Document:-
A/CN.4/SR.1917

Summary record of the 1917th meeting

Topic:
Jurisdictional immunities of States and their property

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

course, eliminate all the risks involved in submitting to arbitration, but going to law was, in any event, never a totally safe proposition.

45. A number of comments had already been made on the words "a civil or commercial matter" used in article 20, paragraph 1. His own opinion was that, even if reference were made to a commercial contract, as Mr. Ushakov had suggested, or if some other wording were used, there would still be a drafting problem that would have to be resolved by the Drafting Committee.

46. With regard to the words "a court of another State on the territory or according to the law of which the arbitration has taken or will take place", also in paragraph 1, it had rightly been pointed out that a reference to "the law" might give rise to problems. The Special Rapporteur had modelled paragraph 1 on article 12 of the 1972 European Convention on State Immunity. In the French text, however, the word *loi* was a literal translation of the word "law". It might have been better to use the word *droit*, even though in private international law the word *loi* was usually used to mean *droit*. The simplest course would therefore be to explain in the commentary that reference was being made to the applicable law in a State, including international law which formed part of the internal law of that State.

47. Referring to the possible link between draft article 20 and the question of the enforcement of arbitral awards, he said that, in his view, it would be logical to take account not only of the case of a court of another State on the territory of which the arbitration had taken or would take place and the case of a court of another State in accordance with the law of which the arbitration had taken or would take place, but also of the case of another State in which an application for the enforcement of an arbitral award had been submitted. In the event of a dispute between a company and a State, efforts were usually made to avoid applications for enforcement because they involved considerable expense. If enforcement was sought, then it was usually applied for in a court of the country where the property in question was located. The non-application of immunity should probably be extended to that case as well. A State might, of course, also apply for the enforcement of an arbitral award, but the problem of immunity from jurisdiction would then not arise.

48. Referring to article 20, paragraph 2, he noted that the words "arbitration agreement" had been translated as *convention d'arbitrage* in French. In English, an "agreement" was a rather modest type of instrument, whereas in French the term *convention* had more lofty connotations. He therefore suggested that, in the French text, the words *accord d'arbitrage* should be used instead in order to take account of all possibilities.

49. It had been suggested that article 20 should refer only to agreements concluded under international law or, in other words, to commercial arbitration agreements concluded between two States. Such agreements would be exceptional, but there had in fact been a case in which one had been concluded. In 1955, René Cassin had rendered an arbitral award in a maritime dispute between the United Kingdom and the Government of Greece.[21] One of the points at issue had been whether there had been a transaction and commercial arbitration or a transaction and arbitration under public international law. Paragraph 2 should therefore be drafted in more explicit terms.

The meeting rose at 1.05 p.m.

[21] The *Diverted cargoes* case (*International Law Reports, 1955* (London), vol. 22 (1958), p. 820).

1917th MEETING

Tuesday, 2 July 1985, at 3.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

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

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

[Agenda item 4]

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

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

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

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

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

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

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

ARTICLE 19 (Ships employed in commercial service) *and*
ARTICLE 20 (Arbitration)[4] *(continued)*

1. Mr. OGISO thanked the Special Rapporteur for submitting a revised version of draft article 19 which took account of the various views expressed at the previous session. He had no objection, in principle, to referring the article to the Drafting Committee, but wished to seek further enlightenment on some points. First, the Special Rapporteur's sixth report (A/CN.4/376 and Add.1 and 2) appeared to contain no mention of a case of collision between ships. It seemed unlikely that no ship owned or operated by a State had been involved in the large number of cases brought before the courts as a result of such collisions. In the hypothetical event that a ship owned or operated by a State for commercial purposes collided with an ordinary commercial ship in the territorial waters of another coastal State, would paragraph 1 of article 19 mean that the court of the coastal State had jurisdiction over the case if the matter was brought before it by the owner of the ordinary commercial ship? If that interpretation was correct, he would welcome confirmation of the assumption that, in so far as the State was engaged as an owner in a commercial operation consisting of the carriage of goods from that State to another coastal State, a case brought before a court in the event of a collision or other accident would constitute a "proceeding relating to the commercial operation of that ship" under the terms of the article.

2. A further question related to the proviso at the end of paragraph 1, namely "provided that ... the ship and cargo belonging to that State were in use or intended for use for commercial purposes". He wondered whether the text in its present form made it sufficiently clear that the proviso did not exclude the case of a ship owned by State A carrying cargo belonging to State B.

3. With regard to draft article 20, he asked for an explanation of the significance of, or need for, the reference to the territory of the other state in which the arbitration had taken or would take place. As far as he could see, it would be sufficient merely to say "another State according to the law of which the arbitration has taken or will take place". That comment apart, he had no objection to the article being referred to the Drafting Committee.

4. Chief AKINJIDE said that, coming as he did from a developing country, he could not but feel the gravest concern over the implications of the two draft articles under consideration. The past 15 years had seen the demolition of the principle of the absolute immunity of States in commercial matters, the greatest assault upon that principle having been made by the *Foreign Sovereign Immunities Act of 1976* of the United States of America and the *State Immunity Act 1978* of the United Kingdom. That development had coincided with the emergence of the developing countries, when many commercial transactions were carried out by States rather than by private companies.

5. Three main groups of interests were affected by draft articles 19 and 20: those of the developed Western countries, 80 or 90 per cent of whose commercial transactions were in the hands of private companies or corporations; those of the developing countries, where the overwhelming majority of commercial transactions was carried out by the State; and those of countries with centrally planned economies, where the State was responsible for all commercial transactions. Far from attempting to maintain an equilibrium between those competing interests, the main thrust of the two articles appeared to be to bring international practice as a whole into line with the United States and United Kingdom Acts he had already mentioned. The meaning of article 19 was in effect that, unless otherwise agreed, a State dealing with a private or public company in another State would enjoy no immunity whatsoever. The resulting situation would have very serious implications. His own experience of commercial litigation in various European countries led him to doubt that any Government of a developing country would sign, still less ratify, either of the two articles now before the Commission. Mr. Ushakov's approach, although perhaps too categorical in some respects, was closer to the reality of the situation. The Soviet Union, which, under the United Kingdom *State Immunity (Merchant Shipping) (Union of Soviet Socialist Republics) Order 1978* (see A/CN.4/376 and Add.1 and 2, paras. 195-196), was exempt from the *State Immunity Act 1978*, could hardly be expected to become a party to a convention that included articles 19 and 20 as proposed by the Special Rapporteur.

6. An aspect of article 20 that should not be overlooked was that, as a rule, nationals of a State involved in arbitration before a court of another State were not allowed to appear as counsel before that court, If, as often happened, a case involving a developing country brought before a court in a developed country was submitted to arbitration under the law of another developed country, the developing country had to retain counsel from both those countries, at enormous cost and with devastating effect upon its economy.

7. For all those reasons, he considered that articles 19 and 20 were too one-sided and failed to reflect the fundamental interests of all members of the international community. They required a very radical review and he was not in favour of their being referred to the Drafting Committee at the present stage.

8. The CHAIRMAN asked whether the review of the kind Chief Akinjide had in mind could be carried out in the Drafting Committee or whether it entailed returning the draft articles to the Special Rapporteur.

9. Chief AKINJIDE said that the issues involved were so fundamental that the articles would, in his view, have to come back to the Commission for further discussion. To accept them would be to subscribe to the proposition that the rich should continue to be rich and the poor should continue to be poor.

10. Mr. RAZAFINDRALAMBO, congratulating the Special Rapporteur on work that reflected a great

[4] For the texts, see 1915th meeting, paras. 2-3.

deal of research, said that the sixth report (A/CN.4/376 and Add.1 and 2) revealed the developments in State practice and the shift from the doctrine of absolute immunity to restricted immunity. It was apparent from the report that the maritime powers had observed the principle of absolute immunity when they had had a virtual monopoly over the seas. The reversal on the part of the United States dated back to 1952 and on the part of the United Kingdom to 1981. Subsequently, the newly independent countries had necessarily concurred with the changes in doctrine, for they could not remain outside the trade flows that had taken shape without them. Trade relations and North-South relations had made those countries economically dependent on the countries of the North, and they had therefore become countries of demand rather than supply, even though for the most part they did possess raw materials needed by the industrialized countries.

11. The countries which had ratified the 1958 Geneva Conventions on the law of the sea (*ibid.*, paras. 208-210) had been able to do no more than accept the distinction drawn between ships according to the nature of their service or activities or according to the nature of their operation. While he appreciated and shared the concerns expressed by Chief Akinjide, it was difficult to see how the countries of the third world could win acceptance for their views in that regard.

12. He endorsed the principle set forth in draft article 19, which provided a new example of an exception to the jurisdictional immunity of States. As to paragraph 1, in his opinion the notion of operation in the words "employs or operates a ship in commercial service" took first place over employment of the ship. What counted was use for commercial purposes: a State could employ or requisition a ship in commercial service for governmental purposes. Furthermore, article 19 covered jurisdiction from immunity only in respect of commercial operations. However, the distinction between "ship" and "cargo" was acceptable in principle, but he wondered why no reference was made to the owner of the cargo. Surely a proceeding could be instituted against the owner of the cargo. If the word "otherwise" signified the owner of the cargo, it would be better to make that point clear. Again, the article spoke of ships "intended for use for commercial purposes". Did that signify intended or actual use? There, too, clarifications were required.

13. Unlike some members of the Commission, he considered that paragraph 2 of article 19 was of some value, since it embodied a distinction established by practice and endorsed by the various conventions on the law of the sea. Failure to mention warships would make for an unfortunate lacuna.

14. Draft article 20 should be referred to the Drafting Committee, for it posed no problem. It reflected both court and arbitral and treaty practice and also the provisions of many international conventions on arbitration. Arbitration had increased considerably since the developing countries had acceded to independence and had grown in parallel with the economic development needs of those countries, constituting as it did the most appropriate way of guaranteeing safe investments and commercial contracts signed with newly independent countries whose legal institutions had been considered, rightly or wrongly, not to afford an equivalent guarantee.

15. The vast majority of the contracts signed by developing countries with foreign companies included clauses on arbitration. Before the establishment of ICSID under the 1965 Washington Convention,[5] use had been made of arbitration by the International Chamber of Commerce or *ad hoc* arbitration. Arbitration by the International Chamber of Commerce offered the advantage of an institutional system which had, over the years, formed a body of decisions and precedents that always made for safety in business. However, the disadvantage in the eyes of some people was that the Chamber was a purely private non-governmental body: hence the idea of establishing ICSID and developing UNCITRAL arbitration rules.

16. To his knowledge, no third world country had refused to insert arbitration clauses in the contracts they had signed. An arbitration agreement necessarily entailed a waiver of jurisdictional immunity with respect to the arbitral tribunal and also with respect to a domestic court for any action relating to arbitration. It was essential to stress that point, since it seemed to have given rise to serious misunderstandings. The arbitral tribunal was not necessarily in a position to rule on any point arising in the course of the proceedings. From the outset of the arbitration, the question might arise of the appointment of arbitrators. When the parties could not agree on such appointment, except in the case of an institutional system such as arbitration by the International Chamber of Commerce, they must refer to an external and impartial body; only a court of law fulfilled such criteria. In the course of the proceedings occasion could arise for a further appeal to a court. Issues of that kind had to be settled in accordance with the law of the court and such law might include peremptory provisions from which the parties could not derogate, which removed any possibility of contradiction between the judicial decision and the free will of the parties.

17. Paragraph 1 of article 20 spoke of an agreement in writing, an essential requirement because the arbitration agreement or clause covered matters that were too complex not to be dealt with in writing; they could not be implicit or verbal. With regard to the words "which has arisen, or may arise", the first case related in his opinion to a *compromis* and the second to an arbitral clause, but the words "may arise" should precede "has arisen", for contracts mostly contained an arbitral clause as additional security for investment companies, whereas a *compromis* might not be signed in the event of a dispute later on. The formulation "out of a civil or commercial matter" could also pose problems in the case of investment, for an investment contract was hybrid *sui generis* and might contain clauses under administrative law, such as clauses on public works or clauses concerning concessions. Again, the words "on the territory or according to the law" implied that it was

[5] See 1916th meeting, footnote 12.

the local court which was competent on a point of law arising in the course of the arbitration proceedings. The cases listed in subparagraphs (*a*), (*b*) and (*c*) were three classic examples of referral to a local court of law, especially in the case of an application for provisional measures preceding the initiation of the arbitration procedure. A case of arbitration between a French company, Electricité et Eau de Madagascar, and Madagascar in 1980 was an illustration of the case covered by subparagraph (*b*). The arbitral tribunal, set up under the auspices of the International Chamber of Commerce, had in the course of the proceedings been asked to order the deposit of a sum of money in a bank. Applications to set aside the arbitral award were more frequent—when the losing party was opposed to an order for enforcement. That was the only instance in which appeals were allowed against an arbitral award in cases of *ad hoc* arbitration.

18. Paragraph 2 of article 20 posed no particular problem, but the phrase "subject to any contrary provision in the arbitration agreement", could be placed at the beginning of paragraph 1. As to inapplicability to arbitration agreements between States, like Mr. Reuter (1916th meeting) he took the view that that provision was too absolute. Agreements on commercial or investment matters could certainly be concluded by States. Indeed, the definition of "foreign State" in draft article 3, paragraph 1 (*a*), and particularly in subparagraph (*a*) (iv), should not be overlooked. Consequently, States could easily conclude contracts containing arbitral clauses with the "instrumentalities" in question acting as organs of a State, something which often occurred in the case of nationalized or semi-public companies.

19. Lastly, he had no objection to referring articles 19 and 20 to the Drafting Committee, which could make the necessary changes, including those requested by Chief Akinjide.

20. Mr. ARANGIO-RUIZ said that he had been impressed by Mr. Mahiou's comments at the previous meeting. It was true that national judges might not always be sufficiently objective in the checks they were required to make on arbitral awards and proceedings in most countries. Mr. Mahiou's concerns were quite justified, not only with regard to the developing countries, but with regard to all States and even private persons, whether natural or legal.

21. International commercial arbitration frequently involved one stronger party, or a party supported by a stronger State. However, if certain abuses or injustices were to be avoided, the answer did not lie in clauses precluding supervision by State courts over arbitral awards and proceedings, nor in maintaining jurisdictional immunity *vis-à-vis* such supervision. Supervision by State courts could not be avoided. It was essential precisely in order to restore the balance which might sometimes have been endangered because one of the parties was weaker. Protection of the weaker party should also be sought in other directions, at the time when the contracts were being concluded, particularly when negotiating the arbitration clauses, on such matters as the composition of the arbitral tribunal and the place at which the tribunal was to sit. The parties, whether private or public, did not pay sufficient attention to the choices open to them in covering such issues in arbitration clauses. After all, no State or State agency could easily be forced to accept "any" arbitration clauses. At the time when contracts were being concluded, it was essential that they avoid binding themselves hand and foot to given arbitration centres in given countries. Once arbitration in a given country was accepted, it was difficult to rule out the natural consequence of subjection to the national judicial authority that was required to check the due and proper form of the proceedings and the award. The same was true regarding the choice of the arbitrators and the body or person that was to choose the third arbitrator in the event of disagreement between the parties. States and persons—particularly non-jurists—allowed themselves to be caught up too easily by the atmosphere of optimism that generally prevailed when a contract was being concluded. From that standpoint, he failed to see the conflict referred to by Mr. Mahiou at the previous meeting between the "free will of the parties", on the one hand, and the role of the judicial authorities of the country in which the arbitration proceedings were held, on the other.

22. Mr. BALANDA said that the bulk of what he had intended to say had already been said by Mr. Mahiou at the previous meeting. The shift towards restricted immunity should be viewed from the general standpoint of international economic relations. When the big Powers had been in control of the seas, they had found it necessary to enjoy virtually complete protection, and hence had asserted the principle of absolute immunity. But when other States had emerged on the international economic scene, in order to further their development they had been compelled, willy-nilly, to come into contact with developed countries. The move had then been in the opposite direction, namely a shift to limitation of immunity on the territory of the developed countries, the centres of trade relations. The industrialized countries had sought in that way to cut back the means of action available to the developing countries.

23. Major interests were the cause of a disequilibrium that was all too well known and one for which a remedy was constantly being sought. Contrary to what some people might believe, in most developing countries the burden of development lay largely with the State. Hence major attention should be paid to the way in which the activities of those States were conducted, since it was not always easy to distinguish between acts *jure gestionis* and acts *jure imperii*. The interests of the developing countries therefore called for the best protection possible.

24. In his sixth report (A/CN.4/376 and Add.1 and 2, paras. 128-131), the Special Rapporteur proposed the following classification of vessels: warships, which enjoyed absolute immunity; ships owned by the State, for which immunity could be claimed if they were used for non-commercial governmental service; and privately-owned ships used in the service of the State, for which immunity could not be claimed. With regard to the second category, he wished to reiterate that, in developing countries, it was the State that engaged in the bulk of develop-

ment activities. Such States owned a number of ships operated by para-State enterprises, which carried out commercial activities to foster development. In such cases, it was difficult to argue that those ships, used exclusively for commercial purposes, could not enjoy the protection afforded by the jurisdictional immunity of the State. It was not enough to identify the ship: the purpose for which the ship was being used also had to be identified, as pointed out by the Special Rapporteur himself, who had established a direct link between draft article 19 and article 12, which had given rise to much discussion in that regard at the previous session. The criteria proposed by the Special Rapporteur (*ibid.*, para. 231) should also include ships which belonged to the State and were used for governmental commercial service, and ships which, even if they did not belong to the State, were used for commercial purposes in order to help development and should also benefit from immunity.

25. As to matters of form, article 19 should be brought into line by and large with article 12 and the expression "non-governmental" should also be inserted before the words "commercial service" in paragraph 1. Commercial service came within governmental activity and consequently it should be possible to claim jurisdictional immunity for the ship. Moreover, at the previous session the Special Rapporteur had been urged to use generally acceptable formulations, yet the report spoke of admiralty proceedings, which did not exist in all countries. A more comprehensive term should be found. He also endorsed Mr. Reuter's objection (1916th meeting) to the word "cargo". The Special Rapporteur would obviously provide some clarifications, but it was important to avoid using terms that could lead to difficulties.

26. With reference to draft article 20, he recognized the value and the merits of international arbitration, but shared the doubts expressed by Mr. Mahiou (*ibid.*) about the way it was dealt with in the Special Rapporteur's comments. To say that "an agreement to submit to arbitration" could be equated with "consent to submit to jurisdiction" (A/CN.4/376 and Add.1 and 2, para. 236) was to deny purely and simply the principle of jurisdictional immunity. He doubted whether such acceptance of arbitration entailed *ipso facto* acceptance of the courts of a State. Two different, parallel proceedings were involved and were not necessarily initiated at the same time. Article 20 should affirm the principle of jurisdictional immunity and, possibly, set forth exceptions. In international contracts, free will was becoming very rare. Rather, they were contracts that the developing countries in particular were obliged to accept, otherwise they would not be able to further their own development. Yet such contracts impaired the sovereignty of States, for which reason the very wording of the article must affirm the principle of jurisdictional immunity and then indicate any exceptions in order to facilitate international economic relations.

27. Mr. EL RASHEED MOHAMED AHMED, speaking in connection with draft article 19, noted that article 2, paragraph 1 (*g*) (ii), defined "commercial contract" as "any contract for a loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction". He wondered whether those terms included tortious liability or such questions as whether a company which had provided loans to a Government in order to buy certain goods could attach a ship belonging to that Government simply to exert pressure for repayment. In his opinion, to accept such an interpretation would be very dangerous. He agreed with the statements made by Chief Akinjide and Mr. Razafindralambo concerning developing countries, but hoped they would not be interpreted to mean that developing countries were not willing to pay for services rendered to them.

28. An additional point, which had been expressed most clearly by Mr. Balanda, was that commercial operations in developing countries, especially in Africa, were not easily separated from public purposes. For example, in the Sudan, the Government supplied the population with certain essential consumer goods, such as wheat and flour, and was therefore actually engaged in commercial activities, but for no profit. If, under time pressure, a Government was constrained in situations of that kind to commandeer certain private ships, were those ships in governmental service or not? If they were, such situations would be difficult for third world countries under the terms of article 19.

29. He agreed with Mr. Calero Rodrigues (1916th meeting) that article 19, paragraph 2, might well be superfluous since paragraph 1 stipulated that the ship and cargo must be intended for use for commercial purposes. The Special Rapporteur was to be commended for eliminating the distinction between actions *in rem* and *in personam*.

30. Draft article 20 spoke of two types of jurisdiction, that of the State where the arbitration was conducted and that of the State in accordance with whose law the arbitration took place. As Mr. McCaffrey had rightly pointed out, no mention was made of third States. A situation could arise in which a ship of State A was involved in a commercial transaction with State B and the arbitration agreement referred to the law of State C, which would have no connection with the transaction itself. That was often true in arbitration cases in the third world, since countries did not wish to submit to local courts because of the pressure exerted by their governments and preferred to submit to the law of a third State. He wondered whether, in the Special Rapporteur's opinion, that situation was desirable. If jurisdiction was to be given to local courts, it should be given to the courts of countries which had a real relationship with the commercial transaction. However, as Mr. Reuter had said (*ibid.*), that would lead the Commission into the application of the rules of private international law of the country where the jurisdiction was exercised, and as Mr. Arangio-Ruiz had said, judges could not always be relied upon in such situations. Perhaps the words "or according to the law" could be removed from the phrase "on the territory or according to the law of which the arbitration has taken or will take place", in paragraph 1.

31. With regard to paragraph 2 of article 20, he wondered whether the words "has effect subject to any contrary provision in the arbitration agreement"

added to the meaning of that provision. The reference to an arbitration agreement between States, however, was entirely appropriate.

32. Lastly, he endorsed the general opinion that articles 19 and 20 should be referred to the Drafting Committee.

33. Mr. KOROMA said that the Commission might perhaps attempt to set out the two differing opinions about draft article 19 in separate articles. One could be entitled "Ships employed by a State in governmental service", or words to that effect, and the other could retain the present title "Ships employed in commercial service", stating the exception, as it were, which the Special Rapporteur was trying to enunciate.

34. In connection with draft article 20, he agreed in substance with Mr. Mahiou (1916th meeting) and wished that there had been time to discuss in greater detail the cases that had been mentioned. At any rate, the reservations expressed in the course of the discussion would have to be dealt with in order to ensure confidence in an arbitration ruling.

35. Mr. LACLETA MUÑOZ said that, in principle, he approved of draft articles 19 and 20, but the Drafting Committee should re-examine both of them closely, especially article 19. He endorsed the latter, which referred to principles embodied in conventions on the law of the sea, but noted that the conventions in question related to an era when State ships had not been used for commercial purposes.

36. In article 20, the reference in paragraph 1 to the State "according to the law of which the arbitration has taken or will take place" was problematical. Indeed, paragraph 1 seemed to be drafted so broadly as to imply that the submission of a dispute to arbitration implied complete waiver by a State of the exercise of jurisdiction: perhaps that paragraph could be redrafted.

37. Paragraph 2 of article 20 might also be reviewed, since it seemed to give an excessive advantage to a State by allowing it to invoke absolute immunity, which it would probably do in many cases. The reference to an arbitration agreement between States was not necessary, for paragraph 1 already said that the agreement involved a State and a foreign natural or juridical person. Nevertheless, there was no reason why an arbitration agreement between States, not in the context of public international law but in the context of commercial law, should not be submitted to commercial arbitration.

38. Mr. TOMUSCHAT said that he agreed in principle with draft articles 19 and 20. Article 19, however, needed careful scrutiny, since it was complex in its present form and the reader might not always grasp the reasons behind some of the language employed. For example, with reference to the phrase "ship and cargo belonging to that State" in paragraph 1, he wondered why it was necessary for both the ship and the cargo to belong to the State: as Mr. Ushakov (1916th meeting) had rightly said, the article related to ships employed in commercial service. That provision should therefore be revised.

39. With regard to article 20, he realized that the language had been taken from conventions already in force. However, the two criteria adopted, namely the law and the territory, were somewhat contingent. He believed a genuine link was needed. After all, the place of arbitration might well be determined merely by a desire to spend time in a particular place. It would certainly be inappropriate to confer review powers on the local courts in such cases. The best control procedure would be to have an international body to which the parties could appeal against any alleged procedural deficiency or other shortcoming.

40. The CHAIRMAN, speaking as a member of the Commission, emphasized the sensitivity and importance of the topic under study, which had been changing rapidly, especially since 1975. The reaction of the developing countries, and to a certain extent the socialist countries, had been to act by way of reciprocity rather than participate in evolving a law generally acceptable to them. Reciprocity was not very effective, since it placed those States on the receiving side and not in a position of equality. In order not to lose the advantages of certain commercial activities, they had to agree to limitations. The form and shape of their own activities was also changing and they had not yet been able to assess what sort of legal framework should regulate commercial relations between States and how far the purpose for which seemingly commercial relations were carried out by States or State agencies should be relevant in developing that legal framework. The Commission must therefore be conscious of that political context.

41. With regard to substance, in contrast with the two earlier alternatives, draft article 19, paragraph 1, did not make it clear whether the non-immunity of a government ship covered both the ship itself and a sister ship. The present drafting of paragraph 1 could be interpreted in either sense. If the wider interpretation was the correct one, that should be made clear.

42. As Mr. Balanda and Mr. Koroma had stated, in developing countries State ships were increasingly being used for purposes which seemed commercial but were actually governmental. Article 19, paragraph 2 (*b*), covered that situation to some extent, but perhaps further clarification could be provided by adding the words "or a public purpose" at the end of the subparagraph. Apart from those comments, article 19 could be retained in its present form, unless the Drafting Committee decided to make some deletions.

43. As to draft article 20, an important point for developing countries in particular was that, if any question relating to the arbitral award was to be subject to the jurisdiction of a third State, in other words the State of the venue, that should be brought to the notice of the State signing the arbitration agreement. A State might select a country for reasons of convenience or of trust in the persons handling the dispute, but it might not be at all familiar with the local law. Such notice had been provided for in a subsidiary manner in paragraph 2; nevertheless, the phrase "subject to any contrary provision in the arbitration agreement" could be added to paragraph 1 or the paragraph could begin with the words "Unless otherwise provided in an arbitration agreement".

44. Again, the phrase "on the territory or according to the law of which the arbitration has taken or will take place" in paragraph 1 of article 20 could be interpreted as applying to the courts of two different States. For example, if the arbitration agreement stipulated that the dispute would be determined by International Chamber of Commerce rules, but the venue of the arbitration was Geneva, which law would prevail in relation to paragraph 1 (*a*), (*b*) and (*c*)? Were two different forums intended?

45. Mr. ARANGIO-RUIZ said that he wished to make it clear that, in his earlier statement, he had not meant to criticize judges or their objectivity but simply to point out that they were open to errors.

46. In regard to the Chairman's suggestion to add the words "or a public purpose" after the words "non-commercial use" in article 19, paragraph 2 (*b*), he suggested instead using the word "public" before "non-commercial", since addition of the word "or" would make matters more difficult. He had personally been involved in an International Chamber of Commerce arbitration in Geneva, and it had been clear to all that the courts whose jurisdiction would prevail were the Swiss courts. It was difficult to alter that kind of relationship between the seat of a tribunal and the competence of the courts, since that would involve changing the national legislation of countries in the territory of which the arbitral tribunal operated.

47. Mr. SUCHARITKUL (Special Rapporteur), summing up the discussion on draft articles 19 and 20, and referring to comments made by Mr. El Rasheed Mohamed Ahmed, pointed out that draft article 19 concerned maritime law and as such was separate from the law of contracts, as Mr. Ogiso had also stated. The rules governing maritime law had existed for some time in the official bilingual texts of the 1926 Brussels Convention.[6] That form of language was highly technical and the Commission should not try to change it. As to the remarks by Mr. Ushakov (1916th meeting) and Mr. Tomuschat, he had tried in the revised text of article 19 to be concise: clarifications could be made in the Drafting Committee.

48. Arbitration, too, was a highly specialized branch of law. The judicial systems of countries varied, and, in his sixth report (A/CN.4/376 and Add.1 and 2, paras. 238-241), he had cited the most reactionary one, which was that of his own country. Other countries, such as Malaysia, however, had changed the law, and all government contracts had to include a *compromis* clause for commercial arbitration.

The meeting rose at 6.05 p.m.

[6] See 1915th meeting, footnote 7.

1918th MEETING

Wednesday, 3 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov. Mr. Yankov.

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

[Agenda item 4]

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

Article 19 (Ships employed in commercial service) *and*

Article 20 (Arbitration)[4] (*continued*)

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

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

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

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

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

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

[4] For the texts, see 1915th meeting, paras. 2-3.