Document:-
A/CN.4/SR.1839

Summary record of the 1839th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1984, vol. I

and its 1934 Additional Protocol (*ibid.*, paras. 199-207). The Convention should not be dismissed as an instrument of purely regional character, since it had many States parties from a number of continents and with differing economic and social systems. He had likewise referred to the codification conventions prepared by the 1958 Conference on the Law of the Sea (*ibid.*, paras. 208-210), to article 236 of the 1982 United Nations Convention on the Law of the Sea (*ibid.*, paras 211-212), regarding protection of the marine environment, to the 1940 Treaty on International Commercial Navigation Law (*ibid.*, para. 213) and to the 1969 International Convention on Civil Liability for Oil Pollution Damage (*ibid.*, para. 214). In the context of treaty practice, he had pointed out (*ibid.*, para. 215) that the use of a "waiver clause" reaffirmed the trend towards the exercise of jurisdiction by competent courts in proceedings against vessels, cargoes and owners, provided the cause of action arose out of commercial shipping forming part of the business activities of the State. A typical example was article XVIII of the Treaty of Friendship, Commerce and Navigation between the United States and the Federal Republic of Germany (*ibid.*).

35. Lastly, his examination of the opinions of writers (*ibid.*, paras. 216-230) revealed that those in favour of absolute immunity and those in favour of restricted immunity were initially more or less equally divided. Nevertheless, there was undoubtedly a clear trend towards restricted immunity, one that had inevitably gathered momentum. It was on the basis of those considerations that he had prepared the alternative versions of draft article 19.

36. Draft article 20 related to arbitration, which in one sense was difficult to dissociate from judicial settlement. Arbitration could take many forms and the main types were discussed in the report (*ibid.*, paras. 237-245). State practice in the matter was not very revealing, since an agreement to submit to arbitration could operate to delay the exercise of the original jurisdiction by a court. In that connection, it would be noted that in the arbitration case *Maritime International Nominees Establishment* v. *Republic of Guinea* (1982), it had been held that the agreement to submit to arbitration did not create new jurisdiction where none existed (*ibid.*, para. 248).

37. With regard to governmental practice, section 9 of the United Kingdom *State Immunity Act 1978* provided that, where a State had agreed in writing to submit a dispute to arbitration, the State was not immune as respects proceedings in the courts of the United Kingdom which related to the arbitration, although a proviso was included to the effect that that provision was subject to any contrary provision in the arbitration agreement and did not apply to any arbitration agreement between States. A similar provision was to be found in Pakistan's *State Immunity Ordinance, 1981* and Singapore's *State Immunity Act, 1979*. He had also referred to the 1972 European Convention on State Immunity, the Geneva Protocol on Arbitration Clauses, of 24 September 1923, and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*ibid.*, paras. 251-253). Consequently, it was clear that, if there was an agreement to submit to arbitration and if there was also a link between the procedure for arbitration and the internal legal system, it was difficult not to infer implied consent to the exercise of jurisdiction. It was on that basis that he had formulated draft article 20 for consideration by the Commission.

The meeting rose at 6 p.m.

1839th MEETING

Wednesday, 13 June 1984, at 11.10 a.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

Organization of work of the session (*concluded*)* (ILC (XXXVI)/Conf. Room Doc.2)

[Agenda item 1]

1. The CHAIRMAN said that the Enlarged Bureau had held a meeting that morning to consider the timetable for the remainder of the session. It recommended:

(*a*) That the Commission should continue its consideration of the following two topics:

Jurisdictional immunities of States and their property (agenda item 3), until 15 June;

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (agenda item 4), from 18 to 22 June;

(*b*) That the Commission should then consider the following topics:

International liability for injurious consequences arising out of acts not prohibited by international law (agenda item 7), from 25 to 29 June;

The law of the non-navigational uses of international watercourses (agenda item 6), from 2 to 9 July;

State responsibility (agenda item 2), from 10 to 20 July;

(*c*) That the Commission should consider its draft report and related matters from 23 to 27 July.

2. The Enlarged Bureau planned to hold a further meeting before the end of the session in order to review the progress of work. If there were no objections, he would take it that the Commission agreed to those recommendations.

It was so agreed.

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* Resumed from the 1815th meeting.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/363 and Add.1, [1] A/CN.4/371, [2] A/CN.4/376 and Add.1 and 2, [3] A/CN.4/L.369, sect. C, ILC (XXXVI)/Conf. Room Doc.1 and Add.1)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR [4] (*continued*)

ARTICLE 19 (Ships employed in commercial service) *and* ARTICLE 20 (Arbitration) [5] (*continued*)

3. Mr. USHAKOV said that the Special Rapporteur was to be commended for the extremely thorough study which had led to the formulation of draft article 19. Personally, he had come to an entirely different conclusion which was not at all surprising, for as indicated in the report (A/CN.4/376 and Add.1 and 2, para. 217), he (Mr. Ushakov) was in favour of so-called "absolute" immunity. In point of fact, he favoured State immunity pure and simple; the word "absolute" was simply added as a modifier by those who were opposed to immunity as such. The Special Rapporteur himself proved to be an advocate of restricted immunity, since article 19 set forth the principle that State immunity should not apply to commercial activities conducted by a State through trading vessels belonging to or used by it. Indeed, under paragraph 2 of alternative A of article 19, that exception would appear to apply even to a State's warships.

4. What was in fact meant by "commercial activities" when they were carried out by a merchant vessel belonging to a State? The question remained unresolved. It was obvious, as he himself had noted in the memorandum which he had presented at the previous session (A/CN.4/371), that a State formed a single indivisible whole and could not engage in acts of governmental authority in some cases and conduct itself as a mere private person in others; in other words, it could not perform *acta jure imperii* and *acta jure gestionis* as the occasion arose. In any event, such a distinction did not apply in court, for the immunity of a senior public official or a member of parliament had to be waived before he could be tried. In the case of State ships employed in commercial service, it was the fact that they belonged to a State that was decisive, and the use to which they were put was irrelevant. A State could use a merchant vessel that belonged to it for purposes other than profit, to help its population or its economic development, by importing wheat for example.

5. Assuming that a distinction could be drawn between acts *jure imperii* and acts *jure gestionis*, could a State be brought before the courts of another State as though it were acting as a private person? The answer was that it definitely could not. It was always the State as such that would be summoned and tried. The exercise of the jurisdiction of a court of one State over another State always amounted to the exercise of the governmental authority, the judicial authority, of the first State over the second. That would be the case, for example, if activities conducted by States through their merchant vessels were the subject-matter of a court action.

6. Yet even the advocates of the theory of functional immunity, which was in his view a mistaken theory, had always tended to recognize that military vessels and other State vessels in public service—even though a distinction between public and non-public service was impossible to make—were exempt from the jurisdiction of another State. A State which possessed or used such vessels was still responsible for any damage they might cause in the ports and territorial waters of a foreign State, whose laws and regulations it was bound to respect. It could easily assume its responsibility in that regard without submitting to the jurisdiction of a court of that foreign State.

7. Many countries, including the Soviet Union, which had always recognized and continued to recognize the absolute immunity of ships belonging to or used by another State, had settled disputes arising out of damage caused by such ships out of court. Jurisdictional immunity did not mean that a State could do what it liked without having to pay compensation. It simply meant that, under the firmly established principle of the sovereign equality of States, a State could not be subjected to the judicial authority of another State. Obviously, in commercial agreements or contracts a State could, either expressly or implicitly, submit voluntarily to the jurisdiction of a foreign State. But it was always the consent of the State that was decisive, even in internal law.

8. The report showed that, in the matter of the application of the theory of functional or restricted immunity, judicial practice was quite scanty and not at all uniform, even within the same State, and that governmental practice, which was incidentally quite recent, was limited to only a small group of States. Article 19 was pointless, if not dangerous, because it ran counter to the funda-

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[1] Reproduced in *Yearbook ... 1983*, vol. II (Part One).

[2] *Idem.*

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

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

Part I of the draft: (*a*) art. 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (*b*) art. 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—para. 1 (*a*) and commentary thereto: *ibid.*, p. 100; para. 1 (*g*) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), p. 21; (*c*) art. 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; para. 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), p. 21; (*d*) arts. 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (*e*) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (*f*) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (*g*) art. 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22-25.

Part III of the draft: (*h*) art. 11, *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised text: *ibid.*, p. 99, footnote 237; (*i*) art. 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (*j*) arts. 13 and 14: *ibid.*, pp. 18-19, footnotes 54 and 55; revised texts: *ibid.*, p. 20, footnotes 58 and 59; (*k*) art. 15 and commentary thereto adopted provisionally by the Commission: *ibid.*, p. 22.

[5] For the texts, see 1838th meeting, para. 25.

mental principles of modern international law and, in particular, the principles of the sovereignty and sovereign equality of States.

9. He would comment on draft article 20 at a later stage, if there was enough time at the present session.

10. Mr. McCAFFREY, referring to alternative A of draft article 19, said that the layout of paragraph 2 made it appear as though the last clause, reading "if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes", applied to subparagraph (*b*) alone, rather than to the paragraph as a whole.

11. With regard to the remarks made by Mr. Ushakov, he pointed out that, if all trading activities were conducted solely by the State or by State entities, there would be complete equality. Under some systems, however, trading was carried out mainly through private entities. A situation of inequality might well arise when a private entity traded with a State and also when it was impossible for the private entity to obtain direct redress through measures initiated by it against the State entity. The private entity would have to rely on its own Government to assert its claim through diplomatic channels, something that would be of small comfort to the private entity, which would lose all control over its attempts to obtain redress. Consequently, many States would insist on allowing direct recourse by private entities against all their trading partners, whether private or governmental. Those were the hard facts of the matter and to insist on full immunity in all circumstances was simply to ignore reality.

12. Chief AKINJIDE said that, in his view, Mr. Ushakov had somewhat over-simplified the issue. To illustrate his point he could cite a case in which he had been involved on behalf of his Government. It had concerned a ship, built in the Federal Republic of Germany, which had belonged to the Nigerian Government and, after delivery, had had to return for repairs. On reaching the English Channel, the ship, manned by members of the Nigerian navy, had developed serious engine trouble. The alarm had been raised and rescue ships had arrived. The salvors, however, had refused to rescue the ship until the Lloyd's salvage form had been signed. As the ship had been in dire straits, that had been done and the ship had then been towed to a French port. The problems had been insurmountable, with contracts involving a private German company, a private French salvage company, Lloyd's of London—a private association—the Nigerian armed forces and a State-owned ship. He very much doubted whether Mr. Ushakov's principle could have been invoked against all those parties. He also doubted whether Mr. Ushakov's theory could prevail until such time as all States followed the same system.

13. Mr. SUCHARITKUL (Special Rapporteur) said that Mr. McCaffrey's comment regarding paragraph 2 (*b*) was quite correct. The words "if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes" appeared wrongly as the last clause of subparagraph (*b*), a transcription mistake that should be rectified. The clause in question should start on a separate line, so as to apply not only to actions *in personam* but also to actions *in rem*.

14. It was thus clear that the provisions of article 19 were not applicable to warships. Should there be any doubt in that regard, it would be necessary to insert a separate provision that specifically excluded warships.

15. Sir Ian SINCLAIR said he agreed with Mr. McCaffrey and felt that Mr. Ushakov had failed to take into account much of the abundant material supplied by the Special Rapporteur in support of draft article 19. That material showed the development of State practice and also discussed a whole series of international conventions which had a direct or indirect bearing on the point under discussion. One of them was the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, which was the outcome of a maritime conference held in Brussels in 1926 in the context of difficulties that arose with regard to State-owned vessels engaged in commercial service when a plea of immunity was entered (A/CN.4/376 and Add.1 and 2, paras. 199-207).

16. The problem at issue could be summarized in the following manner. Shipping was something different from the other matters dealt with by the Commission with regard to the exceptions to immunity. As a matter of legal fiction, a ship was a piece of floating territory. The difficulty was that it moved rapidly from place to place. Various events could take place in connection with a ship: it could be involved in a collision or an incident could occur on the high seas, as in the case referred to by Chief Akinjide. Salvors might then come on the scene and, in circumstances similar to those described by Chief Akinjide, he would himself have given the same advice. If the only alternative to loss of the ship by sinking was to sign a salvage form, then one would have to sign the form. Yet in all fairness, one should appreciate the problem facing the salvors. If they salvaged a ship and the ship disappeared after a few days in port for repairs, they would be left without recourse. Clearly they had to have some kind of arrangement whereby their claim for salvage could be met.

17. Another specific aspect of shipping was that *in rem* jurisdiction amounted in part to the arrest of a vessel, but that did not mean the vessel was physically held up for an indefinite period of time. In practically all the cases which had come to his knowledge, the normal practice was for a bail bond to be posted immediately after the arrest of a vessel, so that the ship could be released and continue its voyage. Ships were constantly on the move, and hence there had to be some means whereby properly justified maritime claims could be asserted on behalf of private persons who had suffered damage as a result of incidents occurring during the voyage.

18. An examination of the Special Rapporteur's commentary, of the 1926 Brussels Convention and of various other international conventions, such as the 1958 Geneva Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea (*ibid.*, paras. 208-212), showed plainly that immunity continued to subsist in regard to State-owned vessels employed in non-

commercial government service. A problem arose when State-owned vessels were used in commercial service; that was another aspect of commercial activity which the Commission had discussed in connection with an earlier article. Since the arrest of a vessel was involved, the case was on the borderline between exceptions to State immunity in the adjudicative field and the concept of immunity from attachment. Accordingly, any provision on the matter had to take both aspects into consideration and also make clear the fact that it related exclusively to commercial service and did not apply to naval ships or to State-owned ships used for non-commercial service.

19. In his review of legal writings (*ibid.*, paras. 216-228), the Special Rapporteur had mentioned a number of writers who upheld the doctrine of absolute immunity, but he would also doubtless agree that the list of authors who endorsed the restrictive concept of immunity could have been much longer.

20. Lastly, the Special Rapporteur had commented on sister-ship jurisdiction in connection with the House of Lords decision in *The "I Congreso del Partido"* case in 1981 (*ibid.*, para. 41) and had stated that "the basis for the assumption and exercise of sister-ship jurisdiction is not completely free from controversy" (*ibid.*, para. 155). Sister-ship jurisdiction as applied in the English courts derived directly from the International Convention relating to the Arrest of Seagoing Ships, signed at Brussels in 1952.[6] To date, there were 31 States parties to the Convention, by no means all of them European countries, for they included Fiji, Guyana, Mauritius, the Syrian Arab Republic and Togo. The purpose of sister-ship jurisdiction was to deal with the problem of the impossibility of arresting the specific vessel in commercial service which had caused the incident giving rise to a maritime claim. In cases of that type, it had been agreed at the 1952 Brussels Conference that, subject to certain conditions, the claimant could arrest a sister ship of the vessel whose service had given rise to the claim.

21. It was important to remember that, in United Kingdom judicial practice, sister-ship jurisdiction was subject to very strict conditions. For example, *The "Sennar" (No. 2)* case, a very recent one reported so far only in the *Financial Times* of 8 June 1984, had not involved a problem of State immunity, but sister-ship jurisdiction had been invoked, first in the courts of the Netherlands and subsequently in the English courts. The purpose had been to avoid a jurisdictional clause included in the contract in the interests of the Sudanese party to the transaction. The contract had related to the export of groundnuts shipped from Sudan to the Netherlands, with a stipulation that it was governed by Sudanese law and that the courts of Khartoum or Port Sudan had exclusive jurisdiction over any dispute arising out of the contract. The Court of Appeal in London had refused to allow sister-ship jurisdiction for the benefit of the claimants and had taken the same view as the Netherlands court earlier, namely that the case fell within Sudanese jurisdiction.

The meeting rose at 12.40 p.m.

[6] See 1837th meeting, footnote 17.

1840th MEETING

Thursday, 14 June 1984, at 10.05 a.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/363 and Add.1,[1] A/CN.4/371,[2] A/CN.4/376 and Add.1 and 2,[3] A/CN.4/L.369, sect. C, ILC (XXXVI)/Conf. Room Doc.1 and Add.1)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[4] (*continued*)

ARTICLE 19 (Ships employed in commercial service) *and* ARTICLE 20 (Arbitration)[5] (*continued*)

1. Mr. QUENTIN-BAXTER said that he had been unable to participate actively tin the discussion of draft articles 16 to 18, which contained provisions that were perhaps necessary and interesting but were of somewhat limited application. Draft article 19, however, dealt with the very important matter of ships, a special case that had to be considered in its own right. Yet some of the ele-

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[2] *Idem.*

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[5] For the texts, see 1838th meeting, para. 25.