

Document:-
A/CN.4/L.397

**Draft articles on jurisdictional immunities of States and their property. Texts adopted by the
Drafting Committee: articles 19 and 20 - reproduced in A/CN.4/SR.1931, para. 12**

Topic:
Jurisdictional immunities of States and their property

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

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

co-operation between the International Law Commission and the Arab Commission and expressed the hope that those relations would become still closer. It would be very useful if the two bodies regularly took an active part in each other's work.

9. Mr. REUTER thanked the Observer for the Arab Commission for International Law for his statement. It was a well-known fact that Europe and the world in general were particularly indebted to the Arab countries for their contribution to the sciences, algebra, medicine, navigation, chemistry and even linguistics. He was happy to see that the Arab countries, old and young alike, attached so much importance to international law and were making regional efforts to unify it. The Arab countries did, of course, have their problems, just as the European countries had had for so many centuries. The Arab countries were therefore wise to try to settle their legal disputes first through negotiation and then by submitting them to the ICJ, from which they had long been absent. The example they were setting was most welcome. He was, moreover, sure that the International Law Commission could learn a great deal from the activities of the Arab Commission for International Law.

10. Mr. CALERO RODRIGUES, speaking also on behalf of the members of the Commission from the Latin American region, thanked the Observer for the Arab Commission for International Law for his statement and associated himself with the other members who had stressed the importance of co-operation between the two bodies, one working at a regional level and the other at the international level on some of the same topics. Increasingly deeper understanding between the two bodies would help to strengthen their co-operation.

Programme, procedures and working methods of the Commission, and its documentation (*concluded*)*

[Agenda item 10]

RECOMMENDATIONS BY THE PLANNING GROUP

11. The CHAIRMAN informed members of the Commission that the Enlarged Bureau had held a meeting that morning to consider two recommendations by the Planning Group, the first relating to documentation and the organization of the Commission's work and the second to the use by the Commission of conference services. The Chairman of the Planning Group had suggested that the Chairman of the Commission might wish to address a letter to the Chairman of the Committee on Conferences explaining that any underutilization of conference services at the beginning of the session had been due to the fact that informal meetings had been held in connection with the election of new members. A reference to both recommendations would be included, for approval, in the Commission's draft report.

* Resumed from the 1893rd meeting.

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, A/CN.4/L.397)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 19 (Ships engaged in commercial service) *and*

ARTICLE 20 (Effect of an arbitration agreement)

12. The CHAIRMAN invited the Chairman of the Drafting Committee to present articles 19 and 20 as proposed by the Drafting Committee (A/CN.4/L.397), which read:

Article 19. Ships engaged in commercial service

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship engaged in commercial [non-governmental] service cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the operation of that ship provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

2. Paragraph 1 does not apply to warships and naval auxiliaries nor to other ships owned or operated by a State and used or intended for use in government non-commercial service.

3. For the purposes of this article, the expression "proceeding relating to the operation of that ship" shall mean, *inter alia*, any proceeding involving the determination of:

- (a) a claim in respect of collision or other accidents of navigation;
- (b) a claim in respect of assistance, salvage and general average;
- (c) a claim in respect of repairs, supplies, or other contracts relating to the ship.

4. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the carriage of cargo on board a ship owned or operated by that State and engaged in commercial [non-governmental] service provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

5. Paragraph 4 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor to any cargo belonging to a State and used or intended for use in government non-commercial service.

6. States may plead all measures of defence, prescription and limitation of liability which are available to private ships and cargoes and their owners.

7. If in any proceedings there arises a question relating to the government and non-commercial character of the ship or cargo, a certificate signed by the diplomatic representative or other competent authority of the State to which the ship or cargo belongs and communicated to the court shall serve as evidence of the character of that ship or cargo.

Article 20. Effect of an arbitration agreement

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a [commercial contract] [civil or commercial matter], that State cannot invoke immunity from jurisdiction before a court of

* Resumed from the 1924th meeting.

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

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

another State which is otherwise competent in a proceeding which relates to:

- (a) the validity or interpretation of the arbitration agreement,
- (b) the arbitration procedure,
- (c) the setting aside of the award,

unless the arbitration agreement otherwise provides.

13. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, with the adoption of articles 19 and 20, the Commission would have completed its consideration of all the articles submitted by the Special Rapporteur for incorporation in part III of the draft, with the exception of article 11 (Scope of the present part), which the Drafting Committee would consider at a later stage, and the title of part III. Article 6 (State immunity) would also have to be considered further by the Drafting Committee, since it had not been possible to agree on a text in the limited time available.

14. Referring to article 19,³ he said that it had been decided to separate the treatment of cargo from that of ships, so that paragraphs 1, 2 and 3 now related to ships, paragraphs 4 and 5 to cargo and paragraphs 6 and 7 to both. A number of drafting changes had been made in order to bring the article into line with articles already adopted and also for the sake of clarity. That explained, for example, why the words "which is otherwise competent" had been added in paragraphs 1 and 4.

15. Paragraph 1 provided for the case in which a State could not invoke immunity from jurisdiction before a court of another State which was otherwise competent. The Drafting Committee had decided that the expression "owns or operates" was sufficiently broad and that it was unnecessary to burden the text with additional expressions such as "possesses or employs". A full explanation would be given in the commentary. The expression "non-governmental" in paragraphs 1 and 4 had been placed in square brackets to indicate that the Drafting Committee had been unable to agree on what type of service by a ship would result in non-immunity. While some members considered that the term "commercial service" reflected the practice of States, others held that the expression "non-governmental" should be inserted to take account of the interests of developing countries that might own or operate ships engaged in service which, though of a commercial nature, should be regarded as governmental by virtue of its governmental purpose. The words "in any proceeding" were intended to cover all kinds of proceedings, including actions against the owner or operator of a ship, admiralty actions *in rem* and actions *in personam*. In the concluding phrase, the time factor had been retained and the words "intended exclusively for use" had been added to provide a safeguard against possible abuse: the intended use of a ship could be difficult to assess and it would be easier to

ascertain an intent to use a ship exclusively for commercial [non-governmental] purposes. Some members considered, however, that the addition of the word "exclusively" would be contrary to State practice and would allow States far too much latitude to claim immunity.

16. Paragraph 2 conferred immunity from jurisdiction on certain categories of ships, such as warships and naval auxiliaries. The latter term, which had been introduced to cover ships such as supply ships and hospital ships, would be explained in the commentary. Further precision had been introduced with the phrase "used or intended for use in government non-commercial service", which was based on the concluding phrase of article 19, paragraph 1, and on the relevant articles of the 1926 Brussels Convention⁴ and of the 1982 United Nations Convention on the Law of the Sea.⁵

17. Paragraph 3 provided examples of a "proceeding relating to the operation of that ship", as referred to in paragraph 1. It was based on article 3, paragraph 1, of the 1926 Brussels Convention, which had been cited by the Special Rapporteur in his sixth report (A/CN.4/376 and Add.1 and 2, para. 204), and which, in the Drafting Committee's view, provided a useful indication of the types of action for which there would be no immunity from jurisdiction under paragraph 1. The technical aspects of maritime law, which were readily apparent from paragraph 3, would be explained in the commentary. The words "operation of that ship" were to be understood not in the sense of the actual physical operation of a ship, but more in the maritime law sense, since a claim in respect of repairs, supplies or other contracts relating to the ship, as provided for in paragraph 3 (c), could well arise even before the ship embarked upon its actual physical operation. Maritime liens and mortgages, for example, were thus not excluded.

18. Paragraph 4 dealt with the non-immunity of a State in certain proceedings relating to the carriage of cargo on board a ship owned or operated by that State. It was modelled on paragraph 1 and his earlier remarks pertaining to terminology and the use of square brackets applied.

19. Paragraph 5 conferred immunity on "any cargo carried on board the ships referred to in paragraph 2" and on "any cargo belonging to a State and used or intended for use in government non-commercial service". It was an important provision in that it maintained immunity, *inter alia*, for cargo intended for emergency operations, such as food relief and medical supplies.

20. Paragraphs 6 and 7, which were new, represented an attempt to strike a balance between the non-immunity of a State under paragraphs 1 and 4 and certain types of protection to be afforded to the State. Those paragraphs were based on articles 4 and 5 of the 1926 Brussels Convention and related both to ships and to cargo. Under paragraph 6, the State could plead the same measures of defence, prescription and limitation of liability as were available to

³ For the revised text of draft article 19 submitted by the Special Rapporteur, see 1915th meeting, para. 2, and for the Commission's consideration thereof, see 1915th meeting (paras. 5-30) and 1916th to 1918th meetings.

Draft article 19 as originally submitted by the Special Rapporteur was considered by the Commission at its thirty-sixth session, see *Yearbook ... 1984*, vol. I, pp. 145 *et seq.*, 1838th meeting (paras. 25 *et seq.*) and 1839th to 1841st meetings.

⁴ See 1915th meeting, footnote 7.

⁵ See 1924th meeting, footnote 11.