Document:-
A/CN.4/SR.1918

Summary record of the 1918th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
1985, vol. I

44. Again, the phrase "on the territory or according to the law of which the arbitration has taken or will take place" in paragraph 1 of article 20 could be interpreted as applying to the courts of two different States. For example, if the arbitration agreement stipulated that the dispute would be determined by International Chamber of Commerce rules, but the venue of the arbitration was Geneva, which law would prevail in relation to paragraph 1 (*a*), (*b*) and (*c*)? Were two different forums intended?

45. Mr. ARANGIO-RUIZ said that he wished to make it clear that, in his earlier statement, he had not meant to criticize judges or their objectivity but simply to point out that they were open to errors.

46. In regard to the Chairman's suggestion to add the words "or a public purpose" after the words "non-commercial use" in article 19, paragraph 2 (*b*), he suggested instead using the word "public" before "non-commercial", since addition of the word "or" would make matters more difficult. He had personally been involved in an International Chamber of Commerce arbitration in Geneva, and it had been clear to all that the courts whose jurisdiction would prevail were the Swiss courts. It was difficult to alter that kind of relationship between the seat of a tribunal and the competence of the courts, since that would involve changing the national legislation of countries in the territory of which the arbitral tribunal operated.

47. Mr. SUCHARITKUL (Special Rapporteur), summing up the discussion on draft articles 19 and 20, and referring to comments made by Mr. El Rasheed Mohamed Ahmed, pointed out that draft article 19 concerned maritime law and as such was separate from the law of contracts, as Mr. Ogiso had also stated. The rules governing maritime law had existed for some time in the official bilingual texts of the 1926 Brussels Convention.[6] That form of language was highly technical and the Commission should not try to change it. As to the remarks by Mr. Ushakov (1916th meeting) and Mr. Tomuschat, he had tried in the revised text of article 19 to be concise: clarifications could be made in the Drafting Committee.

48. Arbitration, too, was a highly specialized branch of law. The judicial systems of countries varied, and, in his sixth report (A/CN.4/376 and Add.1 and 2, paras. 238-241), he had cited the most reactionary one, which was that of his own country. Other countries, such as Malaysia, however, had changed the law, and all government contracts had to include a *compromis* clause for commercial arbitration.

The meeting rose at 6.05 p.m.

[6] See 1915th meeting, footnote 7.

1918th MEETING

Wednesday, 3 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Francis, Mr. Koroma, 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 Rapporteur[3] (*continued*)

Article 19 (Ships employed in commercial service) *and*

Article 20 (Arbitration)[4] (*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.*

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

1. Mr. SUCHARITKUL (Special Rapporteur), continuing his summing-up of the discussion on draft articles 19 and 20, said that article 19 related to a specialized branch of international trade law, covering not only the law of contract and of tort, but also marine insurance and matters such as maritime lien. He had endeavoured, in response to requests, to avoid terminology associated with particular legal systems, such as "common law"; that was why article 19 was couched in terms that might appear to have a hidden meaning and would therefore require close consideration.

2. He recalled that ships were a special type of property, neither movable nor immovable in the strict sense, but floating property with a flag and a nationality. In the case of commercial operation of merchant vessels, the causes and types of action varied widely and the commentaries would have to reflect all the materials included in his sixth report so as to ensure that the position was clear. The decision reached by a German court in *The "Visurgis"; the "Siena"* (1938) provided a useful indication of Continental, United Kingdom and United States practice. That court had held that, allowing for minor differences in the definition of State ships and the extent of the immunities accorded to them, a vessel chartered by a State, but not commanded by a captain in the service of the State, did not enjoy immunity if proceedings *in rem* were brought against it, and that the owner of the vessel could not claim immunity in an action for damages (see A/CN.4/376 and Add.1 and 2, para. 179 *in fine*).

3. The expression "cargo" was a technical term meaning merchandise or goods loaded on board a vessel from the quayside. Ownership of the vessel and ownership of the cargo were two entirely different things, so that a State could own the cargo, but not the vessel. He had cited a number of cases concerning vessels in use, or intended for use, for commercial services. The schooner *Exchange*, for instance, had been an ordinary trading vessel but, following a decree by Napoleon I, had been intended for use as a battleship. The *Prins Frederik*, a Dutch warship, had been used to carry spice from Indonesia; and the *Parlement belge* had carried mail.

4. Some members of the Commission apparently thought there was no need for paragraph 2 of article 19, whereas one member wished that provision to be put in a separate article, to make it clear that there was immunity for one category of ship, but not for another. The general principle, however, was that there was immunity, and that principle was restated in paragraph 2. The primary test could be the nature of the use, but the purpose test should also be considered.

5. With regard to Mr Reuter's remarks (1916th meeting), he pointed out that there were certain triangular transactions in food aid which, though regarded in some United States cases as commercial activity, might be more in the nature of humanitarian and political activity, such as in the case of food aid collected and distributed to the famine-stricken areas of the world by FAO. Another such triangular transaction involved the supply of rice by Thailand to Indonesia, which was often carried in frigates used for non-commercial purposes. The fact that it would be difficult to seize or arrest those ships because of their nature or to institute proceedings *in rem* against them had never been questioned. Paragraph 2 (*b*) of article 19 also represented a reply to a question raised by Mr. Ogiso (1917th meeting) because Japan had engaged in several triangular transactions with food-exporting countries.

6. The whole picture had started to change in the nineteenth century, when the judge in *The "Swift"* (1813) had held that there was no reason why the King of England should not, in his trading, conform to the general rules by which all trade was regulated (A/CN.4/376 and Add.1 and 2, para. 184). Thus trade was a clear exception, and he would challenge those commentators who had cited United States and English cases as following the absolute immunity rule. In the United States, in *The "Pesaro"* (1921), the judge in the lower court had been far more convincing, and the Department of Justice had taken the view that there had been no immunity, although the Supreme Court had been more independent. United Kingdom practice had never been firmly in favour of absolute immunity; on the contrary, immunity had been intermittently restricted. Leading international maritime lawyers and judges had always maintained reservations on that subject. The case in which the application of the principle of absolute immunity had gone farthest was *The "Porto Alexandre"* (1920), although perhaps that case involved the law of prizes, which required study as a separate branch of international law (*ibid.*, para. 152). At the time of the First World War, the maritime Powers had adopted the practice of requisitioning vessels; hence it was not only ownership, but use, possession and operation by a Government that gave the ship some form of immunity.

7. Article 19 therefore contained nothing startling, and any attempt to improve on it should be made solely in order to restore the balance and to ensure that immunity would subsist where a cargo was intended for use by developing countries in dire need and not for commercial purposes.

8. It had been suggested that developing countries should operate merchant fleets, but that was by no means easy. The operation of commercial airlines was much easier: the régime of the Warsaw Convention and the Chicago Convention applied, as well as the IATA agreements, and there was little, if any, question of immunities. For the carriage of goods by sea it was not enough just to set up a merchant fleet with the necessary technical facilities. A Japanese-Thai shipping conference, for instance, consisting of four Japanese and four Thai shipping companies, was dominated not by the Japanese or Thai companies but by shipowners far away; and even had it co-operated closely with India, Pakistan and other neighbouring countries, it would not have been able to intrude on the European conference. There was also the question of cargo. The cost of freight for carrying iron-ore was much higher than that for carrying tapioca, for instance. So far as assistance to developing countries was concerned, therefore, what was needed was co-operation between the shipowners' association and forwarding agents.

9. He noted that, although Mr. Ushakov (1816th meeting) was opposed to article 19, he had said that the USSR, like many socialist countries, had adopted the rules the article embodied in bilateral agreements. Perhaps the difference between Mr. Ushakov's position and his own lay only in the choice of partners or was mainly a matter of confidence. In any case, he trusted that the Commission could agree to refer article 19 to the Drafting Committee.

10. In draft article 20, he had perhaps been remiss in referring to only one kind of arbitration. Mr. Ushakov had helped, however, by saying that he supported the principle and by agreeing that submission to arbitration meant submission to the consequences of arbitration. Reference had also been made to awards under the 1965 Washington Convention,[5] but that Convention provided for self-contained arbitration machinery, and not every type of arbitration was the same. The question arose, therefore, whether article 20 should include a reference to matters other than civil or commercial matters. As he had already observed, it was not possible to interfere with existing legal systems or with the competence of those systems to supervise or control arbitration within their own jurisdictions. There were two points of contact. The courts of the State in which arbitration took place might have jurisdiction to supervise the arbitration, but some courts in that position would go beyond supervision and interfere with the arbitration. It was therefore necessary to provide authority to confirm and enforce the award. Sometimes, however, the law was chosen by the parties; if none of the arbitrators was familiar with the internal law or proper law of the arbitration contract, it would be difficult not to allow the court whose law was applicable to have a say in the interpretation and application of that law. Those two elements had therefore been covered in article 20.

11. The Chairman (1917th meeting) had raised the pertinent question what would happen if there were more then two competent courts and hence a conflict of jurisdiction. The choice would then, of course, lie with the parties seeking the remedy. Mr. Arangio-Ruiz (*ibid.*) had suggested that the parties might not have such a choice, since the law of the territory where the arbitration was being held would favour the competence of the court of that territory: in other words, it was a *forum conveniens*. But there might well be other courts that would have jurisdiction and be willing to exercise it.

12. It had been suggested that the court of the territory in which were located the assets or property of the party against which the award was being sought should have some jurisdiction. If, indeed, submission to arbitration meant submission to the consequences of arbitration, it would also mean submission to the jurisdiction of the court that was competent to enforce the award, and there might be many such courts. In his view, however, submission to arbitration did not constitute a waiver of jurisdictional immunity.

13. The exception to immunity in regard to arbitration was very limited, although arbitration was becoming extremely common. Among other cases in point was *International Association of Machinists and Aerospace Workers* v. *OPEC* (1979),[6] in which it had been decided that, under United States anti-trust law, OPEC could be a plaintiff but not a defendant; it could not be sued, because the court did not have subject-matter jurisdiction. The same applied in another case, in which it had been held that nationalization was not within the competence of the court, since it was an act of State and not shown to be in violation of international law. Arbitration was also linked to pre-trial attachment, enforcement and execution, all of which would be dealt with in more detail in part IV of the draft. He trusted that the Commission would agree to refer article 20 to the Drafting Committee.

14. The CHAIRMAN thanked the Special Rapporteur for his statement and suggested that draft articles 19 and 20 should be referred to the Drafting Committee for review in the light of the discussion and of the Special Rapporteur's explanations.

15. Mr. USHAKOV said that the Commission could not prejudge the Drafting Committee's position or prescribe its point of view. The Drafting Committee could propose that the Commission should delete a particular draft article. Once the Drafting Committee had completed its work, the Commission would be able to take a decision.

16. Sir Ian SINCLAIR said that he agreed entirely with Mr. Ushakov. Although the articles were necessary, in his view, the Drafting Committee should examine their formulation carefully, taking the Commission's views into account.

17. Chief AKINJIDE said that, without prejudice to the position he had taken during the debate (1917th meeting), he wished to endorse the views expressed by Mr. Ushakov and Sir Ian Sinclair. He was still opposed to draft articles 19 and 20, but hoped to put his case more forcefully in the Drafting Committee.

18. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft articles 19 and 20 to the Drafting Committee.

It was so agreed.[7]

19. Mr. USHAKOV recalled that the Special Rapporteur (1915th meeting) and he himself (1916th meeting) had proposed that article 6 of the draft should also be referred to the Drafting Committee.

20. Mr. SUCHARITKUL (Special Rapporteur) said that article 6 had already been referred for re-examination to the Drafting Committee, which also had before it draft article 11, in particular paragraph 2 of that article.

21. Mr. THIAM noted that, in the opinion of some members, the Drafting Committee might find it necessary to delete some particular draft article. Was

[5] See 1916th meeting, footnote 12.

[6] *Federal Supplement*, vol. 477 (1979), p. 553; reproduced in United Nations, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), pp. 503 *et seq.*

[7] For consideration of draft articles 19 and 20 as proposed by the Drafting Committee, see 1931st meeting, paras. 12 *et seq.*, and 1932nd meeting, paras. 1-37.

the Drafting Committee a sub-commission empowered to re-examine the draft articles as to substance, or a Drafting Committee in the strict sense of that term? In his opinion, the powers given to it were too wide.

22. Mr. McCAFFREY said that he would like to know in what order the Drafting Committee would discuss the draft articles. Some members considered it very important to determine the fate of the articles in part III before article 6 and draft article 11, paragraph 2, were considered.

23. The CHAIRMAN said that, as he understood the position, whenever an article was referred to the Drafting Committee the views expressed in the Commission had to be taken into account. The final decision on the article rested with the Commission, to which the Drafting Committee had to report. There need be no fear that the Drafting Committee was being empowered to examine matters of policy.

24. As to Mr. McCaffrey's point, the usual approach was to deal first with any articles embodying principles and then to proceed to the exceptions to those principles. Given the importance of article 6, however, he thought that it should be left to the Drafting Committee to decide when it would be appropriate to consider that article.

25. Mr. DÍAZ GONZÁLEZ shared Mr. Thiam's concern and welcomed the reply given to Mr. Thiam's question. But he had the impression that the Drafting Committee was some kind of supreme authority and that, until it had made its proposals, the Commission could not act. Why not say that a sub-commission had been set up to check the work of the Commission itself?

26. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that to a great extent he shared the doubts expressed by Mr. Thiam and Mr. Díaz González. The Drafting Committee was a technical body whose task was to prepare draft articles with a view to the adoption of a final text. In so doing, it should be guided by the opinions of the Commission. The difficulty was that the opinions of the Commission were not always made clear, for at the preliminary stage of its work it did not conclude each debate with a decision. Every proposal made by the Drafting Committee was, of course, subject to the approval of the Commission. The Drafting Committee was not a super-body and it was controlled by the Commission. It was regrettable that its functions were not more clearly defined, but he feared that such a definition would not be possible.

27. Normally, the order in which draft articles were considered by the Drafting Committee was decided by the Committee itself, but in the present case it would be useful if the Commission could direct the Drafting Committee to consider articles 19, 20, 11 and 6 in that order.

28. Mr. SUCHARITKUL (Special Rapporteur) endorsed that approach.

29. Mr. USHAKOV said that he had only referred to the Special Rapporteur's proposal that the Drafting Committee should re-examine article 6 at the current session; he had not suggested any order of priority.

30. The CHAIRMAN said that many members would be familiar with the role of other drafting committees, such as that of the Third United Nations Conference on the Law of the Sea, whose functions had been strictly of a drafting and technical nature. The role of the Commission's Drafting Committee was more flexible. It was also a smaller body, but was open-ended. That flexibility was helpful to the Commission and should not be limited by any strict terms of reference. The supreme body, however, was the Commission, which could accept or modify any proposal by the Drafting Committee, and its primacy would be maintained.

31. Mr. DÍAZ GONZÁLEZ welcomed the explanations given in regard to the Drafting Committee's mandate. There had been a misunderstanding, inasmuch as he had not made a statement, but had simply asked to be enlightened on that point. He was entirely satisfied with the reply.

32. The CHAIRMAN suggested that the Drafting Committee be asked to consider articles 19 and 20 first, and then to take up articles 11 and 6.

It was so agreed.

The meeting rose at 11.40 a.m.

1919th MEETING

Thursday, 4 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, 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 RAPPORTEUR [3] (*continued*)

ARTICLE 21 (Scope of the present part)

ARTICLE 22 (State immunity from attachment and execution)

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[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:

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