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Summary record of the 1924th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
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the proceedings: precisely for that reason, a separate part was required. He noted in that regard that the definition of "jurisdictional immunities" given in article 2, paragraph 1 (*c*), was qualified by the terms of article 1, so that the scope of part IV was limited to immunity from measures of arrest and execution taken pursuant only to a decision or order of court.

37. In dealing with part IV it would be necessary to define State property more clearly and, in so doing, to take account of the provisions of draft article 2, paragraph 1 (*f*), articles 15 and 18, and draft article 19. The scope of part IV should also be clarified to take account of any other measures, in addition to attachment, arrest and execution, such as Mareva injunctions, by which State property might be affected. Draft articles 22 and 23 should be harmonized since they could give rise to two inconsistent conclusions. The main point was whether paragraph 1 (*a*) and (*b*) of article 22 provided for two separate alternatives or whether there was a link between the two provisions which was spelt out in article 23. Possibly the problem could be resolved by providing for implied consent and identifying the property to which it would relate.

The meeting rose at 1.05 p.m.

1924th MEETING

Thursday, 11 July 1985, at 10 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. 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] (*concluded*)

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] (*concluded*)

1. The CHAIRMAN, speaking as a member of the Commission and continuing the statement he had begun at the previous meeting, said that draft article 22 was based on two assumptions, which the Special Rapporteur had stated in paragraph 83, subparagraphs (*a*) and (*c*), of his seventh report (A/CN.4/388). It was evident from those assumptions and from the part of the report dealing with draft article 23 that paragraph 1 (*a*) and paragraph 1 (*b*) of article 22 were closely connected. The first and last sentences of paragraph 85 of the report, which stressed the importance of consent, were, moreover, clarified by the introduction, in paragraph 88, of the notion of implied consent on which article 24, paragraph 1 (*c*) and (*d*), were also based. The basic thesis that consent should be clearly given for the purposes of the attachment of property was developed in paragraph 97 and the overall position was summed up in paragraph 102. The latter paragraph also advocated that the scope of consent should be specified, and that might explain the detail in which article 23, paragraph 1 (*a*), had been drafted.

2. Against that background, the normal interpretation would have been to read article 22, paragraph 1 (*a*) and (*b*), and article 23, paragraph 1 (*a*), together. The question that arose was, however, whether there was any special reason or justification for referring to article 22, paragraph 1 (*a*) and (*b*), as alternatives, particularly bearing in mind the controversy to which that approach had given rise in the Commission and to which it would undoubtedly give rise in the Sixth Committee of the General Assembly. Since an exception to State immunity from jurisdiction had been made in the case of commercial transactions, it would

[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.

have been logical to make a similar exception in cases where consent was given to attachment or execution.

3. That proposition was supported by the State practice, legislation and case-law of the United States of America and the United Kingdom, where the law was moving in the direction of implied consent. He noted in that connection that funds attached as security pending, or in execution of, judgments fell into four broad categories: funds of an embassy or diplomatic mission; funds deposited by a central bank in a foreign State; assets of agencies or statutory corporations controlled by the State or in which it had an interest; and funds deposited by the State with a corporation or company of a foreign State.

4. Referring to the first of those categories, he noted that, since 1975, when the trend towards qualified immunity had emerged, there had been a number of cases concerning attachment of the funds of a diplomatic mission. In the United Kingdom, for example, in *Alcom Ltd.* v. *Republic of Colombia* (1984) (see A/CN.4/388, para. 114), the House of Lords had held that such funds were not to be regarded as funds used for commercial purposes and that they could, accordingly, not be subject to attachment or execution. That line of reasoning had, however, not been universally followed and there had been cases in which even "mixed" funds, used both for the running of a mission and for commercial transactions, had been attached. That was a sensitive matter, for as pointed out in a commentary[5] on the Court of Appeal decision in the *Alcom* case, certain diplomatic missions had had their embassy accounts attached as a consequence of that decision; others had moved or had threatened to move their accounts to the Channel Islands; and others had informed the Foreign Office that, on the basis of reciprocity, the property of United Kingdom missions abroad was liable to attachment. In the *Alcom* case, the Court of Appeal judgment had been reversed by the House of Lords, so that the funds of missions in the United Kingdom would appear to be immune. The Commission's task was, however, not to interpret national law, but to determine international law, wherever it might be applied, and specifically to determine whether consent should be required before the funds or property of a diplomatic mission could be attached or whether such funds should enjoy absolute immunity under article 24.

5. In referring to the second category of funds, namely funds deposited by a central bank in a foreign State, Chief Akinjide (1919th meeting) had spoken of Nigeria's experience in the matter and had cited a case in which a Mareva injunction had been issued to prevent the Central Bank of Nigeria from drawing on its funds pending the disposal of the case. The decision in that case had, however, been taken prior to the adoption by the United Kingdom of the *State Immunity Act 1978* and it was possible that, on a proper construction of that legislation, such funds would now be entirely immune from attachment, unless of course the bank set aside a separate portion of the funds for the specific purpose of satisfying the judgment or a creditor's interest.

6. The third and fourth categories related, as he had said, to funds belonging to State entities having their own legal personality, such as companies and corporations, and to funds of the State deposited with an agency of a foreign State.

7. The basic issue was therefore how to reconcile article 22, paragraph 1 (*b*), and article 23, paragraph 1 (*a*), and also to determine whether the attachment, arrest or execution of State property in any form should require express waiver of immunity or whether it would be possible to agree to implied waiver and, if so, what the limits of such implied waiver should be, bearing in mind State practice.

8. Turning to specific articles, he said that he saw no reason why draft article 21 should not be retained, with such drafting changes as might be necessary. The question of a separate waiver of immunity from execution could also be covered in article 21, or in a separate article.

9. The point he had already raised in connection with draft article 22 could be dealt with in one of two ways. The first would be to combine paragraph 1 (*a*) and (*b*), replacing the word "or" in paragraph 1 (*a*) by the word "and", and, if necessary, add a new provision, in article 22, article 23 or in a new article, to cover the element of implied waiver. The second solution would be to retain paragraph 1 (*a*) as it stood and to amend and make a separate provision of paragraph 1 (*b*), which would then take account of the ideas expressed in paragraph 88 of the Special Rapporteur's seventh report, of the terms of draft article 24, paragraph 1 (*c*) and (*d*), and of relevant State practice and legislation, and might read:

> "the property is specifically in use or intended for use by the State for a commercial contract or transaction and has been allocated for specified payments or earmarked for payments of judgment or any other debts."

That reformulation would mean that, if separate funds were placed in a bank as a security or guarantee, in connection with property specifically used for a commercial contract or transaction, those funds could be the subject of attachment or execution.

10. He fully agreed that article 22, paragraph 1 (*c*), required careful examination, particularly with regard to title to property pursuant to an act of State taking the form, for example, of the nationalization of natural resources, which should not be subject to question in the forum of the foreign State. Possibly that point, and also the point raised by Mr. Mahiou (1922nd meeting) could be covered by providing that paragraph 1 (*c*) would not apply to an act of a foreign State in respect of the resources or property of the territorial State. That was already partly covered in draft article 11, paragraph 2, but should be couched in more positive language in draft article 22, paragraph 1 (*c*).

11. If his proposed amendment to article 22, paragraph 1 (*b*), was accepted, paragraph 1 (*d*) would be covered and would no longer be necessary.

[5] H. Fox, "Enforcement jurisdiction, foreign State property and diplomatic immunity", *International and Comparative Law Quarterly* (London), vol. 34-1 (January 1985), p. 115, at p. 121.

12. If article 22, paragraph 1 (*b*), was dealt with separately, article 23, paragraph 1 (*a*), might have to be deleted. Paragraph 1 (*b*) and paragraph 2 of article 23 should, however, be retained.

13. He agreed with the substance of draft article 24, but considered that the wording, particularly of paragraph 1 (*a*), required examination. If his revised version of article 22, paragraph 1 (*b*), was accepted, article 24, paragraph 1 (*c*) and (*d*), might also be amended appropriately. It might also be possible to delete paragraph 2 of article 24, since its terms were in any event implied.

14. Mr. LACLETA MUÑOZ said that it would be quite tempting to support the view expressed by Mr. Calero Rodrigues (1922nd meeting), which accorded with that described in the Special Rapporteur's seventh report (A/CN.4/388, paras. 22-23), namely that immunity from jurisdiction went together with immunity from execution and that, in the absence of immunity from jurisdiction, a State could not claim immunity from execution, except of course in the case of express consent to the exercise of jurisdiction, which would not necessarily imply consent to execution. That position did, however, not really reflect the practice of States, as described by the Special Rapporteur. If it was asked whether any purpose would be served by a judicial decision that would not be executed, his own answer would be that every judicial decision exerted some kind of moral pressure on the parties concerned. He therefore found that, at least in conceptual terms, there was no valid reason why a distinction should not be drawn between immunity from jurisdiction and immunity from execution, particularly since such a distinction would reflect State practice.

15. He also did not think that the concept of sovereignty would prevent a foreign State from being subjected to the jurisdiction of another State in cases where the foreign State was not acting in the exercise of its sovereignty. It should be stressed, as Sir Ian Sinclair (1922nd meeting) had suggested, that, in the cases covered by the draft articles, a triangular relationship existed and that the interests at stake were not limited to those of the "author" State and the forum State. The view that immunity from jurisdiction should be limited had been gaining acceptance as a result of the need to protect the interests of private individuals, who were the third element in that relationship. Recognition of a foreign State's immunity from jurisdiction might place a private individual in a particularly unfair position by depriving him of any means of protecting his own legitimate interests.

16. As an example of how State immunity could work against legitimate private interests, he referred to a case in which a foreign State had been one of the owners of land that was located near a large city in Spain and was being used by a cultural agency of that foreign State. The agency had become a member of the owners' association and, under a system provided for by Spanish law, the association had agreed to pay the costs of developing the land in return for a long-term municipal tax exemption. When the time had come to divide the land development costs among the members of the association, the cultural agency, claiming that it was exempt from taxes under a cultural agreement concluded between Spain and its country, had stated that it had not derived any benefit from the land development operation and had refused to pay its share. The other owners had then instituted proceedings against it in the competent court, but, since the land in question had been registered as State property, State immunity had come into play.

17. Although article 21 might not really be necessary, it served as an introduction to part IV of the draft. It could be retained if it was redrafted in the light of the suggestion just made by the Chairman.

18. He would not comment at the present stage on the solutions that had been proposed with a view to harmonizing draft article 22, paragraph 1 (*b*), and draft article 23, paragraph 1 (*a*), but he could not agree with the idea of linking those two provisions or with the use, in article 22, paragraph 1 (*b*), of the words "in commercial and non-governmental service", which implied that governmental commercial operations could be protected by immunity. Article 23 should deal only with the formal aspect of consent and establish the modalities thereof.

19. Draft article 24 would be generally acceptable, subject to the drafting changes that would be required in order to make it clearer that a State did not have to waive the immunity to which it was entitled as a result of the inviolability of the types of property referred to in paragraph 1 (*a*). There was, moreover, no need to take account of property forming part of a State's "national cultural heritage", as referred to in paragraph 1 (*e*), in the draft articles under consideration.

20. Mr. USHAKOV said that if, in the event of a dispute, he made a deposit in his bank account as security against payment of debts which he might incur in the event that the dispute was not settled in his favour, it would be more than obvious that he intended to pay those debts and he could not see how his deposit could be subject to measures of attachment.

21. Sir Ian SINCLAIR said that, while he understood Mr. Ushakov's point, it was quite possible for a person who had made a deposit in a bank as security against payment of a judgment debt to change his mind after the judgment had been delivered. The question then would be whether that property was in fact available to meet the judgment debt and so capable of being seized.

22. Chief AKINJIDE said that, in his own country, there were two possibilities, irrespective of whether a private individual or a State was concerned. Either the money was paid into court pursuant to the order of the court or it was deposited with the court by the parties acting of their own volition. Once that had been done, neither party had control over the money, which was said to be *in custodia legis*. That being so, a defendant could not change his mind and prevent the money from being used to satisfy the debt.

23. The CHAIRMAN, speaking as a member of the Commission, pointed out that deposits by way of security could be paid into court or placed with a bank as collateral. However, the mode of deposit of

security had not been specified. The intention had simply been to provide for implied consent in the event that a problem arose in the course of the commercial contract or transaction.

24. Mr. USHAKOV said his point was that, if a deposit was made in a bank account for a very specific purpose, that meant that the party concerned had consented to pay its debts, not that it had consented to the attachment of that deposit. If the deposit was attached, the debts could not be paid.

25. The CHAIRMAN, speaking as a member of the Commission, said that, if a State gave an assurance that it would perform its obligations under a contract, there would be no question of attachment or execution. It was only where there was a difference as to the respective rights and obligations under the contract that a difficulty might arise. In such cases, the matter could perhaps be settled via diplomatic channels, although when the transaction was between a State and an individual or a corporation diplomatic relations would not usually apply. The point would, however, require further examination.

26. Mr. SUCHARITKUL (Special Rapporteur), summing up the debate, thanked members for their statements, which had been most gratifying in terms of both quantity and quality. He agreed that, particularly where developing countries were concerned, the alternative of no draft convention at all was to be eschewed.

27. The difficulties of the topic, which were manifold and, first of all, linguistic, derived not so much from the translation of the seventh report (A/CN.4/388) as from the complexity of the substantive legal systems involved and from the need to understand the niceties of a wide variety of procedural techniques. He could agree to all the proposals which had been made in that connection relating to languages other than English.

28. It was apparent that any hesitancy in the draft articles could easily result in conflicting conclusions. Some members considered that he had advocated no immunity; others thought that the extent of the immunity he was proposing was unwarranted; and yet others took the view that part IV of the draft articles was perhaps unnecessary, since it was already covered in earlier parts. He understood Mr. Ushakov's position (1920th meeting) very well, since in certain countries, such as the Soviet Union, the problem of jurisdictional immunities had not arisen much in practice, and he appreciated Mr. Ushakov's constructive efforts to propose a satisfactory solution. He was also gratified to note that Mr. Yankov (1919th meeting) agreed that the consent of States to the attachment of property was necessary and that Mr. Flitan (1920th meeting) considered that part IV represented an effort to restore a balance to the draft articles.

29. In formulating the draft articles, he had been somewhat hesitant owing to the uncertainty of recent developments in the law and to conflicting views and doctrine. He had at the same time been mindful of the need to steer a middle course between the interests of the sovereign State, the territorial State and the private individual.

30. He did not insist that article 21 was absolutely necessary, but had included it because it served to draw a line between immunity from jurisdiction proper and immunity from execution and, at the same time, to delineate the scope of part IV. He agreed, however, that the expression "by order of a court" was too narrow: the true intent was to provide for what Sir Ian Sinclair had termed "judicial measures of constraint upon the use of ... property" (1922nd meeting, para. 30).

31. As to the notion of State property, Mr. Reuter (1919th meeting) had expressed the view that it would be a great mistake to apply a definition of the kind proposed. That definition had, however, been borrowed from article 8 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts,[6] the authors of which, in choosing between the law of the successor State and the law of the predecessor State, had opted for the latter. He agreed, however, that his proposed definition was inappropriate, for what was at issue was property in a much wider sense. The question of ownership and title had to be settled under the *lex situs*, as in the case of immovable property acquired abroad, or under the law of the place where the property was registered, as in the case of a car imported for use by a diplomat residing in a foreign State, or under the rules of private international law.

32. Questions had also been raised with regard to the meaning of the expression "property in which a State has an interest". He wished to make it clear that the term "interest" as used in that context had nothing to do with the concept of a "controlling interest" in a company, a matter which was governed by company law. The question of the participation of a State in a company as a shareholder, whether with a controlling interest or not, was governed by article 18. In draft article 22, the term "interest" was used in the same sense as the French term *intérêt* in the expression *droits, avoirs et intérêts* and referred to the type of interest in property recognized by the property law of a particular country.

33. A good illustration of "property in which a State has an interest" was provided by the *Dollfus Mieg* case, mentioned by Sir Ian Sinclair at the 1922nd meeting. France, the United Kingdom and the United States of America had had an interest in the gold bars involved in that case. A State could thus have an interest in a property without having any title of ownership to it. Another interesting example was provided by *Vavasseur* v. *Krupp*,[7] which dated back to 1878 and related to cannon and ammunition which had been ordered by the Emperor of Japan for the Imperial Navy. Following a claim of breach of patent, an attempt had been made to seize the cannon and ammunition before they could be delivered to Japan. A United Kingdom court had, however, released the attachment because the Emperor of Japan had had an interest in the cannon and ammunition, having ordered and paid for them.

[6] A/CONF.117/14.

[7] *The Law Reports, Chancery Division*, vol. IX (1878), p. 351.

34. Situations that could arise in connection with the continental shelf provided a further example of interest without ownership. When two States could not agree on the delimitation of the continental shelf, they sometimes decided to treat the part of the continental shelf in question as a joint development area. The two States would thus have a real interest in that area, although ownership had not yet been established. There was no doubt, however, that the property in question was unattachable.

35. In reply to a question raised by Mr. Ushakov, he referred to an example of money earmarked for the payment of a particular debt. In 1961, an agreement concluded between Thailand and Japan on the repayment of certain wartime loans had contained a compromise settlement on the amount due with accrued interest. It had been agreed that the total amount would be paid, in instalments, into an account in the name of the Bank of Thailand, which had been entrusted with the task of dividing the amounts for payment to individual creditors. The case was thus one of the type referred to in article 22, paragraph 1 (*d*). It was worth noting that the position of property in such a case was quite different from that of money which had been paid into a court and over which the court had custody and control.

36. Since the concept of "attachment, arrest and execution" was meant to cover "judicial measures of constraint upon the use of property", the latter formulation might be included in article 22. It would then be clear that that article did not apply to confiscation or nationalization. The problems which arose in that connection were very real, but they were outside the scope of the present topic.

37. State practice with regard to immunity of State property from execution was by no means uniform. Some of the cases which had arisen in that connection involved problems of recognition and a distinction had to be drawn between recognition *de facto* and recognition *de jure*. In the case of recognition *de facto*, however, physical control was decisive. Thus, during the Spanish Civil War, when Bilbao had changed hands a change of ownership had been acknowledged for ships registered there.

38. It had been said that the main issue at stake was the fact that two sovereignties were involved. One sovereign chose to enter the territory of another when it introduced its property into that territory or acquired property therein. The case was one of the coincidence of two jurisdictions, which gave rise to a problem of priority of jurisdiction, not to a problem of exclusion of jurisdiction. A situation of that kind also occurred where foreign troops visited a country or were stationed in it under a treaty of alliance or some similar agreement.

39. The position was that, in principle, State property enjoyed almost absolute immunity, except for the possibility of waiver. In the draft articles, the term "consent" had been used in preference to the term "waiver". He had accordingly redrafted article 22, which would consist of a single paragraph. The concept of consent, which had been the subject of paragraph 1 (*a*), would be stated at the beginning of the article, which would begin with the words: "A State is immune without its consent in respect of its property, or property in its possession or control or in which it has an interest ...". As proposed by Sir Ian Sinclair, the immunity would be "... from judicial measures of constraint upon the use of such property, including attachment, arrest and execution ...". The exceptions provided for in the former paragraph 1 (*b*) and (*d*) would be combined to read: "unless the property in question is specifically in use or intended for use by the State for commercial and non-governmental purposes and, being located in the State of the forum, has been allocated to a specific payment or has been specifically earmarked for payment of judgment or any other debts". The former paragraph 2 would be deleted as a result of the introduction of the words "judicial measures of constraint upon the use ...". Paragraph 1 (*c*) would also be deleted, since the exception it provided for was already covered by articles 15 and 16.

40. It would be noted that he had retained in article 22 the words "commercial and non-governmental purposes", which had attracted some criticism during the discussion. Actually, those words had been taken from the 1926 Brussels Convention.[8] Similar wording was to be found in article 22, paragraph 1, of the 1958 Convention on the Territorial Sea and the Contiguous Zone,[9] in article 9 of the 1958 Convention on the High Seas[10] and in articles 31 and 32 of the 1982 United Nations Convention on the Law of the Sea.[11] The well-known French authority on the law of the sea, Gilbert Gidel,[12] had, moreover, explained that the determination of the status of ships in public international law and the distinction between "public" and "private" vessels did not depend on the question of ownership: the test was, rather, whether a ship was being used in "governmental and non-commercial service", in which case it was a "public" vessel, or, instead, in "commercial and non-governmental service", in which case it was a "private" vessel. It was therefore appropriate to refer in draft article 22 to "commercial and non-governmental purposes" in order to show that the two requirements of "commercial" and "non-governmental" purposes were cumulative.

41. In accordance with the suggestion by Mr. Calero Rodrigues (1922nd meeting), he had redrafted article 23 to bring it into line with article 8 on express consent to the exercise of jurisdiction. Paragraph 1 of article 23 would now read:

> "1. Subject to article 24, a State cannot invoke immunity from judicial measures of constraint upon the use of its property, or property in its possession or control or in which it has an interest, in a proceeding before a court of another State if the property in question is located in the State of the forum and it has expressly consented to the

[8] See 1915th meeting, footnote 7.

[9] United Nations, *Treaty Series*, vol. 516, p. 205.

[10] *Ibid.*, vol. 450, p. 11.

[11] *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

[12] See G. Gidel, *Le droit international public de la mer* (Paris, Sirey, 1932), vol. I, pp. 98-99.

exercise of judicial measures of constraint upon the property, which it has specifically identified for that purpose:

"(*a*) by international agreement; or

"(*b*) in a written contract; or

"(*c*) by a declaration before the court in a specific case."

He had also drafted a new paragraph 2, which read:

"2. Consent to the exercise of jurisdiction under article 8 shall not be construed as consent to the exercise of judicial measures of constraint under part IV of the present articles, for which a separate waiver is required."

That new paragraph would take account of the proposal by Mr. Francis (1921st meeting) and Sir Ian Sinclair (1922nd meeting) for a new article to follow article 21. He agreed with the substance of that proposal, but thought that it would be more appropriate to include it as paragraph 2 of article 23.

42. He had reformulated article 24, replacing the words "regardless of consent or waiver of immunity" in paragraph 1 by the words "Unless otherwise expressly and specifically agreed by the State concerned". That change of wording should remove any suggestion that a rule of *jus cogens* might be intended.

43. As to the list of types of State property which were immune from attachment and execution, he would be prepared to include the property of regional international organizations in paragraph 1 (*a*). Regional organizations were, however, not covered by the 1975 Vienna Convention on the Representation of States. Some regional organizations had, moreover, disappeared after a rather short life. Another problem was that the legal personality and capacity of regional organizations was not recognized under the internal law of all countries. In Japan and Thailand, for example, the law recognized the European Economic Community as a "person"; but the Community's legal personality was not fully recognized under French law.

44. With regard to property of a military character, as referred to in paragraph 1 (*b*) of article 24, he had used the words "defence agency of the State" to cover the case of a country like Japan, which, under its Constitution, could not have a military authority. The property covered by paragraph 1 (*c*) and (*d*) might be referred to in a single provision. He agreed that the term "national cultural heritage" in paragraph 1 (*e*) should cover religious property, which was unattachable under internal law.

45. The commentary to article 24 would explain that the types of State property covered did not include certain items which were unattachable under internal law. What he had in mind was, for example, the limitation which the law in most countries placed on the seizure and sale of personal possessions to recover debts: for humanitarian reasons, some such possessions were not subject to measures of execution.

46. In conclusion, he thanked all members of the Commission for their valuable contributions and useful suggestions. He would submit the revised texts of draft articles 21 to 24 to the Drafting Committee and suggested that those texts should be referred to the Committee for early consideration at the Commission's next session.

47. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) suggested that the Special Rapporteur's revised drafts of articles 21 to 24 should be circulated informally to all members of the Commission. The work of the Drafting Committee would thereby be greatly facilitated.

48. Sir Ian SINCLAIR supported that useful suggestion and further proposed that the texts of the redrafted articles should be included in the Commission's report on the work of its current session, with an indication that they had not yet been considered either by the Drafting Committee or by the Commission itself.

49. Mr. SUCHARITKUL (Special Rapporteur) said that he agreed to the suggestions made by the Chairman of the Drafting Committee and by Sir Ian Sinclair.

50. Mr. YANKOV requested the Special Rapporteur to consider the possibility of working out an appropriate definition of the words "judicial measures of constraint upon the use of such property, including attachment, arrest and execution". The meaning of those words varied considerably from one system of internal law to another. There was in fact no common denominator for much of the terminology used in part IV of the draft.

51. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer articles 21 to 24 to the Drafting Committee for consideration in the light of the suggestions made and of the redrafts to be submitted by the Special Rapporteur. That decision would be taken on the understanding that the revised texts of draft articles 21 to 24 submitted by the Special Rapporteur would be included in the Commission's report on the work of its thirty-seventh session, with an indication that they had not been considered either by the Drafting Committee or by the Commission itself.

It was so agreed.

The meeting rose at 1.15 p.m.

1925th MEETING

Monday, 15 July 1985, at 3.05 p.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. Jacovides, 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.