

Document:-  
**A/CN.4/SR.1750**

**Summary record of the 1750th meeting**

Topic:  
**<multiple topics>**

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

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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 8<sup>1</sup> (Express consent to the exercise of jurisdiction) *and*

ARTICLE 9<sup>2</sup> (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,<sup>3</sup> 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-

<sup>1</sup> 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.

<sup>2</sup> *Idem.*

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

peal. Furthermore, although in legal texts prepared at the United Nations the word “matter” was apparently regularly translated into Spanish by ‘*cuestión*’, the latter word was too concrete in its meaning, and it might therefore be advisable to replace it by ‘*materia*’.

5. Sir Ian SINCLAIR supported the first point made by Mr. Lacleta Muñoz. In the legal system of a number of countries, including his own, the concept of waiver or voluntary submission to the jurisdiction of another State applied not only to the proceeding before the court but also in the context of an appeal. That fact should be made clear in the commentary.

*Article 8 was adopted.*

6. Mr. SUCHARITKUL (Chairman of the Drafting Committee) said that article 9 embodied in three paragraphs the provisions of paragraphs 4, 5 and 6 of the initial draft. The provisions of paragraph 7 of that draft had been deemed unnecessary, since they merely attempted to specify some of the rules embodied in the preceding paragraph by allowing the question of jurisdictional immunity to be raised at any stage of the proceedings. The practice of various courts was not always uniform; as Mr. Razafindralambo had pointed out (1728th meeting), that question was regarded as falling under ‘*ordre public*’ in the system based on Roman law. No corresponding provision appeared, therefore, in the text as it now stood. To maintain parallelism with article 8, the new article 9 had been drafted in the negative and did not include a reference to waiver of immunity. Further precision and clarity had been introduced by drafting changes made in the light of the use of the term “court”.

7. The Committee had also felt that a subparagraph (c) could be added to article 9, paragraph 2, covering a situation where a State would like to appear before the court of another State, not in order to submit to its jurisdiction on the merits of a case but either to make a statement or to give evidence. There had been a slight difference of opinion as to whether such an appearance was considered already to constitute submission to the jurisdiction; but nothing would prevent a State from invoking a claim of jurisdictional immunity at the same time. In any event, the Drafting Committee should be able to revert to article 9 at the following session.

8. An amendment proposed by Mr. Flitan (1716th meeting) to the effect that waiver of immunity of jurisdiction could not be held to imply waiver of immunity from measures of attachment or execution of the judgment had been regarded as useful, but not as part of article 9. Perhaps it could be included at the end of part II of the draft articles, as a separate provision, or in part IV.

9. He said that the Committee proposed the following title and text for article 9:

*Article 9. Effect of participation in a proceeding before a court*

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:

(a) itself instituted that proceeding; or  
(b) intervened in that proceeding or taken any other step relating to the merits thereof.

2. Paragraph 1 (b) above does not apply to any intervention or step taken for the sole purpose of:

(a) invoking immunity; or  
(b) asserting a right or interest in property at issue in the proceeding.

3. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be considered as consent of that State to the exercise of jurisdiction by that court.

10. Mr. THIAM suggested that, in the French text, the expression ‘*d’aucune manière*’ in subparagraph 1 (b) should be replaced by ‘*de quelque façon que ce soit*’, and that the word ‘*action*’ in the first line of paragraph 3 should be changed to ‘*procédure*’.

*It was so decided.*

11. Sir Ian SINCLAIR observed that the problem raised by the formulation of article 9 was a difficult one, since jurisprudence differed according to the country concerned. He was not sure whether it would be solved by the addition of a subparagraph (c) to paragraph 2; as the Chairman of the Drafting Committee had pointed out, it would have to be considered again at the following session. To satisfy those concerned by the impact of subparagraph 1 (b), perhaps the Special Rapporteur could indicate in the commentary that if a State had taken a step relating to the merits in a proceeding before a foreign court, it preserved the right to claim immunity if the facts could not reasonably have been ascertained and if immunity was claimed as soon as practicable.

12. Mr. USHAKOV said it was because certain situations were not covered by paragraphs 1 and 2 of article 9 that the Drafting Committee was asking the Commission if it would be possible to revert to article 9 at the next session. He noted also that in article 9, paragraph 3, the word “considered” had been translated into French by ‘*réputé*’ and in article 7, paragraph 2 by ‘*considérée*’.

13. Mr. THIAM said that in his view only one term should be used in French and ‘*réputé*’ would be preferable.

14. The CHAIRMAN, speaking as a member of the Commission, said that he understood the misgivings of members of the Drafting Committee who were generally of the impression that the list in article 9, paragraph 2, should be amplified. In the circumstances, the Commission could either adopt the text proposed by the Drafting Committee without change or it could add the words ‘*inter alia*’ before subparagraph 2 (a). In the latter case, an explanation would have to be given in the commentary.

15. Mr. LACLETA MUÑOZ said that if the Spanish translation of the words “shall be considered” was to be standardized, it would be better to use ‘*se considerará*’.

*Subject to its reconsideration by the Drafting Committee at the next session of the Commission, article 9, as amended, was adopted.*

*Mr. Díaz González, First Vice-Chairman, took the Chair.*

### **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 (concluded) (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 (concluded) (A/CN.4/L.344/Add.3 and 5)**

##### **PART III (OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES) (concluded) (A/CN.4/L.344/Add.3)**

##### **SECTION 4 (Treaties and third States or third organizations) (concluded)**

*Commentary to article 38 (Rules in a treaty becoming binding on third States or third organizations through international custom)*

*The commentary to article 38 was approved.*

*Section 4, as amended, was adopted.*

*Part III, as amended, was adopted.*

##### **PART IV (Amendment and modification of treaties) (A/CN.4/L.344/Add.3)**

*Commentary to article 39 (General rule regarding the amendment of treaties)*

16. Sir Ian SINCLAIR proposed that the words "That principle" at the beginning of the third sentence be replaced by "The rule laid down in article 39 of the Vienna Convention".

*It was so decided.*

17. Mr. McCAFFREY proposed that the second part of the first sentence be changed to read "what the parties have decided to do, they may also undo".

*It was so decided.*

*The commentary to article 39, as amended, was adopted.*

##### *General commentary to part IV*

18. Mr. REUTER (Special Rapporteur) said that no commentary had been prepared to articles 40 and 41, which differed very little from the corresponding provisions of the Vienna Convention. In consultation with the Secretariat, a brief commentary covering the whole of part IV could be added before article 39, which required a separate commentary.

*It was so decided.*

*Part IV, as amended, was adopted.*

##### **PART V (Invalidity, termination and suspension of the operation of treaties) (concluded) (A/CN.4/L.344/Add.3 and 5)**

##### **SECTION I (General provisions)**

*Commentary to articles 42 (Validity and continuance in force of treaties), 43 (Obligations imposed by international law independently of a treaty) and 44 (Separability of treaty provisions)*

19. Mr. REUTER (Special Rapporteur) said that, contrary to what had been stated in error in the draft report, the commentary to articles 42, 43 and 44 did not apply to articles 40 and 41.

*The commentary to articles 42, 43 and 44 was approved.*

*Commentary to article 45 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty)*

##### **Paragraph (1)**

20. Sir Ian SINCLAIR suggested that in the second sentence the words "to invoke unlawful coercion" should be replaced by "to invoke coercion of a representative or coercion by the threat or use of force" and that the word "two" in the third sentence should be changed to "three".

21. Mr. McCAFFREY asked what was the meaning of the part of the fifth sentence which read "based on the fear that the principle it established might operate to consolidate situations secured under cover of political domination".

22. Mr. REUTER (Special Rapporteur) said that Sir Ian Sinclair's suggestion was acceptable to him.

23. In answer to Mr. McCaffrey's question, he explained that when one partner was much stronger than the other, politically or economically, the second might feel inclined to remain silent in the event of some peremptory assertion on the part of the first. In the draft articles which had served as the basic text for the preparation of the Vienna Convention on the Law of Treaties, the Commission had included an article on amendment of a treaty by tacit acquiescence. The plenipotentiary conference which had adopted the Convention had not accepted that article, since it could have meant that agreements concluded by the superior authorities of a State would be modified by an attitude of silence on the part of a subordinate department in the same State, thus allowing a *de facto* situation to come about for the sake of peace. That was the situation he was alluding to in the part of the sentence to which Mr. McCaffrey had referred.

24. In the French text the word "*prescription*" in the final sentence of paragraph 1 appeared, by mistake, in the plural. In the English text, the word "prescription" was in the singular, but perhaps it did not have exactly the same connotation as in French.

25. The CHAIRMAN said that in the Spanish text the sentence in question was perfectly clear.

26. Mr. McCAFFREY said that in the light of the Special Rapporteur's explanation he had no objection to retaining the words in question; but perhaps they might read "based on the fear that the principle it established might operate to legitimize situations produced under cover of political domination", which would be clearer.

27. Sir Ian SINCLAIR thought that the word "prescription" should be left in the singular in the English text.

28. Mr. LACLETA MUÑOZ supported Mr. McCaffrey's suggestion but suggested that in order to make it clearer that the hypothesis was one to be rejected, the last part of the sentence in question should be worded: "that the principle it establishes might be used to legitimize situations produced under cover of political domination".

*It was so decided.*

*Paragraph (1), as amended, was approved.*

Paragraphs (2) to (7)

*Paragraphs (2) to (7) were approved.*

*The commentary to article 45, as amended, was approved.*

*Section 1, as amended, was adopted.*

SECTION 2 (Invalidity of treaties)

*Commentary to article 46 (Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties)*

Paragraphs (1) to (7)

*Paragraphs (1) to (7) were approved.*

Paragraph (8)

29. In reply to a question by Mr. McCaffrey, Mr. REUTER (Special Rapporteur) said that the words "in respect of them" in the third sentence could be amplified for the sake of clarity to read: "in respect of the members of that organization".

30. Mr. MAHIU proposed the following modification in order to reflect the idea expressed in the last part of the sentence: "in respect of the members of that organization, which can thus invoke it against them".

*It was so decided.*

*Paragraph (8), as amended, was approved.*

Paragraph (9)

31. Mr. McCaffrey considered that the first sentence in footnote 11 was redundant. From the point of view of the drafting, the last sentence in paragraph (9) would be better placed in paragraph (10), since it raised a new point dealt with in that paragraph.

32. Sir Ian SINCLAIR associated himself with Mr. McCaffrey's second point. The problem of the redundancy in footnote 11 could be solved by changing the words "basic rules of the organization" to "substantive rules of the organization".

*It was so decided.*

*Paragraph (9), as thus amended in the English text, was approved.*

Paragraph (10)

*Paragraph (10) was approved.*

*The commentary to article 46, as amended, was approved.*

*Commentary to article 47 (Specific restrictions on authority to express the consent of a State or an international organization)*

*The commentary to article 47 was approved.*

*Commentary to article 48 (Error)*

*The commentary to article 48 was approved.*

*Commentary to article 49 (Fraud)*

*The commentary to article 49 was approved.*

*Commentary to article 50 (Corruption of a representative of a State or of an international organization)*

*The commentary to article 50 was approved.*

*Commentary to article 51 (Coercion of a representative of a State or of an international organization)*

*The commentary to article 51 was approved.*

*Commentary to article 52 (Coercion by the threat or use of force)*  
Paragraphs (1) to (3)

*Paragraphs (1) to (3) were approved.*

Paragraph (4)

33. Sir Ian SINCLAIR, supported by Mr. McCaffrey, said that in the English text, the first sentence of paragraph (4) seemed to express a collective view of the Commission, which had not been the case. It should be brought more closely into line with the French text, as follows: "In the light of these numerous statements of position, the view can certainly be supported that the prohibition of coercion established by the principles of international law embodied in the Charter goes beyond armed force; this view has been expressed in the Commission."

*It was so decided.*

*Paragraph (4), as amended in the English text, was approved.*

Paragraphs (5) to (8)

*Paragraphs (5) to (8) were approved.*

*The commentary to article 52, as amended, was approved.*

*Commentary to article 53 (Treaties conflicting with a peremptory norm of general international law (jus cogens))*

*The commentary to article 53 was approved.*

*Section 2, as amended, was adopted.*

SECTION 3 (Termination and suspension of the operation of treaties)

*Commentary to article 54 (Termination of or withdrawal from a treaty under its provisions or by consent of the parties)*

*The commentary to article 54 was approved.*

*Commentary to article 55 (Reduction of the parties to a multilateral treaty below the number necessary for its entry into force)*

*The commentary to article 55 was approved.*

*Commentary to article 56 (Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal)*

*The commentary to article 56 was approved.*

*Commentary to article 57 (Suspension of the operation of a treaty under its provisions or by consent of the parties)*

*The commentary to article 57 was approved.*

*Commentary to article 58* (Suspension of the operation of a multilateral treaty by agreement between certain of the parties only)

*The commentary to article 58 was approved.*

*Commentary to article 59* (Termination or suspension of the operation of a treaty implied by conclusion of a later treaty)

*The commentary to article 59 was approved.*

*Commentary to article 60* (Termination or suspension of the operation of a treaty as a consequence of its breach)

*The commentary to article 60 was approved.*

*Commentary to article 61* (Supervening impossibility of performance)

Paragraph (1)

34. Mr. McCAFFREY proposed that the words "in first reading" should be added after the word "Commission" in the penultimate sentence of paragraph (1).

*It was so decided.*

*Paragraph (1), as amended, was approved.*

Paragraphs (2) to (4)

*Paragraphs (2) to (4) were approved.*

*The commentary to article 61, as amended, was approved.*

*Commentary to article 62* (Fundamental change of circumstances)

Paragraph (1)

*Paragraph (1) was approved.*

Paragraph (2)

35. Sir Ian SINCLAIR suggested that the words in the second sentence of paragraph (2) "the result of an act" should be changed to read "the result of a wrongful act".

36. Mr. ILLUECA, supported by Mr. DÍAZ GONZÁLEZ and Mr. LACLETA MUÑOZ, said that the word "*hecho*" in the Spanish text should be replaced by "*acto*".

37. Mr. McCAFFREY said that he agreed with the amendment proposed by Sir Ian Sinclair, and further proposed that the words "under an act", also in the second sentence of paragraph (2), be amended to read "under such an act".

*It was so decided.*

*Paragraph (2), as thus amended, was approved.*

Paragraphs (3) to (13)

*Paragraphs (3) to (13) were approved.*

*The commentary to article 62, as amended, was approved.*

*Commentary to article 63* (Severance of diplomatic or consular relations)

Paragraph (1)

*Paragraph (1) was approved.*

Paragraph (2)

38. Sir Ian SINCLAIR proposed that the end of the second sentence, "which was prepared by the Commis-

sion in the form of draft articles", should be deleted, that the word "these" in the third sentence should be deleted from the phrase "the severance of these relations", and that the word "charter" in the last sentence should be replaced by "constituent instrument".

*It was so decided.*

*Paragraph (2), as amended, was approved.*

Paragraph (3)

*Paragraph (3) was approved.*

*The commentary to article 63, as amended, was approved.*

*Commentary to article 64* (Emergence of a new peremptory norm of general international law (*jus cogens*))

Paragraph (1)

*Paragraph (1) was approved.*

Paragraph (2)

39. Sir Ian SINCLAIR observed that, in the commentary to article 53, the Commission had not wanted to include international organizations in the international community of States. He therefore proposed that the paragraph should end with the words "as having that effect", and also that, in the English text, the sentence should be in the present tense.

*It was so decided.*

*Paragraph (2), as thus amended, was approved.*

Paragraph (3)

*Paragraph (3) was approved.*

*The commentary to article 64, as amended, was approved.*

*Section 3, as amended, was adopted.*

SECTION 4 (Procedure) (*concluded*)

*Commentary to article 65* (Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty)

Paragraph (1)

40. Sir Ian SINCLAIR proposed that the end of the last sentence of paragraph (1) should read "for recourse to third parties, that is to say, the International Court of Justice, arbitration, or a conciliation commission."

*It was so decided.*

*Paragraph (1), as amended, was approved.*

Paragraph (2)

41. Sir Ian SINCLAIR, supported by Mr. McCAFFREY, said that the word "confrontation" in the second sentence of the English text was perhaps a little stronger than intended. The word "balance" or "proceeding" might be more appropriate.

42. Mr. REUTER (Special Rapporteur) said that the word "*confrontation*" in French, was quite correct, since it implied a face-to-face encounter for the purposes of comparison. It was not to be confused with the word "*affrontement*", which had a bellicose connotation. The expression in question gave an accurate idea of the machinery provided for under article 65.

43. Mr. ILLUECA said that in Spanish it was the word “*confrontación*” that had a bellicose connotation. It would be better to use the word “*controversia*”, which appeared in article 65, or “*enfrentamiento*”.

44. Mr. REUTER (Special Rapporteur) suggested the word “dialogue” or “procedure”.

45. The CHAIRMAN said that, in the absence of any objection, he would take it that the Commission decided to delete the word “confrontation” and to replace it by one of the words proposed.

*It was so decided.*

*Paragraph (2), as thus amended, was approved.*

Paragraph (3)

46. Sir Ian SINCLAIR said that the first two sentences of the paragraph did not give a very clear explanation of the system instituted under article 65.

47. Mr. LACLETA MUÑOZ likewise considered that paragraph (3) was not drafted in an entirely satisfactory manner. In his view, it could be deleted, since its sole purpose was to paraphrase article 65.

*Paragraph (3) was deleted.*

Paragraph (4)

*Paragraph (4) was approved.*

Paragraph (5)

48. Mr. RIPHAGEN said that the “right” referred to in the final sentence was apparently the right to raise an objection. Such a right could not, however, be lost as a result of the application of article 45, subparagraph 1 (b) and subparagraph 2 (b), since those provisions dealt with loss of the right to invoke a ground of invalidity.

49. Mr. REUTER (Special Rapporteur) proposed that the final sentence of the paragraph be deleted.

*It was so decided.*

*Paragraph (5), as amended, was approved.*

Paragraph (6)

*Paragraph (6) was approved.*

*The commentary to article 65, as amended, was approved.*

*Commentary to article 66* (Procedures for arbitration and conciliation)

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were approved.*

Paragraph (3)

50. Sir Ian SINCLAIR proposed the deletion of the words “however, imperfect”, in the fourth sentence.

*It was so decided.*

*Paragraph (3), as thus amended, was approved.*

Paragraphs (4) to (6)

*Paragraphs (4) to (6) were approved.*

*The commentary to article 66, as amended, was approved.*

*Section 4, as amended, was adopted.*

*Part V, as amended, was adopted.*

ANNEX (Arbitration and conciliation procedures established in application of article 66)

*Commentary to the annex*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were approved.*

Paragraph (3)

51. Sir Ian SINCLAIR proposed that the second sentence be amended to read:

“The only innovation vis-à-vis the 1969 text is part II, while part I merely makes the provisions drawn up in 1969 for the establishment of a conciliation commission applicable equally to the establishment of an arbitral tribunal.”

*It was so decided.*

*Paragraph (3) as amended, was approved.*

Paragraphs (4) to (10)

*Paragraphs (4) to (10) were approved.*

*The commentary to the annex, as amended, was approved.*

*Chapter II, section C, as amended, was adopted.*

*Mr. Reuter resumed the Chair.*

**D. Resolution adopted by the Commission (A/CN.4/L.344/Add.6)**

52. Mr. DÍAZ GONZÁLEZ said that document A/CN.4/L.344/Add.6 contained the text of paragraph 51 of the report, which formed a new section to be added to chapter II. That section incorporated a resolution expressing the Commission’s appreciation to the Special Rapporteur, Mr. Reuter, for his contribution to the work on the draft articles on the law of treaties between States and international organizations or between international organizations.

*The resolution was adopted by acclamation.*

*Paragraph 51 was adopted.*

*Section D of chapter II was adopted.*

*Chapter II of the draft report, as amended, was adopted.*

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

**B. Draft articles on jurisdictional immunities of States and their property (A/CN.4/L.345/Add.1)**

**PART I. Introduction**

*Commentary to article 1* (Scope of the present articles)

Paragraph (1)

53. Sir Ian SINCLAIR proposed the deletion of the word “drafting” before the word “changes”.

*It was so decided.*

54. Mr. LACLETA MUÑOZ proposed the deletion of the words "new and enlarged" before the word "Commission".

*It was so decided.*

*Paragraph (1), as thus amended, was approved.*

Paragraphs (2) and (3)

55. Sir Ian SINCLAIR proposed that the order of paragraphs (2) and (3) be reversed, since in his view the phrase "of the courts" was the decisive element in the new text and the deletion of "questions relating to" was simply consequential.

*It was so decided.*

56. Sir Ian SINCLAIR further proposed that the new paragraph (3) (former paragraph (2)) be reworded along the following lines: "The phrase 'questions relating to' which appeared in the text as provisionally adopted had now been dropped. The phrase had been necessary at the time when the scope of the draft articles remained uncertain and the Commission had not yet determined whether the draft articles should extend to immunity from jurisdiction generally or should be confined, subject to the clarification indicated in article 2, to immunity from jurisdiction of the courts of another State."

57. Mr. USHAKOV said that Sir Ian Sinclair's proposed text gave the impression that the Commission had taken a final decision in the matter, when it might in fact arrive at another decision at a later date.

58. Mr. KOROMA said it was his understanding that the Special Rapporteur had in fact accepted the need to increase the scope of the draft articles. On that basis he would be prepared to accept Sir Ian Sinclair's proposed text provisionally, so as to allow the work of the Commission to proceed.

59. The CHAIRMAN suggested, in the light of the comments made, that the Commission should adopt the new paragraph (2) on the understanding that the Special Rapporteur would insert a phrase to take account of the provisional and methodological nature of the topic.

*It was so decided.*

60. The CHAIRMAN further suggested that the Commission should adopt the new paragraph (3) (former para. (2)) as amended by Sir Ian Sinclair's proposal, on the understanding that the final form of wording would be agreed between Sir Ian and the Secretariat.

*It was so decided.*

*The new paragraphs (2) and (3), as amended, were approved.*

*The commentary to article 1, as amended, was approved.*

Commentary to article 2 (Use of terms)

Paragraph (1)

*Paragraph (1) was approved.*

Paragraph (2)

61. Sir Ian SINCLAIR said that, in his view, the final sentence of paragraph (2) did not reflect accurately the

discussions that had taken place in plenary meeting and in the Drafting Committee. He therefore proposed that it should be amended to read: "Covered under the definition are organs performing pre-judicial or post-judicial functions in a particular legal system."

62. Mr. LACLETA MUÑOZ supported that proposal.

63. Mr. USHAKOV said that, given the diversity of legal systems, he would prefer it if the last sentence were simply deleted.

64. Mr. KOROMA considered that, if the scope of application of the draft articles was to be enlarged, it would be better to retain the paragraph as drafted.

65. Mr. DÍAZ GONZÁLEZ said he appreciated the soundness of Sir Ian Sinclair's proposal, but in a spirit of compromise he would suggest that the last sentence of the paragraph be deleted.

66. Mr. McCAFFREY supported Sir Ian Sinclair's proposal but wondered whether it would not be advisable also to amplify and clarify the commentary by referring to the Parquet as an example of the organs referred to.

67. Mr. NI thought it would be preferable to delete the final sentence of the paragraph, failing which he would propose that it be amended to read: "Covered under the definition are organs performing pre-adjudicatory or post-adjudicatory functions."

68. Mr. YANKOV favoured the deletion of the final sentence of the paragraph, since the first sentence was sufficiently clear. Unlike Mr. McCaffrey, he did not think that examples should be given at the present stage.

69. Mr. RIPHAGEN noted that the paragraph did not correspond entirely to the text of article 2, which spoke only of "judicial fonctions". He therefore proposed that it should simply be deleted, particularly since the new paragraph (2) of the commentary to article 1 adopted by the Commission was sufficiently explicit.

70. Mr. THIAM likewise felt that the paragraph added nothing and could be deleted, as Mr. Riphagen had proposed.

71. Mr. EL RASHEED MOHAMED AHMED said he was in favour of deleting the final sentence, as proposed by Mr. Díaz González, and would suggest that the words "or similar functions", at the end of the first sentence, be replaced by "or related functions".

72. The CHAIRMAN, speaking as a member of the Commission, supported Mr. Riphagen's proposal that the whole paragraph should be deleted. In his view, it was apparent from the new paragraph (2) of the commentary to article 1, which it had just adopted, that the Commission did indeed hope to provide a more general definition in international terms, and not to refer to the definition under any given legal system.

73. Mr. SUCHARITKUL (Special Rapporteur) saw no objection to Mr. El Rasheed Mohamed Ahmed's



proposal, which would also meet Mr. Koroma's point. However, as it would perhaps be premature to broaden the definition, it might be preferable to delete the whole of paragraph (2).

74. Mr. KOROMA thought, like Mr. Díaz González, that it would suffice simply to delete the final sentence of the paragraph.

75. The CHAIRMAN said that, in the absence of any objection, he would take it that the Commission agreed to delete paragraph (2) of the commentary to article 2, in the light of the comments made.

*It was so decided.*

Paragraph (3) (new paragraph (2))

*Paragraph (3) was approved.*

*The commentary to article 2, as amended, was approved.*

*Part I, as amended, was adopted.*

*The meeting rose at 1 p.m.*

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## 1751st MEETING

*Thursday, 22 July 1982, at 10 a.m.*

*Chairman: Mr. Paul REUTER*

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

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

##### B. Draft article on jurisdictional immunities of States and their property (concluded) (A/CN.4/L.345/Add.1)

###### PART II (GENERAL PRINCIPLES)

1. Mr. SUCHARITKUL (Special Rapporteur) said that the commentaries to draft articles 7, 8 and 9 were of necessity long because they related to articles which the Commission had provisionally adopted on first reading, at its present session. Those commentaries were to some extent a restatement of the Special Rapporteur's previous reports.

2. An additional paragraph should be added to the commentary to article 8, reading:

“(12). Consent to the exercise of jurisdiction in a proceeding before a court of another State covers the exercise of jurisdiction by appellate courts in any subsequent stage of the proceeding up to and including the decision of the court of final instance, retrial and review, but not execution of judgement.”

#### *Commentary to article 7 (Modalities for giving effect to State immunity)*

##### Paragraphs (1) and (2)

3. Sir Ian SINCLAIR, speaking on a point of order, said that at its present session the Commission had made no change in article 6 (State immunity), which was to be reconsidered and reworded at a later session. It was therefore pointless to reproduce, in the body of the Commission's report, the text of that article and paragraphs (1) and (2) of the commentary to article 7, both of which related to article 6.

4. Mr. McCAFFREY said that he agreed with Sir Ian, particularly since paragraph (1) of the commentary did not altogether reflect the current state of the Commission's work on article 6.

5. Mr. LACLETA MUÑOZ said that, while he shared the views of Sir Ian Sinclair and Mr. McCaffrey, he considered that the Commission, instead of deleting article 6 and paragraphs (1) and (2) of the commentary to article 7, should state in the report that article 6 had not been the subject of detailed consideration and that some members had reservations about it and about paragraphs (1) and (2) of the commentary to article 7. His own reservations related to the conception of the two paragraphs of article 6 and to the meaning of the term “*hacer efectivo*”.

6. Mr. USHAKOV said once more that he had reservations regarding the title of Part II, “General principles”. Only article 6—whose title he also found unsatisfactory—seemed to lay down general principles, and not articles 7, 8 and 9.

7. Mr. DÍAZ GONZÁLEZ said that he endorsed the reservations expressed by Mr. Lacleta Muñoz, in regard in particular to article 6, paragraph 2, and paragraphs (1) and (2) of the commentary to article 7, which both related to article 6.

8. Mr. YANKOV said that, although he had reservations about certain concepts underlying article 6, it would complicate matters if the text of the article was not included in the report. He therefore proposed that it should be reproduced, if not in the body of the report, then at least in a footnote, and that it should be followed by a few brief explanations.

9. Mr. CALERO RODRIGUES supported the suggestion of Mr. Lacleta Muñoz and Mr. Yankov that the Commission should summarize the discussions on article 6 in a footnote, with an indication that it had been provisionally found acceptable as a basis for article 7 and the following articles.

10. Sir Ian SINCLAIR said he could agree to the Commission reproducing the text of article 6 in its report, on the understanding that the existing footnote 2 would be amplified so as to reflect the discussions that had taken place at the present session, and would make it clear that the Commission was still considering article 6 and would continue to seek a more satisfactory form of wording.