Document:-
A/CN.4/SR.1921

Summary record of the 1921st meeting

Topic:
Jurisdictional immunities of States and their property

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

of attachment could arise before an order was issued, for example at a preliminary stage in proceedings in which the State objected to jurisdictional immunity.

29. In paragraph 1 (*a*) of article 22, it would be appropriate to include a safeguard clause stating that article 24 placed restrictions on the content of that subparagraph. The words "such" and "in question" in that subparagraph were superfluous. As to paragraph 1 (*b*), the Drafting Committee would have to decide whether the word "and", which was used in the phrase "in commercial and non-governmental service", should be retained or deleted. The wording of paragraph 1 (*d*) could be much simpler if express reference were not made to the identification of the property. It would be enough to state that the property had to be allocated for satisfaction of a final judgment or payment of debts incurred by the State.

30. Paragraph 2 of article 22 required only a few drafting amendments, which he would submit to the Drafting Committee.

31. In the title of draft article 23, the words "Modalities and effect of" could be deleted and the words "attachment and execution" should be replaced by the words "attachment, arrest and execution". Paragraph 1 of that article should begin with the words "Pursuant to the provisions of article 22, paragraph 1 (*a*)", thereby establishing a link between the two articles. In view of the importance of consent to attachment, arrest or execution, it would be logical to maintain the requirement that consent should be given in writing and not to allow oral consent. Paragraph 1 (*a*), which dealt with property forming part of a "commercial transaction", could be deleted; there was no need to include a reference to such property in article 23, which was directly related to article 22, paragraph 1 (*a*), which provided that the State concerned could consent to attachment, arrest or execution against the property in question.

32. Draft article 24 required only a few drafting changes. For example, the words "permanently immune" in the title should be replaced by the words "absolutely immune" or "totally immune", since time was not the decisive factor in that context. If the Commission decided to list the three principal forms of attachment, the word "arrest" should be added to the title. The words "Property of a central bank" in paragraph 1 (*c*) should, as already suggested, be replaced by the words "Funds of a central bank". The five categories of property referred to in paragraph 1 (*a*) to (*e*) were actually only a minimum list of the types of property that enjoyed absolute immunity from attachment, arrest and execution.

33. As to the term "State property", he pointed out that draft article 2, paragraph 1 (*f*), contained a definition that should meet the concern expressed by Mr. Ushakov.

The meeting rose at 1 p.m.

1921st MEETING

Monday, 8 July 1985, at 3.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Balanda, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, 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)

ARTICLE 23 (Modalities and effect of consent to attachment and execution) *and*

ARTICLE 24 (Types of State property permanently immune from attachment and execution)[4] (*continued*)

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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:

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, para. 4.

1. Mr. EL RASHEED MOHAMED AHMED said that the Special Rapporteur had stressed at the outset that property as such was not, strictly speaking, entitled to immunity: immunity attached to the State. It was therefore within the competence of the territorial courts to hear actions or to make orders in respect of the property at issue. As Mr. Reuter (1919th meeting) had pointed out, a State could not claim authority in the territory of another State. If a State acquired property in the territory of another State, then its property rights were determined by the internal law of that other State.

2. In international law, jurisdiction was based on the consent of a State when its rights were to be adjudged by the local courts. The principle involved was that of the equality of States and, although that principle had not undergone any significant change, there was a tendency to apply the concept of restricted or functional immunity.

3. To simplify the matter, the situation could be regarded as a struggle between sovereign wills. But since States had a tangible common interest, a balance had to be struck to accommodate their conflicting interests in an orderly and acceptable manner. On that point, he supported Mr. Flitan's plea (1920th meeting) for a pragmatic approach. If one agreed with Jenks that the concept of law must be looked upon "as the positive instrument of enlightened policy substituting the progress of international society for arbitrary power",[5] it became all the more pertinent to seek realistic and positive solutions.

4. He agreed with Mr. Yankov (1919th meeting) that draft article 21 did not give a comprehensive idea of the content of part IV, which it purported to introduce. Jurisdiction in the present context was based on consent, and the subsequent articles dealt with State immunity from attachment and execution, the modalities and effect of consent, and the types of permanently immune State property. Those fundamental concepts should be reflected in article 21, which defined the scope of part IV. He therefore proposed that, in that article, the words "its prior consent or its subsequent waiver of immunity" should be inserted after the words "immunity of one State". If that was not acceptable, he proposed, alternatively, that the words "and to the effect of prior consent or subsequent waiver of immunity upon them" should be added at the end of the present text of article 21.

5. Draft article 22 stated as a general rule that consent was a prerequisite for the exercise of local jurisdiction. Four exceptions to that rule were set out in paragraph 1 (*a*) to (*d*). The exception in paragraph 1 (*b*) had attracted a certain amount of criticism, some of which related to the difficulty of determining precisely what constituted "commercial and non-governmental service". The welfare State—which all developing countries claimed to be—engaged in commercial activity in order to overcome shortages of foreign currency and meet the needs of its population; but the fact that a State engaged in trading did not make it a trader in the true sense of the word.

6. The present trend was for States to carry on their commercial activities through State-owned corporations. In view of that situation, a distinction should be made between commercial services operated by a Government directly, and those operated by a Government indirectly. Where a commercial service was operated directly, consideration should be given to the public service factor. In that case, consent must be sought to found jurisdiction. On the other hand, if the service was operated by a government-owned corporation, consent would be presumed, if needed at all.

7. Paragraph 2 of article 22 specified that a State was immune even in respect of property in which it merely had an interest. The interest of the State might be very small, however, and it might not be appropriate then to regard the immunity as covering the whole of the property. Much would depend on whether the interest of the State in the property could be readily and precisely identified.

8. Draft article 23 dealt with the modalities and effect of consent to attachment and execution. The Special Rapporteur stated in his seventh report (A/CN.4/388, para. 19) that "immunity from attachment and execution is far more absolute than immunity from jurisdiction" and repeatedly stressed the need for an express and separate waiver for measures of execution. But that was not borne out by the present formulation of article 23, which ought to make a clear distinction between consent at the stage of initiating judicial proceedings and consent at the stage of execution. In the latter case, as the Special Rapporteur said, consent was "in no sense to be lightly presumed" (*ibid.*, para. 39).

9. He therefore suggested that article 23 should be redrafted in the light of those remarks. Paragraph 1 (*a*), which seemed to be a repetition of paragraph 1 (*b*) of article 22, should be deleted. Paragraph 2 could also be eliminated by introducing, at the beginning of paragraph 1, a proviso such as "Subject to the provisions of article 24".

10. As to draft article 24, he had at first had doubts about the existence of a category of "untouchable" property. If consent was the foundation of jurisdiction, it could not be said that, consent notwithstanding, certain property could not be attached. He was grateful to the Special Rapporteur, however, for his explanation that it was a matter of degree. The types of property mentioned in article 24 would appear to be beyond reach, of necessity or by law. Some, such as those mentioned in paragraph 1 (*a*), were protected by convention.

11. Consent in respect of some types of property might not be easily obtained and if presumed it could have far-reaching consequences that would not conduce to the maintenance of the international legal order. For example, under most constitutions, financial appropriation was the province of parliament or other representative bodies. Hence it could not be imagined that any Government could easily bind itself financially in advance, in any agreement. Thus consent could not go beyond the very first level of jurisdiction, namely the initiation of legal proceedings. When the stage of execution was reached, express consent would again be needed. On that

[5] C. W. Jenks, *A New World of Law?* (London, Longmans, 1969), p. 129.

understanding, article 24 could attract wider acceptance. Although the article was welcome as it stood, other types of property could well be added, for example the property of regional international organizations.

12. Mr. FRANCIS said that he supported the main thrust of the articles in part IV of the draft. He agreed with Mr. Flitan (1920th meeting) on the need to adopt a pragmatic approach to the topic and produce articles acceptable to the largest possible number of States, bearing in mind that most of them supported the principle of State immunity.

13. The topic under consideration was one of the 14 topics selected for codification by the Commission in 1949. Had the Commission taken up State immunity at that early stage, its work would probably have had to be reviewed 30 years later, more or less as had happened with the law of the sea. In the past decade there had been some important developments: a number of leading developed countries had begun to restrict State immunity in legislation and multilateral conventions. The Special Rapporteur had referred in his reports to that restrictive approach and had furnished evidence of it in State practice and judicial decisions, all of which were to the disadvantage of developing countries. That being so, the present work was of great interest, both to developing countries and to the world community as a whole.

14. Referring to part IV of the draft, he asked what should be the realistic expectations of developing countries, given the laws adopted by developed countries and the multilateral instruments concluded, which tended to restrict State immunity in important respects. He did not believe that developing countries could expect a complete reversal of the action taken by an important sector of the international community; but they should try to effect some compromise with a view to protecting their interests.

15. Turning to the individual articles, he suggested that the wording of draft article 21 should be simplified. That could be done by broadening the definition of "State property" in paragraph 1 (*f*) of draft article 2 to include property in the "possession or control" of a State or in which it had "an interest". Article 21 could then be shortened to read:

> "The present part applies to the immunity of one State's property from attachment, arrest and execution by order of a court of another State."

16. He then proposed that a new article be inserted after article 21, to state the important general proposition that waiver of immunity by a State in order to have a suit heard did not, by itself, expose that State's property to execution in the same forum. It was important to state that principle, because there had been conflicting decisions on the matter in national courts, and the proper place to state it was in part IV of the draft.

17. He agreed with the essential content of draft article 22, but thought that its drafting could be greatly simplified. Some guidance could be had from article 22, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations and article 25, paragraph 3, of the 1969 Convention on Special Missions, which both referred to the "premises" of a mission. He supported the suggestion by Mr. Tomuschat (1920th meeting) that paragraph 1 (*b*) of draft article 22 should be harmonized with paragraph 1 (*a*) of draft article 23.

18. He approved of draft article 23 in general terms, but its wording could be simplified. For example, paragraph 2 could be eliminated by introducing a proviso in paragraph 1.

19. He felt uneasy about the general formulation of draft article 24, because of certain judicial decisions. One example was the 1980 decision by a United States District Court upholding the attachment of the bank account of the Embassy of the United Republic of Tanzania on the ground that, by submitting to arbitration, the foreign State had waived its immunity from execution (see A/CN.4/388, para. 114). Decisions of that sort illustrated the need for an article such as he had proposed for insertion after article 21, proclaiming the principle of freedom of State property from execution even after a judgment had been entered.

20. Another case of the same kind had occurred in 1976 in the Federal Republic of Germany, where the Provincial Court of Frankfurt had upheld the attachment of assets belonging to the Central Bank of Nigeria, on the ground that those assets were not devoted to the public service of the Nigerian State.[6] Protection of the assets of its central bank from attachment and execution was vital to a developing country, for the central bank was the centre of all economic activity and interference with the management of its funds could spell disaster. In the light of those examples, it was essential to provide adequate protection for the financial institutions of developing countries.

21. Referring to paragraph 1 of article 24, he expressed doubts about the use of the word "final" before "judgment" in the introductory clause. The use of that adjective appeared to expose State property to unnecessary attachment at low levels of jurisdiction. With regard to paragraph 1 (*e*), he wished to place on record his support for the protection of national cultural heritages.

22. Mr. RAZAFINDRALAMBO said that the immunity of States from arrest and execution relating to their property was of particular importance and was probably more closely connected with the principle of the sovereign equality of States than was immunity from jurisdiction. As the Special Rapporteur had shown in his excellent seventh report (A/CN.4/388), there were no great differences in the current practice of States concerning immunity from arrest and execution. While execution measures came after the judicial proceedings, conservation measures or provisional attachment might be carried out during the proceedings. It should be noted, in that context, that arrest and other measures of constraint might result from a decision that was not necessarily judicial, as in cases of requisition, confiscation, detention and even sequestration. All those measures led to the same result. Like Mr. Ushakov (1920th meeting), he wondered why the scope of part IV of

[6] See *International Law Reports* (Cambridge), vol. 65 (1984), p. 131.

the draft had not been extended to measures of constraint other than attachment and arrest. The Special Rapporteur recognized that arrest could be effected by either judicial or administrative machinery (A/CN.4/388, para. 117).

23. In the matter of immunity from arrest and execution, the practice of States seemed to be characterized by a certain uniformity and constancy. As the Special Rapporteur had observed, the jurisprudence of the common-law countries and the Roman law countries clearly confirmed the distinction between immunity from jurisdiction and immunity from execution. That distinction had been established by multilateral treaties, in particular the 1961 and 1963 Vienna Conventions on diplomatic relations and on consular relations. The countries of the third world had always firmly defended that distinction, even when they were in the position of plaintiffs. The 1965 Washington Convention,[7] concluded under the auspices of IBRD and setting up ICSID, had maintained the principle of that distinction at the urging of third world countries and had been confined to simplifying the enforcement procedure.

24. The numerous exceptions to the principle of immunity from jurisdiction, often due to the demands of the economic development of States, which induced them to waive that immunity, should find their indispensable counterpoise in the application of the principle of immunity from arrest and execution. In that respect, he certainly supported the conclusion reached by the Special Rapporteur in his seventh report, namely that

> ... the taking, even as a judicial sanction, of property constituting the cultural heritage of a nation or the pillage of natural resources over which a State is entrusted with permanent sovereignty cannot be condoned by mere judicial confirmation by a municipal tribunal. (*Ibid.*, para. 44.)

25. The structure of part IV of the draft, which comprised four articles, was clear and logical. Those four articles raised no problems of substance. The comments made by other members of the Commission on the drafting were mostly justified; he himself intended to make some proposals to the Drafting Committee.

26. The measures of constraint referred to in draft article 21 did not seem to be entirely differentiated and were not complete, as he had already observed. With regard to the French terms, *saisie-exécution* was only one form of *saisie*, so that it would be better to use the words *immunité de saisie et d'exécution* (immunity from attachment and execution). Moreover, there were other forms of *saisie* (attachment) ordered by non-judicial authorities, such as administrative, governmental, or even legislative or parliamentary authorities.

27. Draft article 22, paragraph 1, stated the principle of immunity from attachment, arrest and execution and set out a number of exceptions in subparagraphs (*a*) to (*d*). The text of subparagraph (*b*) should be re-examined having regard to the wording of draft article 19 (Ships employed in commercial contract" in paragraph 1 (*g*) of article 2 of the draft. It would be advisable to emphasize not only the nature, but also the purpose of commercial use. If the exception stated in paragraph 1 (*a*) of article 22, which related to consent, was read in conjunction with the exceptions stated in paragraph 1 (*b*) to (*d*), it appeared to be distinct from the latter exceptions, so that consent did not appear to be necessary, for instance, for the application of paragraph 1 (*b*). But draft article 23, which dealt with consent, provided that a State could consent not to invoke its immunity provided that the property in question formed "part of a commercial transaction" or was "used in connection with commercial activities". It followed that consent would only be possible in the cases covered by that condition, that was to say in relation to a commercial activity, although article 22 seemed to dispense with the need for consent in that particular case, in which there would be no immunity. Perhaps the Special Rapporteur could clarify that point.

28. The wording of article 22 should be harmonized with that of article 21, and the notion of State property should be extended in accordance with the definition given in draft article 2, paragraph 1 (*f*).

29. The comment he had made on draft article 22 also applied to draft article 23, namely that, in French, since *saisie-exécution* was only one form of *saisie*, it would be better to use the words *saisie et exécution* (attachment and execution). The disparity noted between paragraph 1 (*b*) of article 22 and paragraph 1 (*a*) of article 23 seemed to explain why some members of the Commission wanted the latter provision to be deleted. But, in his opinion, if a deletion was necessary it was rather paragraph 1 (*b*) of article 22 that should be deleted, to improve the balance of the article. He also wondered why, in paragraph 1 of article 23, the Special Rapporteur had not dealt with the case of renunciation of immunity by a unilateral act, which seemed quite possible.

30. In regard to draft article 24, which provided for exceptions to the provisions of article 23, he noted that the principle of immunity from attachment, well known in internal law, was based on concern to safeguard the higher interests of the individual or the public interest, and hence on the need to avoid disruption of those activities of the State which pertained to its sovereignty. The possibility of derogating from the application of immunity by means of consent seemed to be more dangerous for developing countries, whose economic, financial or political situation might induce them to consent to renounce their immunity from attachment or execution in agreements which they judged essential for their economic development. In his report (*ibid.*, para. 115), the Special Rapporteur noted a more marked tendency than in the past to allow attachment of foreign State property. Consequently, he (Mr. Razafindralambo) fully supported the principle affirmed in article 24. He merely wondered whether the immunity of certain property prescribed by national law should not be a residual provision; that was to say that, in addition to the cases of immunity from attachment provided for in article 24, the cases recognized under national law might perhaps also be included.

[7] See 1916th meeting, footnote 12.

31. As to the wording of article 24, and in particular its paragraph 1 (*a*), he too was in favour of placing regional international organizations on the same footing as universal organizations. He saw no contradiction between paragraph 1 (*a*) and the possibility of waiving the immunities established by the codification conventions, since those were personal immunities, not immunities in respect of property. Paragraph 1 (*c*) seemed clear and sufficiently flexible to cover all sorts of property, not only the funds of central banks. Paragraph 1 (*e*) was entirely necessary, although it was open to question whether that provision should not be extended to certain property, considered *in globo*, in respect of which States could rely on the principle of permanent sovereignty over their natural resources. The attachment of property of that kind would completely paralyse the economic life of a country having serious economic difficulties. It was not without reason that IMF and several international banks had refrained from taking certain measures against countries heavily indebted to them. As to paragraph 2, he did not see that it served any useful purpose.

32. Mr. MALEK observed, first of all, that the draft articles under consideration faced one apparently insurmountable obstacle to the acceptance of their underlying principle. Some speakers had indeed maintained during the discussion that the rule of the jurisdictional immunity of States, being based on the sovereignty or sovereign equality of States and thus admitting of no limitation, unless subject to the principle of reciprocity, remained intact in all cases and all circumstances. But the Special Rapporteur did not seem to be discouraged by that trend of opinion, which was bound to make the draft articles rather insecure where acceptance was concerned, and was continuing to seek compromise solutions, even going so far as to recommend modification of the basic article, article 6, in order to come closer to the different views expressed.

33. He then referred to the statement made by the Special Rapporteur in his sixth report (A/CN.4/376 and Add.1 and 2, para. 139) that, until a fairly recent date, "international law was still essentially and exclusively of European origin". At the present time, which was characterized by a universalist movement in international law, the diversity of social factors was opposed to the universality of legal rules. That antagonism had produced, between States, several bodies of international law. In his seventh report (A/CN.4/388, para. 66), referring to the 1972 European Convention on State Immunity, the Special Rapporteur observed that reaffirmation of the classic position was based on "mutual confidence within a close community" which was "further strengthened by an undertaking on the part of each contracting State to honour a judgment given against it". How many States within the universal community would be willing to give such undertakings?

34. The Special Rapporteur had also noted a marked strengthening of restrictive practice and the absence of practice confirming absolute immunity. In his sixth report (A/CN.4/376 and Add.1 and 2, para. 46), he had said it was "high time an absolute view was cited so as to present firm opposition to the restrictive trends" and he had raised the question "how to slow down, arrest or even reverse the trends so as to maintain what jurisdictional immunities there might still be for States and their property". In the Special Rapporteur's opinion, the solution was to speed up the work under the present programme; and it was under that programme that it was planned to enumerate as precisely as possible the various fields considered to constitute exceptions to the rule of immunity. In the course he had given on that subject at The Hague Academy of International Law in 1980,[8] Sir Ian Sinclair, too, had noted the tendency to recognize and apply the restrictive theory, although none of the arguments advanced in its favour was entirely satisfactory. According to him, courts sometimes tried to define the acts for which States could not claim immunity, but the problem could perhaps be more easily resolved by seeking to define more closely the cases in which, even under the restrictive theory, immunity should still be accorded. The Special Rapporteur appeared to consider that that process could be useful in elaborating part IV of the draft articles. In that part, the immunity of States was indeed the rule, except under certain conditions and in certain cases. Part IV went even further, since it protected certain categories of State property in all circumstances against any measure of attachment or execution.

35. Draft article 21 would be useful only if it defined the scope of part IV as precisely as possible. It should therefore deal more specifically with the question of the title of the foreign State to the property which the rule of immunity was intended to protect, and with the different kinds of measures which could be taken against it.

36. The Commission should also improve the wording of draft article 22, which was not very felicitous. The first phrase of paragraph 1, which referred to the "present articles", was rather confusing, since it was not clear which articles were meant. Was it the articles of part IV or those of the whole draft? Also, was that phrase really necessary? The rule of immunity was not stated satisfactorily either. The text of paragraph 1 was purely informative, and that of paragraph 2 seemed to be worded better in that respect.

37. He was in favour of retaining the whole of draft article 23 and approved the substance of draft article 24, although he proposed that in paragraph 1 (*e*) the words "and religious" should be added after the word "cultural".

38. For the time being, part V of the draft only made him wonder why the immunities of sovereigns and heads of State were dealt with under the heading "Miscellaneous provisions". A partial reply was given in paragraph 118 of the seventh report (A/CN.4/388); he suggested that the difficulties described in that paragraph should be overcome by amending the title of part V or by placing draft article 25 at the end of part IV, where it would not be out of place.

[8] "The law of sovereign immunity. Recent developments", *Collected Courses of The Hague Academy of International Law, 1980-II* (Alphen aan den Rijn, Sijthoff & Noordhoff, 1981), vol. 167, pp. 197 *et seq.*

39. Mr. OGISO expressed his appreciation for the Special Rapporteur's comprehensive and instructive seventh report (A/CN.4/388). Referring first to draft article 22, he noted that the Special Rapporteur had divided the régime governing State immunity into two parts: immunity of the State from the jurisdiction of local courts in general, and immunity of the State from attachment and execution. He also noted that the Special Rapporteur had stressed that immunity from attachment and execution was more absolute than State immunity in general, and that waiver of immunity from the proceedings of local courts did not entail waiver of immunity from attachment and execution.

40. The Special Rapporteur had considered State practice at some length and, in his seventh report (*ibid.*, para. 47), referred to the vacillation in judicial practice, which was an indication of the difficulties inherent in the topic. According to the explanations given in his report, the Special Rapporteur seemed to believe that immunity from attachment and execution was based on the fundamental requirement of consent, with a few limited exceptions. The exceptions enumerated in paragraph 1 (*a*) to (*d*) of article 22, however, were linked by the word "or", which seemed to mean that, in the case of the property referred to in paragraph 1 (*b*), (*c*) and (*d*), consent was not required. It was not certain, in his view, that there was any uniform practice, particularly in regard to property that was, in the words of paragraph 1 (*b*) of article 22, "in use or intended for use by the State in commercial and non-governmental service". Most of the State practice to which the Special Rapporteur referred in his report related to claims arising out of the operation of ships, for which consent was not required, particularly where an interim order of a court was concerned. It might therefore be more in keeping with prevailing State practice and with international treaties such as the 1926 Brussels Convention[9] to confine the provision in paragraph 1 (*b*) to ships and their cargoes, rather than to refer to property in general.

41. In draft article 21, the phrase "or in which it has an interest" seemed to broaden the scope of State immunity unduly. Supposing, for example, that a State had shares in a company against whose property an attachment order was made, could that State invoke immunity by alleging that it had an interest in the property if it had only a minority holding? Or supposing that a State had a third mortgage on certain property and a person with a first mortgage on the same property decided to foreclose his mortgage, could that State stop the foreclosure proceedings by invoking State immunity? In view of the problems which could arise, he suggested that the words "control or in which it has an interest" should be replaced by the words "in which it has a controlling interest". The same remarks applied to article 22, paragraph 2, in which the same phrase appeared.

42. Draft article 23, which dealt with the modalities and effect of consent, had to be considered in the context of its relationship to article 22, which specified certain cases in which immunity could not be invoked, and to article 24, which listed various kinds of property in respect of which State immunity could not be waived. Bearing those relationships in mind, the proper place for paragraph 2 of article 23 might be in article 22, since the effect of article 24 was to limit the provisions of article 22. Moreover, since the purpose of article 23 was to clarify the modalities of the consent régime, he would suggest that the phrase "provided that the property in question, movable or immovable, intellectual or industrial" in paragraph 1 could be deleted, along with subparagraphs (*a*) and (*b*).

43. In draft article 24, paragraph 1, purely on a point of drafting, he wondered whether subparagraph (*a*) could not be qualified, in the same way as subparagraphs (*c*) and (*d*), by a clause which might perhaps read: "except an account earmarked for specific payments and not related to a diplomatic or consular purpose". If an embassy had such an account, that account should, in his view, be treated as an exception to subparagraph (*a*).

The meeting rose at 6 p.m.

[9] See 1915th meeting, footnote 7.

1922nd MEETING

Tuesday, 9 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, 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*)

[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*,

(*Continued on next page.*)