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Summary record of the 1749th meeting

Topic:
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organization in question. The word “each” in the English text should therefore be deleted, since it was not necessarily each treaty that involved the organization and its member States.

35. Sir Ian SINCLAIR said that, in his view, the problem with the English version arose because the words “*d’une manière distincte*”, which could be related to the word “each”, had not been translated. He therefore suggested that in the English text the phrase “each involving an international organization” should be amended to read “each involving in a distinctive manner an international organization”.

It was so decided.

36. Mr. MAHIOU, also referring to the first sentence, asked whether it would not be best to replace the words “several treaties” by the words “two or more treaties”.

37. Mr. REUTER (Special Rapporteur) said that he preferred the existing wording; there would of course be at least two treaties—the original treaty and the constituent instrument of the organization—but, in some cases, there might also be a third treaty between the members of the international organization concerned and its partners which were parties to the original treaty.

38. Mr. USHAKOV, referring to the second sentence of paragraph 2, said that the expression “run by an international organization” did not seem particularly apt for a customs union.

39. Mr. REUTER (Special Rapporteur) suggested that, in order to meet that point, the expression in question should be amended to read “in the case where it takes the form of an international organization”.

It was so decided.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

40. Mr. CALERO RODRIGUES proposed that in the English text the words “from a number of” should be replaced by the words “from the following”.

It was so decided.

Paragraph (4), as amended, was approved.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were approved.

Paragraph (8)

41. Mr. McCAFFREY, supported by Sir Ian SINCLAIR, proposed that in the first sentence the word “third” should be deleted; read in conjunction with the last part of the concluding sentence of paragraph 7, it was confusing.

42. Mr. USHAKOV proposed that the words “third States” should be replaced by wording indicating that

the States concerned were not parties to the treaty in question.

43. Mr. SUCHARITKUL agreed with Mr. Ushakov and proposed that the same change should be made in the last line of paragraph (7).

44. The CHAIRMAN suggested that the Special Rapporteur should be invited to redraft the first sentence of paragraph (8) in the light of the comments made.

It was so decided.

45. Mr. MAHIOU pointed out that the fourth sentence of paragraph (8) should be amended in the same way as the second sentence of paragraph (2).

46. Mr. REUTER (Special Rapporteur) agreed. He suggested that the words “that manages a customs union” should be replaced by the words “that has been given its form by a customs union”.

It was so decided.

Paragraph (8), as amended, was approved.

Paragraphs (9) to (17)

Paragraphs (9) to (17) were approved.

The commentary to article 36 bis, as amended, was approved.

Commentary to article 37 (Revocation or modification of obligations or rights of third States or third organizations)

The commentary to article 37 was approved.

The meeting rose at 6 p.m.

1749th MEETING

Tuesday, 20 July 1982, at 10.05 a.m.

*Chairman: Mr. Leonardo DÍAZ GONZÁLEZ
later: Mr. Paul REUTER*

Draft report of the Commission on the work of its thirty-fourth session (*continued*)

CHAPTER II. *Question of treaties concluded between States and international organizations or between two or more international organizations (continued)* (A/CN.4/L.344 and Add.1-6)

C. *Draft articles on the law of treaties between States and international organizations or between international organizations (continued)* (A/CN.4/L.344 and Add.1-5)

1. The CHAIRMAN invited the members of the Commission to limit their observations to points of substance.

PART V (INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES) (A/CN.4/L.344/Add.4)

SECTION 4 (Procedure)

Commentary to article 67 (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

2. Mr. McCAFFREY suggested that the last sentence should be amended by replacing the words "to require the" by "to justify requiring the".

It was so decided.

Paragraph (3), as amended, was approved.

The commentary to article 67, as amended, was approved.

Commentary to article 68 (Revocation of notifications and instruments provided for in articles 65 and 67)

The commentary to article 68 was approved.

Section 4, as amended, was adopted.

SECTION 5 (Consequences of the invalidity, termination or suspension of the operation of a treaty)

Commentary to article 69 (Consequences of the invalidity of a treaty)

The commentary to article 69 was approved.

Commentary to article 70 (Consequences of the termination of a treaty)

3. Sir Ian SINCLAIR said that he would like the Special Rapporteur to explain what was meant by the expression "a rule regarding conflict of laws over time" in the last sentence of the commentary.

4. Mr. McCAFFREY said that he believed the expression "conflict of laws", which represented a notion of private international law, was inappropriate. He would prefer it to be replaced by an expression such as "conflict of treaty obligations".

5. Mr. REUTER (Special Rapporteur) said that in continental-law countries with a predominantly Germanic culture, the expression used was "intertemporal law". In French law, the expression "conflict of laws" was removed from the pure context of private international law to refer to conflicts of laws which took place over time; the question was, which law applied, depending on the temporal circumstances, to a situation or to effects which took place over time. However, to solve the problem completely, he proposed that the entire last sentence should be deleted.

It was so decided.

The commentary to article 70, as amended, was approved.

Commentary to article 71 (Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law)

6. Mr. McCAFFREY said that the expression "conflict of laws over time" in the third sentence raised the same problem as in the commentary to article 70. Furthermore, he did not quite see what interpretation was being referred to in the third sentence of the commentary.

7. Sir Ian SINCLAIR suggested that the second and third sentences should be deleted and that the beginning of the following sentence should be amended to read: "The Commission considered it inappropriate to make any changes to the text of article 71, not only ...".

8. Mr. REUTER (Special Rapporteur) said that he agreed to those suggestions, which made it clear that the question at issue was the interpretation of the three articles of the Vienna Convention on the Law of Treaties which dealt with peremptory norms.

The commentary to article 71, as amended, was approved.

Commentary to article 72 (Consequences of the suspension of the operation of a treaty)

The commentary to article 72 was approved.

Section 5, as amended, was adopted.

PART VI (MISCELLANEOUS PROVISIONS)

Commentary to article 73 (Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of participation by a State in the membership of an organization)

Paragraphs (1) to (12)

Paragraphs (1) to (12) were approved.

Paragraph (13)

9. Mr. McCAFFREY suggested that, in the English text, the words "to that treaty" in the first sentence should be replaced by the words "to such a treaty" and that the end of the sentence, beginning with the words "the implication being", should be deleted.

It was so decided.

Paragraph (13), as amended, was approved.

Paragraph (14)

Paragraph (14) was approved.

The commentary to article 73, as amended, was approved.

Commentary to article 74 (Diplomatic and consular relations and conclusion of treaties)

The commentary to article 74 was approved.

Commentary to article 75 (Case of an aggressor State)

The commentary to article 75 was approved.

Part VI, as amended, was adopted.

PART VII (DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION)

Commentary to article 76 (Depositaries of treaties)

Paragraph (1)

Paragraph (1) was approved.

Paragraphs (2) and (3)

10. Sir Ian SINCLAIR proposed that the last sentence in paragraph 2 should become the first sentence in paragraph 3.

It was so decided.

11. Mr. McCAFFREY, referring to the English text, proposed that in the second sentence of paragraph (3), the word “need” should be inserted after the word “what”.

It was so decided.

Paragraphs (2) and (3), as amended, were approved.

The commentary to article 76, as amended, was approved.

Commentary to article 77 (Functions of depositaries)

The commentary to article 77 was approved.

Commentary to article 78 (Notifications and communications)

12. Mr. McCAFFREY proposed that it should be made clear, at the beginning of the first sentence, that the article 78 in question was article 78 of the Vienna Convention on the Law of Treaties.

It was so decided.

The commentary to article 78, as amended, was approved.

Commentary to article 79 (Correction of errors in texts or in certified copies of treaties)

The commentary to article 79 was approved.

Commentary to article 80 (Registration and publication of treaties)

The commentary to article 80 was approved.

Part VII, as amended, was adopted.

Mr. Reuter took the chair.

CHAPTER V. Jurisdictional immunities of States and their property (A/CN.4/L.345 and Add.1)

A. Introduction (A/CN.4/L.345)

Paragraphs 1 to 10

Paragraphs 1 to 10 were adopted.

Paragraph 11

13. Mr. McCAFFREY proposed that in the last sentence the words “as various expressions of consent” should be replaced by an expression such as “on the various ways of expressing consent”.

It was so decided.

Paragraph 11, as amended, was adopted.

Paragraphs 12 to 19

Paragraphs 12 to 19 were adopted.

Paragraph 20

14. Mr. McCAFFREY proposed that, in the English text, in the last sentence, the words “In civil-law jurisdiction” should be replaced by the words “In the civil law system”.

It was so decided.

Paragraph 20, as amended, was adopted.

Paragraphs 21 and 22

Paragraphs 21 and 22 were adopted.

Paragraph 23

15. Mr. McCAFFREY proposed that the words “it was to be hoped” in the penultimate sentence should be replaced by the words “it appeared”.

It was so decided.

16. Sir Ian SINCLAIR proposed that the words “He noted that” at the beginning of the same sentence should be deleted.

It was so decided.

Paragraph 23, as amended, was adopted.

Paragraphs 24 to 33

Paragraphs 24 to 33 were adopted.

Paragraph 34

17. Sir Ian SINCLAIR proposed that the words “of the above” in the second sentence should be replaced by the words “of the article”.

It was so decided.

Paragraph 34, as amended, was adopted.

Paragraph 35

18. Mr. McCAFFREY proposed that, in the English text, the words “pleadings on the merits” in the fifth sentence should be replaced by the words “steps concerning the merits”.

19. Mr. SUCHARITKUL (Special Rapporteur) said that he believed it would be just as well simply to delete the words “pleadings on”.

It was so decided.

Paragraph 35, as amended, was adopted.

Paragraphs 36 to 42

Paragraphs 36 to 42 were adopted.

Section A, as amended, was adopted.

CHAPTER III. State responsibility (A/CN.4/L.346)

A. Introduction

Paragraphs 1 to 15

Paragraphs 1 to 15 were adopted.

Section A was adopted.

B. Consideration of the topic at this session

Paragraphs 16 to 36

Paragraphs 16 to 36 were adopted.

Paragraph 37

20. Sir Ian SINCLAIR proposed that the words "of the commitment" should be deleted.

*It was so decided.**Paragraph 37, as amended, was adopted.*

Paragraphs 38 to 40

*Paragraphs 38 to 40 were adopted.**Section B, as amended, was adopted.**Chapter III as a whole, as amended, was adopted.*

**Jurisdictional immunities of States
and their property (continued)* (A/CN.4/L.342)**

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 1, ARTICLE 2, subpara. 1 (a), ARTICLES 7, 8 and 9

21. Mr. SUCHARITKUL (Chairman of the Drafting Committee), before introducing the draft articles on jurisdictional immunities of States and their property adopted by the Drafting Committee (A/CN.4/L.342), said that the Committee had held 23 meetings in all, during which it had adopted the texts of 55 draft articles and the annex, and reviewed 26 draft articles, on the law of treaties between States and international organizations or between international organizations. That had been the priority topic at the Commission's thirty-fourth session. The Committee had also held a preliminary discussion on the first few articles in part 2 of the draft articles on State responsibility for internationally wrongful acts. Finally, the Committee had adopted the texts of the draft articles on jurisdictional immunities which he would shortly introduce. The Committee's achievements at the present session compared favourably with those at preceding sessions; in that connection he wished to thank all the members of the Drafting Committee as well as the Special Rapporteurs concerned and those members of the Commission who had attended the Committee's meetings.

22. Unless the General Assembly requested the Commission to complete the second reading of part 1 of the draft articles on State responsibility for internationally wrongful acts, the Drafting Committee should be in a position, at the thirty-fifth session, to consider the three remaining draft articles on jurisdictional immunities of States and their property and the nine draft articles on State responsibility. To those should be added the 14 draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier which the Drafting Committee had not yet

begun. The Drafting Committee should then be able to consider such new articles as might be referred to it by the Commission in the course of its thirty-fifth session.

CONSIDERATION BY THE COMMISSION

ARTICLE 2¹ subpara. 1 (a) (Use of terms: "court")

23. Turning to the draft articles on jurisdictional immunities of States and their property, he said that the Committee proposed the following new text for article 2, subparagraph 1 (a):

"(a) 'court' means any organ of a State, however named, entitled to exercise judicial functions;"

24. Although article 2, on use of terms, would have to be considered towards the end of the preparation of the draft on first reading, the Drafting Committee had deemed it appropriate, in the light of the debate in the Commission, to adopt at the present stage a provisional definition of the term "court". The definition was intended to delimit the topic under consideration, namely, to show that the jurisdictional immunities referred to in the title of the topic were immunities from the jurisdiction of the courts of a State. The expressions "organ" and "judicial functions" had been found sufficiently flexible to encompass the varied characteristics that might be attributed to them under the internal law of States.

25. The CHAIRMAN, noting that there were no comments, suggested that the Commission might adopt article 2, subparagraph 1 (a), as proposed by the Drafting Committee.

*Article 2, subparagraph 1 (a), was adopted.*ARTICLE 1² (Scope of the present articles)

26. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text and title for article 1:

Article 1. Scope of the present articles

The present articles apply to the immunity of one State and its property from the jurisdiction of the courts of another State.

The text of the article had been modified in the light of the definition of the word "court". The words "of the courts" had been added to qualify the word "jurisdiction" and the words "questions relating to" had been deleted.

27. Mr. USHAKOV said he noted that the Drafting Committee had decided to confine the scope of the draft to the immunity of one State from the jurisdiction of the courts of another State. He thought it was best for the time being to be specific, although he was not sure what the position would be with regard, for example, to prop-

¹ For the text, see *Yearbook ... 1981*, vol. II (Part Two), p. 153, footnote 655.

² For the text initially adopted by the Commission, see *Yearbook ... 1980*, vol. II (Part Two), p. 141.

* Resumed from the 1730th meeting.

erty and execution falling more within the jurisdiction of the administrative authorities.

28. While he was able to accept draft article 1, he nevertheless regretted that draft article 6,³ which stated the principle of jurisdictional immunity of States, had to remain in abeyance. He found it a little difficult to understand the attitude of other members of the Commission in that respect. They seemed to be afraid that, once the principle was enunciated, exceptions to it would no longer be possible; that seemed somewhat strange, since exceptions often proved the rule. They even feared a provision to the effect that a State should enjoy immunity from the jurisdiction of the courts of another State “save as otherwise provided for in the articles”, since they felt that the exceptions provided for would not be exhaustive and that difficulties would ensue. Yet the principle existed, and it was recognized by all States; if it was not enunciated, the Commission would be failing in its task. He would therefore like an assurance that the Commission would try to state the principle; otherwise it would be pointless to talk of exceptions.

29. Sir Ian SINCLAIR said that the new text of draft article 1 proposed by the Drafting Committee did in a sense confine the scope of the topic, inasmuch as it would leave certain areas unregulated by the draft. Members would, however, probably agree that there seemed to be a dearth of reliable authority for settling the wider issue of the extent of immunity from the jurisdiction of administrative authorities, for instance, given the general principle that one State entity operating in the territory of another State was fundamentally obliged to comply with the laws of the latter. In the circumstances, he considered that the new draft article 1 was a very considerable improvement and should provide the foundation for the ensuing draft articles. Although there might be problems when it came to the chapters relating to property and execution, he did not think that they would be insurmountable.

30. Agreeing that draft article 6 raised a problem, he said that he had always taken the view that, even in its present wording, it did state a principle of immunity, to which there were exceptions. It could of course be argued that that in itself was a controversial way of presenting the topic. There was at least one school of thought according to which the whole doctrine of State immunity was an exception to an overriding principle, that of the jurisdiction of the territorial sovereign. In his view, however, the problem raised by Mr. Ushakov would solve itself as work on the draft articles proceeded. If draft article 6 were to be modified in such a way as to state that the principle of immunity applied “except as provided in the articles”, the Commission would immediately be confronted with the problem of the scope and range of the exceptions that would come later in the draft. Having participated in the elaboration of the European Convention on State Immunity,⁴ he

knew how difficult it was to draw up an exhaustive catalogue of cases of non-immunity. Some flexibility therefore had to be ensured in the later draft articles in order to enable the future instrument to operate in an effective manner, having regard to the way in which the jurisprudence of the courts developed.

31. Consequently, he did not think it would be possible to take a decision on draft article 6 at the present stage of work on the topic. In his opinion, the matter would sort itself out as work progressed, and should not, in the final analysis, prove a stumbling-block. At any rate, the Drafting Committee was proceeding on the basis that draft article 6 did state a principle and that exceptions to it would be provided for. That should bring some comfort to Mr. Ushakov.

32. Mr. YANKOV said he felt bound to agree with the reasoning of Mr. Ushakov, especially in regard to the link between the new article 1 and article 6 as provisionally adopted by the Drafting Committee. Even if the restrictive scope of article 1, which confined the application of the articles to the jurisdiction of the courts, was simply regarded at that stage as a working hypothesis, it was hardly a step forward, considering its implications for article 6. As Sir Ian Sinclair had observed, the fact that some areas would remain unregulated by the draft might unnecessarily restrict the general rule on State immunity and lead to results which conflicted with customary and conventional law and the ambit of State immunity as indicated by State practice at large. Enunciating a general rule by way of exceptions might shrink the legal notion of State immunity and its application. The issue deserved further consideration, since it was easier to repair consequences at the present state than later on. Flexibility and a pragmatic approach were to be recommended, but great caution should be exercised as well.

33. He suggested that the door should be left open for considering all the implications that article 6 might have for the articles following it. Even articles 7 to 9, if seen in terms of the restrictive approach resulting from article 1 as amended and article 6, might need further consideration by the Drafting Committee and the Commission. In view of that, he was not prepared to endorse articles 7 to 9 as they stood.

34. Mr. NI, referring to the proposed definition of “court” in article 2, subparagraph 1 (a), recalled that in the Drafting Committee Sir Ian had proposed the following formulation of that definition:

“ ‘court’ means any organ of a State, however named, entitled to exercise adjudicatory functions in civil, commercial or administrative matters”.

There had been considerable discussion in the Committee about the word “adjudicatory”, since in countries whose judicial system included procurators, they were considered as exercising judicial functions in the service of the courts although they never made decisions or gave judgements. The present formulation—“ ‘court’ means any organ of a State, however named, entitled to exercise judicial functions”—was appropriate because

³ *Ibid.*, p. 142.

⁴ See 1708th meeting, footnote 12.

the term "judicial functions" did not exclude the exercise of functions considered judicial but not adjudicatory.

35. He shared the concern expressed by Mr. Ushakov and Mr. Yankov regarding the present formulation of article 6, although he did not feel so strongly as Mr. Ushakov that the article formulated an exception. It did state a certain principle, but not very clearly; it gave the impression that whatever kind of State immunity was given would be governed by the articles to follow. During the debate in the Commission a number of formulations had been proposed, some of which were enumerated in paragraphs 27 and 28 of chapter V of the draft report (A/CN.4/L.345). It was obvious that the present one was not final. The Drafting Committee had even set up a working group to try to reword article 6, but the group had not had time to do that. Although he was not absolutely satisfied with the present formulation of that article, he took the view, like Sir Ian Sinclair, that it could be revised when the Commission had arrived at a definite formulation of the articles following it.

36. Mr. KOROMA recalled that in an earlier intervention (1712th meeting) he had tried, if anything, to extend the application of jurisdictional immunity, whereas article 1 and article 2, subparagraph 1 (a), took a restrictive approach. As to article 6, it stated a basic principle of international law and so was not subordinate to the other articles. He was prepared to accept the view of the Special Rapporteur that article 1 and article 2, subparagraph 1 (a), as presently formulated, should be accepted as a working hypothesis.

37. Mr. CALERO RODRIGUES said that he approved the articles submitted by the Drafting Committee, on the understanding that further consideration of article 6 was necessary. He agreed with the limitation of the scope of the articles now presented in article 1, which simply clarified the Special Rapporteur's position that the Commission should confine itself to dealing with the jurisdiction of the courts. Precisely because the Commission was not being too ambitious, article 6 should be clearer than it was at present. According to his understanding of that article, it stated the principle that immunity existed under general international law except as far as limitations to it were laid down in the draft articles. It had been impossible at the present session for the Drafting Committee to come to grips with the problem of article 6. However, it was his understanding that if the Commission was able to approve articles 1, 2, subparagraph 1 (a), 7, 8 and 9, it would come back to article 6 in the future in order to make the meaning of the article absolutely clear.

38. Mr. FRANCIS said that he wished to associate himself with the reservations expressed by Mr. Koroma concerning the limitation in scope of article 1.

39. The CHAIRMAN, speaking as a member of the Commission, said that he approved of the working method whereby the scope of the draft was limited from

the outset to jurisdictional immunity in judicial matters; that did not mean that there were not other forms of jurisdictional immunity or that the Commission could not examine them subsequently. The situation had been almost identical when the Commission had tackled the study of succession of States in respect of matters other than treaties; in order to make progress, it had had to study certain aspects of the question one by one.

40. The definition of the term "court" in article 2, subparagraph 1 (a), was quite acceptable to him. When dealing with an exceptionally difficult topic, it was important to show some flexibility.

41. He would not be able to gain a clear idea of article 6 and the following articles until the entire draft had been elaborated. It was not unusual that the early articles of a draft could only be evaluated in relation to the subsequent articles and that the latter sometimes obliged the Commission to revise the former. In the present case, it was evident that each article called the preceding articles into question. However, in order to progress, the Commission must have texts before it which, even if they were not perfectly satisfactory, enabled it gradually to obtain a comprehensive view of the issue, which might ultimately be acceptable as a compromise.

42. Mr. McCAFFREY said he wished to associate himself with the last remarks made by the Chairman in his capacity as a member of the Commission. It was essential for the Commission to approve the articles submitted by the Drafting Committee in order to provide a working basis for continued progress the following year. The Sixth Committee would certainly find it curious if the Commission failed to approve those articles provisionally. Their approval did not mean that they had to be perfect in the eyes of every member of the Commission.

43. Concerning article 1, he agreed with Mr. Calero Rodrigues that the empirical method followed by the Special Rapporteur had not revealed a State practice that was broad enough to expand the coverage of the present articles beyond what was provided for in the new article 1. It would certainly be highly inadvisable to purport to create principles of immunity which did not exist. He referred in that connection to the examples mentioned in the Commission and in the Drafting Committee, particularly in regard to administrative proceedings, to which all agreed that States were subject.

44. The definition of the term "court" in article 2, subparagraph 1 (a), was a pivotal accomplishment in that it enabled the Commission to avoid defining jurisdiction more specifically at that stage.

45. The draft articles submitted by the Drafting Committee were the product of long and hard labour; it would be regrettable to leave them pending for another year. He therefore endorsed the suggestion that they should be given provisional approval.

Article 1 was adopted.

ARTICLE 7⁵ (Modalities for giving effect to State immunity)

46. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that when part IV of the draft articles, concerning immunities of State property from measures of attachment and execution, was drafted, the Commission might wish to re-examine the scope of article 1. In order not to delay its work, the Drafting Committee had appointed a working group to consider article 6. He was grateful to Mr. Ni for having drawn attention to some of the draft proposals which the group had made. He wished to assure Mr. Yankov that article 6 as it stood would have to be changed, both because of the changes in article 1 and because article 6, paragraph 2, carried over into article 7. As Special Rapporteur, he had submitted the following alternative texts for the phrase “in accordance with the provisions of the present articles” in the two paragraphs of article 6: in paragraph 1, “to the extent of and subject to the limitations provided in the present articles”; and in paragraph 2, “except as otherwise provided in the present articles”.

47. Turning to article 7, he said that the Drafting Committee proposed the following title and text for the article:

Article 7. Modalities for giving effect to State immunity

1. A State shall give effect to State immunity [under article 6] by refraining from exercising jurisdiction in a proceeding before its courts against another State.

2. A proceeding before a court of a State shall be considered to have been instituted against another State, whether or not that other State is named as a party to that proceeding, so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the rights, interests, properties or activities of that other State.

3. In particular, a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of that State, or against one of its agencies or instrumentalities in respect of an act performed in the exercise of governmental authority, or against one of the representatives of that State in respect of an act performed in his capacity as a representative, or when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control.

48. The text of article 7 reproduced substantially that submitted by the Special Rapporteur to the Drafting Committee for the same article towards the end of the thirty-third session of the Commission.⁶ Paragraph 1 was based on alternative A, but with drafting changes made necessary by the introduction of the term “court”. Thus the rather long and detailed formulation in the original text (“refraining from subjecting another State to the jurisdiction of its otherwise competent judicial and administrative authorities [or] and by disallowing the [conduct] continuance of legal proceedings”) had been replaced by the following more

concise phrase: “refraining from exercising jurisdiction in a proceeding before its courts”. The words “under article 6” remained in square brackets in order to highlight the existence of differing views on the contents of article 6 and the importance attached by some members to that article.

49. In paragraphs 2 and 3, the term “court” had been utilized where necessary and the text had been recast accordingly. In particular, the words in former paragraph 3, “against one of its organs, agencies or instrumentalities acting as a sovereign authority”, had been altered to read: “against one of the organs of that State, or against one of its agencies or instrumentalities in respect of an act performed in the exercise of governmental authority”; that terminology, borrowed from part 1 of the draft articles on State responsibility for internationally wrongful acts, helped to ensure some uniformity among the drafts being elaborated by the Commission on different topics.

50. In the title of article 7, the words “Obligation to give” had been replaced by the words “Modalities for giving”, which reflected the contents of the article better. Finally, in paragraph 2 of the French text the words “*désigné comme une partie*” had been replaced by the words “*cité comme partie*”.

51. Mr. USHAKOV said that the Drafting Committee had worded article 7 on the basis that it would be able to finalize the text of article 6. As the words “under article 6” in paragraph 1 of the article indicated, article 7 did in fact depend on article 6, about which the Drafting Committee had been unable to reach agreement. If article 6 concerned immunity from the jurisdiction of the courts only, article 7, which dealt with how to give effect to that immunity, would definitely make sense. But at present article 6 was much wider in scope and encompassed all forms of immunity from the jurisdiction of the State.

52. Without article 6, the articles following it should be left in abeyance. He himself could not understand why some members of the Commission were reluctant to state a well-known principle of international customary and conventional law in article 6 and why that principle could not be stated until the exceptions to which it was subject had been enumerated. He was neither for nor against articles 7, 8 and 9. They simply seemed meaningless to him because they lacked the basis which article 6 should represent.

53. Sir Ian SINCLAIR said that he was not as pessimistic as Mr. Ushakov about the implications of article 6 for articles 7, 8 and 9. The new text of article 1 represented progress in that it delimited the scope of the draft articles. Accordingly, although there might be differing views in the Commission as to the precise formulation of article 6, the statement of principle it contained was bound to relate to immunity from jurisdiction in proceedings before the courts of another State. There was at least that measure of agreement regarding a revised formulation for article 6. The fact that the Commission, for reasons advanced earlier by

⁵ For the text submitted by the Special Rapporteur and the initial consideration thereof by the Commission at its present session, see 1714th meeting, paras. 6-41; 1715th meeting; and 1716th meeting, paras. 1-14.

⁶ See *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnote 668.

Mr. Ushakov and himself, had not yet been able to finalize the text of article 6 should in no way prevent it from provisionally adopting articles 7, 8 and 9. Only in that way would it be able to proceed with the elaboration of the draft articles and finally solve the problem posed by the uncertainty over the precise formulation of article 6.

54. Mr. McCAFFREY said that, in his understanding, Mr. Ushakov's difficulties with articles 7, 8 and 9 stemmed from the fact that, in the absence of a statement of the principle of State immunity, those articles had no foundation. However, as Sir Ian had pointed out, article 6 would state a principle which would be a solid foundation for articles 7, 8 and 9. The only question which arose whether article 6 would state the principle as one of general international law or as one elucidated from the articles under study. Since there was no disagreement on the actual purpose of article 6, it did not need to be in final form for the Commission to be able to adopt articles 7, 8 and 9 provisionally.

55. The CHAIRMAN, speaking as a member of the Commission, said that he could accept article 7 subject to certain reservations. In particular, the word "control" at the end of paragraph 3 was a common law term which had simply been reproduced in French. Although control was a clear concept in the restrictive practices legislation of most States that had adopted such legislation, as well as in certain international conventions, he would be unable to reach a final decision on article 7 until the Commission had indicated clearly what it meant by "control". The notion could be construed so broadly as to make immunity absolute in all cases.

56. Mr. KOROMA said that he was prepared to accept Sir Ian Sinclair's view that article 6 could, at least for the time being, be predicated on article 1. On that basis, article 7 could be accepted provisionally.

Article 7 was adopted subject to the reservations formulated by some members of the Commission.

The meeting rose at 1 p.m.

1750th MEETING

Wednesday, 21 July 1982, at 10.15 a.m.

Chairman: Mr. Paul REUTER

later: Mr. Leonardo DÍAZ GONZÁLEZ

Jurisdictional immunities of States and their property (concluded) (A/CN.4/L.342)

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (concluded)

CONSIDERATION BY THE COMMISSION

ARTICLE 8¹ (Express consent to the exercise of jurisdiction) *and*

ARTICLE 9² (Effect of participation in a proceeding before a court)

1. Mr. SUCHARITKUL (Chairman of the Drafting Committee), referring to the draft articles adopted by the Drafting Committee (A/CN.4/L.342), said that in the light of the Commission's debate at the previous session on the draft articles 8 and 9 submitted by the Special Rapporteur,³ the Drafting Committee had concluded that there was no need to include in the draft a general principle such as that of article 8 on "Consent of State". The Drafting Committee also concluded that the original text of article 9, dealing with the "Expression of consent" could conveniently be divided into two separate articles to cover, respectively, express consent to the exercise of jurisdiction and the act implying consent to such exercise or, as the more neutral title of article 9 as it now stood indicated, the "Effect of participation in a proceeding before a court".

2. The basic idea embodied in the former text of draft article 8 underlined the provisions of former article 9 and was maintained in the new wording of article 8 concerning "express consent". In view of the Drafting Committee's decision to split the text of the former article 9 in two, paragraph 1 of the article, which was essentially descriptive, became unnecessary. The present text of article 8 formulated, in one simplified and consolidated paragraph, the provisions found in paragraphs 2 and 3 of former article 9. The new single text did not make reference to the waiver of immunity, that being deemed to be one of the forms in which consent could be expressed. To emphasize the mandatory nature of the rule, the text was formulated in the negative rather than the affirmative used in the original, which had been criticized as being merely descriptive.

3. Accordingly, the Drafting Committee proposed the following title and text for article 8:

Article 8. Express consent to the exercise of jurisdiction

A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to any matter if it has expressly consented to the exercise of jurisdiction by that court with regard to such a matter:

- (a) by international agreement;
- (b) in a written contract; or
- (c) by a declaration before the court in a specific case.

4. Mr. LACLETA MUÑOZ pointed out, in connection with the word "proceeding", that when a State could not invoke immunity from jurisdiction before a court of first instance in another State, it obviously could not do so before a court of second instance or ap-

¹ For the text submitted by the Special Rapporteur and the initial consideration thereof by the Commission at its present session, see 1716th meeting, paras. 15-47, and 1717th meeting, paras. 1-39.

² *Idem.*

³ See *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 669 and 670.