

Document:-
A/CN.4/SR.1916

Summary record of the 1916th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
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meeting, the Committee of Experts was to hold an exchange of views and information on the preparation of the conference that was to meet in Vienna in 1986 to study the question of treaties concluded between States and international organizations or between international organizations.

41. By holding such consultations, the European Committee on Legal Co-operation was doing useful work not only for the States members of the Council of Europe, but also for the international community as a whole, since those regional activities were bound to facilitate the work of the United Nations. It was in that spirit that the Committee approached the problems of public international law; in doing so, it gave expression to its will to co-operate as closely as possible with the Commission and the United Nations.

42. The CHAIRMAN thanked the Observer for the European Committee on Legal Co-operation for his interesting account of the Committee's activities. The Committee and the Commission had much in common and worked in parallel on many subjects. The two bodies were constantly helping each other and he hoped that their future relations would be strengthened so as to enhance that co-operation to their mutual advantage.

43. Sir Ian SINCLAIR expressed his sincere gratitude to the European Committee on Legal Co-operation for the cordial welcome extended to him when he had represented the Commission at the Committee's session in November 1984. The European Committee was engaged in the study of subjects that were related—or partly related—to items on the Commission's agenda. It was gratifying for members of the Commission to know that they were not alone in undertaking the study of certain difficult topics.

44. Mr. USHAKOV, speaking also on behalf of Mr. Flitan and Mr. Yankov, thanked the Observer for the European Committee on Legal Co-operation for his interesting statement. The work of the Committee was very useful to the Commission, since the subjects which it examined were often connected with topics before the Commission. Of course, the draft conventions prepared by the Committee were of only regional application, and that application was limited to Western Europe. But the fate of its drafts was often very similar to that of the Commission's own: it was not uncommon for the number of ratifications and accessions to be rather small. The process of development of international law by means of regional or general treaties was certainly a slow one.

45. Chief AKINJIDE, speaking on behalf of the members of the Commission from the African region, stressed the affinity between Africa and Europe. That affinity, for which there were historical reasons, had not come to an end with independence. Centrifugal forces in Europe had led to the tragedy of two world wars, but in recent decades there had been, fortunately for Europe and the world, a centripetal movement. Europe now offered an example of stability. Africa needed stability and the ability to feed itself. In all its endeavours, Africa drew largely upon European experience; thus the legislation of practically all African countries was based on French, English, Portuguese, Spanish or Italian models.

46. Mr. CALERO RODRIGUES, speaking on behalf of the members from the Latin American region, thanked the Observer for the European Committee on Legal Co-operation for his interesting statement and joined in the tributes which had been paid to the Committee's work. It was very important for the Commission to keep abreast of developments in the work being done in the various regions by the European Committee on Legal Co-operation, the Inter-American Juridical Committee and the Asian-African Legal Consultative Committee. He hoped that co-operation with the European Committee would be continued and strengthened in the future.

47. Mr. SUCHARITKUL, speaking on behalf of the members from the Asian region, said that co-operation between Asia and Europe went very far back in history. With regard to international law, it was worth recalling that Asia had had an international law of its own for many centuries. Thailand, for example, had sent its first diplomatic representative to Amsterdam at the time of Grotius—an ambassador who had concluded the first commercial agreement between the two countries. Asia was a continent of great diversity; indeed, countries such as China and India had a large variety of cultures within their own borders. Asian efforts to arrive at harmony and unity met with obstacles no less great than those encountered in Europe. In its work on international law, Asia was associated with Africa in the Asian-African Legal Consultative Committee.

48. He welcomed the statement by the Observer for the European Committee on Legal Co-operation and thanked him for his account of the Committee's endeavours, from which so much could be learnt in view of the very advanced stage of its work on many topics.

The meeting rose at 6.10 p.m.

1916th MEETING

Tuesday, 2 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Diaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property
(continued) (A/CN.4/376 and Add.1 and 2,¹
A/CN.4/388,² A/CN.4/L.382, sect. D, ILC
(XXXVII)/Conf.Room Doc.1 and Add.1)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³ (continued)

ARTICLE 19 (Ships employed in commercial service)
and

ARTICLE 20 (Arbitration)⁴ (continued)

1. Sir Ian SINCLAIR, referring to draft article 20, the last in the set of provisions dealing with exceptions to State immunity, said that arbitration was becoming more and more frequent as a means of resolving disputes arising out of contracts between States and private companies or other entities. It was in the interest of the parties that such disputes should be settled speedily and with as little acrimony as possible. Arbitration might therefore be as much in the interest of a State party to a contract as in that of a private company or entity.

2. It was often suggested that developing countries were at a disadvantage in arbitration when they were opposed by a powerful multinational company. That was, however, not necessarily true, as shown by *Baruch-Foster Corporation v. Imperial Ethiopian Government*, which had been decided by an arbitral tribunal in 1974 and to which Mr. Jean-Flavien Lalive had referred in a series of lectures he had given in 1983 at The Hague Academy of International Law.⁵ The dispute in question had arisen out of a

contract under which the Ethiopian Government had accorded an oil exploration concession to Baruch-Foster, a Texas oil company. Although the Ethiopian Government had initially been somewhat reluctant to go to arbitration, it had finally decided to do so and had obtained from the arbitral tribunal not only the rejection of the claim made by the oil company, but an award of damages amounting to \$US 700,000 plus interest under its own counter-claim. Perhaps the most interesting development in that case had been that, since the oil company had refused to execute the award, the Ethiopian Government had sought execution in the United States courts on the basis of the 1958 New York Convention.⁶ A federal district judge in Texas had confirmed the award and the company had been compelled to pay more than \$900,000 to the Ethiopian Government. That case demonstrated that recourse to arbitration could be in the interest of a State party to a contract. The problem was, however, that awards in many important arbitrations involving States parties to contracts had not been published and were thus not well known.

3. Turning to the text of article 20, he drew attention to an interesting passage from the report by the Australian Law Reform Commission on "Foreign State immunity",⁷ which stated that most countries regulated the conduct of arbitration within their jurisdiction on the basis that the forum State had an interest in the conduct of such arbitration in accordance with basic standards of due process and fairness. The extent to which a State might wish to exercise such a supervisory role was a matter of legal policy. Conflicting considerations came into play in that regard. For example, a Government might wish to encourage the use of its capital as an arbitration centre. It was well known that there was a keen rivalry between cities such as Paris, London and Kuala Lumpur, which were willing to offer the necessary facilities for international commercial arbitration. That was no doubt one of the reasons why the United Kingdom *Arbitration Act 1979*⁸ had very significantly limited the extent to which United Kingdom courts could exercise their supervisory role over arbitrations taking place in the United Kingdom. To the extent that that was a general phenomenon, cases in which arbitration between a private person and a foreign State could come before the courts of the forum State would be very rare. Nevertheless, the plea of immunity should not be allowed to prevail in cases where the foreign State had agreed to arbitrate and the jurisdiction of the court of the forum State was confined to the exercise of its normal supervisory role.

4. In his sixth report (A/CN.4/376 and Add.1 and 2, para. 249), the Special Rapporteur cited section 9 of the United Kingdom *State Immunity Act 1978*, whose wording was not clear. No case involving the interpretation of that section had yet come before the courts, but he did not think that it could be said to

¹ Reproduced in *Yearbook ... 1984*, vol. II (Part One).

² Reproduced in *Yearbook ... 1985*, vol. II (Part One).

³ The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (a) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (b) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—paragraph 1 (a) and commentary thereto: *ibid.*, p. 100; paragraph 1 (g) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (c) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (d) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (e) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (f) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (g) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

Part III of the draft: (h) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (i) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (j) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (k) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (l) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*

⁴ For the texts, see 1915th meeting, paras. 2-3.

⁵ "Contrats entre Etats ou entreprises étatiques et personnes privées: développements récents", *Collected Courses of The Hague Academy of International Law, 1983-III* (The Hague, Nijhoff, 1984), vol. 181, pp. 73 *et seq.*

⁶ See 1915th meeting, footnote 10.

⁷ Australian Law Reform Commission Report 24, *Foreign State Immunity* (Canberra, Australian Government Publishing Service, 1984).

⁸ United Kingdom, *The Public General Acts, 1979*, part II, chap. 42, p. 1047.

apply to the enforcement of arbitral awards, since it dealt with "adjudicative jurisdiction", not with "enforcement jurisdiction". It was thus preferable to specify, as did article 12 of the 1972 European Convention on State Immunity (*ibid.*, para. 251) and draft article 20, the three cases in which the supervisory role of the courts of the forum State could be exercised.

5. Although he generally agreed with article 20 as submitted by the Special Rapporteur, he did not think that the scope of the provision should be limited to disputes arising out of "a civil or commercial matter". In that connection, the report of the Australian Law Reform Commission had stressed that the interest of the State was the same whatever the subject-matter of the dispute. He therefore suggested the deletion of the words "which has arisen, or may arise, out of a civil or commercial matter" in article 20, paragraph 1.

6. Lastly, he stressed that article 20 related only to immunity from jurisdiction and not to enforcement jurisdiction. The question of the enforceability of arbitral awards should be left aside and dealt with in the context of draft articles 21 to 24.

7. Mr. CALERO RODRIGUES said that the present formulation of draft article 19 represented a considerable improvement compared with the two earlier alternatives submitted by the Special Rapporteur, which were too technical and based too closely on a particular legal system and would therefore have been difficult to apply. The revised text now under consideration was sufficient for the Commission's present purposes.

8. The words "Unless otherwise agreed between the States concerned" at the beginning of paragraph 1 gave a subsidiary character to the provision contained in that paragraph. He endorsed that approach, as well as the reference to a State which "owns, possesses, employs or operates" a ship, which covered all possibilities.

9. He nevertheless had some doubts about the words "that ship and cargo". Any proceedings that might take place would be against the ship rather than the cargo. He also saw no reason for the inclusion of the words "whether the proceeding is instituted against its owner or operator or otherwise", which would only lead to unnecessary complications. He did, however, agree with the inclusion of the words "provided that, at the time when the cause of action arose ...", which dealt with the important time factor. A ship could be in use for commercial purposes at one moment and for other purposes at another.

10. Paragraph 2 provided for two exceptions to the exceptions stated in paragraph 1. The one in paragraph 2 (a) was clearly unnecessary. Paragraph 1 clearly related only to ships in commercial service and therefore did not apply to the warships and ships in governmental service which paragraph 2 (a) purported to exclude. The same was true of paragraph 2 (b), which referred to cargo "destined for non-commercial use". It was sometimes claimed that it was an advantage to state the obvious, but, in his view, statements of the obvious only served to create confusion and doubt in respect of texts which were otherwise clear.

11. The exception in draft article 20 related to arbitration. A State which agreed to go to arbitration was deemed to have waived its immunity from jurisdiction in respect of the court exercising supervisory jurisdiction over the arbitration. That, of course, presupposed that, under the laws of the foreign State concerned, the foreign court in question could exercise such jurisdiction; but that was not the case, for example, under Brazilian law.

12. He welcomed the provision in paragraph 2 which stated that paragraph 1 did not apply to an arbitration agreement between States. That paragraph also gave a subsidiary character to the rule in paragraph 1 by specifying that "Paragraph 1 has effect subject to any contrary provision in the arbitration agreement".

13. In conclusion, he said that articles 19 and 20 should be referred to the Drafting Committee for the necessary drafting changes.

14. Mr. McCAFFREY said that he supported draft article 20, which provided that an agreement to arbitrate a dispute arising out of a transaction amounted to an implied waiver of immunity from the jurisdiction of a court of a foreign State. Sir Ian Sinclair's comment on the general usefulness of arbitration in the present-day world had been entirely relevant. In contracts between States and private parties, both sides preferred arbitration as a means of settling disputes expeditiously, at less cost and without public attention.

15. Referring to the relevant legislation in his own country, he said that, although the *Foreign Sovereign Immunities Act of 1976* did not contain any provision on arbitration, the legislative history of that Act indicated that the intention of Congress had been that actions to enforce arbitration agreements could be brought in the United States of America under the provision which allowed suits to be brought against foreign States that had waived immunity from jurisdiction. That interpretation had been confirmed by the United States Court of Appeals in *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes* (1964).⁹

16. Legislation to amend the *Foreign Sovereign Immunities Act* had been introduced in the United States Senate to provide expressly for jurisdiction to enforce arbitral agreements and awards. Bill No. S.1071, which had been introduced on 3 May 1985,¹⁰ would thus allow intervention by United States courts (a) if the arbitration took place in the United States; (b) if the agreement or award was governed by a treaty or other international agreement which was in force for the United States and called for the recognition and enforcement of arbitral awards; (c) if the underlying claim against the foreign State could have been brought in a United States court under the *Foreign Sovereign Immunities Act*. Examples of such treaties were the 1958 New York

⁹ *Federal Reporter, 2d Series*, vol. 336 (1965), p. 354; *International Law Reports* (London), vol. 35 (1967), p. 110.

¹⁰ For the text, see *American Journal of International Law*, (Washington, D.C.), vol. 79, No. 3 (July 1985), pp. 784 *et seq.*; see especially the proposed amendment to section 1605, subsection (a) (6).

Convention,¹¹ the Convention on the Settlement of Investment Disputes between States and Nationals of Other States¹² and the 1981 Iran-United States Agreement concerning the Settlement of Claims.¹³ In the light of that proposed amendment to the *Foreign Sovereign Immunities Act*, he considered that the text of draft article 20 might be unduly restrictive.

17. Another possibility which might or might not be covered by article 20 was illustrated by *Libyan-American Oil Company v. Socialist People's Libyan Arab Jamahiriya* (1980),¹⁴ which had gone to arbitration as a result of Libya's expropriation of a petroleum concession in 1973. The dispute-settlement provisions of the contract had provided for arbitration in a place on which the parties or the arbitrators might agree. The court had concluded that, "although the United States was not named [as a place of arbitration], consent to have a dispute arbitrated where the arbitrators might determine was certainly consent to have it arbitrated in the United States". Accordingly, the court had found that Libya had waived the defence of sovereign immunity and had implicitly consented to the jurisdiction of the United States courts for the purpose of the enforcement of the agreement to submit to arbitration.

18. With regard to *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, to which the Special Rapporteur had referred in his sixth report (A/CN.4/376 and Add.1 and 2, para. 248), stating that

... the United States Court of Appeal concluded that the defendant was immune under the *Foreign Sovereign Immunities Act of 1976* and that the court lacked subject-matter jurisdiction to confirm the award, as the suits were between foreign plaintiffs and foreign States,

it should be noted that the dispute had arisen from a contract for shipping services to transport Guinean bauxite to foreign markets. The contract had provided for arbitration by arbitrators to be selected by the Chairman of the International Centre for Settlement of Investment Disputes (ICSID),¹⁵ which was located in Washington. An ICSID arbitration had, however, never been organized. Instead, MINE had obtained an order from a United States court compelling arbitration under the auspices of the American Arbitration Association and it had subsequently brought an action in the Federal District Court to enforce an award resulting from that proceeding for more than \$US 25 million.

19. Guinea had failed to appear in the original judicial proceedings and the arbitration, but had appeared in the enforcement action to plead, *inter alia*, sovereign immunity and the exclusivity of the contractual ICSID remedy. The Court of Appeal had considered that the issue before it was whether agree-

ment to ICSID arbitration in Washington constituted an implicit waiver of sovereign immunity under section 1605 (a) (1) of the *Foreign Sovereign Immunities Act*. The Court had concluded that, as the parties had not contemplated judicial enforcement of their agreement to arbitrate, Guinea had not waived its immunity in an action to enforce a non-ICSID award. There was thus no doubt that an agreement to ICSID arbitration in Washington did not constitute a waiver of immunity from the general jurisdiction of United States courts.

20. In conclusion, he supported the suggestion that draft article 20 should be referred to the Drafting Committee.

21. Mr. MAHIU said that the two alternatives of draft article 19 originally submitted by the Special Rapporteur in his sixth report (A/CN.4/376 and Add.1 and 2, paras. 232-233) had given rise to a number of objections. Some members of the Commission had taken the view that the analysis and presentation of the article gave the impression that account was being taken of the position of only one or two States and had pointed out that the legal system of, for example, the United Kingdom and the concepts employed therein could not be used as the basis for an article forming part of an international convention.

22. Article 19 actually raised the quite simple problem of whether the principle of the jurisdictional immunities of States applied in the case of ships employed in commercial service; but the solutions to that problem were not simple. In some countries, particularly developing countries, there were ships that belonged to government enterprises or national or mixed companies which had independent legal personality and whose activities were subject to trade law. Immunity could be said not to apply in such cases, since such enterprises or companies had to be governed by the same trade law rules as all other enterprises and companies. A State as such could, however, use ships for operations that were not easily classifiable, such as the carriage of foodstuffs under technical assistance programmes for drought-stricken Sahelian countries. Could such ships and their cargoes be regarded as being in commercial service and as not being entitled to any immunity whatsoever? With regard to any claim that might be brought against them, would they be subject to the same rules and obligations that applied to ordinary commercial ships? It was because such questions had been raised that the Special Rapporteur had submitted the revised version of article 19.

23. He was not sure that the new text of article 19 would dispel all the doubts that had been expressed. Since some developing countries owned only one or two commercial ships, it was, for example, open to question whether, in the event of a dispute concerning a commercial debt, those ships could be immobilized and made liable to proceedings, with the result that the developing country concerned might be deprived of all or part of its fleet. Article 19 thus had to be considered from the point of view of its practical consequences.

¹¹ See 1915th meeting, footnote 10.

¹² Opened for signature at Washington on 18 March 1965 (United Nations, *Treaty Series*, vol. 575, p. 159); hereinafter referred to as "1965 Washington Convention".

¹³ See *International Legal Materials* (Washington, D.C.), vol. XX, No. 1 (January 1981), p. 230.

¹⁴ *Federal Supplement*, vol. 482 (1980), p. 1175; see especially p. 1178.

¹⁵ Established by the 1965 Washington Convention (see footnote 12 above).

24. In view of the growing importance of arbitration in international trade relations, article 20 had a place in the draft. In his sixth report (*ibid.*, para. 248), the Special Rapporteur had referred to *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*. MINE had concluded a transport contract with the Republic of Guinea which had contained a clause providing for arbitration by ICSID. Guinea had, however, been brought by MINE before a United States court, which had decided that the arbitration procedure to be applied would be that of the American Arbitration Association, not that of ICSID. Although Guinea had refused to take part in the proceedings on the grounds that it had agreed only to the ICSID arbitration clause, the court had decided to refer the matter to an arbitral tribunal set up under the auspices of the American Arbitration Association and an award of \$US 25 million had been made against Guinea. MINE had then applied to the arbitral tribunal for the enforcement of the award and Guinea had appeared—unsuccessfully—to oppose the application for enforcement. It had then brought its own appeal, which had been based on two arguments: first, that its consent to arbitration by ICSID excluded any other remedy, and secondly, that it had not waived its jurisdictional immunities. The Court of Appeal had considered only the second argument, without ruling on the first. Solely on the basis of the United States *Foreign Sovereign Immunities Act of 1976*, it had concluded that Guinea had not waived its jurisdictional immunity and that it (the Court) lacked competence in the matter.

25. One of the lessons to be drawn from that case was that national courts tended to rely exclusively on internal law and did not always take account of international conventions. Although, in the case in question, and following the appeal by Guinea, the outcome had been favourable to the State, that tendency could create problems because a State might be involved in proceedings in the courts of another State on the basis of a particular interpretation of internal law or of an international convention, despite the fact that the 1965 Washington Convention¹⁶ established the obligation of national courts to refrain from intervening. A State could thus be involved in proceedings and even ordered to pay a certain amount under a procedure that was, from the legal point of view, rather singular, not to say dubious.

26. The practice of other western States could vary. France had a large body of case-law that was somewhat contradictory. Some lower courts might decide that a State's acceptance of a commercial arbitration clause meant that it waived jurisdictional immunity, while others might reach the opposite conclusion. The Court of Cassation had, however, taken a definite position in favour of the latter view and Mr. Robert, the former President of the Court of Arbitration of the International Chamber of Commerce, had endorsed that position. In the final analysis, the issue was one of the relationship between national courts and arbitration, since some national courts had a tendency to try to intervene in arbitration proceedings. As a result of that tendency, a number

of States, including France, had adopted legislation to keep national courts under closer supervision.

27. In his sixth report (*ibid.*, para. 252), the Special Rapporteur had cited a passage from article 1 of the 1923 Geneva Protocol on Arbitration Clauses relating to recognition of the validity of an arbitration agreement and the consequences it might have with regard to the submission of a dispute to arbitration and, possibly, with regard to the role of national courts. Since the Commission was now discussing the role played by the law of the country in which arbitration took place and by the courts of that country, it might, however, have been more to the point to refer to the first paragraph of article 2 of that Protocol, which stated that the arbitral procedure, including the constitution of the arbitral tribunal, would be governed by the will of the parties and by the law of the country in whose territory the arbitration took place.

28. It was perhaps not quite correct to state, as the Special Rapporteur had done in the subheading preceding paragraph 255 of his sixth report, that consent to arbitration was "an irresistible implication of consent" to the exercise of jurisdiction. When jurisdiction existed, it was limited to specific aspects of a case. The Special Rapporteur's trenchant assertion could, moreover, be countered by what arbitrators had been known to say, namely that to consent to arbitration was to deny the competence of national courts. For example, Mr. René-Jean Dupuy, sole arbitrator in *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Government of the Libyan Arab Republic* (1977), had considered that, in that case, the arbitration clause constituted evidence of the internationalization of the contract, which removed it from the sphere of internal law and the national courts.¹⁷

29. Arbitration such as that provided for in the 1965 Washington Convention usually precluded the exercise of jurisdiction. Many of the provisions of that instrument were, moreover, intended to avoid proceedings in national courts. It thus contained a detailed procedure for the appointment of arbitrators, but made no provision for an enforcement procedure, although an arbitral award could normally not be executed in the territory of a State without that State's approval. The problem of the relationship between arbitration clauses and jurisdiction was thus an extremely complex one. Draft article 20 should be reviewed in the light of those considerations, and he reserved the right to suggest some amendments to the Drafting Committee.

30. Mr. USHAKOV said that the Special Rapporteur had been right to suggest (1915th meeting) that the Drafting Committee should be requested to consider article 6, whose present wording was far from perfect. The principle of State immunity had to be clearly stated in that article, which had a direct bearing on many of the other articles in the draft.

31. He was opposed in principle to draft article 19. The best way to deal with the practical difficulties it involved was to leave it to States to agree on juris-

¹⁶ See footnote 12 above.

¹⁷ *International Law Reports* (Cambridge), vol. 53 (1979), p. 389; see especially paragraph 44 of the arbitral award.

dictional immunity. In accordance with the position adopted by the Soviet Union, he took the view that, although the jurisdictional immunities of States and their property had to be respected, a State could, by agreement, consent to the exercise of jurisdiction by another State. Such consent could, moreover, apply not only to the jurisdiction of courts of countries having trade relations with the USSR, but also to measures of execution.

32. Before analysing article 19, he pointed out that the term "State property" had to be explained more clearly. If the Commission drew on the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts¹⁸ and defined that term as property, rights and interests owned by a State according to its internal law, it would still have to agree on what the idea of "ownership" meant. Under Soviet law, it meant the possession, employment and administration of property and those three elements were also to be found in most other legal systems. Without those three elements, ownership did not exist.

33. In the French and English texts of article 19, paragraph 1, there was a glaring contradiction between the words "a State which owns, possesses, employs or operates a ship in commercial service cannot invoke immunity" and the words "at the time when the cause of action arose, the ship and cargo belonging to that State were in use or intended for use for commercial purposes". To his mind, the ownership of property derived not only from possession of that property, but also from its employment and administration. Paragraph 1 might thus be construed as covering the case of a State which had chartered a ship from a company—possibly a private company—and was using it to transport a cargo belonging to it; but it would be going too far to take account of such a case, for it did not really bear any relation to the topic of jurisdictional immunities. Article 19 should deal only with the case of a State which employed and operated a ship that it owned.

34. The title of the article was also unacceptable. Might it mean that ships were employed in commercial service by private companies? In the Soviet Union, for example, ships belonged to the State, but were employed and operated on a temporary basis by shipping companies, which were not State bodies and for which the State was not responsible. Article 7 of the draft notwithstanding, proceedings could be instituted against such shipping companies, which did not enjoy jurisdictional immunity. But that was an entirely different issue.

35. The case which the Commission should consider was that of a State which owned a ship in commercial service and also employed and operated that ship. The question would then arise whether proceedings could or could not be instituted against that State. The States to which that definition applied were, for the most part, developing countries. To provide that they could not invoke immunity from

the jurisdiction of a court of another State would be contrary to their interests and would assuredly give rise to many difficulties.

36. Although he was somewhat at a loss to understand the meaning of the title of draft article 20, he could agree with the principle on which that provision was based, but he was firmly opposed to its wording, which gave rise to more problems than it solved and was far too vague. It failed to specify that a dispute must have arisen out of the application or interpretation of the clauses of a commercial contract, that arbitration had to be of a commercial nature, that consent to the exercise of jurisdiction by a court of another State was valid only in the particular case of arbitration in the territory or in accordance with the law of a particular State, and that the applicable law was the law indicated in the commercial contract in question. What would happen if the arbitration clause contained in the commercial contract provided that the arbitral award could not be set aside and could not be appealed?

37. With regard to proceedings in relation to the validity or interpretation of the arbitration agreement, as referred to in paragraph 1 (a), he pointed out that the interpretation of the arbitration agreement was the object and purpose of arbitration. As to paragraph 1 (b), he said that, in consenting to submit a dispute to permanent commercial arbitration machinery, the parties were considered to have consented to the established arbitration procedure, of which the award formed part. It was legally impossible for a court to rule on an arbitral award that had been rendered. Paragraph 1 (c) did not make it clear under what clause of a contract a State which had agreed to submit to commercial arbitration and was considered to have consented to the exercise of jurisdiction of a court could invoke immunity from jurisdiction in any proceedings before that court in relation to the setting aside of the arbitral award. Such a situation would be possible only if the parties had agreed to submit the matter to any court of any State so as to ask that court to decide whether the arbitral award was fair or not and whether the arbitrator or arbitrators had followed the prescribed rules. In any other case, that situation would be impossible, since, as a matter of principle, arbitral awards were final and binding and could not be appealed.

38. Mr. REUTER suggested that, in the French text of draft article 19, paragraph 2 (a), the words *navires exploités ou employés par un Etat à son propre service* should be replaced by the more commonly used words *navires en service gouvernemental*.

39. Article 19 seemed to give rise to three substantive problems. The first had been discussed by Mr. Calero Rodrigues and concerned the question of the link between ships and cargo. It thus had to be determined whether, under maritime law, cargo was linked to the ship, particularly for the purpose of legal proceedings, or in other words whether, under the general principles of maritime law, the captain always represented the ship and its cargo as well. That was an important point on which he would like the Special Rapporteur to provide further clarification. He personally was of the opinion that article 19

¹⁸ A/CONF.117/14.

referred to general principles of maritime law and that what had to be solved was a drafting problem, since the title of the article referred only to "ships employed in commercial service" and did not mention "cargo intended for commercial use".

40. The second substantive problem related to the scope of immunity, in connection with which the Special Rapporteur had tried to propose a compromise solution. Instead of using the term "commercial ships" in paragraph 2 (a), however, the Special Rapporteur had used the broader and more flexible term "ships operated or employed by a State in governmental service", which would imply the idea of "ships employed in commercial service" and cover not only a fairly large number of situations, but also the case of a commercial ship employed in governmental service. He could endorse that approach, which was implied by the text, since it would make immunity considerably broader in scope. To his mind, however, a "commercial ship" would normally be employed in commercial service. For the purposes of the burden of proof, it would therefore have to be presumed that a commercial ship was being employed in commercial service. There had, however, been examples of the rather surprising case in which a warship had been employed in commercial service. During the First World War, for instance, the Germans had employed a submarine as a commercial ship to transport valuable dyes to the United States of America. Another presumption that had to be made was that cargo carried on board a ship employed in commercial service would normally be intended for commercial purposes. It would be helpful if the Special Rapporteur could explain whether he had considered the possibility of cargo which was on board a ship employed in commercial service but which was not intended for commercial purposes, because it was not clear how the first few articles of the draft—except, of course, article 4—would apply in the case of cargo which was not intended for commercial purposes or for any of the governmental services of a State in the territory of another State.

41. The third substantive problem related to the question of property. He understood Mr. Ushakov's point of view and, in particular, his basic theory that each State's legal system would determine how that State's title to a particular type of property was to be defined. In article 19, the Special Rapporteur appeared to have tried to propose a solution which would cover a number of cases that could arise in maritime law. The rule that only the internal law of a State determined the status of property transported to another State did, however, not apply in many cases. That was a problem of private international law with which the Commission would have to deal. Article 2, paragraph 1 (f), of the draft, which provided that "'State property' means property, rights and interests which are owned by a State according to its internal law", would thus not be appropriate in every case. A building located abroad would not be owned by a State according to its internal law. Its rules of capacity might be applicable in such a case, but the rules concerning the formation of title to property would not be. He would refer to the question of movable property when the Commission came to discuss draft articles 21 to 28.

42. Subject to the clarifications he had requested the Special Rapporteur to provide, article 19 would be acceptable and could be referred to the Drafting Committee.

43. Arbitration, as dealt with in draft article 20, was a matter of concern to developed and developing countries alike because it involved considerable risks. A developing country would, however, have more to lose than a developed country if an arbitral award went against it. The position of such a country was easy to understand, for, in submitting to arbitration, it took a risk and, as often happened, could ever go so far as to decide that there could be no appeal against any arbitral award that might be rendered. In the absence of such a decision, it was the appeals procedure provided for under the system of arbitration chosen that would apply. The 1965 Washington Convention,¹⁹ for example, provided for an appeal to an international court within the framework of ICSID. The International Chamber of Commerce system was in itself a kind of appeals procedure because, although a special arbitral tribunal could be set up by the parties, no award would be binding until it had been examined by the Court of Arbitration of the International Chamber of Commerce. That procedure offered some security. In addition, all legislative systems provided that, in an ordinary arbitration case, a party to a dispute could request a national court to provide it with guarantees against particularly serious risks. The purpose of article 20 was thus simply to make it clear that, in the absence of any provision to the contrary—which frequently existed—a State could not, in submitting to an arbitral tribunal, decide to resort to measures of supervision by a national court and still claim immunity from jurisdiction.

44. The *Pyramids* case²⁰ provided an example of how a developing country had recently benefited from the rule embodied in article 20. A United States company had concluded an agreement in 1974 with a public body, the Egyptian General Organization for Tourism and Hotels, for the construction by that company of a large tourist complex near the site of the pyramids. The United States company had demanded the Egyptian Government's signature on the contract and the signature had been given. The project had, of course, raised a general outcry and the Egyptian Parliament had ultimately blocked its implementation, even though the United States company had already spent large amounts of money on preliminary studies. In 1983 the case had been brought before the International Chamber of Commerce, which had ruled that the Egyptian Government was bound by the contract. The Egyptian Government had then requested the Court of Appeals of Paris to set aside the arbitral award, which the Court had done in 1984, stating that the terms of the contract binding the Egyptian Government did not imply that that Government had waived its immunity from jurisdiction. In his view, that example showed that article 20 was useful. That provision did not, of

¹⁹ See footnote 12 above.

²⁰ See *Arab Republic of Egypt v. Southern Pacific Properties, Ltd. et al.* (1984) (*International Legal Materials* (Washington, D.C.), vol. XXIII, No. 5 (September 1984), p. 1048).

course, eliminate all the risks involved in submitting to arbitration, but going to law was, in any event, never a totally safe proposition.

45. A number of comments had already been made on the words "a civil or commercial matter" used in article 20, paragraph 1. His own opinion was that, even if reference were made to a commercial contract, as Mr. Ushakov had suggested, or if some other wording were used, there would still be a drafting problem that would have to be resolved by the Drafting Committee.

46. With regard to the words "a court of another State on the territory or according to the law of which the arbitration has taken or will take place", also in paragraph 1, it had rightly been pointed out that a reference to "the law" might give rise to problems. The Special Rapporteur had modelled paragraph 1 on article 12 of the 1972 European Convention on State Immunity. In the French text, however, the word *loi* was a literal translation of the word "law". It might have been better to use the word *droit*, even though in private international law the word *loi* was usually used to mean *droit*. The simplest course would therefore be to explain in the commentary that reference was being made to the applicable law in a State, including international law which formed part of the internal law of that State.

47. Referring to the possible link between draft article 20 and the question of the enforcement of arbitral awards, he said that, in his view, it would be logical to take account not only of the case of a court of another State on the territory of which the arbitration had taken or would take place and the case of a court of another State in accordance with the law of which the arbitration had taken or would take place, but also of the case of another State in which an application for the enforcement of an arbitral award had been submitted. In the event of a dispute between a company and a State, efforts were usually made to avoid applications for enforcement because they involved considerable expense. If enforcement was sought, then it was usually applied for in a court of the country where the property in question was located. The non-application of immunity should probably be extended to that case as well. A State might, of course, also apply for the enforcement of an arbitral award, but the problem of immunity from jurisdiction would then not arise.

48. Referring to article 20, paragraph 2, he noted that the words "arbitration agreement" had been translated as *convention d'arbitrage* in French. In English, an "agreement" was a rather modest type of instrument, whereas in French the term *convention* had more lofty connotations. He therefore suggested that, in the French text, the words *accord d'arbitrage* should be used instead in order to take account of all possibilities.

49. It had been suggested that article 20 should refer only to agreements concluded under international law or, in other words, to commercial arbitration agreements concluded between two States. Such agreements would be exceptional, but there had in fact been a case in which one had been concluded. In 1955, René Cassin had rendered an arbitral award in a maritime dispute between the United Kingdom and

the Government of Greece.²¹ One of the points at issue had been whether there had been a transaction and commercial arbitration or a transaction and arbitration under public international law. Paragraph 2 should therefore be drafted in more explicit terms.

The meeting rose at 1.05 p.m.

²¹ The *Diverted cargoes case* (*International Law Reports*, 1955 (London), vol. 22 (1958), p. 820).

1917th MEETING

Tuesday, 2 July 1985, at 3.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balandá, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (continued) (A/CN.4/376 and Add.1 and 2,¹ A/CN.4/388,² A/CN.4/L.382, sect. D, ILC (XXXVII)/Conf.Room Doc.1 and Add.1)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPporteur³ (continued)

¹ Reproduced in *Yearbook ... 1984*, vol. II (Part One).

² Reproduced in *Yearbook ... 1985*, vol. II (Part One).

³ The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (a) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (b) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—paragraph 1 (a) and commentary thereto: *ibid.*, p. 100; paragraph 1 (g) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (c) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (d) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (e) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (f) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (g) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

Part III of the draft: (h) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (i) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (j) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (k) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (l) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*