functions considered judicial but not adjudicatory.

35. He shared the concern expressed by Mr. Ushakov and Mr. Yankov regarding the present formulation of article 6, although he did not feel so strongly as Mr. Ushakov that the article formulated an exception. It did state a certain principle, but not very clearly; it gave the impression that whatever kind of State immunity was given would be governed by the articles to follow. During the debate in the Commission a number of formulations had been proposed, some of which were enumerated in paragraphs 27 and 28 of chapter V of the draft report (A/CN.4/L.345). It was obvious that the present one was not final. The Drafting Committee had even set up a working group to try to reword article 6, but the group had not had time to do that. Although he was not absolutely satisfied with the present formulation of that article, he took the view, like Sir Ian Sinclair, that it could be revised when the Commission had arrived at a definite formulation of the articles following it.

36. Mr. KOROMA recalled that in an earlier intervention (1712th meeting) he had tried, if anything, to extend the application of jurisdictional immunity, whereas article 1 and article 2, subparagraph 1 (a), took a restrictive approach. As to article 6, it stated a basic principle of international law and so was not subordinate to the other articles. He was prepared to accept the view of the Special Rapporteur that article 1 and article 2, subparagraph 1 (a), as presently formulated, should be accepted as a working hypothesis.

37. Mr. CALERO RODRIGUES said that he approved the articles submitted by the Drafting Committee, on the understanding that further consideration of article 6 was necessary. He agreed with the limitation of the scope of the articles now presented in article 1, which simply clarified the Special Rapporteur's position that the Commission should confine itself to dealing with the jurisdiction of the courts. Precisely because the Commission was not being too ambitious, article 6 should be clearer than it was at present. According to his understanding of that article, it stated the principle that immunity existed under general international law except as far as limitations to it were laid down in the draft articles. It had been impossible at the present session for the Drafting Committee to come to grips with the problem of article 6. However, it was his understanding that if the Commission was able to approve articles 1, 2, subparagraph 1 (a), 7, 8 and 9, it would come back to article 6 in the future in order to make the meaning of the article absolutely clear.

38. Mr. FRANCIS said that he wished to associate himself with the reservations expressed by Mr. Koroma concerning the limitation in scope of article 1.

39. The CHAIRMAN, speaking as a member of the Commission, said that he approved of the working method whereby the scope of the draft was limited from

the outset to jurisdictional immunity in judicial matters; that did not mean that there were not other forms of jurisdictional immunity or that the Commission could not examine them subsequently. The situation had been almost identical when the Commission had tackled the study of succession of States in respect of matters other than treaties; in order to make progress, it had had to study certain aspects of the question one by one.

40. The definition of the term "court" in article 2, subparagraph 1 (a), was quite acceptable to him. When dealing with an exceptionally difficult topic, it was important to show some flexibility.

41. He would not be able to gain a clear idea of article 6 and the following articles until the entire draft had been elaborated. It was not unusual that the early articles of a draft could only be evaluated in relation to the subsequent articles and that the latter sometimes obliged the Commission to revise the former. In the present case, it was evident that each article called the preceding articles into question. However, in order to progress, the Commission must have texts before it which, even if they were not perfectly satisfactory, enabled it gradually to obtain a comprehensive view of the issue, which might ultimately be acceptable as a compromise.

42. Mr. McCAFFREY said he wished to associate himself with the last remarks made by the Chairman in his capacity as a member of the Commission. It was essential for the Commission to approve the articles submitted by the Drafting Committee in order to provide a working basis for continued progress the following year. The Sixth Committee would certainly find it curious if the Commission failed to approve those articles provisionally. Their approval did not mean that they had to be perfect in the eyes of every member of the Commission.

43. Concerning article 1, he agreed with Mr. Calero Rodrigues that the empirical method followed by the Special Rapporteur had not revealed a State practice that was broad enough to expand the coverage of the present articles beyond what was provided for in the new article 1. It would certainly be highly inadvisable to purport to create principles of immunity which did not exist. He referred in that connection to the examples mentioned in the Commission and in the Drafting Committee, particularly in regard to administrative proceedings, to which all agreed that States were subject.

44. The definition of the term "court" in article 2, subparagraph 1 (a), was a pivotal accomplishment in that it enabled the Commission to avoid defining jurisdiction more specifically at that stage.

45. The draft articles submitted by the Drafting Committee were the product of long and hard labour; it would be regrettable to leave them pending for another year. He therefore endorsed the suggestion that they should be given provisional approval.

Article 1 was adopted.

ARTICLE 7⁵ (Modalities for giving effect to State immunity)

46. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that when part IV of the draft articles, concerning immunities of State property from measures of attachment and execution, was drafted, the Commission might wish to re-examine the scope of article 1. In order not to delay its work, the Drafting Committee had appointed a working group to consider article 6. He was grateful to Mr. Ni for having drawn attention to some of the draft proposals which the group had made. He wished to assure Mr. Yankov that article 6 as it stood would have to be changed, both because of the changes in article 1 and because article 6, paragraph 2, carried over into article 7. As Special Rapporteur, he had submitted the following alternative texts for the phrase “in accordance with the provisions of the present articles” in the two paragraphs of article 6: in paragraph 1, “to the extent of and subject to the limitations provided in the present articles”; and in paragraph 2, “except as otherwise provided in the present articles”.

47. Turning to article 7, he said that the Drafting Committee proposed the following title and text for the article:

Article 7. Modalities for giving effect to State immunity

1. A State shall give effect to State immunity [under article 6] by refraining from exercising jurisdiction in a proceeding before its courts against another State.

2. A proceeding before a court of a State shall be considered to have been instituted against another State, whether or not that other State is named as a party to that proceeding, so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the rights, interests, properties or activities of that other State.

3. In particular, a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of that State, or against one of its agencies or instrumentalities in respect of an act performed in the exercise of governmental authority, or against one of the representatives of that State in respect of an act performed in his capacity as a representative, or when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control.

48. The text of article 7 reproduced substantially that submitted by the Special Rapporteur to the Drafting Committee for the same article towards the end of the thirty-third session of the Commission.⁶ Paragraph 1 was based on alternative A, but with drafting changes made necessary by the introduction of the term “court”. Thus the rather long and detailed formulation in the original text (“refraining from subjecting another State to the jurisdiction of its otherwise competent judicial and administrative authorities [or] and by disallowing the [conduct] continuance of legal proceedings”) had been replaced by the following more

concise phrase: “refraining from exercising jurisdiction in a proceeding before its courts”. The words “under article 6” remained in square brackets in order to highlight the existence of differing views on the contents of article 6 and the importance attached by some members to that article.

49. In paragraphs 2 and 3, the term “court” had been utilized where necessary and the text had been recast accordingly. In particular, the words in former paragraph 3, “against one of its organs, agencies or instrumentalities acting as a sovereign authority”, had been altered to read: “against one of the organs of that State, or against one of its agencies or instrumentalities in respect of an act performed in the exercise of governmental authority”; that terminology, borrowed from part 1 of the draft articles on State responsibility for internationally wrongful acts, helped to ensure some uniformity among the drafts being elaborated by the Commission on different topics.

50. In the title of article 7, the words “Obligation to give” had been replaced by the words “Modalities for giving”, which reflected the contents of the article better. Finally, in paragraph 2 of the French text the words “*désigné comme une partie*” had been replaced by the words “*cité comme partie*”.

51. Mr. USHAKOV said that the Drafting Committee had worded article 7 on the basis that it would be able to finalize the text of article 6. As the words “under article 6” in paragraph 1 of the article indicated, article 7 did in fact depend on article 6, about which the Drafting Committee had been unable to reach agreement. If article 6 concerned immunity from the jurisdiction of the courts only, article 7, which dealt with how to give effect to that immunity, would definitely make sense. But at present article 6 was much wider in scope and encompassed all forms of immunity from the jurisdiction of the State.

52. Without article 6, the articles following it should be left in abeyance. He himself could not understand why some members of the Commission were reluctant to state a well-known principle of international customary and conventional law in article 6 and why that principle could not be stated until the exceptions to which it was subject had been enumerated. He was neither for nor against articles 7, 8 and 9. They simply seemed meaningless to him because they lacked the basis which article 6 should represent.

53. Sir Ian SINCLAIR said that he was not as pessimistic as Mr. Ushakov about the implications of article 6 for articles 7, 8 and 9. The new text of article 1 represented progress in that it delimited the scope of the draft articles. Accordingly, although there might be differing views in the Commission as to the precise formulation of article 6, the statement of principle it contained was bound to relate to immunity from jurisdiction in proceedings before the courts of another State. There was at least that measure of agreement regarding a revised formulation for article 6. The fact that the Commission, for reasons advanced earlier by

⁵ For the text submitted by the Special Rapporteur and the initial consideration thereof by the Commission at its present session, see 1714th meeting, paras. 6-41; 1715th meeting; and 1716th meeting, paras. 1-14.

⁶ See *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnote 668.

Mr. Ushakov and himself, had not yet been able to finalize the text of article 6 should in no way prevent it from provisionally adopting articles 7, 8 and 9. Only in that way would it be able to proceed with the elaboration of the draft articles and finally solve the problem posed by the uncertainty over the precise formulation of article 6.

54. Mr. McCAFFREY said that, in his understanding, Mr. Ushakov's difficulties with articles 7, 8 and 9 stemmed from the fact that, in the absence of a statement of the principle of State immunity, those articles had no foundation. However, as Sir Ian had pointed out, article 6 would state a principle which would be a solid foundation for articles 7, 8 and 9. The only question which arose whether article 6 would state the principle as one of general international law or as one elucidated from the articles under study. Since there was no disagreement on the actual purpose of article 6, it did not need to be in final form for the Commission to be able to adopt articles 7, 8 and 9 provisionally.

55. The CHAIRMAN, speaking as a member of the Commission, said that he could accept article 7 subject to certain reservations. In particular, the word "control" at the end of paragraph 3 was a common law term which had simply been reproduced in French. Although control was a clear concept in the restrictive practices legislation of most States that had adopted such legislation, as well as in certain international conventions, he would be unable to reach a final decision on article 7 until the Commission had indicated clearly what it meant by "control". The notion could be construed so broadly as to make immunity absolute in all cases.

56. Mr. KOROMA said that he was prepared to accept Sir Ian Sinclair's view that article 6 could, at least for the time being, be predicated on article 1. On that basis, article 7 could be accepted provisionally.

Article 7 was adopted subject to the reservations formulated by some members of the Commission.

The meeting rose at 1 p.m.

1750th MEETING

Wednesday, 21 July 1982, at 10.15 a.m.

Chairman: Mr. Paul REUTER

later: Mr. Leonardo DÍAZ GONZÁLEZ

Jurisdictional immunities of States and their property (concluded) (A/CN.4/L.342)

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (concluded)

CONSIDERATION BY THE COMMISSION

ARTICLE 8¹ (Express consent to the exercise of jurisdiction) *and*

ARTICLE 9² (Effect of participation in a proceeding before a court)

1. Mr. SUCHARITKUL (Chairman of the Drafting Committee), referring to the draft articles adopted by the Drafting Committee (A/CN.4/L.342), said that in the light of the Commission's debate at the previous session on the draft articles 8 and 9 submitted by the Special Rapporteur,³ the Drafting Committee had concluded that there was no need to include in the draft a general principle such as that of article 8 on "Consent of State". The Drafting Committee also concluded that the original text of article 9, dealing with the "Expression of consent" could conveniently be divided into two separate articles to cover, respectively, express consent to the exercise of jurisdiction and the act implying consent to such exercise or, as the more neutral title of article 9 as it now stood indicated, the "Effect of participation in a proceeding before a court".

2. The basic idea embodied in the former text of draft article 8 underlined the provisions of former article 9 and was maintained in the new wording of article 8 concerning "express consent". In view of the Drafting Committee's decision to split the text of the former article 9 in two, paragraph 1 of the article, which was essentially descriptive, became unnecessary. The present text of article 8 formulated, in one simplified and consolidated paragraph, the provisions found in paragraphs 2 and 3 of former article 9. The new single text did not make reference to the waiver of immunity, that being deemed to be one of the forms in which consent could be expressed. To emphasize the mandatory nature of the rule, the text was formulated in the negative rather than the affirmative used in the original, which had been criticized as being merely descriptive.

3. Accordingly, the Drafting Committee proposed the following title and text for article 8:

Article 8. Express consent to the exercise of jurisdiction

A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to any matter if it has expressly consented to the exercise of jurisdiction by that court with regard to such a matter:

- (a) by international agreement;
- (b) in a written contract; or
- (c) by a declaration before the court in a specific case.

4. Mr. LACLETA MUÑOZ pointed out, in connection with the word "proceeding", that when a State could not invoke immunity from jurisdiction before a court of first instance in another State, it obviously could not do so before a court of second instance or ap-

¹ For the text submitted by the Special Rapporteur and the initial consideration thereof by the Commission at its present session, see 1716th meeting, paras. 15-47, and 1717th meeting, paras. 1-39.

² *Idem.*

³ See *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 669 and 670.

peal. Furthermore, although in legal texts prepared at the United Nations the word “matter” was apparently regularly translated into Spanish by *‘cuestión’*, the latter word was too concrete in its meaning, and it might therefore be advisable to replace it by *‘materia’*.

5. Sir Ian SINCLAIR supported the first point made by Mr. Lacleta Muñoz. In the legal system of a number of countries, including his own, the concept of waiver or voluntary submission to the jurisdiction of another State applied not only to the proceeding before the court but also in the context of an appeal. That fact should be made clear in the commentary.

Article 8 was adopted.

6. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that article 9 embodied in three paragraphs the provisions of paragraphs 4, 5 and 6 of the initial draft. The provisions of paragraph 7 of that draft had been deemed unnecessary, since they merely attempted to specify some of the rules embodied in the preceding paragraph by allowing the question of jurisdictional immunity to be raised at any stage of the proceedings. The practice of various courts was not always uniform; as Mr. Razafindralambo had pointed out (1728th meeting), that question was regarded as falling under *“ordre public”* in the system based on Roman law. No corresponding provision appeared, therefore, in the text as it now stood. To maintain parallelism with article 8, the new article 9 had been drafted in the negative and did not include a reference to waiver of immunity. Further precision and clarity had been introduced by drafting changes made in the light of the use of the term “court”.

7. The Committee had also felt that a subparagraph (c) could be added to article 9, paragraph 2, covering a situation where a State would like to appear before the court of another State, not in order to submit to its jurisdiction on the merits of a case but either to make a statement or to give evidence. There had been a slight difference of opinion as to whether such an appearance was considered already to constitute submission to the jurisdiction; but nothing would prevent a State from invoking a claim of jurisdictional immunity at the same time. In any event, the Drafting Committee should be able to revert to article 9 at the following session.

8. An amendement proposed by Mr. Flitan (1716th meeting) to the effect that waiver of immunity of jurisdiction could not be held to imply waiver of immunity from measures of attachment or execution of the judgment had been regarded as useful, but not as part of article 9. Perhaps it could be included at the end of part II of the draft articles, as a separate provision, or in part IV.

9. He said that the Committee proposed the following title and text for article 9:

Article 9. Effect of participation in a proceeding before a court

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:

(a) itself instituted that proceeding; or
(b) intervened in that proceeding or taken any other step relating to the merits thereof.

2. Paragraph 1 (b) above does not apply to any intervention or step taken for the sole purpose of:

(a) invoking immunity; or
(b) asserting a right or interest in property at issue in the proceeding.

3. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be considered as consent of that State to the exercise of jurisdiction by that court.

10. Mr. THIAM suggested that, in the French text, the expression *“d’aucune manière”* in subparagraph 1 (b) should be replaced by *“de quelque façon que ce soit”*, and that the word *“action”* in the first line of paragraph 3 should be changed to *“procédure”*.

It was so decided.

11. Sir Ian SINCLAIR observed that the problem raised by the formulation of article 9 was a difficult one, since jurisprudence differed according to the country concerned. He was not sure whether it would be solved by the addition of a subparagraph (c) to paragraph 2; as the Chairman of the Drafting Committee had pointed out, it would have to be considered again at the following session. To satisfy those concerned by the impact of subparagraph 1 (b), perhaps the Special Rapporteur could indicate in the commentary that if a State had taken a step relating to the merits in a proceeding before a foreign court, it preserved the right to claim immunity if the facts could not reasonably have been ascertained and if immunity was claimed as soon as practicable.

12. Mr. USHAKOV said it was because certain situations were not covered by paragraphs 1 and 2 of article 9 that the Drafting Committee was asking the Commission if it would be possible to revert to article 9 at the next session. He noted also that in article 9, paragraph 3, the word “considered” had been translated into French by *“réputé”* and in article 7, paragraph 2 by *“considérée”*.

13. Mr. THIAM said that in his view only one term should be used in French and *“réputé”* would be preferable.

14. The CHAIRMAN, speaking as a member of the Commission, said that he understood the misgivings of members of the Drafting Committee who were generally of the impression that the list in article 9, paragraph 2, should be amplified. In the circumstances, the Commission could either adopt the text proposed by the Drafting Committee without change or it could add the words *“inter alia”* before subparagraph 2 (a). In the latter case, an explanation would have to be given in the commentary.

15. Mr. LACLETA MUÑOZ said that if the Spanish translation of the words “shall be considered” was to be standardized, it would be better to use *“se considerará”*.

Subject to its reconsideration by the Drafting Committee at the next session of the Commission, article 9, as amended, was adopted.

Mr. Díaz González, First Vice-Chairman, took the Chair.

Draft report of the Commission on the work of its thirty-fourth session (continued)

CHAPTER II. Question of treaties concluded between States and international organizations or between two or more international organizations (concluded) (A/CN.4/L.344 and Add.1-6)

C. Draft articles on the law of treaties between States and international organizations or between international organizations (concluded) (A/CN.4/L.344/Add.3 and 5)

PART III (OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES) (concluded) (A/CN.4/L.344/Add.3)

SECTION 4 (Treaties and third States or third organizations) (concluded)

Commentary to article 38 (Rules in a treaty becoming binding on third States or third organizations through international custom)

The commentary to article 38 was approved.

Section 4, as amended, was adopted.

Part III, as amended, was adopted.

PART IV (Amendment and modification of treaties) (A/CN.4/L.344/Add.3)

Commentary to article 39 (General rule regarding the amendment of treaties)

16. Sir Ian SINCLAIR proposed that the words "That principle" at the beginning of the third sentence be replaced by "The rule laid down in article 39 of the Vienna Convention".

It was so decided.

17. Mr. McCAFFREY proposed that the second part of the first sentence be changed to read "what the parties have decided to do, they may also undo".

It was so decided.

The commentary to article 39, as amended, was adopted.

General commentary to part IV

18. Mr. REUTER (Special Rapporteur) said that no commentary had been prepared to articles 40 and 41, which differed very little from the corresponding provisions of the Vienna Convention. In consultation with the Secretariat, a brief commentary covering the whole of part IV could be added before article 39, which required a separate commentary.

It was so decided.

Part IV, as amended, was adopted.

PART V (Invalidity, termination and suspension of the operation of treaties) (concluded) (A/CN.4/L.344/Add.3 and 5)

SECTION I (General provisions)

Commentary to articles 42 (Validity and continuance in force of treaties), 43 (Obligations imposed by international law independently of a treaty) and 44 (Separability of treaty provisions)

19. Mr. REUTER (Special Rapporteur) said that, contrary to what had been stated in error in the draft report, the commentary to articles 42, 43 and 44 did not apply to articles 40 and 41.

The commentary to articles 42, 43 and 44 was approved.

Commentary to article 45 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty)

Paragraph (1)

20. Sir Ian SINCLAIR suggested that in the second sentence the words "to invoke unlawful coercion" should be replaced by "to invoke coercion of a representative or coercion by the threat or use of force" and that the word "two" in the third sentence should be changed to "three".

21. Mr. McCAFFREY asked what was the meaning of the part of the fifth sentence which read "based on the fear that the principle it established might operate to consolidate situations secured under cover of political domination".

22. Mr. REUTER (Special Rapporteur) said that Sir Ian Sinclair's suggestion was acceptable to him.

23. In answer to Mr. McCaffrey's question, he explained that when one partner was much stronger than the other, politically or economically, the second might feel inclined to remain silent in the event of some peremptory assertion on the part of the first. In the draft articles which had served as the basic text for the preparation of the Vienna Convention on the Law of Treaties, the Commission had included an article on amendment of a treaty by tacit acquiescence. The plenipotentiary conference which had adopted the Convention had not accepted that article, since it could have meant that agreements concluded by the superior authorities of a State would be modified by an attitude of silence on the part of a subordinate department in the same State, thus allowing a *de facto* situation to come about for the sake of peace. That was the situation he was alluding to in the part of the sentence to which Mr. McCaffrey had referred.

24. In the French text the word "*prescription*" in the final sentence of paragraph 1 appeared, by mistake, in the plural. In the English text, the word "*prescription*" was in the singular, but perhaps it did not have exactly the same connotation as in French.

25. The CHAIRMAN said that in the Spanish text the sentence in question was perfectly clear.

26. Mr. McCAFFREY said that in the light of the Special Rapporteur's explanation he had no objection to retaining the words in question; but perhaps they might read "based on the fear that the principle it established might operate to legitimize situations produced under cover of political domination", which would be clearer.

27. Sir Ian SINCLAIR thought that the word "prescription" should be left in the singular in the English text.

28. Mr. LACLETA MUÑOZ supported Mr. McCaffrey's suggestion but suggested that in order to make it clearer that the hypothesis was one to be rejected, the last part of the sentence in question should be worded: "that the principle it establishes might be used to legitimize situations produced under cover of political domination".

It was so decided.

Paragraph (1), as amended, was approved.

Paragraphs (2) to (7)

Paragraphs (2) to (7) were approved.

The commentary to article 45, as amended, was approved.

Section 1, as amended, was adopted.

SECTION 2 (Invalidity of treaties)

Commentary to article 46 (Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were approved.

Paragraph (8)

29. In reply to a question by Mr. McCaffrey, Mr. REUTER (Special Rapporteur) said that the words "in respect of them" in the third sentence could be amplified for the sake of clarity to read: "in respect of the members of that organization".

30. Mr. MAHIU proposed the following modification in order to reflect the idea expressed in the last part of the sentence: "in respect of the members of that organization, which can thus invoke it against them".

It was so decided.

Paragraph (8), as amended, was approved.

Paragraph (9)

31. Mr. McCaffrey considered that the first sentence in footnote 11 was redundant. From the point of view of the drafting, the last sentence in paragraph (9) would be better placed in paragraph (10), since it raised a new point dealt with in that paragraph.

32. Sir Ian SINCLAIR associated himself with Mr. McCaffrey's second point. The problem of the redundancy in footnote 11 could be solved by changing the words "basic rules of the organization" to "substantive rules of the organization".

It was so decided.

Paragraph (9), as thus amended in the English text, was approved.

Paragraph (10)

Paragraph (10) was approved.

The commentary to article 46, as amended, was approved.

Commentary to article 47 (Specific restrictions on authority to express the consent of a State or an international organization)

The commentary to article 47 was approved.

Commentary to article 48 (Error)

The commentary to article 48 was approved.

Commentary to article 49 (Fraud)

The commentary to article 49 was approved.

Commentary to article 50 (Corruption of a representative of a State or of an international organization)

The commentary to article 50 was approved.

Commentary to article 51 (Coercion of a representative of a State or of an international organization)

The commentary to article 51 was approved.

Commentary to article 52 (Coercion by the threat or use of force)
Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

Paragraph (4)

33. Sir Ian SINCLAIR, supported by Mr. McCaffrey, said that in the English text, the first sentence of paragraph (4) seemed to express a collective view of the Commission, which had not been the case. It should be brought more closely into line with the French text, as follows: "In the light of these numerous statements of position, the view can certainly be supported that the prohibition of coercion established by the principles of international law embodied in the Charter goes beyond armed force; this view has been expressed in the Commission."

It was so decided.

Paragraph (4), as amended in the English text, was approved.

Paragraphs (5) to (8)

Paragraphs (5) to (8) were approved.

The commentary to article 52, as amended, was approved.

Commentary to article 53 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*))

The commentary to article 53 was approved.

Section 2, as amended, was adopted.

SECTION 3 (Termination and suspension of the operation of treaties)

Commentary to article 54 (Termination of or withdrawal from a treaty under its provisions or by consent of the parties)

The commentary to article 54 was approved.

Commentary to article 55 (Reduction of the parties to a multilateral treaty below the number necessary for its entry into force)

The commentary to article 55 was approved.

Commentary to article 56 (Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal)

The commentary to article 56 was approved.

Commentary to article 57 (Suspension of the operation of a treaty under its provisions or by consent of the parties)

The commentary to article 57 was approved.

Commentary to article 58 (Suspension of the operation of a multi-lateral treaty by agreement between certain of the parties only)

The commentary to article 58 was approved.

Commentary to article 59 (Termination or suspension of the operation of a treaty implied by conclusion of a later treaty)

The commentary to article 59 was approved.

Commentary to article 60 (Termination or suspension of the operation of a treaty as a consequence of its breach)

The commentary to article 60 was approved.

Commentary to article 61 (Supervening impossibility of performance)

Paragraph (1)

34. Mr. McCAFFREY proposed that the words "in first reading" should be added after the word "Commission" in the penultimate sentence of paragraph (1).

It was so decided.

Paragraph (1), as amended, was approved.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were approved.

The commentary to article 61, as amended, was approved.

Commentary to article 62 (Fundamental change of circumstances)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

35. Sir Ian SINCLAIR suggested that the words in the second sentence of paragraph (2) "the result of an act" should be changed to read "the result of a wrongful act".

36. Mr. ILLUECA, supported by Mr. DÍAZ GONZÁLEZ and Mr. LACLETA MUÑOZ, said that the word "*hecho*" in the Spanish text should be replaced by "*acto*".

37. Mr. McCAFFREY said that he agreed with the amendment proposed by Sir Ian Sinclair, and further proposed that the words "under an act", also in the second sentence of paragraph (2), be amended to read "under such an act".

It was so decided.

Paragraph (2), as thus amended, was approved.

Paragraphs (3) to (13)

Paragraphs (3) to (13) were approved.

The commentary to article 62, as amended, was approved.

Commentary to article 63 (Severance of diplomatic or consular relations)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

38. Sir Ian SINCLAIR proposed that the end of the second sentence, "which was prepared by the Commis-

sion in the form of draft articles", should be deleted, that the word "these" in the third sentence should be deleted from the phrase "the severance of these relations", and that the word "charter" in the last sentence should be replaced by "constituent instrument".

It was so decided.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

The commentary to article 63, as amended, was approved.

Commentary to article 64 (Emergence of a new peremptory norm of general international law (*jus cogens*))

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

39. Sir Ian SINCLAIR observed that, in the commentary to article 53, the Commission had not wanted to include international organizations in the international community of States. He therefore proposed that the paragraph should end with the words "as having that effect", and also that, in the English text, the sentence should be in the present tense.

It was so decided.

Paragraph (2), as thus amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

The commentary to article 64, as amended, was approved.

Section 3, as amended, was adopted.

SECTION 4 (Procedure) (*concluded*)

Commentary to article 65 (Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty)

Paragraph (1)

40. Sir Ian SINCLAIR proposed that the end of the last sentence of paragraph (1) should read "for recourse to third parties, that is to say, the International Court of Justice, arbitration, or a conciliation commission."

It was so decided.

Paragraph (1), as amended, was approved.

Paragraph (2)

41. Sir Ian SINCLAIR, supported by Mr. McCAFFREY, said that the word "confrontation" in the second sentence of the English text was perhaps a little stronger than intended. The word "balance" or "proceeding" might be more appropriate.

42. Mr. REUTER (Special Rapporteur) said that the word "*confrontation*" in French, was quite correct, since it implied a face-to-face encounter for the purposes of comparison. It was not to be confused with the word "*affrontement*", which had a bellicose connotation. The expression in question gave an accurate idea of the machinery provided for under article 65.

43. Mr. ILLUECA said that in Spanish it was the word “*confrontación*” that had a bellicose connotation. It would be better to use the word “*controversia*”, which appeared in article 65, or “*enfrentamiento*”.

44. Mr. REUTER (Special Rapporteur) suggested the word “dialogue” or “procedure”.

45. The CHAIRMAN said that, in the absence of any objection, he would take it that the Commission decided to delete the word “confrontation” and to replace it by one of the words proposed.

It was so decided.

Paragraph (2), as thus amended, was approved.

Paragraph (3)

46. Sir Ian SINCLAIR said that the first two sentences of the paragraph did not give a very clear explanation of the system instituted under article 65.

47. Mr. LACLETA MUÑOZ likewise considered that paragraph (3) was not drafted in an entirely satisfactory manner. In his view, it could be deleted, since its sole purpose was to paraphrase article 65.

Paragraph (3) was deleted.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

48. Mr. RIPHAGEN said that the “right” referred to in the final sentence was apparently the right to raise an objection. Such a right could not, however, be lost as a result of the application of article 45, subparagraph 1 (b) and subparagraph 2 (b), since those provisions dealt with loss of the right to invoke a ground of invalidity.

49. Mr. REUTER (Special Rapporteur) proposed that the final sentence of the paragraph be deleted.

It was so decided.

Paragraph (5), as amended, was approved.

Paragraph (6)

Paragraph (6) was approved.

The commentary to article 65, as amended, was approved.

Commentary to article 66 (Procedures for arbitration and conciliation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

50. Sir Ian SINCLAIR proposed the deletion of the words “however, imperfect”, in the fourth sentence.

It was so decided.

Paragraph (3), as thus amended, was approved.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were approved.

The commentary to article 66, as amended, was approved.

Section 4, as amended, was adopted.

Part V, as amended, was adopted.

ANNEX (Arbitration and conciliation procedures established in application of article 66)

Commentary to the annex

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

51. Sir Ian SINCLAIR proposed that the second sentence be amended to read:

“The only innovation vis-à-vis the 1969 text is part II, while part I merely makes the provisions drawn up in 1969 for the establishment of a conciliation commission applicable equally to the establishment of an arbitral tribunal.”

It was so decided.

Paragraph (3) as amended, was approved.

Paragraphs (4) to (10)

Paragraphs (4) to (10) were approved.

The commentary to the annex, as amended, was approved.

Chapter II, section C, as amended, was adopted.

Mr. Reuter resumed the Chair.

D. Resolution adopted by the Commission (A/CN.4/L.344/Add.6)

52. Mr. DÍAZ GONZÁLEZ said that document A/CN.4/L.344/Add.6 contained the text of paragraph 51 of the report, which formed a new section to be added to chapter II. That section incorporated a resolution expressing the Commission's appreciation to the Special Rapporteur, Mr. Reuter, for his contribution to the work on the draft articles on the law of treaties between States and international organizations or between international organizations.

The resolution was adopted by acclamation.

Paragraph 51 was adopted.

Section D of chapter II was adopted.

Chapter II of the draft report, as amended, was adopted.

CHAPTER V. (Jurisdictional immunities of States and their property (continued) A/CN.4/L.345 and Add.1)

B. Draft articles on jurisdictional immunities of States and their property (A/CN.4/L.345/Add.1)

PART I. Introduction

Commentary to article 1 (Scope of the present articles)

Paragraph (1)

53. Sir Ian SINCLAIR proposed the deletion of the word “drafting” before the word “changes”.

It was so decided.

54. Mr. LACLETA MUÑOZ proposed the deletion of the words "new and enlarged" before the word "Commission".

It was so decided.

Paragraph (1), as thus amended, was approved.

Paragraphs (2) and (3)

55. Sir Ian SINCLAIR proposed that the order of paragraphs (2) and (3) be reversed, since in his view the phrase "of the courts" was the decisive element in the new text and the deletion of "questions relating to" was simply consequential.

It was so decided.

56. Sir Ian SINCLAIR further proposed that the new paragraph (3) (former paragraph (2)) be reworded along the following lines: "The phrase 'questions relating to' which appeared in the text as provisionally adopted had now been dropped. The phrase had been necessary at the time when the scope of the draft articles remained uncertain and the Commission had not yet determined whether the draft articles should extend to immunity from jurisdiction generally or should be confined, subject to the clarification indicated in article 2, to immunity from jurisdiction of the courts of another State."

57. Mr. USHAKOV said that Sir Ian Sinclair's proposed text gave the impression that the Commission had taken a final decision in the matter, when it might in fact arrive at another decision at a later date.

58. Mr. KOROMA said it was his understanding that the Special Rapporteur had in fact accepted the need to increase the scope of the draft articles. On that basis he would be prepared to accept Sir Ian Sinclair's proposed text provisionally, so as to allow the work of the Commission to proceed.

59. The CHAIRMAN suggested, in the light of the comments made, that the Commission should adopt the new paragraph (2) on the understanding that the Special Rapporteur would insert a phrase to take account of the provisional and methodological nature of the topic.

It was so decided.

60. The CHAIRMAN further suggested that the Commission should adopt the new paragraph (3) (former para. (2)) as amended by Sir Ian Sinclair's proposal, on the understanding that the final form of wording would be agreed between Sir Ian and the Secretariat.

It was so decided.

The new paragraphs (2) and (3), as amended, were approved.

The commentary to article 1, as amended, was approved.

Commentary to article 2 (Use of terms)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

61. Sir Ian SINCLAIR said that, in his view, the final sentence of paragraph (2) did not reflect accurately the

discussions that had taken place in plenary meeting and in the Drafting Committee. He therefore proposed that it should be amended to read: "Covered under the definition are organs performing pre-judicial or post-judicial functions in a particular legal system."

62. Mr. LACLETA MUÑOZ supported that proposal.

63. Mr. USHAKOV said that, given the diversity of legal systems, he would prefer it if the last sentence were simply deleted.

64. Mr. KOROMA considered that, if the scope of application of the draft articles was to be enlarged, it would be better to retain the paragraph as drafted.

65. Mr. DÍAZ GONZÁLEZ said he appreciated the soundness of Sir Ian Sinclair's proposal, but in a spirit of compromise he would suggest that the last sentence of the paragraph be deleted.

66. Mr. McCAFFREY supported Sir Ian Sinclair's proposal but wondered whether it would not be advisable also to amplify and clarify the commentary by referring to the Parquet as an example of the organs referred to.

67. Mr. NI thought it would be preferable to delete the final sentence of the paragraph, failing which he would propose that it be amended to read: "Covered under the definition are organs performing pre-adjudicatory or post-adjudicatory functions."

68. Mr. YANKOV favoured the deletion of the final sentence of the paragraph, since the first sentence was sufficiently clear. Unlike Mr. McCaffrey, he did not think that examples should be given at the present stage.

69. Mr. RIPHAGEN noted that the paragraph did not correspond entirely to the text of article 2, which spoke only of "judicial fonctions". He therefore proposed that it should simply be deleted, particularly since the new paragraph (2) of the commentary to article 1 adopted by the Commission was sufficiently explicit.

70. Mr. THIAM likewise felt that the paragraph added nothing and could be deleted, as Mr. Riphagen had proposed.

71. Mr. EL RASHEED MOHAMED AHMED said he was in favour of deleting the final sentence, as proposed by Mr. Díaz González, and would suggest that the words "or similar functions", at the end of the first sentence, be replaced by "or related functions".

72. The CHAIRMAN, speaking as a member of the Commission, supported Mr. Riphagen's proposal that the whole paragraph should be deleted. In his view, it was apparent from the new paragraph (2) of the commentary to article 1, which it had just adopted, that the Commission did indeed hope to provide a more general definition in international terms, and not to refer to the definition under any given legal system.

73. Mr. SUCHARITKUL (Special Rapporteur) saw no objection to Mr. El Rasheed Mohamed Ahmed's

proposal, which would also meet Mr. Koroma's point. However, as it would perhaps be premature to broaden the definition, it might be preferable to delete the whole of paragraph (2).

74. Mr. KOROMA thought, like Mr. Díaz González, that it would suffice simply to delete the final sentence of the paragraph.

75. The CHAIRMAN said that, in the absence of any objection, he would take it that the Commission agreed to delete paragraph (2) of the commentary to article 2, in the light of the comments made.

It was so decided.

Paragraph (3) (new paragraph (2))

Paragraph (3) was approved.

The commentary to article 2, as amended, was approved.

Part I, as amended, was adopted.

The meeting rose at 1 p.m.

1751st MEETING

Thursday, 22 July 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

Draft report of the Commission on the work of its thirty-fourth session (continued)

CHAPTER V. Jurisdictional immunities of States and their property (concluded) (A/CN.4/L.345 and Add.1)

B. Draft article on jurisdictional immunities of States and their property (concluded) (A/CN.4/L.345/Add.1)

PART II (GENERAL PRINCIPLES)

1. Mr. SUCHARITKUL (Special Rapporteur) said that the commentaries to draft articles 7, 8 and 9 were of necessity long because they related to articles which the Commission had provisionally adopted on first reading, at its present session. Those commentaries were to some extent a restatement of the Special Rapporteur's previous reports.

2. An additional paragraph should be added to the commentary to article 8, reading:

“(12). Consent to the exercise of jurisdiction in a proceeding before a court of another State covers the exercise of jurisdiction by appellate courts in any subsequent stage of the proceeding up to and including the decision of the court of final instance, retrial and review, but not execution of judgement.”

Commentary to article 7 (Modalities for giving effect to State immunity)

Paragraphs (1) and (2)

3. Sir Ian SINCLAIR, speaking on a point of order, said that at its present session the Commission had made no change in article 6 (State immunity), which was to be reconsidered and reworded at a later session. It was therefore pointless to reproduce, in the body of the Commission's report, the text of that article and paragraphs (1) and (2) of the commentary to article 7, both of which related to article 6.

4. Mr. McCAFFREY said that he agreed with Sir Ian, particularly since paragraph (1) of the commentary did not altogether reflect the current state of the Commission's work on article 6.

5. Mr. LACLETA MUÑOZ said that, while he shared the views of Sir Ian Sinclair and Mr. McCaffrey, he considered that the Commission, instead of deleting article 6 and paragraphs (1) and (2) of the commentary to article 7, should state in the report that article 6 had not been the subject of detailed consideration and that some members had reservations about it and about paragraphs (1) and (2) of the commentary to article 7. His own reservations related to the conception of the two paragraphs of article 6 and to the meaning of the term “*hacer efectivo*”.

6. Mr. USHAKOV said once more that he had reservations regarding the title of Part II, “General principles”. Only article 6—whose title he also found unsatisfactory—seemed to lay down general principles, and not articles 7, 8 and 9.

7. Mr. DÍAZ GONZÁLEZ said that he endorsed the reservations expressed by Mr. Lacleta Muñoz, in regard in particular to article 6, paragraph 2, and paragraphs (1) and (2) of the commentary to article 7, which both related to article 6.

8. Mr. YANKOV said that, although he had reservations about certain concepts underlying article 6, it would complicate matters if the text of the article was not included in the report. He therefore proposed that it should be reproduced, if not in the body of the report, then at least in a footnote, and that it should be followed by a few brief explanations.

9. Mr. CALERO RODRIGUES supported the suggestion of Mr. Lacleta Muñoz and Mr. Yankov that the Commission should summarize the discussions on article 6 in a footnote, with an indication that it had been provisionally found acceptable as a basis for article 7 and the following articles.

10. Sir Ian SINCLAIR said he could agree to the Commission reproducing the text of article 6 in its report, on the understanding that the existing footnote 2 would be amplified so as to reflect the discussions that had taken place at the present session, and would make it clear that the Commission was still considering article 6 and would continue to seek a more satisfactory form of wording.