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Summary record of the 1714th meeting

Topic:
Jurisdictional immunities of States and their property

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

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

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

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

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

The meeting rose at 1.10 p.m.

1714th MEETING

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

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

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

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³ (*continued*)

1. Mr. SUCHARITKUL (Special Rapporteur) said that, since draft articles 1 and 6 had already been

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

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

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

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

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

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

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

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

It was so decided.

ARTICLE 7 (Obligation to give effect to State immunity)

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

Article 7. Obligation to give effect to State immunity

PARAGRAPH 1—ALTERNATIVE A

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

PARAGRAPH 1—ALTERNATIVE B

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

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

named as a party, so long as the proceeding in effect seeks to compel that other State either to submit to local jurisdiction or else to bear the consequences of judicial determination by the competent authority which may [involve] affect the sovereign rights, interests, properties or activities of the State.

3. In particular, a proceeding may be considered to be one against another State [when] if it is instituted against one of its organs, agencies or instrumentalities acting as a sovereign authority; or against one of its representatives in respect of acts performed by them as State representatives, or [if] it is designed to deprive another State of its public property or the use of such property in its possession or control.

NOTE: Paragraph 3 would constitute an alternative to the text of draft article 3, subparagraph 1 (a).

7. Mr. SUCHARITKUL (Special Rapporteur) said that article 7 was not simply another way of expressing the main principle of State immunity but a different aspect of the matter, namely, the duty of one State to refrain from subjecting another to its jurisdiction.

8. The words “otherwise competent ... authorities” used in paragraph 1, alternative A, had been borrowed from a number of sources, including judicial practice in India. The competence of authorities to consider a question was presumed to exist beforehand. When he had raised that point at the previous session, a number of members, particularly Sir Francis Vallat,⁴ had pointed out that, in the practice of common law countries, the pre-existence of jurisdiction was not always deemed a priority and the question of jurisdictional immunity, which came under the heading of public international law, was sometimes considered independently of the private international law question of rules of competence. The article had therefore been revised accordingly. In alternative B, the phrase “**notwithstanding the existing** competence of the authority before which the proceedings are pending” was also meant to convey the idea of the pre-existence of jurisdiction and of immunity as freedom from existing jurisdictions.

9. As to paragraph 2, the original text had spoken of the exercise of jurisdiction against a foreign State, but in the light of observations made by Mr. Calle y Calle⁵ had been altered to refer to proceedings against another State. Such proceedings might, in the event, be instituted against an organ or agent of the other State, or against property under its control or in its possession. In many jurisdictions, the possibility of attachment of property existed during the pre-trial period and such attachment could be carried out *in rem*, without any proceeding being taken directly against a party. For that reason, it was necessary to indicate when the obligation of a State to refrain from subjecting another State to its jurisdiction arose. If paragraph 3 was adopted, the definition of a foreign State contained in article 2 subpara. 1 (d), would be unnecessary, and it would therefore be useful for the Drafting Committee to bear in mind the views expressed by members of the Commission as to the appropriate place for such a rule.

10. Mr. EVENSEN said that he preferred alternative A of paragraph 1, with the following changes: the words “and administrative authorities” should be replaced by “or administrative and police authorities”, and the remainder of the sentence should be deleted. The wording of the paragraph would then be consistent with that of article 3, subparagraph 1 (b) (iv).

11. The text of paragraph 2 should be amended to read:

“The provisions of paragraph 1 of this article are applicable whether or not the other State is named as a party, so long as the proceeding in effect seeks to compel that other State either to submit to local jurisdiction or else to bear the consequences of determination by the competent judicial or administrative or police authorities which may affect the sovereign rights, interests, properties or activities of the other State.”

In paragraph 3, the words “In particular, a proceeding may be considered to be one against another State” should be replaced by “A proceeding may be considered to be instituted against another State”.

12. Lastly, in view of what was stated in article 7 and other articles, the definitions of “territorial State” and “foreign State” contained in article 2, subparas. 1 (c) and (d), could be dispensed with by using the terms “State” and “another State”, as in article 7.

13. Mr. USHAKOV said that, although article 7 figured in part II of the draft, entitled “General principles”, it did not in fact enunciate a principle. Paragraph 1, in each of the versions proposed by the Special Rapporteur, provided that a State should give effect to State immunity under article 6; yet article 6, which was also contained in part II, did not specify the modalities for applying the principle of immunity. Admittedly, it did set forth the principle, but contained a *renvoi* to the other articles of the draft, which embodied exceptions to that principle. What were in fact the immunities in question? Would the draft deal with all possible immunities, establishing them as a general and fundamental rule of international law that applied to State activities in all domains and to all inter-State relations, or would it deal solely with jurisdictional immunity, in other words, with immunity from the judicial system of another State?

14. He was convinced that State immunity was a thing complete in itself, even though, for the sake of convenience, it had been split up for codification purposes according to the spheres of State activity and the relations of State *inter se*, in which connection he mentioned as examples the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on Special Missions. Immunity was still immunity, for all that. It was important to pinpoint the scope of the draft, namely, jurisdictional immunity, in order to avoid merely reproducing or going against the provisions of those Conventions, and to define the word “jurisdiction”, which could, for example, mean both sovereignty and judicial competence.

⁴ Yearbook ... 1981, vol. 1, p. 59, 1653rd meeting, para. 29.

⁵ Ibid., p. 61, 1654th meeting, paras. 2-3.

15. The wording of article 7 raised numerous problems that were difficult to solve. He had in mind, for instance, such formulations as, in alternative A of paragraph 1: "by refraining from subjecting another State to the jurisdiction of its otherwise competent judicial and administrative authorities, [or] and by disallowing the [conduct] continuance of legal proceedings against another State"; in paragraph 2: "so long as the proceeding in effect seeks to compel that other State either to submit to local jurisdiction or else to bear the consequences of judicial determination by the competent authority which may [involve] affect the sovereign rights, properties or activities of the State"; and in paragraph 3: "a proceeding may be considered to be one against another State [when] if it is instituted against one of its organs, agencies or instrumentalities acting as a sovereign authority; or against one of its representatives in respect of acts performed by them as State representatives".

16. For all those reasons, he was of the opinion that article 7 was entirely unnecessary: the rule of immunity was a rule on so-called international obligations "of result", and States alone were competent, under their internal law, to equip themselves to achieve that specific result.

17. Mr. THIAM said he had the impression that there was some incongruity between the title and the content of the article. From the title, one would expect the article to enunciate a basic rule, but it was purely descriptive and, as a result, the Commission could not discuss it in terms of substance. He also had some reservations about the use of the word "instrumentalities" in paragraph 3, because he could not see how a proceeding could be instituted against an "instrumentality".

18. Mr. McCaffrey said that, although it seemed impossible to avoid alluding to article 6 in the course of the present discussion, he did not suggest that the Commission should refer that article once again to the Drafting Committee.

19. Article 7 performed a predominantly definitional function and did not accomplish anything that could not be done by amending articles 2 and 6. He agreed with previous speakers who experienced difficulties regarding article 6, particularly in regard to the phrase "in accordance with the provisions of the present articles" and the two-paragraph structure. Article 6 might therefore be amended to read as follows:

"A State and its property are immune from the jurisdiction of another State except as provided in part III of the present articles."

That wording would eliminate the troublesome phrase, state the rule more clearly and also make it applicable to State property, which was not included in the definition of a "foreign State" in article 2, subparagraph 1 (d) or specifically mentioned in the definition of "jurisdiction" contained in article 2, subparagraph 1 (g). Again, the latter definition might usefully be expanded to read:

" 'Jurisdiction' means the competence or power of a territorial State to entertain legal proceedings, to settle disputes, to adjudicate litigations, or to attach or affect interests in property, as well as the power to administer justice in all its aspects."

In that way, it would also cover all measures relating to property, from pre-judgement attachment to post-judgement execution. Moreover, such an expanded definition of "jurisdiction" would have a bearing not only on the broad rule of jurisdictional immunity laid down in article 6, but also on the reference in article 7, paragraph 2, to the consequences of judicial determination which might affect properties of the State. The changes he was suggesting would eliminate the need for that part of paragraph 2 and, at the same time, render superfluous the reference in paragraph 3 to a legal proceeding designed to deprive another State of its public property or the use of such property.

20. The Commission would undoubtedly have to deal with the exceptions as to property, and could well do so in part III of the draft. However, it did not seem necessary to follow the approach adopted in the United States Foreign Sovereign Immunities Act of 1976⁶ and establish separate rules for the jurisdictional immunity of State property and the jurisdictional immunity of the State itself.

21. The substance of the two alternative versions for paragraph 1 of article 7 was already implied by the words "immune from the jurisdiction of another State" contained in article 6, but if such a paragraph was held to be necessary, alternative A would be preferable, since its terms covered both judicial and administrative authorities. In that connection, he agreed with Mr. Evensen that a reference should be made to police authorities, and also proposed that the words "[as stipulated in]" and "[or]" should be deleted and that the words "[conduct] continuance" should be replaced by "maintenance".

22. The aim of paragraph 2 seemed to be to ensure that the rule of immunity could not be circumvented by not naming the other State as a party, and that proceedings would none the less be considered as being against another State—in which case the rule of immunity would apply—so long as either one of two conditions were satisfied, namely, that the proceedings had the effect of seeking to compel the other State either to submit to local jurisdiction or to bear the consequences of a judicial determination affecting its sovereign rights, interests, properties or activities. The first condition apparently referred to initial assertions of jurisdiction in the action itself, while the second could be read as referring to the enforcement of a judgement already obtained. Of course, a waiver of immunity in regard to the action itself did not carry with it a waiver of enforcement of a resulting judgement against the property of the State. Paragraph 2 could, therefore, be referring to the two situations. Like paragraph 3, it was in effect a refinement of the general principle.

⁶ See 1709th meeting, footnote 13.

23. A decision on the retention of those two paragraphs would depend on whether a detailed definition of sovereign immunity was regarded as necessary. No harm would be done by spelling out exactly what it meant for a foreign State to be immune from local jurisdiction, but one could argue equally strongly that such a course would be unnecessary in article 7 if all terms were properly defined in article 2.

24. Again, article 7 used a number of terms in the form in which they were employed in article 3, which in effect supplemented the definitions of "foreign State", "jurisdiction", and "trading or commercial activity" set forth in article 2. In his opinion, it was somewhat cumbersome to define the same terms in two different places and it would be better to consolidate articles 2 and 3. Thus, article 3, subparagraph 1 (a), could be added to article 2, subparagraph 1 (d); article 3, subparagraph 1 (b), could be combined with article 2, subparagraph 1 (g), and article 3, paragraph 2, could be added to article 2, subparagraph 1 (f). In that way, most of the rules stated in paragraphs 2 and 3 of article 7 would be covered by the straightforward statement in article 6 that "A State is immune from the jurisdiction of another State".

25. The two points in paragraph 3 of article 7 that were not specifically covered by the definitions in articles 2 and 3 were, first, the term "representatives" of the foreign State, and second, the reference to depriving a foreign State of its property. In the first instance, "representatives" could easily be added to article 3, subparagraph 1 (a) (iv), as combined with article 2, subparagraph 1 (d), and in the second instance, the matter would be covered by his earlier suggestion for an expanded definition of "jurisdiction". Paragraph 3 would then prove to be unnecessary or of only marginal use at best.

26. Lastly, assuming that the admonitory function of paragraph 2 was deemed to be a desirable feature of part II of the draft, it could constitute the whole of article 7, with the first part redrafted to read:

"The immunity of a State and its property from the jurisdiction of another State under article 6 applies whether or not the former State is named as a party to legal proceedings in the latter State, so long as such proceedings in effect seek ...".

27. Mr. EL RASHEED MOHAMED AHMED, expressing his preference for alternative A for paragraph 1, said that it set forth the procedure whereby a State could meet its obligation, for the word "shall" denoted obligation. However, a difficulty arose in relation to article 3, subparagraph 1 (b) (iv), which, in addition to the expression "judicial or administrative authorities" also used in article 2, subparagraph 1 (b), included a reference to "police authorities". Accordingly, in alternative A the word "executive" should be added before "judicial", so as to cover not only police authorities but also ministries of foreign affairs.

28. Paragraph 2 was designed to guard against unnecessary litigation by preventing those who were unable to institute proceedings directly from attempting to initiate proceedings indirectly. However, the words "may [involve] affect" should be replaced by "designed to affect" or "intended to affect", in order to bring the wording of the paragraph 2 into line with that of paragraph 3.

29. Mr. JAGOTA said that it was essential to be clear about the scope of the jurisdictional immunities of States and their property. As defined in articles 2 and 3, jurisdictional immunity meant, basically, immunity from the adjudication procedures of foreign States, in other words, of their courts and other, quasi-judicial bodies. Thus, the draft was not concerned with such matters as the international sea-bed, which fell outside the jurisdiction of sovereign States, but was confined mainly to the jurisdictional immunities of States and their property in the relations between States.

30. Assuming the article 6 stated the rule of sovereign immunity and that the extent of the obligation involved would be specified later in part III, the question that arose was whether article 7 was necessary. Unlike Mr. McCaffrey, who considered that it was simply definitional in nature and that whatever it sought to achieve could be done by redrafting articles 2 and 3, his own view was that it was indeed useful, and he would not hasten to delete it. The essence of article 7 lay in paragraph 1, which dealt with a State's obligation to implement the rule set forth in article 6 and was expressed not only in positive terms but also in negative terms, since it required a State to refrain "from subjecting another State to the jurisdiction of its otherwise competent judicial and administrative authorities". It would be advisable to retain that element, which would not normally be incorporated in a definition.

31. There were two basic differences between the alternative versions for paragraph 1. In the first place, alternative A, unlike alternative B, did not provide for general immunity from the jurisdiction of another State. By virtue of its reference to "competent judicial and administrative authorities", it respected the actual scope of the draft and did not extend to such areas as immunity from payment of taxes. Consequently, it was concerned solely with disputes that arose before the local courts and other authorities having quasi-judicial functions and such ancillary police functions as seizure, attachment and execution.

32. The second difference might be unintentional, but it could well cause difficulties. In alternative A, the expression "competent judicial and administrative authorities" covered only the first limb of the paragraph, starting with the words "refraining from subjecting another State" and did not encompass the question of disallowing proceedings against another State. In alternative B, however, the reference to competence appeared at the end of the paragraph and therefore applied to both things. Those were purely drafting matters, but whichever alternative was

adopted, it was essential to specify clearly the type of forum from which immunity should be claimed.

33. Again, paragraph 2 had both a purpose and a place in the draft. To illustrate his point, he cited the case of a dispute over goods owned by the Government of India that had arisen between the supplier of the goods and the repairer. The latter had secured an order from the local courts authorizing it to retain the goods as a lien until such time as the supplier had paid over monies due. The Foreign Office had been asked to intervene, since the goods in question were public property, but had replied that it had no power to do so. A case of that kind fell squarely within the terms of paragraph 2: the Government of India had not been named as a party to the legal proceedings and its property had most certainly been affected.

34. It was suggested in the footnote to article 7 that paragraph 3 could constitute an alternative to article 3, subparagraph 1 (a), which dealt with the definition of a "foreign State". However, the latter part of paragraph 3 also dealt with property, which was not covered by article 3, subparagraph 1 (a). Hence, the footnote did not apply to paragraph 3 in its entirety.

35. Mr. BALANDA said that he would not repeat the amendments to article 7 he had proposed during the general discussion (1710th meeting). The more he looked at the article, the more he questioned its real value, for the basic principle already seemed to have been enunciated in article 6. As other members of the Commission had pointed out, article 7 did not, strictly speaking, contain a rule and was simply a corollary to article 6.

36. If article 7 was retained, it would have to be worded so that it would not give rise to any practical difficulties for the various legal systems. For example, it had been proposed that, in alternative A for paragraph 1, reference should be made not only to the judicial and administrative authorities, but also to the "police authorities". It should, however, be noted that some countries, such as his own, had no police authorities, but did have a *gendarmérie* and armed forces.

37. As the Special Rapporteur had said, in alternative A the words "otherwise competent", which referred to the judicial and administrative authorities, were not necessary because immunity always entailed competence. In any event, he himself would have a definite preference for alternative B, which came much closer to meeting the concerns he had expressed.

38. On the other hand, if article 7 were deleted, the consequent elimination of paragraph 2 would be regrettable, for it sought to clarify the way in which the interests of a State could be affected by a measure, whether judicial or administrative, taken by another State. Subject to better formulation, the idea expressed in paragraph 2 warranted consideration. As to the words "judicial determination", a distinction was sometimes drawn between judicial courts and ad-

ministrative courts and, as some members of the Commission had also noted, in some legal systems the police authorities could take measures that might affect the rights and interests of other States. Hence, paragraph 2 would have to be recast in order to cover all those situations. At the same time, the words "competent authority" were not entirely satisfactory and should be amended. Immunity did indeed entail competence, as he had already pointed out, but a measure taken by an authority which was not competent could still affect the interests of another State.

39. In respect of paragraph 3, he agreed with Mr. Thiam that the word "instrumentalities" really had no place in the text because, in systems based on the French model at least, it would be inconceivable for a proceeding to be instituted against an instrumentality, which did not have legal personality. However, the word "*mécanismes*" in the French text was perhaps only a poor translation of the word "instrumentalities". Similarly, in connection with the phrase "as a sovereign authority", he shared Mr. Ushakov's view that it was difficult to see how a State could act otherwise than as a sovereign authority, whether on its own or through its political or administrative organs. Retention of the phrase would therefore give rise to problems, particularly since the exceptions provided for in the draft related to private law activities, something which prevented a State from performing them as a sovereign authority.

40. Several members of the Commission encountered difficulties with the words "State", "organs", "agencies" and "representatives" and regarded them as conflicting with the definition of the scope of the draft apparent in article 4, which specified that the articles did not apply to the jurisdictional immunities accorded in the four Conventions on diplomatic relations, consular relations, special missions and the representation of States in their relations with international organizations of a universal character. To reassure those members, the Commission could simply refer to the "State" and add, before the definitions of the terms "territorial State" and "foreign State" in article 2, paragraph 1, a definition of the term "State" as it was to be understood in the draft. In view of the varied systems of internal law, the definition should encompass political and administrative entities and agencies subordinate to them. Indeed the concept of the term "State" differed considerably from one country to another, and no attempt should be made to take account of the niceties of the different systems.

41. Furthermore, in the French version of article 7, paragraph 3, the words "*faits accomplis*" (acts performed) did not appear to be correct. The part of article 2 concerning the activities that could be conducted by the State related to *actes juridiques*, and not *faits juridiques*. Lastly, the expression "public property" in paragraph 3 was normally used in contrast to "private property", which signified property that fell within the private domain of the State and was therefore open to seizure, at least in some systems of law. To employ the expression might well cause problems, for the question

could arise of whether, in a particular case, the property was public or private, something that might create a very delicate situation in view of the unicity of the State. If the property was private and the act did not come within the category of *acta jure imperii*, immunity could not be claimed. Hence, it would be better to avoid a *renvoi* to internal law.

The meeting rose at 1 p.m.

1715th MEETING

Thursday, 27 May 1982, at 10.10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

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

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPOORTEUR³ (*continued*)

ARTICLE 7 (Obligation to give effect to State immunity)⁴ (*continued*)

1. Mr. AL-QAYSI said that the terms “rule” and “principle” had been employed a great deal in the course of the discussion and, in order to determine whether they could be used interchangeably, he had consulted the authorities. Paton, in his work on jurisprudence,⁵ had defined a principle as the broad reasoning that lay at the base of a rule of law: it demonstrated that the law was not simply a collection of rules, and through it, the law could draw nourishment from the views of the community. Rules, on the other hand, were precepts which laid down the consequences that would inevitably flow from certain facts—for instance, a will would be invalid if it was not attested by two witnesses. On that basis, it was apparent that article 6 set forth a rule on the jurisdictional immunity of States that was based on the principle of sovereignty.

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

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

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

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

⁵ G. W. Paton, *A Text-book of Jurisprudence* (Oxford, Clarendon Press, 1946), p. 176.

2. Clearly, the content of article 7 had to be examined in the light of its purpose, for it sought to enunciate the obligation that was the corollary to the right embodied in article 6. Accordingly, article 7 viewed the rule of State immunity from the opposite standpoint, namely, that of the State granting immunity, rather than the State claiming immunity. Moreover, the provisions of article 7 were set in the context of the interrelationship between competence and State immunity, in which connection the Special Rapporteur had rightly stated in his fourth report (A/CN.4/357, para. 21) that the “rules of competence of the court are very relevant in all cases, whether or not the question of State immunity is also involved”; the reason being that, without the necessary jurisdiction, the question of immunity would be hypothetical, since there would be no exercise of jurisdiction from which the foreign State could be deemed immune.

3. During the Commission's deliberations it had been maintained that article 7 stated nothing of substance. Although he did not share Mr. Ushakov's views (1714th meeting), they were fully justified inasmuch as they were the logical outcome of his position on article 6, to which article 7 referred. Mr. Thiam's doubts (*ibid.*) seemed to be caused, first, by the incongruity between the title of the article and the actual content, which was descriptive, and second, by the negative terms in which the article was couched. It had to be remembered, however, that obligations could be stated in negative terms, which did not detract from the force of the obligation and afforded a very appropriate drafting device when there were exceptions to the operation of the rule itself, as was the case in point. It certainly could not be argued that the principle of the non-use of force in international relations, as laid down in Article 2, paragraph 4, of the Charter of the United Nations, did not state an obligation because it was expressed in negative terms.

4. The point concerning the descriptive character of the article tallied with Mr. McCaffrey's view (*ibid.*) that the text was definitional and could be covered by making changes in articles 2 and 3. In that respect, he would endorse most of what Mr. Jagota had said (*ibid.*), namely, that paragraph 1 was not definitional because it stated an obligation, something that could readily be seen from the analysis of jural relationships referred to in the Special Rapporteur's third report (A/CN.4/340 and Add.1, para. 18). Paragraph 2 of the article was also substantive in that it dealt with legal proceedings against a State, whether or not named as a party, when the said State was in effect impleaded. That aspect of the matter was part and parcel of the obligation laid down in paragraph 1. Consequently, paragraph 3, despite the note thereto, only provided a partial alternative to the text of article 3, subparagraph 1 (a), since it contained a reference to property, a notion that obviously could not be subsumed under the notion of foreign States.

5. In one respect he disagreed with Mr. Jagota's comments on the two versions of paragraph 1. The matter