Document:-
A/CN.4/SR.1922

Summary record of the 1922nd meeting

Topic:
Jurisdictional immunities of States and their property

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

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.*)

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*)

1. Mr. MAHIOU said that the draft articles stated certain general rules, behind which there was a suggestion of internal proceedings as varied as they were complex. Several members of the Commission had stated that, in drafting the texts, it was necessary to take account of the different legal systems of States. As Mr. Reuter (1919th meeting) had observed, the procedural issues concealed a problem of substance: that of the meeting-point of jurisdictional immunities with the territorial sovereignty of States where the legal status of the property of other States was concerned. The Special Rapporteur had recognized that the principle of jurisdictional immunities was more strongly affirmed in part IV of the draft articles than in the preceding parts. He endorsed the Special Rapporteur's approach, although his own point of view on some aspects of the topic was rather different. While it could be said, as Mr. Reuter had done, that there was no rule of international law granting States the right to acquire and possess property in other States, it could also be held that there was no rule of international law prohibiting it. Doctrine was silent on that point, but practice showed that States did acquire and hold property in other States which could be protected by diplomatic, consular or other conventions relating, in particular, to property used for activities pertaining to sovereignty. Thus a State which allowed a foreign State to acquire or possess property in its territory did so advisedly; it knew that the other State was not an ordinary owner like any other, and it consented to restrict its territorial sovereignty and grant immunities to the other State. Hence that was a special situation.

2. Paragraph 1 (*a*) of draft article 22 should take account of article 23. He wondered whether a more appropriate place for that subparagraph would not have been in the introductory provision of paragraph 1, since unlike the following subparagraphs it did not relate to property. While he did not wish to reopen the argument about paragraph 1 (*c*), he thought it would be difficult to avoid referring to the problem of nationalization. To speak of a "proceeding to determine the question of ownership by the State" necessarily led to consideration of a delicate matter. He feared that the proceeding might conceal a legal jungle favourable to ambushes. It often happened that countries, especially developing countries, invoking the principle of the permanent sovereignty of States over their natural resources took nationalization measures, which were then contested. The claims of the former owner of the nationalized property, often described by him as "red", could lead to attachment of the goods concerned in the importing country. Such a proceeding could hamper or even paralyse the economy of the country which had carried out the nationalization, and could thus constitute a formidable weapon. It would be better to discuss that question in the Commission than to see it resurface in the Sixth Committee of the General Assembly or in other bodies.

3. He would like draft article 23 to be worded as simply as possible, because of its links with paragraph 1 (*a*) of article 22. Mr. Flitan (1920th meeting) had made some interesting suggestions on that point.

4. In regard to draft article 24, Mr. Yankov (1919th meeting) had noted that paragraph 1 (*a*) contained no reference to delegations to international conferences. Had the Special Rapporteur omitted them deliberately because they were unlikely to be in possession of property liable to attachment? He associated himself with those members of the Commission who had proposed that regional international organizations should also be included in the provision. He doubted whether paragraph 1 (*b*) need be as long as it was, but that was for the Drafting Committee to decide. The meaning of the restriction introduced in paragraph 1 (*c*) was not clear. The property of a central bank was sometimes allocated for specific payments, since the central bank might be responsible for administering the State's external debt; could the amounts thus allocated be attached? The same comment applied to paragraph 1 (*d*). Paragraph 1 (*e*) was acceptable subject to some redrafting. Since the object was to prevent a nation's cultural heritage from leaving the country, and since that heritage could be State property, private property or of mixed ownership, did immunity from attachment apply to the cultural heritage in general, whatever its ownership?

5. Mr. CALERO RODRIGUES, after congratulating the Special Rapporteur on his seventh report (A/CN.4/388), said he doubted whether part IV of the draft articles was really necessary. The title was somewhat misleading, because it referred to attachment and execution as well as to property, whereas the articles dealt with immunity from attachment, arrest and execution. The fact that immunity from measures of execution applied to property was secondary. As the Special Rapporteur rightly said in his report, the topic was State immunity, not property immunity. In that connection, he referred members to the last two sentences of paragraph 4 of the report. The Commission had not, however, been offered there a choice of alternatives: proceedings could be directed against a State *eo nomine* and could at the same time be aimed at depriving that State of its

(*Footnote 3 continued.*)

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.

property. It could be argued that the references to property in part IV were of no more significance than the references in other parts, and that part IV should deal basically, or even exclusively, with State immunity from measures of attachment, arrest and execution. Indeed, part IV could be limited to the single principle, developed by the Special Rapporteur in his report, that execution constituted a separate part of the proceeding and that jurisdiction for the proceeding as such did not necessarily imply jurisdiction for execution; hence a new and separate plea of immunity could be entered at that stage.

6. Since the difficulties generally arose not in court proceedings against a foreign State, but at the stage of enforcement of the judgment, the theory had been advanced that jurisdiction should not be exercised when there was no possibility of execution. That theory had found wide acceptance in Brazilian jurisprudence and the Supreme Court of Brazil had applied it to decline jurisdiction. Most courts, however, were content to exercise jurisdiction even when it was clear that their judgments could not be enforced. They accepted that execution was on a different level and hence also generally accepted that consent to proceedings did not mean consent to execution of the judgment. That was perhaps the main principle proposed in part IV of the draft, for the other elements were not new and, in his view, did not apply only to execution. The protection accorded to certain types of property under part IV, and denial of immunity for other types, should be prescribed more generally at the other stages in the proceedings. There seemed to be no valid reason why a court could pass judgment concerning, for instance, diplomatic property, only to be prevented from enforcing its judgment.

7. In his view, therefore, part IV could be dispensed with. The requirement of separate consent to execution could be included in the general principles, and the provisions aimed at protecting certain types of property by immunity could find a place in part II or part III. However, that would involve much rearrangement of the draft articles. He would therefore leave on record his reservations regarding the usefulness of part IV and turn to the draft articles themselves.

8. Draft article 21 was a scope article and, as such, would be useful only if it qualified the articles that followed in some way. Since it did not do so, he doubted whether it was necessary. If the article was to be retained, its drafting should be reconsidered with a view to reflecting the content of the other articles more accurately; but he would prefer its deletion.

9. Draft article 22, the key article, sought to define the precise nature of attachment, arrest and execution, but he doubted whether it really clarified those terms. For instance, what was the difference between trying to deprive a State of property and compelling it to vacate or surrender that property? As to the four exceptions to the basic rule, the first one, laid down in paragraph 1 (*a*), related to consent. But consent had already been dealt with in article 8 of the draft, so it would be advisable to follow the language of that article more closely. The other exceptions, laid down in paragraph 1 (*b*), (*c*) and (*d*), all related to the nature or situation of the property or the right of the State. Taking those exceptions in reverse order, if paragraph 1 (*d*) was intended to mean that immunity would not apply if property had been allocated by a State for the satisfaction of a final judgment or the payment of a debt in the particular case before the court, the language of that provision should be made clearer, so as to leave no room for doubt. The situation contemplated in paragraph 1 (*c*) was similar to that provided for in paragraph 1 (*a*) and (*b*) of article 15 of the draft, and he agreed that immunity could not be invoked, even at the execution stage. As to the exception under paragraph 1 (*b*) of article 22, he was a little puzzled. Article 22 provided that such property was not covered by immunity from attachment, arrest and execution, in apparent extension of the principle already stated in article 12 of the draft. As he understood draft article 23, paragraph 1 (*a*), however, it too applied to property "in use or intended for use by the State in commercial and non-governmental service", which, according to article 22, was not covered by immunity. Why, then, should a State consent to attachment, arrest, or execution if the property was not protected by immunity? Unless he had misunderstood the meaning of those provisions, he believed it would be enough to state the exceptions in article 22 and confine the content of article 23 to specifying that consent must be in writing and that it could be given by international agreement or in a contract or before the court, as provided in article 8 of the draft.

10. He was in two minds about draft article 24. While he agreed that all the types of property enumerated in that article should be immune from attachment, arrest and execution, he wondered whether States should in fact be required to limit their sovereignty by restricting their right to dispose of their own property. Yet the harsh realities of international life might well force States to do just that, against their own best interests, in which case article 24 might well afford their only protection. Despite persistent doubts, therefore, he was prepared to accept article 24 as drafted.

11. Chief AKINJIDE commended the Special Rapporteur for his excellent seventh report (A/CN.4/388), the broad lines of which he endorsed, although it did not go as far as he would have liked.

12. With regard to draft article 22, paragraph 1, he could not agree that the phrase "property in which a State has an interest" was too broad. It was important to remember that the reference was not to a trading company owned by a State, but to a State as such. The position could be illustrated by examples taken from West Africa. For instance, Senegal and Nigeria were engaged in a joint enterprise to exploit salt in Senegal: each State had invested a certain amount and drew a certain percentage of the earnings. It was thus an enterprise in which they had an interest as States and which was important for their survival. Guinea and Nigeria were likewise jointly engaged in exploiting iron ore for the economic benefit of both States and possibly of other States in the region as well. Benin and Nigeria operated, as States,

a joint enterprise for the manufacture of cement. The phrase in question might be inappropriate for the United States of America or for European countries, but it was highly appropriate for developing countries endeavouring in their own small way to become economically self-sufficient.

13. He agreed with Mr. Mahiou about paragraph 1 (*a*) of article 22 and did not understand why such a provision had been included. With regard to intellectual property, for instance, many of the component states of his own country spent 40 to 50 per cent of their budget on education, and about 95 per cent of the textbooks used were of foreign origin. Gradually, however, those states were acquiring the copyright of their textbooks and reprinting them locally, thus achieving a significant reduction in their education budgets. It was most unlikely that any developing country would sign a convention giving the consent referred to in paragraph 1 (*a*), since it would strike at the very basis of its development. He therefore considered that paragraph 1 (*a*) should be deleted.

14. On draft article 23, he simply endorsed the remarks made by Mr. Balanda (1920th meeting), Mr. Flitan (*ibid.*), Mr. Francis (1921st meeting) and Mr. Razafindralambo (*ibid.*).

15. As to draft article 24, he noted the criticism that had been made of the word "property" in paragraph 1 (*c*) and (*d*). Again, he would illustrate his views by referring to what happened in practice. In Nigeria, currency was printed and coins were minted under a highly successful arrangement with a foreign company. Because of that foreign element, the central bank owned two aircraft, which were often used to transport highly confidential materials. It was imperative for those aircraft to enjoy protection, for their attachment could have the effect of paralysing the national economy. Indeed, anything owned by a central bank, not only money, should have full protection, which was why he supported the all-embracing term "property".

16. It might also sometimes be necessary to determine which entities in a State were entitled to immunity. There had been cases of a developing country being ruled by two factions, each in possession of certain territory and machinery of government, and each recognized by powerful States. There was also the case of Governments-in-exile, which had occurred during the Second World War and might occur again. Possibly both situations could be dealt with in the commentary to article 24.

17. Mr. DÍAZ GONZÁLEZ said that the discussion had contributed many elements which would undoubtedly help the Special Rapporteur to recast the draft articles. Nevertheless, the Special Rapporteur deserved congratulations for having revealed himself, by his patience and wisdom, to be a true disciple of Buddha and for having, little by little, found solutions to problems which had seemed difficult at first sight.

18. He agreed with the comments already made suggesting that the wording of part IV of the draft articles should be brought into line with that of the three preceding parts. Like Mr. Ushakov (1920th meeting), he believed that article 6 was the text on which the whole draft was based. He had already had occasion to point out that it was sufficient to state, in paragraph 1 of article 6, that "A State is immune from the jurisdiction of another State", since it was not "in accordance with the provisions of the present articles" that the State enjoyed such immunity, but by virtue of the principle of State sovereignty. He had nevertheless joined the consensus on article 6, which had been adopted provisionally in order to enable the Commission to make progress.

19. He had no objection to accepting draft articles 21 to 24 on the understanding that they should be brought into line with the preceding articles, should be drafted more simply and should reflect more accurately the explanations provided by the Special Rapporteur in his seventh report (A/CN.4/388). In particular, attention should be given to the wording of paragraph 1 (*c*) of article 22, and the meaning of the word "control" should be clearly defined. He reminded members that the concept of "State property" had given rise to a long debate when the Commission had been elaborating the draft articles on succession of States in respect of matters other than treaties. That debate had yielded, if not a precise idea, at least a fairly clear one of what constituted State property.

20. Sir Ian SINCLAIR, after paying tribute to the Special Rapporteur, said that he had been somewhat alarmed by the remarks made by Mr. Ushakov (1920th meeting), who appeared to consider only the interests of the acting State, a State endowed with the attributes of sovereign power and clothed in the impenetrable armour of immunity, completely ignoring the interests of the territorial sovereign. The fact of the matter was that two sovereignties were involved: the sovereignty exercisable by the territorial State, or State of the forum, and the sovereignty exercisable by the State carrying on activities in the territorial State. Moreover, in all matters involving a claim to sovereign immunity, there was a third party which could not be ignored, namely the private party or entity which wished to pursue a claim against the foreign State and which was, or might be, frustrated by a plea of sovereign immunity. There was thus a triangular relationship in which the interests of the acting State, the territorial State, and the private claimant had to be acknowledged or reconciled.

21. Turning to draft articles 21 to 24, he observed that there was ample authority for the proposition that the immunity of foreign State property from attachment, arrest and execution was not absolute, but dependent upon the uses to which the property was being or had been put. It was only necessary to cite *X.* v. *Republic of the Philippines* (1977) and *Alcom Ltd.* v. *Republic of Colombia* (1984), cited by the Special Rapporteur in his seventh report (A/CN.4/388, para. 114), in support of that proposition. The analysis by the Federal Constitutional Court of the Federal Republic of Germany in *X.* v. *Republic of the Philippines* was particularly convincing in that it encompassed analyses of case-law from a wide variety of jurisdictions.

22. There was a clear distinction in English law between the related concepts of attachment, arrest and execution. Attachment meant the placing under

legal authority of specific identifiable property. In that context, a Mareva injunction might not constitute an attachment of property in the strict sense, inasmuch as it was an order *in personam* directed towards a particular natural or juridical person, requiring that person to retain certain funds within the jurisdiction. A Mareva injunction did not, strictly speaking, operate as an attachment of specific assets. That was certainly the view taken by the Court of Appeal in *Cretanor Maritime Co. Ltd.* v. *Irish Marine Management Ltd.* (1978).[5] In a later case, Lord Denning had taken a somewhat different view, holding that a Mareva injunction was comparable to the process of *saisie conservatoire* under French law. In view of that conflict of judicial opinion in the English courts, it would be unwise to regard the term "attachment" as necessarily covering a Mareva injunction. For that, if for no other reason, he tended to agree that the draft articles should not refer specifically to "attachment, arrest and execution", but should employ some more general wording. In his view, it would not be right to exclude Mareva injunctions from the scope of the draft articles on the purely technical ground that they did not operate as an attachment of specific property.

23. The term "arrest" likewise had a specific meaning in English law. In the context of Admiralty proceedings *in rem*, namely proceedings initiated by the service of a writ *in rem* against a ship, the mere service of the writ did not as such constitute an arrest. Application had to be made for a separate warrant of arrest if there was no appearance to the writ or if the claimant suspected that there might be no appearance. If there was an appearance, the normal procedure was for the owner of the ship, if it had already been arrested, to procure its release by giving security for the plaintiff's claim. Again, the use of the term "arrest" might not sufficiently comprehend the degree of constraint imposed on a ship by the service of a writ *in rem*, which reinforced his view that more general language was required.

24. Before concluding those general considerations, he wished to comment on the complaint by Chief Akinjide (1919th meeting) about the Mareva injunction issued against the Central Bank of Nigeria in the *Trendtex* case (1977).[6] In that case, it had been held by the Court of Appeal in London, in continuing the Mareva injunction, that no distinction could be made between immunity from jurisdiction and immunity from execution. That ruling seemed dubious to him. English law, following international law in that respect, had always acknowledged that immunity from execution was something quite distinct from immunity from suit. Accordingly, waiver of immunity from suit did not involve waiver of immunity from execution. He therefore supported the suggestion by Mr. Francis (1921st meeting) that a statement of the legal position in that respect be incorporated in the draft articles, in view of the occasional attempts by judges in the United Kingdom and elsewhere to embrace the facile principle that jurisdiction to sue carried with it jurisdiction to require execution of the judgment.

25. It should also be noted that, in the United Kingdom, the *State Immunity Act 1978* had reversed the ruling handed down in the *Trendtex* case, in so far as that ruling related to the possibility of obtaining a Mareva injunction against a foreign central bank. The effect of section 14 (4) of the 1978 Act was that the property of a foreign State's central bank was not to be regarded as being in use, or intended for use, for commercial purposes, which would make it available for execution; the effect of that subsection, when read in conjunction with section 13 of the Act, was that relief could not in future be obtained against a foreign central bank by way of injunction or order for specific performance or for the recovery of land or other property, unless the foreign central bank specifically consented thereto in writing. In other words, full protection was henceforth extended to the property of a foreign central bank or monetary authority.

26. With regard to draft articles 21 to 24, he had to say that their formulation did not live up to the supporting materials put forward in the Special Rapporteur's report.

27. He shared the view expressed by Mr. Yankov (1919th meeting) and Mr. Calero Rodrigues that article 21 appeared to serve no useful purpose. The scope of part IV of the draft would be evident from the content of articles 22 to 24 and it was not necessary to define it in general terms in an introductory article.

28. During the discussion, a certain amount of criticism had been levelled at the use of the expression "property in its possession or control or in which it has an interest". The difficulties to which a formula of that kind could give rise were illustrated by the *Dollfus Mieg* case, which had been decided soon after the Second World War. Gold bars in occupied France had been seized by the Allied Forces and handed over to the Tripartite Commission for the Restitution of Monetary Gold. The ownership of the gold bars had not then been known and they had been deposited with the Bank of England by the Governments of the United Kingdom, the United States of America and France. Those Governments had not claimed ownership, but the gold bars had clearly been either property of which the three States were in possession or control, or property in which they had an interest. The Dollfus Mieg company had instituted proceedings against the Bank of England in the English courts, claiming title to the gold bars. At a later stage in the proceedings, the Governments of France and the United States had intervened and rightly claimed sovereign immunity, which was duly accorded.[7]

29. A situation of that kind could arise not only in the context of the exercise of jurisdiction by the courts of the forum, but also in the context of possible measures of execution. Other examples of that kind could be given, particularly shipping cases, where a State often asserted an interest in a ship in

[5] *The All England Law Reports, 1978*, vol. 3, p. 164.

[6] See 1919th meeting, footnote 5.

[7] See *Dollfus Mieg et Cie S.A.* v. *Bank of England* (1950) (*The Law Reports, Chancery Division, 1950*, p. 333); *United States of America and Republic of France* v. *Dollfus Mieg et Cie S.A. and Bank of England* (1952) (*The All England Law Reports, 1952*, vol. 1, p. 572).

the context of *in rem* proceedings. He accordingly believed that inclusion of the phrase "property in its possession or control or in which it has an interest" was essential.

30. He supported, in general, the introductory provision of draft article 22, paragraph 1, but proposed that the formula "attachment, arrest and execution" should be replaced by a phrase such as: "judicial measures of constraint upon the use of such property, including attachment, arrest and execution". That amendment would have the incidental advantage of making it possible to dispense with paragraph 2, which appeared to have been included only to cover injunctions or other types of order which might not, strictly speaking, constitute attachment, arrest or execution.

31. He supported Mr. Malek's proposal (1921st meeting) to delete the opening words of article 22, paragraph 1, "In accordance with the provisions of the present articles". As a further drafting improvement to that paragraph, he suggested that the words "is protected by the rule of State immunity" should be replaced by the shorter formula "is immune".

32. Referring to the exceptions set out in subparagraphs (*a*) to (*d*) of paragraph 1 of article 22, he said that he would discuss the content of subparagraph (*a*) when he came to article 23. The exception in subparagraph (*b*) was clearly of the first importance. That exception, which related to property in use for commercial service, constituted an alternative to the exception in subparagraph (*a*), relating to consent. He strongly opposed the suggestion that the two subparagraphs should be combined, so as to make the conditions stated therein cumulative. The two conditions—consent and commercial service—should be kept separate.

33. He could not accept the drafting of subparagraph (*b*), in particular the use of the conjunction "and" to link the concepts of "commercial" and "non-governmental" service. Such a formulation would seem to allow for the possibility of a governmental service which was solely commercial. He suggested that the reference to "commercial and non-governmental service" should be replaced by a more acceptable formula referring to "commercial use" or "use for commercial purposes".

34. On subparagraph (*c*), he reserved his position pending further explanations by the Special Rapporteur. With reference to Mr. Mahiou's remarks, however, he could say that he himself had doubts as to whether the provision could be used to cover the delicate question of nationalization. On subparagraph (*d*), he reserved his position pending clarification by the Special Rapporteur. At first sight, that provision did not seem necessary, in view of the content of subparagraphs (*a*) and (*b*). His conclusion on article 22 was, therefore, that it might be possible to shorten it considerably, reducing it to its essentials.

35. With regard to draft article 23, he observed that, judging by its title (Modalities and effect of consent to attachment and execution), the article contained material which was out of place. He was thinking in particular of the proviso at the end of paragraph 1, "provided that the property in question, movable or immovable, intellectual or industrial: (*a*) forms part of a commercial transaction ...", which was redolent of article 22, paragraph 1 (*b*). He saw no reason why consent should be limited to property to which immunity did not apply, and accordingly supported the proposal by Mr. Calero Rodrigues to delete that proviso and confine the provisions of article 23 to the modalities and effect of consent to attachment and execution, in accordance with its title.

36. He also urged that, in the final drafting of article 23, due regard should be had to the wording of article 8, on express consent to the exercise of jurisdiction. Moreover, in article 23, paragraph 1, it should be made clear that consent could also be given before the court.

37. Referring to draft article 24, he expressed concern about the effect of the introductory provision of paragraph 1, which appeared to place a limitation on the consent which a State might give. He felt strongly that no limitation should be imposed on State sovereignty in regard to the circumstances in which a State could give its consent to execution.

38. Article 24 should, in his view, be confined to listing the various types of State property which could not in any circumstances be regarded as being in use or intended for use for commercial purposes. Of some interest in that connection was the ruling given by the House of Lords in 1984 in *Alcom Ltd.* v. *Republic of Colombia*, the effect of which was to place a strict limitation on the interpretation by the courts of what constituted property used for commercial purposes (see A/CN.4/388, para. 114). Article 24 should accordingly be redrafted so as to present its provisions as an interpretation of what constituted property used for commercial purposes; the exceptions in subparagraphs (*a*) to (*e*) of paragraph 1 would then indicate the types of property which were not to be regarded as in use or intended for use for commercial purposes.

39. He understood the Special Rapporteur's reasons for using the formula "regardless of consent or waiver of immunity, the following property may not be attached ..." in article 24, paragraph 1. The intention was to avoid pressure being exerted on a developing country to give its consent or waiver in a contract. He believed, however, that the reformulation he had suggested would prove equally effective for that purpose.

40. He supported the suggestion that subparagraph (*a*) of paragraph 1 should be expanded to cover the property of regional international organizations. The wording of subparagraph (*b*) should be revised to confine it within proper limits. In a case in the French courts, a transaction relating to the supply of cigarettes to the Vietnamese army had been considered as an act *jure imperii*, not *jure gestionis*;[8] that sort of extensive interpretation of the concept of

[8] See *Gugenheim* v. *State of Vietnam* (Appeals Court, Paris, 1955) (*International Law Reports, 1955* (London), vol. 22 (1958), pp. 224-225) (judgment upheld by the Cour de Cassation, 1961 (*Revue générale de droit international public* (Paris), vol. 66 (1962), p. 654)).

"property of a military character" should be avoided. As to subparagaph (*c*), dealing with the property of a central bank, he had already pointed out that, in the United Kingdom, the *State Immunity Act 1978* adequately covered that point. He suggested that the Drafting Committee should examine whether the qualifications set out in subparagraphs (*c*) and (*d*) were really necessary.

41. As to paragraph 1 (*e*) he had reservations regarding the reference to the State's "distinct national cultural heritage". That expression could be taken to cover works of artistic or historical value which were in private hands. In many countries, the State imposed restrictions on the export of such works, although their character as purely private property was not affected. Property of that kind was clearly not covered by State immunity, and nothing should be said which might suggest that it was.

42. Mr. REUTER said that, as the topic was not simple, it would be vain to aim at simple texts. Besides, it was important to take account of the two trends which were emerging in the Commission, one favouring an extensive and the other a restrictive application of State immunity. Generally speaking it was the socialist States, and some States invoking the needs of developing countries, which defended the broadening of State immunity. Before referring the draft articles to the Drafting Committee, members should further clarify their positions, so as not to charge the Committee with too heavy responsibilities. In the view of some members, the State almost always enjoyed immunity, whereas territorial organizations and other entities having legal personality under internal law did not. Others, who defended the developed countries' position, held that the State enjoyed immunity in the exercise of all governmental functions, whether they were performed by the State itself or by decentralized agencies, whereas activities not involving the exercise of governmental authority did not entail immunity, even for the State. But there was also an intermediate position, defended by Mr. Balanda (1920th meeting), on which members of the Commission would do well to reflect further. A broadening of immunity could in fact be achieved by combining the two trends and providing that the State enjoyed general immunity, since it could act only as a State and could not engage in private activities, but that decentralized agencies also exercising governmental functions enjoyed immunity like the State. The draft articles opted for an intermediate solution of that kind. By according immunity to certain types of property and by using rather vague terms, they granted State immunity to activities carried on by certain entities other than States. Through the notions of property immunity and functional immunity, the Commission had succeeded in combining the two trends, which was rather heartening.

43. To arrive at a middle course did not seem impossible, if only compromises could be accepted. Failure would be regrettable, not only in view of the efforts made by the Special Rapporteur, but also for developing countries. The elaboration of a general convention would seem to be in those countries' interest, provided, of course, that its text was acceptable to them. Reliance on the conclusion of bilateral agreements would not be a satisfactory solution. That being so, it was essential to pursue to their logical conclusion the anxieties that had been expressed. For instance, Mr. Mahiou had raised the question of the treatment of goods in international trade following a nationalization. He himself was inclined to believe that titles of ownership established by a State after nationalization of movable property had international validity and were effective against third States.

44. In the last analysis, the only was of moderating certain State immunities was to reinforce the security of international trade. The immunity of State-owned ships confirmed that conclusion. But although he fully understood that, for the security of claims relating to shipping operations or to specific transactions in international trade, it did not seem possible to accept the immunity of State-owned ships, he was equally convinced that it was contrary to the interests of international trade for a State having general claims against another State to be able suddenly to arrest its merchant ships. Moreover, the Commission had not accepted State immunity for claims arising from responsibility. In that connection, he cited *The "Grandcamp"*, the case of a French ship sailing under the French flag whose cargo of ammonium nitrate had exploded in the port of Texas City in April 1947, killing the crew and destroying half the town. Under the Commission's draft articles, a State-owned ship which caused an accident engaging the owner's responsibility did not enjoy immunity. An example of that kind could open the way for possible compromise solutions.

45. Another example was that of land bought by a State from a person who was not the land's owner for the purpose of building an embassy. If the local courts decided that the State had not become the owner of the land, jurisdictional immunity was not applicable. If in the mean time, however, the embassy had been built on the land, there could be no question of issuing a writ of execution against the embassy, at the risk of seriously disrupting the diplomatic service. In such a case, immunity from execution had to be recognized. In practice, the State which had bought the land could ask for time to leave the premises and establish its embassy elsewhere. It was also possible that the State of the forum would enact a law after the event, which allowed it to expropriate the land and compensate the owner by arrangement with the foreign State. Consequently, it seemed difficult not to maintain an immunity from execution that was separate from immunity from jurisdiction. There could indeed be immunity from execution even in the absence of immunity from jurisdiction. It remained to be seen whether immunity from execution should only be limited according to immunity from jurisdiction.

46. In any case, it would be advisable to reserve, at least in the commentary, the delicate problem of the measures which a State could take in regard to property which normally enjoyed immunity, but which could in certain cases be deprived of it. So far as military equipment was concerned, a State in which a deserting soldier took refuge with a military vehicle would normally return the vehicle to the State of

origin. But the commentary should reserve the case in which a State was led to take measures against military equipment paid for but not yet delivered, following a decision to apply sanctions taken by the United Nations.

47. Lastly, on the subject of regional international organizations, he referred to the case of several States belonging to a monetary union and having a common issuing bank. It had happened that one of the member States of such a union had seized all the banknotes of the issuing institution in its territory and put them in circulation, even though some of them had not been issued. Since banknotes enjoyed absolute immunity, it was essential to mention the property of a regional international organization.

48. In conclusion, he emphasized the need to determine the causes of the main differences of opinion in the Commission, to set limits to them and to work together in a spirit of mutual understanding.

The meeting rose at 1.05 p.m.

1923rd MEETING

Wednesday, 10 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. 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*)

1. Mr. USHAKOV said that, in political terms, he understood the position adopted by some members of the Commission and some Governments regarding cases involving persons, whether natural or legal: they always championed persons, contrary to the rules of international law or any well-established theory. For example, they had advocated protection of the interests of persons when the Commission had sought to define the term "State debt" in the draft articles on succession of States in respect of State property, archives and debts. In their opinion, the definition should have covered debts which, under a capitalist system, persons could contract towards the State, even though international law did not deal with relations between States and natural or legal persons. The draft definition had covered not only any financial obligation of a State towards another State or any other subject of international law, which had been acceptable because international law governed the resulting international relations, but also any other financial obligation, in other words any debt towards a State contracted by a natural or legal person. Obviously such a debt had to be paid, but it had to be paid in accordance with private international law, not public international law. The Commission had deleted the latter part of the definition, following a tied vote on the matter.

2. Some members had spoken of triangular relations between two States and a natural or legal person and had insisted on the need to protect the interests of the latter. When their attention was drawn to the fact that State sovereignty was essential in the circumstances and that, in the same way as a State could not be subject to the governmental authority of another State, it could not itself exercise its State power *vis-à-vis* another State, those members retorted that such considerations were purely theoretical and that account must be taken of practice. They argued that the State did not enjoy immunity for its commercial activities but that all its other activities were undertaken in the exercise of its sov-

[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.