Document:-
A/CN.4/SR.1717

Summary record of the 1717th meeting

Topic:
Jurisdictional immunities of States and their property

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

it was not the same conduct as that referred to in paragraph 1.

46. His remarks concerning article 9, although numerous, related essentially to drafting matters. They did not mean, therefore, that he did not find the article generally acceptable. With regard to articles 9 and 10, it should be noted that they contained neither general rules nor general principles, but exceptions. The fact that a State gave its consent to the exercise of jurisdiction by the court of another State constituted an exception to the principle of immunity. It was therefore entirely wrong to include those articles in the part of the draft devoted to general principles.

47. Mr. FLITAN said that he considered the complexity of the topic of State immunity to require provisions as detailed as article 9. He also believed, as he had already indicated (1715th meeting), that in its work on the topic the Commission should draw on certain existing multilateral conventions. It was with these two considerations in mind that he proposed the addition to article 9 of a paragraph specifying that waiver of jurisdictional immunity for a civil or administrative action should not be held to imply waiver of immunity from the execution of the judgement, for which a separate waiver was necessary. Models for such a provision were to be found in article 31, paragraph 4, and article 61, paragraph 4, of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.

The meeting rose at 1 p.m.

1717th MEETING

Tuesday, 1 June 1982, at 3 p.m.

Chairman: Mr. Paul REUTER

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[3] (*continued*)

ARTICLE 8 (Consent of State) *and*

ARTICLE 9 (Expression of consent) (*concluded*) *and*

ARTICLE 10 (Counter-claims)[4] (*continued*)

1. Mr. NI said that, in view of the rule enunciated in article 6, however incomplete and subject to improvement it might be, and the provisions of article 7, paragraph 1, article 8 was by no means indispensable. The approach adopted by the Special Rapporteur in part II of the draft articles (General Principles) had been made abundantly clear in his third report (A/CN.4/340 and Add.1, para. 45), which stated that article 6 enunciated the rule of State immunity, while article 7 set out its correlative, the corresponding obligation of restraint on the part of the territorial State, as well as a third element of State immunity, namely, the notion of "consent". In his presentation of the draft articles on consent, the Special Rapporteur had said[5] that the existence of consent could be viewed as an exception to the principle of State immunity and had been so viewed in some national legislation and regional conventions, but that, for the purposes of the draft articles, he preferred to consider consent as a constituent element of State immunity. Articles 6, 7 and 8 as they now stood were in line with the approach adopted by the Special Rapporteur.

2. The meticulous work the Special Rapporteur had done and the logical sequence in which he had presented articles 6, 7 and 8 were greatly appreciated, but the proposition that the notion of consent, or rather, lack of consent, was an ingredient or constituent element of State immunity was not readily understandable, and the arguments adduced by the Special Rapporteur in paragraphs 16 and 19 of his fourth report (A/CN.4/357) were not necessarily conclusive. The question whether consent or lack of consent was an element of State immunity was, however, academic, and it should not prevent the Commission from drafting articles on jurisdictional immunity.

3. Although article 8 was entitled "Consent of State", paragraph 1 merely repeated what had already been stated in substance in article 6, paragraph 1, and article 7, paragraph 1. It was only paragraph 2 that dealt with the substance of the question, namely, the fact that jurisdiction could be exercised in a legal proceeding

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[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).

[3] The texts of draft articles submitted at previous sessions of the Commission are reproduced as follows: (*a*) art. 1 and the commentary thereto, provisionally adopted by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (*b*) arts. 2 to 5, in *Yearbook ... 1981*, vol. II (Part Two), p.153-154, footnotes 655-658; (*c*) art. 6 and the commentary thereto, provisionally adopted by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (*d*) arts. 7 to 10, revised at the Commission's thirty-third session: *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671.

[4] For the texts see 1716th meeting, para. 17.

[5] *Yearbook ... 1981*, vol. I, pp. 110-111, 1663rd meeting, para. 3.

against a State which consented to its exercise. Hence, if article 8 was to be retained as a general statement of consent and to be followed by articles of a more specific nature, its paragraph 2 might be all that was needed. If a general statement on consent was to be included in article 8, it should also be made clear that the effect of consent did not apply to interim seizure, attachment or post-judgement execution.

4. The retention or deletion of article 8 might depend to some extent on whether the wording of article 6 could be improved. If State immunity was to be taken as a rule and not an exception to territorial jurisdiction, and if the words "in accordance with the provisions of the present articles", in article 6, were regarded as unsatisfactory, as he tended to think they were, those words might be replaced by the words "except as otherwise provided in the present articles"; that wording had been proposed by Mr. Jagota (1711th meeting) and other members of the Commission, and had the advantage of clearly affirming that State immunity was a rule subject only to certain exceptions. Such wording had, moreover, been used in the United States Foreign Sovereign Immunities Act of 1976[6] and in the United Kingdom State Immunity Act of 1978.[7] Indeed, if the rule of State immunity was clearly established, it did not have to be repeated at the beginning of every article or at the beginning of every part of the draft.

5. The Special Rapporteur was to be commended for the improvement he had made by combining the contents of the original articles 8, 9 and 11 in the new article 9, which was generally acceptable, even though it raised some questions of drafting. For example, six of the seven paragraphs of article 9 referred only to "the court" or the "jurisdiction of the court" and they might, for the sake of uniformity, be brought into line with article 7, alternative A of para. 1, which referred to the "judicial and administrative authorities" of the territorial State. The words "in progress" at the end of article 9, paragraph 1, would probably give rise to confusion because different jurisdictions might attach different meanings to the expression "the proceeding in progress", which might mean the opposite of "a stay of proceedings" in the common-law system or signify that a State could give valid consent only when the proceeding was going on. It might also be possible to combine certain paragraphs, such as paragraphs 2 and 3, which referred to the time of giving consent, and paragraphs 4 and 5, which both provided for the voluntary submission of the dependent State. The meaning of the words "in respect of one or more types of activities" in paragraph 2 should also be explained more fully. He would refer at a later stage to article 10, on counterclaims.

6. Mr. EL RASHEED MOHAMED AHMED said that article 9 dealt with the various modalities of consent, which were clearly stated in the Special Rapporteur's fourth report (A/357, para. 17). He fully agreed with the comments made by Mr. Ni on paragraph 1 of that article. Paragraph 3 dealt with the situation in which proceedings were instituted in the receiving State by a plaintiff, whether a natural or a juridical person, who enjoined the foreign State as a defendant. It provided that consent could be given by "actual submission to the jurisdiction of the court or by an express waiver of immunity". It should, however, also state whether such consent must be given at the stage of the first hearing or at a later stage, since the words "relating to the merit" in paragraph 4 made it clear that the defendant knew what type of case was being brought against him.

7. Paragraph 4 referred to the situation in which a foreign State instituted a legal proceeding and to that in which it took part, or a step, in the proceeding relating to the merit. It did not, however, show in what capacity such participation took place. It might therefore be interpreted to mean that a State took part in the proceeding either as a defendant or as an interpleader or an *amicus curiae*. Paragraph 4 was nevertheless in keeping with article 32, paragraph 3, of the Vienna Convention on Diplomatic Relations and article 45, paragraph 3, of the Vienna Convention on Consular Relations; in that connection, he agreed with Mr. Flitan (1715th meeting) that the articles under consideration should be modeled as closely as possible on the provisions of existing conventions. It was also necessary to specify at what stage failure on the part of a State to enter appearance in a proceeding before the court of another State would bring the provisions of paragraph 6 into play. In municipal law, for example, failure to appear at the first hearing might result in a default decree against the defendant.

8. The words "during any stage of the proceedings", in paragraph 7, were also unclear. Did they refer to proceedings in the court of first instance or to any stage in litigation? If facts on which a claim of immunity could be based were made known to a State after the court of first instance had given its judgement, would that State be prevented from raising a claim of immunity? If "steps in the proceedings" were taken in the court of first instance, how early did such facts have to be made known? In other words, did the words "at the earliest possible moment", at the end of paragraph 7, mean before the first hearing or before the pronouncement of judgement? He raised those questions because they involved practical matters and the Commission had to provide for all the practical situations which could arise, so that conflicting interpretations could not deprive the draft articles of their meaning and intent.

9. Mr. McCAFFREY said that the Special Rapporteur had successfully broken down consent into its constituent elements in article 9, which would provide a good starting point for the Commission's discussions. The Commission might, however, subsequently decide that separate articles on implied and express consent should be included in the draft and that it was not desirable to regulate consent in great detail, because detailed terms could be interpreted in different ways in different legal

[6] See 1709th meeting, footnote 13.

[7] *Ibid.*, footnote 12.

systems and the use of more general terms would take account of unforeseen circumstances and all legal systems and settings. Since some members believed that consent could be implied simply by the entry of a State into a legal relationship, in the broad sense of the term, with a private or non-governmental entity, the Commission would also have to decide whether such consent was a separate exception to jurisdictional immunity, or simply a species of the genus consent dealt with in part II of the draft.

10. Article 9, paragraph 1, as he saw it, was an attempt to state a general rule to be dealt with in subsequent paragraphs. In order to make that clear, paragraph 1 might specify that a State could give its consent expressly, as provided in paragraphs 2 and 3, or implicitly, as provided in paragraphs 4 and 6. Such a clarification was especially necessary because of the words "by necessary implication", which were not, in his view, self-explanatory, and might therefore be qualified by a reference to the provisions of paragraph 4. The problems raised by paragraph 1 could thus be solved either by treating the entire subject of consent in very general terms, along the lines of the United States Foreign Sovereign Immunities Act of 1976, section 1605 (*a*) (1), or by continuing to follow the present approach and simply replacing the words "either expressly or by necessary implication from its own conduct in relation to the proceeding in progress" by the words "either expressly or by implication as provided in this article".

11. In paragraph 2 of article 9, the term "treaty" did not overlap with the term "international agreement", which could be an informal agreement, but the use of the words "Such consent" might be ambiguous because, technically, they included consent by necessary implication, whereas paragraphs 2 and 3 really referred to express consent. The words "Such consent" in paragraphs 2 and 3 should therefore be amended. Paragraph 2 would also be clearer if the words "of a State" were added after the word "jurisdiction", and he agreed with Mr. Ni's comment concerning the words "in respect of one or more types of activities" at the end of that paragraph.

12. In paragraph 3 and in paragraph 6, it would be better to refer only to "consent", not to both "consent" and "waiver". In paragraph 4, the word "merit" should be replaced by the word "merits". In paragraph 5, it would be preferable to relate the terms used to the relevant paragraphs of article 9, saying, for example, "voluntary submission under paragraph 4" and "waiver under paragraph 3". Mr. Ushakov (1716th meeting) had rightly pointed out that the reference in paragraph 5 to "property" raised the question whether the Commission should deal with property in part II or in some subsequent part of the draft articles. In view of his earlier comment on the use of the word "waiver", the beginning of the second sentence of paragraph 6 might be amended to read: "Nor is such consent implied by any conduct other than ... .

13. As to paragraph 7, he agreed with Mr. El Rasheed Mohamed Ahmed that it was necessary to clarify the meaning of the words "stage of the proceedings". Since the second sentence of paragraph 7 did not make it clear whether an initial waiver of immunity would prevent a State from later raising a defence of immunity, the words "it has once waived its immunity and" might be inserted in the third line, between the word "after" and the words "it has taken steps". Lastly, the Commission might wish to consider the possibility, suggested by Mr. Flitan (*ibid.*), of adding another paragraph to article 9 to state expressly the obvious rule that a waiver of jurisdiction for the purpose of the proceeding proper did not amount to a waiver for the purpose of the execution of a resulting judgement.

14. Mr. BALANDA said he believed that the exact scope of article 8 must be evaluated, having regard to the structure of the draft. Part I of the draft was devoted to definitions, part II to general principles and part III to exceptions to the principle of State immunity. Since article 8 was placed in the part relating to principles, one expected it to state an important principle. But the principle it stated seemed to be in contradiction with the principle which followed from the explanation given by the Special Rapporteur in his fourth report (A/CN.4/357, para. 16). According to the Special Rapporteur, consent was not necessary for a State to be able to exercise its jurisdiction against another State. He fully agreed with that view and was surprised that under the terms of article 8 "a State shall not exercise jurisdiction in any legal proceeding against another State without the consent of that other State". According to that provision, a State would have to consent to another State's exercising jurisdiction over it, whereas the basic principle was that of non-consent. That contradiction was all the more troublesome because, unlike international law, which made the consent of the parties a condition for the exercise of jurisdiction, internal law did not require the consent of the defendant for the courts of a State to be able to hear litigation. And in the cases contemplated in article 8, it was the State courts which would have to examine the question of their own competence to try any case involving another State. It should not be forgotten that, in the last analysis, the problem of immunity would arise in the context of the internal law of States. Thus article 8 seemed to introduce an idea which did not appear to be accepted by any State: that of subordinating the exercise of jurisdiction to the consent of the parties. Since the Special Rapporteur had precisely the opposite principle in view, that of non-consent, he suggested that article 8 be drafted in the following terms:

> "The consent of States is not required for the exercise of the jurisdiction of another State against them. Nevertheless, a State may consent, either expressly or implicitly, to submit to the jurisdiction of another State."

15. As to article 9, the Special Rapporteur had drafted it in a very detailed way, probably in order to make it more easily understandable. He wondered, however,

whether such a mass of detail would not complicate the task of those looking for the *ratio legis* of that provision. The seven paragraphs of the article were intended to enable a judge to determine, according to internal law, whether consent had been given and, if so, whether that consent had been explicit or implicit. But such detailed provisions might have the opposite effect; since the terms used did not necessarily cover the same real situations in the different systems of internal law, those provisions could be the subject of different interpretations. It would therefore be preferable to state more clearly the basic principles which article 9 was meant to establish, without going into details.

16. Article 10 set out a principle relating to counter-claims, but also sought to define the notion of a counter-claim. In his opinion the Commission should refrain, as far as possible, from defining the expressions used in the draft, with the exception of important expressions used in a sense different from their meaning in the main international conventions concerning related subjects. Article 10, paragraph 1, should be confined to expressing the principle that a party could be permitted to make a counter-claim, without seeking to define the notion of a counter-claim, which was easy to grasp despite the diversity of systems of internal law. As to paragraph 2, it seemed to add nothing to paragraph 1, since it was obvious that a party which could make a counter-claim could act in respect of its principle claim. That provision was probably not indispensable.

17. Mr. EVENSEN said he shared the view expressed by Mr. Ni that articles 6 and 8 dealt with more or less the same subject-matter and could be merged. If the Commission decided to retain article 8 as a separate provision, however, it should bear in mind its consideration of article 7, during which it had decided that immunity should apply not only to court proceedings but also to proceedings before other authorities, such as administrative and police authorities, and should delete the reference to "any legal proceeding" in article 8, paragraph 1, which he took to mean only "court proceedings". Since paragraph 2 seemed to deal with the same subject-matter as paragraph 1, the text of article 8 might be amended to read:

> "1. Unless otherwise provided in the present articles, a State shall not exercise jurisdiction in any proceeding, as defined in article 7, against another State without the consent of that other State.
>
> "2. If express or implied consent has been given in accordance with article 9, jurisdiction may be exercised against the consenting State to the extent that such a proceeding is covered by that consent."

18. In article 9, the Commission should also try to cover consent to proceedings before courts and consent to proceedings before other authorities as well. Article 9 would then have to be redrafted; it should take particular account of consent to court proceedings, which were probably the most common. Paragraphs 4 and 7 could be combined, because they both related to pleadings on merits. In the second sentence of paragraph 6, it might, moreover, be appropriate to refer both to express consent and to implied consent, as had been done in paragraph 1.

19. Mr. QUENTIN-BAXTER said he fully agreed with many other members of the Commission that the Special Rapporteur had been right to revise the wording of articles 8 and 9 so that the difference between consent and waiver was not raised to the level of a distinction of substance. It was entirely correct to refer in article 9 not only to consent, but also to waiver. Indeed, the topic under consideration was part of every student's text book. It was black-letter law, an area in which the Commission was concerned not only to state the minimum, but to state it in a form that could be easily recognized by the authorities that normally dealt with such rules of law. While there were obvious reasons for looking carefully at the wording of the individual paragraphs of article 9 and, possibly, amending them, his over-all impression was that that draft article represented very faithfully the kind of rules that were set out in texts of international law and applied by municipal courts.

20. The inclusion of detail in article 9 would, of course, depend on a statement of the principle of consent in article 8. Like Mr. Ni, he was by no means convinced that that principle had to be stated negatively in article 8, paragraph 1, and positively in article 8, paragraph 2; but he found it difficult to be dogmatic about that or any other point of drafting, because there were still so many undecided variables elsewhere in the text of the draft articles.

21. Referring generally to the basic structure of the draft, he observed that, in article 2, subparagraph 1 (*g*), and in article 3, subparagraph 1 (*b*), the Commission was attempting to state the very essence of jurisdiction, namely, the power to adjudicate, to determine questions of law and of fact and to administer justice. To his mind, it would therefore be of great advantage to refer to jurisdiction not in terms of legal proceedings, court proceedings or proceedings before any particular branch of Government, but, rather, in an entirely general manner, so that no State could find in its legal system a means of escaping from the broad principle of international law embodied in article 9. The Commission was concerned with the power to adjudicate and, while that power would normally be exercised by courts or tribunals in the judicial branch of Government, it would sometimes be exercised by a tribunal which depended on the executive branch. He was therefore firmly convinced that the Commission should look carefully at the later context in which it would use such terms as "court proceedings" or "legal proceedings" and make every effort to ensure that the coverage of the draft articles was as general as possible.

22. For much the same reason, he would not be inclined to include in part II of the draft any stipulation about consent to jurisdiction or waiver of immunity from jurisdiction not affecting questions of execution. It was, of course, true that a waiver of immunity from jurisdiction could affect questions of execution or

attachment, but the proper place to deal with such matters was in the part of the draft having nothing to do with the power to adjudicate. Similarly, he did not think it was necessary to mention property in the context of jurisdictional immunities. The immunity of the agents of the State and the immunity of its property were two entirely different things. The Special Rapporteur had attempted to deal with the relationship between agents and property in article 7, paragraphs 2 and 3, in connection with which there were no doubt still many difficult questions to be discussed; but in those provisions, the Commission was speaking quite generally and attempting to deal in a comprehensive manner with property.

23. It therefore seemed to him that, while the Drafting Committee had a great deal of scope for amendments to the wording of the draft articles, it had before it provisions and commentaries that raised all the relevant points; he trusted that it would continue to state the broad principles in ways that would emancipate the draft articles from the effects of any particular legal system.

24. Mr. KOROMA said that, since the principle or rule of jurisdictional immunity could not be classified as *jus cogens*, the State of territorial competence might decide to institute proceedings against a foreign State operating in its territory. Under draft article 8, however, it could do so only with the consent of the foreign State. As the Special Rapporteur had rightly said (A/CN.4/357, paras. 16 and 19), consent of the State over which jurisdiction was to be exercised, or was being exercised, or the lack of such consent, was vitally relevant, if not determinative, in the consideration of any questions relating to jurisdictional immunity. Consent therefore played a dual role in that it was both a legal limit and a legal basis for action. The Special Rapporteur had also said that consent by a foreign State to be subject to the jurisdiction of the territorially competent State was not an exception to the rule of State immunity, but part of that rule.

25. Although the Special Rapporteur had said that article 8 was not an exception to the rule of jurisdictional immunity (A/CN.4/340 and Add.1, para. 51), the provisions of that draft article were apparently subject to part III of the draft articles, which dealt with exceptions. Consequently, the wording of draft article 8 appeared to contradict what the Special Rapporteur himself had said. He agreed that the concept of consent did not constitute an exception and considered that the words "Subject to part III of the draft articles" should be deleted from article 8, paragraph 1.

26. Draft article 8 limited draft articles 2 (subpara. 1 (*g*)), 3 and 7, from which it flowed. Whereas under article 7 a State must refrain from subjecting another State to the jurisdiction of its competent judicial and administrative authorities, under article 8 it was required to refrain only from instituting legal proceedings against another State. Some harmonization of the texts was called for.

27. Draft article 9, which was largely explanatory, was sufficiently wide-ranging to be comprehensive, if not exhaustive, and should be retained, subject to any drafting changes or other amendments which might be appropriate.

28. Mr. SUCHARITKUL (Special Rapporteur) said that the many comments made by members of the Commission, particularly with regard to the drafting of draft article 9, had been most helpful. While he agreed with the view that the rules set out in part II of the draft should be stated collectively, it would not be possible to include them all in a single article.

29. In draft article 8, the words "Subject to part III of the draft articles" had been included in square brackets to accommodate the view that the rule should not be stated in too absolute or unqualified a manner. Personally, he would be prepared to state the rule without any such qualification, it being understood that any qualifications or exceptions were to be found in the relevant conventions themselves. As Mr. Quentin-Baxter had rightly said, references needed to be made to interrelationships at certain points. That was a matter of drafting, however. With regard to the comments made by Mr. Ushakov and the Chairman concerning the title of the draft article, he thought the choice of appropriate wording was a matter for the Drafting Committee.

30. He was inclined to agree with the view expressed by Mr. Koroma, that the Commission should not think in terms of one State exercising jurisdiction "against" another State. The expression "jurisdiction over" was used in a number of instances in the Vienna Convention on the Representation of States in their Relations with International Organizations of Universal Character. Perhaps the text could be harmonized, where possible, by the deletion of any references to legal proceedings. Such an amendment might also be compatible with the proposal made by Mr. Evensen.

31. The formulation of the principle itself had been based on article 61 of the Code of Civil Procedure of the Soviet Union,[8] under which the filing of a suit against a foreign State, or the attachment of its property in the Soviet Union, were permitted only with the consent of the competent organs of the State concerned. That was simply another way of stating that jurisdiction could not be exercised against another State without the consent of that State, which was the wording used in draft article 8, paragraph 1. As far as the actual wording of the paragraph was concerned, however, he was prepared to be guided by the view of the majority.

32. Mr. McCaffrey had quite rightly said that draft article 9 was concerned with circumstances in which the question of jurisdictional immunity could be said not to arise, because consent had been given. In drafting paragraph 1 of that article, he had deliberately avoided the use of the expressions "implied consent" or "implied waiver", preferring the terms "expressly" and "by implication", in order to avoid creating confusion

[8] See 1708th meeting, footnote 10.

when the Commission came to consider part III of the draft, or other exceptions. Mr. McCaffrey's proposal would certainly help to clarify and identify the ways in which consent could be given, either expressly or by implication.

33. Paragraph 2 presented a number of problems, which the explanations provided (1716th meeting) by Mr. Al-Qaysi and Mr. Ushakov had helped to clarify. He had used the expression "international agreement" because some collective term was needed to identify agreements which fell neither into the category of treaties between States or between international organizations and States, nor into that of contracts concluded by State agencies with private individuals within or outside the State. Further clarification could, however, be provided in the commentaries to the draft articles. He agreed that it might be preferable to replace the expression "types of activities" by "spheres of activity" or "areas of activity".

34. Referring to Mr. Quentin-Baxter's comments on paragraph 3, he said that waiver could be considered equivalent to consent when the State itself did not institute legal proceedings. Paragraphs 4 and 5 were intended to indicate the circumstances in which a State could be presumed to have submitted to the jurisdiction of another State by itself bringing an action. In that connection, Mr. Balanda had rightly pointed out that in some jurisdictions the entering of a counter-claim by a foreign State was considered as the institution of proceedings. But since the same might not be true of other legal systems, the idea had to be expressed separately in order to anticipate problems that might arise in connection with cross actions relating to the principal claim, but also constituting independent counter-claims.

35. The question of property had raised a number of difficulties, as was apparent from the wording of draft article 7, paragraphs 2 and 3. When could a foreign State whose property was affected by a civil action be deemed to have submitted to the exercise of jurisdiction by another State or to have waived immunity from jurisdiction? Was the State bound to prove title or give evidence of possession? Practice varied. In the past, the tendency had apparently been towards absolute immunity, it being sufficient for a State to claim ownership for jurisdiction to be terminated. In other cases, however, the court might reserve the power to consider evidence of title or possession, in which case immunity must be upheld before other possible exceptions were considered. But the Commission might consider it unnecessary to go into such detail.

36. As to paragraph 7 of article 9, if the Commission considered that the wording could not accommodate different legal systems, it could be dispensed with. The proposal made by Mr. Flitan (*ibid.*) might provide a satisfactory alternative. It might be possible to stipulate that waiver of immunity from jurisdiction did not imply waiver of immunity from execution.

37. Referring to the observations made by Mr. Ushakov (1709th meeting) and Mr. Balanda (1712th meeting), he agreed that the definition of "immunity" might be a little confusing. To describe a State as immune from the jurisdiction of another State meant that it was exempt from that jurisdiction. But the word "exempt" could also be used to mean that a State exempted another State from its jurisdiction, or refrained from the exercise of that jurisdiction.

38. He proposed that the Commission should confirm that draft article 9 had been referred to the Drafting Committee.

39. The CHAIRMAN said that if there were no objections, he would take it that discussion on articles 8 and 9 was concluded and that those articles were referred to the Drafting Committee.

It was so decided.[9]

40. Mr. USHAKOV, referring to article 10, said that he had many doubts about its wording and content. First, the words "In any legal proceedings [...] in which a State has taken part or a step relating to the merit, in a court of another State", in paragraph 1, were ambiguous. If they meant that a State was acting as plaintiff, the making of a counter-claim against it was conceivable; but if they meant that it was acting as defendant, that was not conceivable. Similarly, the clause "in accordance with the provisions of the present articles jurisdiction could be exercised, had separate proceedings been instituted before that court" was not clear.

41. Secondly, paragraph 2 of the article raised the question whether a defendant State which had invoked jurisdictional immunity with respect to a court could nevertheless make a counter-claim. In short, the question was whether a State which had tacitly agreed to submit to the jurisdiction of a court by instituting a legal proceeding against another State was deemed to have consented to the exercise of the jurisdiction of that court with respect to a counter-claim. He did not believe that was a generally accepted rule; in the Soviet Union, at least, the making of a counter-claim depended on the express consent of the State concerned. It was true that the rule applied to diplomatic agents, under article 32, paragraph 3 of the Vienna Convention on Diplomatic Relations; but a State could not be assimilated to a diplomatic agent, since it could never act as a private person. It would therefore be advisable for the Special Rapporteur to carry out further research on that question.

The meeting rose at 6 p.m.

[9] For consideration of the texts proposed by the Drafting Committee, see 1750th meeting, paras. 1-15.