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Summary record of the 1710th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
1982, vol. I

25. Yet another fundamental question was whether rules of internal law could be treated in the same way as rules of international law. That, again, was impossible: rules of internal law could be invoked only in the light of their conformity or non-conformity with international law, which, as stated in article 27 of the Vienna Convention on the Law of Treaties and in article 27 of the draft articles on treaties concluded between States and international organizations or between international organizations,[14] always took precedence in the event of conflict.

26. Finally, jurisdictional immunities were indivisible. Since article 31 of the 1961 Vienna Convention on Diplomatic Relations provided that, in the exercise of his functions on behalf of the sending State, a diplomatic agent enjoyed immunity from even civil jurisdiction in the receiving State, the sending State should similarly enjoy such immunity for, say, its own trading activities. Plainly, the draft article must be based on the fundamental principle of the unrestricted sovereign equality of States, and he hoped that the Special Rapporteur would take account of his comments.

27. Mr. QUENTIN-BAXTER said that he attached rather less fundamental significance than did Mr. Ushakov to draft article 6. Admittedly, paragraph 1 of the article could not be read as a complete statement of a rule, but it could not be read as a denial of the existence of any relevant law. The article should be seen, not as a foundation, but as a sort of scaffolding without which no building would be possible. It affirmed that the topic in question was one in which it had been customary to state a law and to qualify it. A statement of the rule without qualification would be unacceptable in most quarters, and a statement of the qualifications would make little sense unless those qualifications could be related to a hypothetical rule. Consequently, the Commission should suspend judgement as to whether the sovereignty of States to do as they wished in their own territories preceded or succeeded the duty of States to give effect, where appropriate, to the principle of State immunity. The success of the Commission's efforts would depend on its ability to strike an acceptable balance between the statement of the rule and the statement of the exceptions or qualifications pertaining to that rule. Article 6 should therefore be regarded simply as a pre-condition for that balancing exercise.

28. In its work on the current topic the Commission had reached a stage where it was no longer satisfactory to set forth the rights and obligations of States in hard and fast terms, for modern relationships between States involved a more subtle element of give and take. There could be no doubt that international relations functioned more smoothly when States accorded due deference to the activities and the property of other States within their territory and did not seek to involve them needlessly in the administration of local justice. The absolute view of State immunity, on the other hand, must imperil the sovereign discretion of States within their own territory.

29. One fact to be considered in deciding how far the Commission wished to take the principle of sovereign immunity was the anxiety felt in some countries with regard to the possible over-reach of domestic laws in other countries. The relationship between that question and the draft articles before the Commission might be remote, but should nevertheless be recognized as a legitimate concern of Governments. In the final analysis, a number of grey areas might persist, as alluded to by a number of previous speakers. The rule might have to be based on the principle of reciprocity, whereby the minimum demands made by law in any circumstances could be supplemented on an agreed and reciprocal basis.

30. Lastly, great difficulty was obviously being experienced with regard to terminology. Expressions such as "trading and commercial activities" had long been the subject of serious disagreement within individual legal systems and between members of courts. The Commission's success in dealing with the topic would be judged partly on its ability to introduce a measure of uniformity and clarification, so that the draft articles would act as an encouragement to national jurisdictions to move towards a common interpretation of certain vital elements. However, that process could not be carried to the point of eliminating the very fine judgements which courts had always had to make in the area in question.

The meeting rose at 1.05 p.m.

1710th MEETING

Wednesday, 19 May 1982, at 10.10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLES

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

[Agenda item 6]

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

[14] See *Yearbook ... 1980*, vol. II (Part Two), p. 71; see also 1699th meeting, para. 27.

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

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

GENERAL COMMENTS ON PARTS I, II AND III OF THE DRAFT ARTICLES[3] (*continued*)

1. Mr. THIAM congratulated the Special Rapporteur on a learned report (A/CN.4/357) and brilliant presentation of a difficult and controversial topic (1708th meeting).

2. The basic question was, in fact, whether a State could be brought before the courts of another State without its consent. Some people answered in the negative and others in the affirmative, but all, paradoxically, based their position on the idea of sovereignty. Those who answered in the negative held that sovereignty was absolute because it somehow merged with *imperium*, in other words, authority and dominion, and it was therefore difficult to admit that a State which was exercising its sovereignty could be arraigned by another State. The opposite view was that sovereignty was not necessarily connected with *imperium*: it was above all else a function, and was to be judged in terms of its aim. Hence, it went without saying that an attempt had to be made to determine to what extent that function sometimes merged with *imperium*. For example, when the State exercised its natural powers—when it operated the police force and system of justice, when it ensured external defence and handled international relations—it exercised *imperium*. But a State sometimes acted outside the context of its natural powers, rather like a private person, in which circumstances it was acknowledged that the State must if necessary be brought before the courts in the same way as private persons. That theory, drawn from internal law, in particular administrative law, was perhaps not crystal clear, for cases arose in which it was difficult to say whether the State was acting as a public authority or as a private person. For instance, if a State decided to operate the public transport system within its territory and sold the necessary tickets, was it engaging in a commercial activity? Some held that it was, whereas others held that it was not, precisely because public transport arrangements fell within the sovereign powers of the State. Thus, the distinction between public acts and administrative acts was difficult to establish.

3. Nevertheless, it had to be acknowledged that, from the point of view of codification, the Commission was dealing with two systems. One of those systems, defended by Mr. Ushakov, maintained that the State could not have dual personality and, that there could be no duality in the acts of a State, even if the State was exercising certain powers which, under some systems of law, fell within the private sphere. That signified that the State always acted as a public authority. But there could be no question of favouring one system over another, and the Commission's work of universal codification must reflect all trends, without neglecting the particular situation in the countries of the third world, for example. How did the problem of jurisdictional immunity arise for them in practical terms? More and more frequently, States were conducting on the territory of other States activities which could entail their responsibility: those States were most often major Powers, with enormous facilities available to them. Accordingly, to lay down the principle that immunity was absolute would naturally run the risk of protecting those Powers to the detriment of other weaker countries. In the final analysis, should the Commission affirm that jurisdictional immunity was an absolute principle, or should it affirm the contrary? In the circumstances he preferred to reserve his reply.

4. In the beginning, the Commission had asked the Special Rapporteur to choose between two methods for his work of codification: the deductive method, which started with the affirmation of a principle in order to draw all the consequences therefrom; or the inductive method, which, on the basis of an analysis of the practices of the various States in the various legal systems, might make it possible to establish a rule. The Special Rapporteur had indeed made a laudable effort to analyse a whole range of judicial, administrative and Government practice, an analysis which showed that State immunity was subject to attenuations and limitations in certain cases.

5. However, some insufficiently explored areas still remained, and it would be useful for the Special Rapporteur to expand on his information. For example, in the newly independent countries, particularly in Africa—apart from the Maghreb, where principles bequeathed by the former colonizers had been reaffirmed—it was difficult to say exactly what current practice was. In Senegal at least, there was for the moment a national law which stipulated that no proceedings could be instituted against a foreign State by any Senegalese court without its consent; if that State engaged in an activity which was not properly speaking an act of public authority, it could be arraigned by Senegalese courts.

6. He had suggested to the Special Rapporteur that, if a principle was to be affirmed at the outset, the principle was not that of jurisdictional immunity, but rather that of the territorial competence of the State within which the dispute arose.[4] On that basis, the aim then would be to indicate the exceptions to that principle. More often than not, when a dispute arose between two States, each invoked its own sovereignty. In his opinion, the sovereignty of the territorial State—in other words, the State within which the dispute had arisen—must serve as the point of departure. But the Special Rapporteur had

[3] The texts of draft articles in part I and part II of the draft are reproduced as follows: (*a*) art. 1 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (*b*) arts. 2 to 5, in *Yearbook ... 1981*, vol. II (Part Two), pp.153-154, footnotes 655-658; (*c*) art. 6 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (*d*) arts. 7 to 10, revised at the Commission's thirty-third session, in *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671. Part III of the draft contains articles 11 and 12, submitted in the Special Rapporteur's fourth report (A/CN.4/357, paras. 29 and 121).

[4] See *Yearbook ... 1980*, vol. I, p. 216, 1625th meeting, para. 13.

adopted the opposite position and affirmed that the basic principle was that of the jurisdictional immunity of the State which was to be arraigned. For the moment, it was difficult to arrive at any firm conclusion, but he was convinced, as was Mr. Quentin-Baxter (1709th meeting), that if the Commission was to engage in fruitful work of codification, it was essential to strike a balance between the interests and the principles involved.

7. Mr. BALANDA congratulated the Special Rapporteur on the quality of his fourth report (A/CN.4/357), which presented the national case law of States, and in certain instances their legislation and practices and the views of learned associations with regard to the sensitive issue of jurisdictional immunities of States and their property. He fully endorsed the approach adopted, namely the inductive method, for international law, like national law, was a fact of life in society and the law could only be elaborated properly on the basis of the facts.

8. He was appreciative of the efforts made by the Special Rapporteur to analyse the differences between immunity itself and jurisdiction or lack of jurisdiction, something which was the other aspect of the problem. In that connection, it should be noted that in most legal systems, at least in systems of written law, the jurisdiction of the courts was established in a legal text that was absolute and radical in nature, in the sense that the allocation of jurisdiction among the various courts was irrevocable once it was determined by the law.

9. On the other hand, immunity, as the Special Rapporteur had rightly pointed out, was relative (*ibid.*, para. 22). First of all, it was relative with regard to the nature of the act, and the objective criterion proposed by the Special Rapporteur in that regard was quite acceptable. Immunity was also relative with regard to the beneficiary: the consequence of the immunity was the inadmissibility of the case, and not lack of jurisdiction. If a court was competent, it could not decline jurisdiction simply because a State entered an appearance before it, since the subject-matter alone established the basis for adjudicatory jurisdiction and was normally determined by the law. Did that mean, however, that the nature of the act should alone be taken into consideration in order to determine whether or not the act came within jurisdiction of a State? Like Mr. Thiam, he believed that in some situations it was not easy to pinpoint the nature of the act itself and precautions therefore had to be taken to ascertain whether it came within the exercise of *imperium* or could be compared to an act under private law. For example, to some people, a contract for arms deliveries concluded by a State in order to equip its armed forces could easily be classed as an act under private law, comparable to an act performed by a private person on his own behalf or on behalf of a third person.

10. Hence, it seemed that the criterion should not be limited *prima facie* to the nature of the act and that in some instances the purpose of the act should be taken into account. Admittedly, that was basically a matter of interpretation on the part of the judge, but in the light of Belgian practice, at least in the *Monnaie* v. *Carathéodori Effendi* case,[5] he believed that the criterion of the nature of the act alone should not preclude other necessary factors, more particularly the purpose of the act performed by the State.

11. He would not go so far as Mr. Ushakov (1709th meeting) and infer that the sovereignty of States formed the foundation of international law, but he did agree that it was indeed the basis of the jurisdictional immunity of States and their property and was, moreover, an attribute of States. On the other hand, he experienced the same difficulties as Mr. Thiam on the question of whether a general rule or an exception was involved. It was apparent that States adopted positions which were sometimes quite contradictory: some recognized absolute immunity, whereas others limited immunity to highly specific areas. But the question was definitely of current interest, in view of the relations that States were obliged to establish with one another, and the Commission should therefore go into the matter more thoroughly. In order to make headway, it should not dwell solely on principles; it should concentrate on matters of formulation and, once a particular area had been properly demarcated, set forth the specific rules, without going so far as to specify that the rule of the jurisdictional immunity of States was peremptory.

12. States, at least those which made a distinction between *acta jure imperii* and *acta jure gestionis*, had sought to place the State and the individual on an equal footing, something which would never be possible, even when the State engaged in certain activities comparable to those conducted by an individual, a natural or juridical person. Basic differences would always persist. The first difference, as pointed out by the Special Rapporteur (A/CN.4/357, para. 37), was that even if the State could, in some of its activities, be compared to a private individual—and thus be said not to enjoy jurisdictional immunity—difficulties arose in connection with execution or related measures, a problem which did not occur in the case of the individual. The second difference lay in article 8, which was concerned with consent of State, a matter to which he would revert in due course. The third difference lay in national law. In legal systems which drew a distinction between civil and commercial law on the one hand and administrative law on the other, the initial tendency had been to allow States a wide margin of sovereignty. However, in view of the abuses in the exercise of the public authority of States, an attempt had been made in administrative law to curtail the array of powers vested in the State as the public authority. Thus, administrative law tended more and more to subject the activities of the State to the control of the administrative tribunals. In the systems of written law based upon the Franco-Belgian system, there was an area of administrative law which both the

[5] *Pandectes périodiques, 1903* (Brussels), vol. 16, No. 750, pp. 492-493.

administrative tribunals and the judicial forums did not wish to enter, namely "governmental acts" (*actes de gouvernement*). The power of interpretation was generally left to the judicial authority itself, and when an act was declared a "governmental act" it fell outside the competence and control of the courts and tribunals.

13. In most of the legal systems studied, the Special Rapporteur had analysed two general trends: in one, the State acted as a public authority, and in the other, the State could conduct activities on the same basis as an individual and therefore be subject to the jurisdiction of other States. For his own part, he believed, as did Mr. Thiam, that it would be more logical to view the problem of the jurisdictional immunity of States from the standpoint of the territorial State, rather than that of the State which engaged in an activity in another State.

14. With regard to the substance of the report, there appeared to be a contradiction between paragraphs 25 and 26, for the Special Rapporteur seemed to be indicating that the dual approach, or the distinction between *acta jure imperii* and *acta jure gestionis*, was not reflected in practice. Nevertheless, in the major part of the report, the Special Rapporteur had correctly shown that, in many situations, States did indeed make a distinction between those two categories of acts. Personally, he accepted such a distinction, more especially because the State could act in either capacity under his own country's legal system. He none the less realized that, as Mr. Ushakov had pointed out, in other systems the State was indivisible.

15. With reference to the articles submitted by the Special Rapporteur, he shared Mr. Ushakov's reactions to article 6 and wondered whether it should not clearly and unambiguously affirm the principle of jurisdictional immunity in the same way as the 1963 Vienna Convention on Consular Relations and the 1961 Vienna Convention on Diplomatic Relations. Again, in view of the current wording of article 6, it was questionable whether article 7 was really necessary. If article 7 was to be retained, he would prefer alternative B for paragraph 1, since the expression "judicial and administrative authorities" in alternative A could give rise to confusion in certain legal systems; other authorities could well be involved, as had been stressed at the thirty-sixth session of the General Assembly by the Sixth Committee's Working Group on the Draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Account should therefore be taken of all the authorities that could assume jurisdiction in cases involving State activities. Furthermore, the term "instrumentalities" in paragraph 3 of article 7 was too abstract, since legal proceedings could be instituted only against an entity that enjoyed legal personality and an instrumentality had no such personality. Similarly, the expressions in that paragraph "acting as a sovereign authority" and "as State representatives" were not really suitable in that context. Activities which a State performed as a sovereign authority were precisely *acta jure imperii* and therefore did not fall under the terms of the draft. Exactly the same applied in the case of activities carried on by persons in their capacity as "State representatives". In point of fact, the paragraph sought to cover activities performed by States acting as if they were private persons.

16. Article 8 also posed serious difficulties, since it brought into play an element alien to internal law: the principle of the consent of the State to be arraigned before the courts of another State. Consent was certainly fundamental to international law, but in internal law it was not a prerequisite for jurisdiction. In internal law, someone who did not consent could still be prosecuted and the court could, if necessary, pronounce judgment by default. Therefore, the behaviour of the courts was dictated by the national legislation. In those circumstances, how was it possible to bring in the idea of consent so far as the defendant was concerned? The question called for thorough examination, for the incorporation of a new rule would cause upheavals in the legal systems in some States.

17. As for article 9, the expression "*juridiction du tribunal*" (jurisdiction of the court) in paragraph 3 seemed tautological in French, and a more appropriate term should be found. Similarly, it would be better to replace the word "*tribunal*" (court) in paragraph 4 by a more comprehensive expression that would make allowance for all kinds of systems of law.

18. With respect to the French version of article 10, it was not clear in which cases a party—in other words, the State—to be prosecuted by the courts of another State could *take part* (*participer*) in the proceedings. Generally speaking, one could enter appearance (*comparaître*) before the courts and tribunals either as the plaintiff or the defendant. A State could also take a step (*intervenir*) in proceedings to which it had not been a party *ab initio*. There seemed to be some confusion regarding the principle involved in article 10. Perhaps the best course would be to set forth the principle, and define what was meant by "counter-claim" in another paragraph. Similarly, the last clause in paragraph 1: "if, in accordance with the provisions of the present articles jurisdiction could be exercised, had separate proceedings been instituted before that court", did not appear to be absolutely necessary. It went without saying that if jurisdiction could be exercised in regard of the principal claim, it could also be exercised in respect of a counter-claim.

19. Mr. LACLETA MUÑOZ said he believed that it would be useful for the members of the Commission to have a document that would give them a more comprehensive view of the entire draft and would consist of an introduction, with the definitions and the rules of interpretation, followed by a general rule or principle, and then by articles setting forth the exceptions to the rule and perhaps the exceptions to the exceptions.

20. He wished to commend the Special Rapporteur's fourth report (A/CN.4/357), which, in addition to its practical contents, afforded an overall idea of the first

exception—that of trading or commercial activities—and backed up his own convictions. Spanish law did not contain any provision relating to the principle of jurisdictional immunity of States and their property, and no decision on the matter had been taken by the Supreme Court, which alone made case law. However, a dual trend had emerged in Spain in decisions of judges of courts of first and second instance: on the one hand, an affirmation that the jurisdictional immunity of States and their property was absolute, and on the other, the idea that such immunity was limited, because a distinction was drawn in the majority of cases between *acta jure imperii* and *acta jure gestionis*. In fact, absolute immunity was not affirmed *a priori*, but when he considered that the circumstances of the case so warranted, the judge simply recognized it, without elaborating on the matter. On the other hand, so far as the executive power was concerned, the guiding idea was undoubtedly that of placing limitations on immunity in terms of public acts and administrative acts. He therefore endorsed the conclusions reached by the Special Rapporteur and, in particular, believed that article 12 was acceptable in the main.

21. Nevertheless, he experienced serious doubts regarding articles 1 and 6, which the Commission had adopted on a provisional basis. The usefulness of article 1 depended upon the final formulation of the draft, but the wording of article 6 was not satisfactory, and in that respect he largely agreed with Mr. Ushakov's criticisms (1709th meeting) of the text. In its present form, article 6 sought to reflect the various schools of thought, and paragraphs 1 and 2 duplicated each other; rather, it should lay down a rule which would then be followed by exceptions. Again, article 7, especially alternative B for paragraph 1, was subordinated to the current wording of article 6.

22. The general structure of articles 2 and 4, which had been set aside for the moment, was acceptable. Nevertheless, those articles would have to be worded very precisely, since they would define jurisdiction and competence and determine whether the set of draft articles would deal with immunity from the jurisdiction of the courts of justice, including administrative courts and tribunals, or whether they would deal with immunity from the jurisdiction of all the authorities of the State. In his opinion, the draft should deal exclusively with immunity from the jurisdiction of the courts, for in essence, jurisdictional immunity signified immunity with respect to the organs of the State that were required to interpret and apply law.

23. He was disturbed by the lack of any reference to the immunity of diplomatic missions, something with which the Vienna Convention on Diplomatic Relations did not deal. Article 3 was not clear in that connection; yet the jurisdictional immunity of diplomatic missions, as organs of a State, was greater than the actual immunity of the State.

24. Two "extremist" positions had emerged in the course of the discussion. On the one hand, Mr. Ushakov had said (*ibid.*) that jurisdictional immunity must inevitably be absolute, for the State was sovereign, all States were equally sovereign and, hence, their immunity from the jurisdiction of the courts of other States must be absolute. But that was a one-sided point of view: what happened in the case of the other State, which was also sovereign? Obviously, one of them must give up some of its sovereignty in some way, and the Commission should find an answer to that problem. Furthermore, the sovereign equality of States required the economic, social and even the political systems of States to be identical, together with the substance of the State's sovereign powers. But such was not the case.

25. On the other hand, Mr. Malek (*ibid.*) had expressed some doubts as to the very existence of an international norm relating to State immunities. For his own part, he believed that, despite differences of opinion as to the scope or content of that norm, the norm itself was generally acknowledged. In any event, even if some States did not deem it conceivable in certain instances, they none the less considered it to be a practice, a rule of customary international law. Accordingly, it would be to the Commission's credit if it raised a rule of customary international law to the rank of a legal norm.

26. Mr. YANKOV expressed his appreciation of the Special Rapporteur's learned and comprehensive report and said that, in view of the new composition of the Commission, the review of basic principles embarked upon at the present session was a very useful exercise. Only when the basic premises had been fully explored could the Commission proceed to draft specific articles.

27. He concurred with Mr. Thiam in his view that the main object of the examination of the topic was to draft a universally applicable code. While States with similar socio-political and legal systems might not require such a code, it was important to establish a bridge between countries with differing systems of law. If that aim could be achieved, the Commission could then offer the international community a credible and dynamic instrument containing legally binding rules which provided a flexible but stable regime. If, however, the topic was regarded as falling within the area of comity of nations, it might not be advisable to engage in a codification exercise. Moreover, if the rules drafted were to be optional, rather than madatory, it was difficult to see the purpose that would be served by the instrument ultimately adopted.

28. There were a number of very difficult problems to be solved, many of them stemming from the complex nature of the acts of States themselves. Admittedly, the specific purposes of the various acts of States were a very important consideration, but nevertheless, the State itself was a single entity, and whatever it did was an expression of its public authority. In that regard, he associated himself with the observations made by Mr. Ushakov.

29. As it stood, article 6 reflected only one school of thought; in other words, the rule of immunity was

stated negatively in terms of the exceptions thereto. Therefore, for the time being the words "in accordance with the provisions of the present articles" could well be deleted from paragraph 1, but retained in paragraph 2. Paragraph 1 would then simply state the principle of immunity as such, while paragraph 2 would provide for some flexibility in applying it.

30. Mr. USHAKOV said that, in his opinion, there could be no clash between the sovereignty of the territorial State and that of the foreign State which was acting upon its territory. The principle of the sovereign equality of States meant that States were free to establish the political, legal, social, cultural or other systems that they deemed most appropriate. Each one of those systems fell within the domain of internal affairs. Being equal, States were therefore duty bound to recognize one another's different systems. Although they enjoyed immunities, they must respect the internal law of any State in whose territory they were acting. That was stated in article 41 of the Vienna Convention on Diplomatic Relations, under which all persons enjoying the privileges and immunities set forth in the Convention had the duty, without prejudice to those privileges and immunities, to respect the laws and regulations of the receiving State.

31. Obviously, by reason of their sovereignty, States were free to disallow any activity by another State in their territory, including trading or commercial activities. But if a State accepted certain activities, it accepted those activities along with all of their consequences. When the political, legal or other system of a State disallowed certain activities by other States, the latter must respect that prohibition. It followed that the sovereignty of the territorial State was safeguarded, since it was for that State to allow or disallow activities by other States in its territory. Under article 2 of the Vienna Convention on Diplomatic Relations, a State was not even required to establish diplomatic relations with other States, for such relations were established by mutual consent. Plainly, that rule stemmed from the principle of the sovereign equality of States. There again, if a State allowed diplomatic missions into its territory, it allowed them with all of the consequences laid down in customary or written international law, more particularly in the matter of privileges and immunities.

32. In connection with another question raised during the discussion, he emphasized that, when a State concluded a contract with a legal entity under private law, such as a bank, it concluded a private law contract and not a contract under international law. The law applicable to the contract could be determined by the rules of private international law and was internal law, for example, the law of the place at which the contract was signed. The State which had concluded the contract must obviously respect the law governing the contract. But the question of the applicable law and the obligation to respect that law had to be differentiated from the question of legal proceedings that could be instituted. Because of State sovereignty, proceedings could not be instituted in one State against another State without the latter's consent. Any State compelled to appear before the court of another State without enjoying jurisdictional immunity would be subjected to the public authority of that other State, something that would be a serious breach of the principle of the sovereign equality of States.

The meeting rose at 11.40 a.m.

1711th MEETING

Friday, 21 May 1982, at 10 a.m.

Chairman: Mr. Constantin FLITAN

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

[Agenda item 6]

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

GENERAL COMMENTS ON PARTS I, II AND III OF THE DRAFT ARTICLES[3] (*continued*)

1. Mr. JAGOTA said that the Commission's enlarged membership and the new element of regional representation that it afforded would certainly enhance the Commission's contribution to international law.

2. With the fourth report (A/CN.4/357), in which the Special Rapporteur had encapsulated his broad knowledge of the subject of jurisdictional immunities of States, the Commission was now entering into the heart of the matter, namely, the exceptions to the rule of sovereign immunity. Opinions on how to state the rule were divided. On the one side it was rightly felt that, since all sovereign States were equal, no court of one sovereign State could sit in judgement on another State and, hence, that fundamental principle must be stated unequivocally. The other side, however, queried

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[1] *Yearbook ... 1981*, vol. II (Part One).

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

[3] The texts of draft articles in part I and part II of the draft are reproduced as follows: (*a*) art. 1 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (*b*) arts. 2 to 5, in *Yearbook ... 1981*, vol. II (Part Two), pp.153-154, footnotes 655-658; (*c*) art. 6 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (*d*) arts. 7 to 10, revised at the Commission's thirty-third session, in *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671. Part III of the draft contains articles 11 and 12, submitted in the Special Rapporteur's fourth report (A/CN.4/357, paras. 29 and 121).