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Summary record of the 1664th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
1981, vol. I

1664th MEETING

Tuesday, 2 June 1981, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/331 and Add.1,[1] A/CN.4/340 and Add.1, A/CN.4/343 and Add.1–4)

[Item 7 of the agenda]

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

ARTICLE 8 (Consent of State),

ARTICLE 9 (Voluntary submission),

ARTICLE 10 (Counter-claims), *and*

ARTICLE 11 (Waiver)[2] (*continued*)

1. Mr. SUCHARITKUL (Special Rapporteur) said that, in the light of the discussion, he had a number of amendments to suggest in respect of draft article 8, with a view to facilitating the Commission's subsequent deliberations. The amendments represented an attempt to state the draft article in general terms, rather than to reflect differences between various municipal legal systems. Accordingly, paragraph 1 might begin with the words "Unless otherwise provided in the present articles", or "Subject to the provisions of Part III of the draft articles", along the lines proposed by Mr. Aldrich (1663rd meeting) and Sir Francis Vallat (1657th meeting), so as to prevent the statement from being too sweeping. In addition, the words "in legal proceedings" might be inserted after the word "jurisdiction", as suggested by Mr. Calle y Calle (*ibid.*).

2. In paragraph 3, it might be appropriate to indicate that the methods of expressing consent enumerated in subparagraphs (*a*), (*b*) and (*c*) did not constitute an exhaustive list, and therefore to insert the words "by various methods, including notably" after the words "paragraph 2". In subparagraph (*b*), it might be preferable to omit the words "a treaty or" and to replace the word "cases" by "activities". Finally, in order to avoid unnecessary confusion, subparagraph (*c*) might be reworded on the lines suggested by Mr. Jagota at the previous meeting, to read:

"by appearing before the court through its authorized representative in a proceeding ... without invoking a plea of State immunity".

3. The concept of voluntary submission, as expressed in draft article 9, was simply one aspect of the concept of consent, and certain distinctions could be drawn between the concepts dealt with in articles 9, 10 and 11. If the Commission proceeded from the premise that it was dealing with the question of State immunity from the jurisdiction of the courts, a clear relationship would be seen to exist between the existence of jurisdiction and the existence of immunity, for, logically speaking, where there was no jurisdiction, there could be no immunity. In practice, however, that was not the case, since parties to a dispute could enter a plea of immunity. Again, if no immunity existed, it was logical that a waiver of immunity was unnecessary. Yet a State might, in practice, agree to waive its immunity, whether it existed or not, for immunity could be waived in advance in certain areas that were customarily or traditionally regarded as being covered by limitations or exceptions. Furthermore, a waiver of immunity did not necessarily create jurisdiction, but consent might form the very foundation of jurisdiction, which could be based not only on the principle of territoriality but also, in many cases, on the principles of private international law.

4. The terminology used in article 9 was intended to invite comment from the Commission. The concept of voluntary submission was widely accepted, and references to it could be found in the legislations of the United Kingdom and the United States of America and in the 1972 European Convention on State Immunity.[3]

5. Mr. REUTER said that the Special Rapporteur appeared to feel with regard to article 8 that paragraphs 1 and 2 stated principles, whereas paragraph 3 contained a programme. It was an interesting idea, but the end result ought to be a programme based on a time criterion. It would be better to reverse the order of subparagraphs (*a*) and (*b*) of paragraph 3, so as to begin with the first possible manifestation of consent, that which preceded all disputes, go on to the subsequent manifestation upon the arising of a dispute, and end the paragraph with the judicial phase.

6. There remained the question raised by Mr. Ushakov at the very beginning of the examination of article 8, namely, the need to be more specific about certain eventualities than others, Subparagraph (*b*) required little elaboration, but that was not true of the content of subparagraph (*a*), which covered the case of a dispute between a governmental or administrative authority of one State and another State or an individual. The authorities of a State that were competent to give consent and those which handled a matter when it came before a court were not necessarily the same. In some countries, representation of the State's interests even before a foreign or

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[1] *Yearbook ... 1980*, vol. II (Part One).

[2] For texts, see 1657th meeting, para. 1.

[3] See 1663rd meeting, footnote 5.

international court, as opposed to action in conventional matters, was the responsibility of specialized agents. Perhaps the Special Rapporteur intended to expand in other provisions on the case covered by subparagraph (*a*). If that was so, article 9 would give rise to problems, for it seemed to be more than a detailed statement of the means of expressing consent before a court. Subparagraphs 1 (*a*) and (*b*) did indeed refer to procedural situations, but subparagraph 1 (*c*) was far broader: it referred back to the subject-matter of article 8, subparagraph 3 (*a*), namely, written expression of consent after the arising of a dispute. Paragraphs 2 and 3 of article 9 both clearly concerned procedure. To judge from the Special Rapporteur's explanations concerning article 8, the Commission should delete, or at least reword, article 9, subparagraph 1 (*c*).

7. In fact, the Special Rapporteur's reasoning was clear, and everything hinged on terminology. A term must be found to serve as a title for article 9 and to cover all the cases envisaged therein. It must be neutral with respect to the terminology of internal law, but cover all the systems of such law. Personally, he had nothing against the term "voluntary submission", but he thought that it would have to be defined in article 9. The Special Rapporteur seemed to have in mind a procedural act, of whatever nature, by a State, and it was true that until a State had taken a procedural measure it had not given its consent. That point must be clearly indicated. As the Special Rapporteur had pointed out, the procedural measures that a State could take varied greatly. It could appear and defend on the merits or defend its jurisdictional immunity; it could intervene in a case between two other States, or even intervene as *amicus curiae*. Consequently, it must be made clear that procedural action, of whatever nature, implied consent only if it emanated from a competent authority and clearly expressed the will of the State. The Commission could not go much further in that respect. Admittedly, when a State agreed to defend on the merits or when it appeared to maintain its immunity, there was manifestly consent. In other cases, however, there must be no room for doubt as to the proper interpretation of the State's action.

8. If article 9, subparagraph 1 (*c*) was maintained, he would find it hard to subscribe to the statement in paragraph 61 of the report (A/CN.4/340 and Add.1) that "the question whether such expression of volition could be said to be manifest must ultimately be determined by the judicial authority in accordance with its own established practice or its own rules of procedure, having regard to the circumstances of each case". It was true that a State which undertook a procedural action ran a risk, for it ought not to act unless it had sufficient knowledge of the applicable procedural law; it submitted to some degree to the local law. The word "ultimately" meant that a State could not place on that procedural law an interpretation that was contrary to judicial practice. That view was valid with respect to procedure, but not with respect to consent given in a treaty or in the form of a governmental act.

9. Consequently, the passage he had quoted was not correct in the case covered by article 9, subparagraph 1 (*c*). A State's courts could not "ultimately" interpret the text of a treaty; such interpretation was a matter for the States parties to the treaty, and any disagreement between them must be settled by one of the means of settlement provided by international law. In the case of a contract, the situation was more complex. If the applicable law was the *lex fori*, a State accepting it took the risk that its expression of volition would be interpreted in accordance with that law. But even when some other form of law was applicable, it was doubtful whether it could be said that a decision would ultimately be taken by the judicial authorities.

10. Mr. CALLE Y CALLE noted that the distinction between voluntary submission, dealt with in article 9, and the expression of consent, dealt with in article 8, was a very fine one. In a case of voluntary submission, the State concerned took the step either of choosing a forum or of initiating proceedings. In that connection, the Special Rapporteur had stated in paragraph 59 of his report that:

> The State is considered as being impleaded in either event, whether it has itself freely and voluntarily submitted to the jurisdiction, or merely consented to the exercise of such jurisdiction by a court of another State, as in article 8.

However, the fact of being impleaded did not result solely from consent to jurisdiction, but could take other forms. The paragraph cited went on to say that: "Once jurisdiction becomes exercisable without the need to compel the State to submit to it", that State could not subsequently object to the exercise of jurisdiction on the grounds of an absence of consent. It could be wrongly inferred from that passage that there were instances in which one State could be compelled to submit to the jurisdiction of another.

11. Referring to paragraph 64 of the report, he said that he could not see how a jurisdiction could be imposed upon a State which was not a party to the dispute concerned and simply intervened as *amicus curiae*. The notion of submission to jurisdiction was linked less to the entry of appearance than to the judicial examination of certain questions. To submit to a jurisdiction was to accept in advance the results of its exercise. In that respect, consent was not the same as waiver. In cases of waiver, a State renounced a manifest right of immunity. Voluntary submission included an element of interest.

12. With regard to the structure of article 9, paragraph 1 was drafted as a permissive provision. It said that one State might exercise its jurisdiction against another State which had voluntarily submitted to the jurisdiction of one of its courts. Paragraph 2 stated an obvious rule: a failure to appear did not imply voluntary submission, but was evidence of an absence of such submission. Thought must be given to cases in which advance provision was made in a treaty

or a contract for voluntary submission but the State did not appear when proceedings began. Could the action then continue?

13. Lastly, paragraph 3 concerned a case which did not in fact fall under the heading of voluntary submission, namely, that of appearance or intervention by a State following the institution of proceedings before a court of another State, in order to oppose further exercise of the court's jurisdiction or to assert an interest in a property in question.

14. Mr. JAGOTA said that the amendments to article 8 suggested by the Special Rapporteur appeared to deal with most of the matters raised during the discussion. His own point regarding subparagraph 3 (*c*) (1663rd meeting) had been that any State contesting the merits of a claim would, whether it invoked the plea of State immunity or not, be deemed to have given consent. In any event, that question could be considered by the Drafting Committee.

15. He was still not sure whether articles 8 and 9 should be kept separate. Mr. Reuter had stated that draft article 8 enunciated the basic norm of consent, whereas article 9 was concerned with voluntary submission in specific legal proceedings before a court, and, consequently, the modalities of voluntary submission should be set out in article 9, while article 8 should deal with the broader aspects of consent expressed either in a treaty or before a court. If the Commission accepted that reasoning, it would have good grounds for keeping the two articles separate. However, it should consider carefully whether such a distinction could be made and whether it would be of practical utility. For example, insertion of the words "in legal proceedings" in paragraph 1 of article 8 might make the distinction pointless.

16. Article 9, paragraph 1, was in effect a combination of paragraphs 2 and 3 of article 8. In other words, the effects and modalities of voluntary submission were essentially the same as in the case of consent. Moreover, as Mr. Reuter had pointed out, article 9, subparagraph 1 (*c*), seemed to deal with the same subject-matter as article 8, subparagraphs 3 (*a*) and (*b*), while article 9, subparagraph 1 (*b*) corresponded to article 8, subparagraph 3 (*c*).

17. Article 9, paragraph 2, was an explanatory clause and, as such, was probably useful. Its paragraph 3 merely stated in negative terms what was already stated in positive terms in article 8, subparagraph 3 (*c*) and article 9, subparagraph 1 (*b*), but even if the two articles were to be kept separate, consideration might be given to the possibility of including the provision contained in article 9, paragraph 3, in article 8 for the purposes of greater clarity. However, the second part of article 9, paragraph 3, as currently drafted, was expressed in absolute terms, whereas the example cited in the report, namely, article 13 of the European Convention on State Immunity, was expressed in qualified terms. Accordingly, if that paragraph was intended to be limited in scope, that intention should be made clear by inserting the words "in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it" after the word "question".

18. Mr. USHAKOV said that, at the outset of its work on the jurisdictional immunity of States and their property, the Commission had made a regrettable and retrograde choice in taking the view that the principle of jurisdictional immunity did not exist. Draft article 6 established that a State was

> immune from the jurisdiction of another State in accordance with the provisions of the present articles,

meaning that jurisdictional immunity existed only to the extent that the draft articles said that it existed. In the case of consent, however, the articles proposed by the Special Rapporteur were based on the existence of the principle of immunity, for they were designed as exceptions to the application of that principle consequent upon consent by a State entitled to jurisdictional immunity. If the existence of the principle was denied, the consent would have to come from the receiving State, since it was that State which would consent not to exercise its jurisdiction over the sending State, or in other words, which would consent to confer upon the sending State immunity from jurisdiction. The European Convention on State Immunity laid down, in article 15, the principle that a State was entitled to immunity from jurisdiction, except in a number of cases mentioned in articles 1 to 14 of the Convention. In his view, the Commission was acting contrary to existing international law by starting from the opposing principle. Hence it was engaging in regressive, rather than progressive, development of international law.

19. As he had said at the previous meeting, the consent given by a State was necessarily voluntary. There was no need to say, as did article 9, paragraph 1 (*b*), that the State gave the consent "of its own volition", for any consent given under constraint from another State would be contrary to modern international law. It could therefore be assumed that all the expressions of consent mentioned in the draft articles were voluntary.

20. Again, a distinction should be made between an express manifestation of consent and consent resulting from conduct. In article 9, subparagraph 1 (*a*), and perhaps also subparagraph 1 (*b*), concerned cases in which consent could be inferred from conduct, whereas subparagraph 1 (*c*) had to do with an express manifestation of conduct. In the case covered by subparagraph 1 (*a*), a State instituted, or intervened in, proceedings before a court. Several members of the Commission had raised the question of whether such intervention related to title to property or to the substance of the case. On that point, the European Convention on State Immunity was clear: a State was not entitled to immunity from jurisdiction if it moved

on the merits. It was very dangerous to adopt a general approach in such matters.

21. Article 9, subparagraph 1 (*b*), dealt with the case in which a State appeared before the court, but it did not specify in what proceedings or for what purpose the appearance was made. There again, vague wording was not enough. The subparagraph went on to refer to the case in which a State took an unspecified "step in connection with proceedings" before the court. Did that mean that a State which contacted a court because it was interested in documents submitted in the course of proceedings committed an act that could be interpreted as acceptance of the court's jurisdiction? It was essential to determine which acts could be interpreted as implying acceptance of jurisdiction, and that depended, in the final analysis, on the municipal law. In addition, he wondered which of the many stages of the jurisdictional process had to be taken into consideration.

22. The case covered by article 9, subparagraph 1 (*c*), should be considered separately, because it related to an express manifestation of consent. The approach followed in paragraphs 2 and 3 of the article was not entirely satisfactory either. The paragraphs concerned voluntary submission, whereas the real question was that of the existence or absence of immunity from jurisdiction.

23. Mr. EVENSEN said that, in his opinion, the wording of article 9, paragraph 2, was too vague. In practice, one of the main reactions of States to proceedings in which they considered that they were entitled to claim immunity was to fail to appear before the court of the other State, and he therefore suggested that the Commission should either amend paragraph 2 to read:

> "The failure of a State to appear in proceedings before a court of another State shall not be construed as voluntary submission"

or go one step further and make a more positive assertion.

24. In that connection, he agreed with the view that the last phrase of article 15 of the European Convention on State Immunity, "the court shall decline to entertain such proceedings even if the State does not appear", would afford national courts greater clarity and guidance than did draft article 9, paragraph 2.

25. He also shared Mr. Jagota's opinion that article 9, paragraph 3, should use the very succinct wording of article 13 of the European Convention on State Immunity, which read:

> Paragraph 1 of Article 1 shall not apply where a Contracting State asserts, in proceedings pending before a court of another Contracting State to which it is not a party, that it has a right or interest in property which is the subject-matter of the proceedings, and the circumstances are such that it would have been entitled to immunity if the proceedings had been brought against it.

26. Sir Francis VALLAT said that all members of the Commission were obviously entitled to their own interpretation of what was meant by progress, as distinct from the progressive development of international law. However, when Mr. Ushakov had referred in essentially monolithic terms to "regressive development", his own impression had been that the Commission was being taken back generations in its concept of the State—which had after all made great progress in developing its activities in the interests of mankind and had gone far beyond its ancient functions of maintaining order within and defending itself from attack from without. It was those changed conditions and the realities of the modern-day world that the Commission needed to reflect in the draft articles it was preparing. That, in his view, was the meaning of progressive development.

27. As a result of the statements made by other members of the Commission, he had come to the conclusion that articles 8 to 11 all dealt in one way or another with the concept of consent to the exercise of jurisdiction. The element of consent was present even in article 10, for when a State instituted proceedings in the courts of another State it was in a sense consenting to the consequence of having a counter-claim brought against it in respect of the subject-matter of the dispute. Thus, the underlying distinction in the draft articles under consideration was between consent that was expressed and consent that flowed from the conduct of the State—conduct which, in normal circumstances, took the form of some participation in proceedings before the court of the territorial State.

28. It therefore seemed to him that much of the overlapping and repetition to be found in the draft articles could be avoided if the Commission recognized that it was dealing with different aspects of consent, and that it needed to distinguish between express consent and consent implied from participation in proceedings. Admittedly, such an approach might mean that the draft would not have separate articles on voluntary submission and waiver, which could be subsumed under a general heading; but it would avoid the kind of situation in which, for example, article 8, subparagraph 3 (*c*), was very close to the subject-matter of article 9, subparagraph 1 (*b*), and article 9, paragraph 3, basically expressed the same idea as article 11, paragraph 4. It might be worthwhile for the Special Rapporteur to prepare redrafts of the articles under consideration on the basis of the suggestions made by members of the Commission.

29. Mr. ALDRICH said that, as a general approach, he was reserving judgement as to whether draft articles 8 to 11 should be combined. Instinctively, he felt that the articles should be fewer in number, but the Special Rapporteur had been wise to submit them to the Commission in an extended form, and the Commission itself would be wise to deal with them one by one, looking at their interconnections and then deciding whether or not they should be merged.

30. With regard to article 9, he considered that subparagraph 1 (*b*) was somewhat different from subparagraph 1 (*a*) and subparagraph 1 (*c*). Indeed, the basic rule of voluntary submission was the one stated in subparagraph 1 (*c*). The rule enunciated in subparagraph 1 (*b*) might or might not be one of voluntary submission, and it struck him that, since legal advisers to Governments were only human and could make mistakes, they might be caught out by article 9, subparagraph 1 (*b*), without ever voluntarily submitting to anything.

31. In his opinion, paragraph 2 of article 9 was quite unnecessary, partly because it would look strange to the casual reader, who might ask how failure to appear in proceedings could conceivably be regarded as voluntary submission to those proceedings or what greater contempt there could be for the proceedings than to stay away from them. Many questions and misunderstandings would be avoided if that paragraph was deleted.

32. Mr. VEROSTA said that, since the Special Rapporteur was more or less bound to formulate general principles of State immunity before enunciating the exceptions to them, he had not been able to follow the model of the European Convention on State Immunity, in which article 15 stated the general principle but articles 1 to 14 stated the exceptions thereto. Although the Commission might well request the Special Rapporteur to merge draft articles 8 and 9, which meant nearly the same thing, it should remember that, at the present stage in its work, it had to avoid burdening the draft articles with details that might, so to speak, suffocate the general principles that were being elaborated.

33. The Commission might also try to decide whether it shared the view expressed in the second preambular paragraph of the European Convention on State Immunity, which read:

> Taking into account the fact that there is in international law a tendency to restrict the cases in which a State may claim immunity before foreign courts.

34. Mr. ŠAHOVIĆ said that the Commission should be grateful to the Special Rapporteur for having offered it such a wide choice of formulas for dealing with the question of jurisdictional immunities. On the other hand, he was somewhat perplexed by article 9, which had led the Commission to take up again a number of fundamental problems that should have been settled earlier in connection with articles 6 and 7. In that respect, Mr. Ushakov's comments concerning the need to select a clearly defined point of departure confirmed, if confirmation was needed, that the Commission had not yet determined a crucial matter, namely its attitude to the general principle of State immunity.

35. Since the Special Rapporteur's argument at the beginning of paragraph 59 of his report (A/CN.4/340 and Add.1) tended to prove that there was virtually no difference between voluntary submissions and the consent of a State, it might be thought surprising that the draft should contain a separate provision on voluntary submission. In fact, another course seemed feasible: to start with voluntary submission based on the consent of the State and reverse the order of the provisions, because consent was the expression of the will of the State. Such a method might make it possible to reach agreement within the Commission.

36. Like Sir Francis Vallat, he thought that the Commission should look only to international law as revealed by practice and devise general rules falling within the context of international law as such, with no reference to the internal law of States.

37. He therefore suggested that a single article should be formed from the opening paragraphs of articles 8 and 9 and practical questions should be left to succeeding articles. The advantage of such a procedure would be that, once it had distilled from the Special Rapporteur's proposals one or two general rules—which would be logical candidates for inclusion in the second part of the draft, which was devoted to general principles—the Commission could use the results of its discussions concerning articles 8 and 9 to draft other articles.

38. Mr. QUENTIN-BAXTER said that the alternatives for paragraph 2 of draft article 7 covered cases in which a State that was not named as a party was nevertheless involved in legal proceedings. That question of the nature of the State's involvement was, of course, a difficult and technical one and had not yet been considered by the Commission. Articles 8 to 11 also took account of such a possible case. For example, article 9, paragraph 3, and article 11, paragraph 4, related not only to a claim of lack of jurisdiction on the ground of State immunity but also to an assertion of an interest in the property in question.

39. However, the articles now under consideration do not seem to take sufficient account of the quite common situation in which a party—for example, a reserve bank with quasi-governmental functions—claimed to be the State itself in another guise and to have the immunity which attached to the State. The court of the territorial State would then have to decide whether such a claim was well-founded. He wondered how some of the negative provisions of articles 8 to 11, particularly article 11, paragraph 3, would apply in such a case, and what the position of the State would be when the agency against which a case was brought did not raise a plea of immunity. When redrafting the present articles, the Special Rapporteur might try to decide how the negative provisions would apply in cases in which the State itself was not "on stage" in its own capacity, but in which it was none the less substantially involved.

40. Mr. RIPHAGEN drew the attention of the Special Rapporteur to the fact that article 9, sub-

paragraph 1 (*b*), was akin to the first sentence of article 3, paragraph 1, of the European Convention on State Immunity, which read:

> A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if, before claiming immunity, it takes any step in the proceedings relating to the merits.

That sentence seemed to embody the idea that if a State voluntarily participated in proceedings it had to accept the consequences of such participation.

41. Again, the second sentence of article 3, paragraph 1, of the European Convention read:

> However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it has taken such a step, it can claim immunity based on these facts if it does so at the earliest possible moment.

That sentence served a useful purpose because, in the European Convention, there were a number of situations of fact in which the State could not claim immunity and other situations in which it could not always know beforehand whether or not it could claim immunity. In practice, such situations might very well arise in connection with the draft articles under consideration, in which that sentence should be taken into account.

42. Mr. SUCHARITKUL (Special Rapporteur) said that a number of pertinent points had been made concerning Sir Francis Vallat's suggestion that articles 8 to 11 should be approached from the point of view that the subject-matter under discussion was that of consent. Mr. Reuter had pinpointed the problem by saying that paragraphs 1 and 2 of article 8 contained a clear statement of principle, while paragraph 3 dealt with different ways of expressing consent. He himself had gone on from article 8, subparagraph 3 (*c*), to give in article 9 another example of a way of expressing consent. It was because voluntary submission was well-known that he had singled it out in a separate provision. Nevertheless, voluntary submission was only one of several ways of expressing consent by conduct, and it might be better described by using the words "participation in the proceedings".

43. Any overlapping between articles 8 and 9 could certainly be eliminated—for example, by deleting article 9, subparagraph 1 (*c*). Those two draft articles might also be merged under the heading "*expressis verbis*", as suggested by Mr. Ushakov. Moreover, article 9, paragraph 2, might be worded positively and placed somewhere in article 6, article 7 or article 8 to make it clear that failure to appear in proceedings before a court could not be construed as consent. He would also take account of the parallel between article 9, paragraph 3, and article 11, paragraph 4, to which Mr. Quentin-Baxter had drawn attention.

The meeting rose at 1 p.m.

1665th MEETING

Wednesday, 3 June 1981, at 10.10 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Jurisdictional immunities of States and their property (*concluded*) (A/CN.4/331 and Add.1,[1] A/CN.4/340 and Add.1, A/CN.4/343 and Add.1–4)

[Item 7 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*concluded*)

ARTICLE 8 (Consent of State),

ARTICLE 9 (Voluntary submission),

ARTICLE 10 (Counter-claims), *and*

ARTICLE 11 (Waiver)[2] (*concluded*)

1. Mr. SUCHARITKUL (Special Rapporteur), summing up the discussion of draft article 9, said that he appreciated the comments made by Mr. Calle y Calle, which had provided further clarifications of the line of thinking he (the Special Rapporteur) had pursued in his third report (A/CN.4/340 and Add.1). He would make every effort to incorporate the drafting suggestions made by Mr. Evensen, Mr. Jagota, Mr. Ushakov and Mr. Quentin-Baxter in the redraft which he would prepare. He was grateful to Mr. Reuter and Mr. Ushakov for raising an interesting point concerning the stage in legal proceedings when active participation by a State or one of its authorized representatives was considered as consent to submit to jurisdiction.

2. He could accept Mr. Reuter's suggestion that the ways of expressing consent should be rearranged in chronological order: before the dispute arose, when a certain stage had been reached in the legal proceedings, or after the dispute arose. In that connection, he said that Mr. Reuter's understanding of paragraph 61 of the third report had been correct: the paragraph had been intended to refer to the form of consent and to the requirement of the expression of consent that had to be satisfied in accordance with the test established by the court concerned. It had nothing to do with the interpretation of consent given in a treaty, an international agreement or a contract; that matter had been dealt with in other paragraphs of the report.

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[1] *Yearbook ... 1980*, vol. II (Part One).

[2] For texts, see 1657th meeting, para. 1.