Document:-
**A/CN.4/SR.2115**

**Summary record of the 2115th meeting**

Topic:
**Jurisdictional immunities of States and their property**

Extract from the Yearbook of the International Law Commission:-
**1989**, **vol. I**

be ordered only by a court of the State in which the arbitration had taken place.

57. On the question of the extent of proceedings involving the exercise of supervisory jurisdiction by a court of another State, one Government had suggested that a reference to proceedings relating to the "recognition and enforcement" of an arbitral award should be added in subparagraph (*c*) of article 19 (*ibid.*, para. 35).

58. With one exception, recent codifications did not regard the submission by a State to arbitration as a waiver of immunity from enforcement, but he had not had the opportunity to study the relevant part of the recent United States reservation in that connection. In State practice, it appeared that two conflicting views had been asserted as to whether, by entering into an agreement to arbitrate, a State could not invoke its immunity in proceedings relating to the enforcement of an award against it. In his opinion, the enforcement of arbitral awards was dealt with correctly in the draft articles, in spite of the comment by Australia suggesting the need for more explicit treatment (*ibid.*, para. 37 *in fine*).

59. If the question was approached from the point of view that an application for enforcement served no useful purpose except as a first step towards execution, the plea of State immunity would be allowed in that proceeding to obtain the preliminary order in so far as the State's consent had not been given to the jurisdiction of the courts relating to actual execution. On the other hand, if one considered that—distinguishing recognition of an award from its execution—recognition was the natural complement of the binding character of any agreement to submit to arbitration and should not be impaired by considerations of sovereign immunity, the immunity would apply to the process of execution but not to the preceding recognition of the arbitral award.

60. In that connection, the French courts strictly distinguished recognition of arbitral awards from actual execution of the awards (*ibid.*, para. 40). The method of dealing with applications to enforce arbitral awards against foreign States might be specific to France, but it would provide the Commission with useful guidance for rethinking the question. He therefore suggested that, to cover the case in which the State of the forum adopted domestic legislation admitting the same position as the French courts, the Commission could add a new subparagraph (*d*) to article 19, reading: "the recognition of the award", on the understanding that it should not be interpreted as implying waiver of immunity from execution.

*The meeting rose at 1 p.m.*

---

## 2115th MEETING

*Thursday, 8 June 1989, at 10 a.m.*

*Chairman*: Mr. Bernhard GRAEFRATH

*Present*: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

---

### Jurisdictional immunities of States and their property (*continued*) (A/CN.4/410 and Add.1-5,[1] A/CN.4/415,[2] A/CN.4/422 and Add.1,[3] A/CN.4/L.431, sect. F)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CONSIDERATION OF THE DRAFT ARTICLES[4] ON SECOND READING (*continued*)

1. Mr. OGISO (Special Rapporteur), continuing his introduction of his second report (A/CN.4/422 and Add.1), summarized the comments and observations received from Governments on part IV of the draft articles (State immunity in respect of property from measures of constraint).

2. Although most Governments held that immunity from measures of constraint was separate from jurisdictional immunity of States, some legal experts argued that allowing plaintiffs to proceed against foreign States and then withholding from them the fruits of successful litigation through immunity from execution might put them in the doubly frustrating position of being left with an unenforceable judgment and expensive legal costs. The Swiss Government had pointed out that the draft articles departed considerably from the 1972 European Convention on State Immunity. Yet the system under the European Convention was based on the obligation of States parties to abide voluntarily by the judgments rendered against them and it would be difficult to apply the same system elsewhere in its entirety. In addition to a waiver, the United Kingdom *State Immunity Act 1978* permitted enforcement of a judgment or an arbitral award in respect of property which was in use or intended for use for commercial purposes. The United States *Foreign Sovereign Immunities Act of 1976* established a general rule of immunity from execution with a number of exceptions, all of them referring only to commercial property. The general tendency in European countries was to permit enforcement with regard to commercial property, but to deny it in the case of property designated for public purposes. Article 21 of the draft had been worded along those lines. The only point remaining for consideration was whether the phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed", in subparagraph (*a*), should be deleted, as a number of Governments had suggested, in order better to reflect European practice. If that suggestion was not acceptable, the addition of the words "Unless

---

[1] Reproduced in *Yearbook ... 1988*, vol. II (Part One).

[2] *Ibid.*

[3] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

[4] For the texts, see 2114th meeting, para. 31.

otherwise agreed between the States concerned" at the beginning of the article might alleviate the difficulties of those countries which preferred the deletion of the phrase to which he had referred.

3. Article 23, paragraph 1 (*a*), related to bank accounts of a State, which were involved in many cases concerning measures of constraint. One possible view was that bank accounts were inherently commercial assets; another was that the mere future possibility of public use was sufficient to regard a bank account as immune. Both views were somewhat extreme. Monies in bank accounts under the control of a diplomatic or consular mission carried the presumption of a public purpose and therefore enjoyed immunity. However, the 1961 Vienna Convention on Diplomatic Relations did not refer specifically to the general question of bank accounts and, as it now stood, article 23, paragraph 1 (*a*), of the draft seemed to correspond fairly faithfully to customary law. The only issue remaining to be resolved was that of accounts of central banks. The British Court of Appeal had denied immunity twice in such a case, but the United States *Foreign Sovereign Immunities Act of 1976* preserved immunity from attachment and execution of property belonging to a foreign central bank or monetary authority. Taking into account the comments made by the Federal Republic of Germany and the provisions of the United States Act, he suggested that article 23, paragraph 1 (*c*), be amended to read: "property of the central bank or other monetary authority of the State which is in the territory of another State and serves monetary purposes".

4. He had already pointed out that the Commission might consider deleting article 28 if the proposed new article 6 *bis* were adopted (see 2114th meeting, para. 39). Article 28 had been criticized by some Governments as possibly giving rise to different interpretations. Moreover, the two Governments which had offered critical comments on paragraph 2 (*a*) had given two different interpretations of the phrase "applies any of the provisions of the present articles restrictively". One Government feared that the expression would be interpreted abusively to restrict the general rule of State immunity, while the other feared that it might be interpreted as restricting the application of exceptions to immunity.

5. It would be noted that paragraph 2 (*b*) of article 28 ("where . . . States extend to each other treatment different from. . .") departed slightly from article 47, paragraph 2 (*b*), of the Vienna Convention on Diplomatic Relations ("where . . . States extend to each other more favourable treatment. . ."), thus reflecting the basic difference between the two instruments. He urged the Commission to weigh the legal consequences of the provision carefully before deciding to adopt it.

6. Mr. CALERO RODRIGUES asked the Special Rapporteur to explain whether he was in fact proposing new versions of the draft articles.

7. Mr. OGISO (Special Rapporteur) said that, although most of the changes he was proposing were additions to the text, some could have repercussions on articles already adopted: for example, the adoption of the proposed new article 6 *bis* would entail the deletion of article 28, a measure which had not been proposed so far.

8. Mr. KOROMA, commenting generally on the draft articles, said that, while the legislation and examples of legal practice referred to in the second report (A/CN.4/422 and Add.1) could give the impression that the doctrine of absolute immunity had been abandoned, it still prevailed in the majority of Asian, African and Latin-American States. For a topic such as the one under consideration, it was the arguments of States, not the decisions of domestic courts, that should constitute the principal source of law. He had, moreover, requested the previous Special Rapporteur to use as his sources not only court rulings, but also the arguments presented before the courts by defendant States.

9. He would like to know whether the Special Rapporteur believed that the proposed new article 6 *bis* should replace article 6, in which case it might be asked what would remain of the principle of jurisdictional immunity.

10. Mr. OGISO (Special Rapporteur) said that he was proposing the deletion of the bracketed phrase in article 6 and the addition of article 6 *bis* to the amended text.

11. Mr. BENNOUNA said that, at the stage of second reading of the draft articles, the Commission should avoid entering yet again into a general debate which would serve no theoretical purpose and could only impede the progress of its work. What the Commission had to do now was to consider the draft articles as adopted on first reading to determine what changes should be made in them in the light of the comments made by Governments and to provide guidance for the work of the Drafting Committee, which would be called upon to produce a final text in 1990.

12. Mr. SHI said that the topic under consideration was a very sensitive one which involved the sovereignty, sovereign equality and interests of States. The previous Special Rapporteur had admitted in his second report[5] that the principle of State immunity had become firmly established in customary international law; but there were two schools of thought with regard to that principle—the school of absolute immunity and the school of restricted immunity—and each one reflected the practice of certain States, the former reflecting the practice of by far the vast majority of States. In the past few decades, there had been a trend in certain countries, particularly Western developed countries, to favour the principle of restricted sovereignty. If no compromise formula could be found to bridge the gap between the two schools of thought, the stalemate might adversely affect political and economic relations between States.

13. By way of illustration, he referred to *Jackson et al.* v. *People's Republic of China* (1982), a case brought before the United States District Court of Alabama which he explained in detail. A number of American citizens had, with the help of the United States *Foreign Sovereign Immunities Act of 1976*, sought redemption by the Chinese Government of bonds issued by China before 1949. The Chinese Government had indicated to the United States Government the absolute nature of sovereign immunity and rejected the service of process. Default judgment had been passed and the plaintiffs had sought to enter an order for attachment or execution proceedings, at which point China indicated to the United States Department of State that, if

[5] *Yearbook . . . 1980*, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1.

China's property in the United States were judicially attached, the Chinese Government reserved the right to take countermeasures. Following consultations between legal delegations of the two Governments and various turns of events, the case had been dismissed on the basis of the non-retroactivity of the *Foreign Sovereign Immunities Act of 1976*. Other plaintiffs in similar cases before other United States courts had withdrawn their suits. Had it not been for the restraint shown by the Chinese Government and the effective co-operation of the United States Government, the two opposing views on sovereign immunity might have had consequences difficult to predict.

14. His intent in citing that case was to demonstrate that the Commission must search for a compromise formula that would strike the proper balance between the two doctrines. It was unfortunate that the draft articles adopted on first reading were inspired mainly by the 1972 European Convention on State Immunity and the United States *Foreign Sovereign Immunities Act of 1976*. It could hardly be said that the draft articles reflected general international law or the practice of the vast majority of States. He could therefore not agree with the Special Rapporteur's statement in his second report that

> it can no longer be maintained that the absolute theory of State immunity is a universally binding norm of customary international law. However . . . the doctrine of absolute immunity is still the norm on which *States that have not consented to its modification** could rely. . . . (A/CN.4/422 and Add.1, para. 10.)

The customary rule of sovereign immunity was valid not only in relations between States that espoused the absolute doctrine, but also in relations between States in favour of the opposing doctrine. The restrictive doctrine could apply only to relations between States which advocated that doctrine. That was, however, a source of endless polemics and an accommodating attitude had to be adopted in dealing with the topic.

15. Seen from that point of view, the draft articles before the Commission would have to be improved if they were to be acceptable to the international community as a whole. The members of that community represented great diversity in political, economic, social and legal systems and stages of development. States did not simply coexist: they had to coexist in peace, harmony and good-neighbourliness, particularly in view of their economic interdependence. The draft should therefore strengthen the principle of State immunity in consonance with the sovereignty and sovereign equality of States, take into account the interests of States and adapt to their diverse economic, social and legal systems. Only if the second reading of the draft articles were so oriented could the objective of formulating the draft articles be achieved. As the Chinese Government had pointed out in its comments and observations, that objective was

> to strike the necessary balance between the limitation and prevention of abuses of national judicial process against foreign sovereign States and the provision of equitable and reasonable means of resolving disputes, thus helping to safeguard world peace, develop international economic co-operation and promote friendly contacts between peoples. . . . (A/CN.4/410 and Add.1-5.)

16. Having made those general comments and turning to specific articles, he noted that the Special Rapporteur had proposed combining articles 2 and 3 into a single article. That was an entirely acceptable solution. Paragraph 1 (*b*) of the new article 2 (A/CN.4/415, para. 29) attempted to identify what was covered by the word "State". However, the expressions "various organs of government", "political subdivisions of the State" and "agencies or instrumentalities of the State" were not defined and the explanations given in the commentary to article 3[6] did not suffice. It was a matter of importance to a number of countries, particularly the socialist countries, that State enterprises should not come under the definition of the word "State"; that should be made clear in the wording of the article.

17. Paragraph 1 (*c*) (ii) of the new article 2 was superfluous. Practice following the Second World War showed that financial transactions between Governments and foreign private financial institutions almost invariably provided for a waiver of sovereign immunity on the part of those Governments. That practice would continue irrespective of the future convention, since it provided banks and other private financial institutions with protection for their rights and interests. In the case of bonds, it also protected bondholders and enhanced the credibility of Government borrowers.

18. The purpose of paragraph 3 of the new article 2 was to determine what constituted a commercial contract by seeking a compromise between its nature and its purpose. More weight was, however, given to the nature of the contract, since, under the proposed provision, the purpose of the contract could be taken into account only if that was expressly provided for in an international agreement or contract between the parties. That was certainly a retrogression as compared with the previous text (para. 2 of former article 3).

19. Part II of the draft (General principles) codified the principle of the jurisdictional immunities of States and their property and the basic article was article 6, which affirmed the general rule of State immunity. He could accept the article as formulated only if the bracketed phrase "and the relevant rules of general international law" were deleted. Because of the words "subject to the provisions of the present articles", which came just before, there was no need for the bracketed text, which would give rise to confusion and make the entire draft meaningless. Indeed, what were the "relevant rules of general international law"? And if there were such rules, why were they not specified in the draft? The new article 6 *bis*, by which the Special Rapporteur proposed to replace that phrase (A/CN.4/422 and Add.1, para. 17), might afford a solution if the exceptions under articles 11 to 19 were reduced to a minimum.

20. Part III of the draft called for two general comments. The first was that, because of the essential nature of State immunity, the title "Exceptions to State immunity" would be more appropriate than "Limitations on State immunity". Secondly, exceptions to State immunity, though necessary in view of the present state of international relations—in particular economic and commercial relations—should be kept to the minimum that was justified by reality.

21. Article 11 provided for an exception in the case of commercial contracts. It was true that, as more and more States engaged in commercial activities, differences were bound to arise between States and foreign private persons, and the lack of legal means for settling such differences placed private individuals at a disadvantage *vis-à-vis*

---

[6] *Yearbook . . . 1986*, vol. II (Part Two), pp. 13-14.

sovereign States—a situation that could only have an adverse effect on the international movement of goods, services and financial resources. It was therefore understandable that article 11 made commercial contracts an exception to State immunity, and that would be acceptable subject to a proviso reading "provided that the commercial contract has a significant territorial connection with the State of the forum", as proposed by the previous Special Rapporteur in 1983.[7] The need for such a proviso was obvious, since the words "by virtue of the applicable rules of private international law" lacked precision—quite apart from the fact that the rules of conflict of laws of States were not uniform. Even the United States *Foreign Sovereign Immunities Act of 1976* provided for such a territorial link.

22. On the other hand, in formulating the exception under article 11, account must be taken of the fact that the economic, social and legal systems of States were far from being identical. Some, for instance, attributed to the State commercial activities which others did not regard as such. It was because of that confusion that, in lawsuits, there was often a problem of choice of parties as defendants and that plaintiffs sometimes abused domestic legal procedure to make the State itself and the State enterprise concerned co-defendants in the same lawsuit on the ground of presumed identity. That was an added reason for incorporating the concept of "segregated State property", as the Special Rapporteur had done in the proposed new article 11 *bis* (A/CN.4/415, para. 122).

23. Article 11 *bis* should, however, not only define the concept of segregated State property, but also exempt foreign sovereign States from appearance before a court to invoke immunity in a proceeding concerning differences relating to a commercial contract between a State enterprise with segregated property and foreign persons. Such an exemption was also of importance to developing countries because of the exorbitantly high costs of such lawsuits.

24. In view of those considerations, he proposed, on a preliminary basis, that the new article 11 *bis* should read:

> "1. If a State enterprise enters into a commercial contract with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the State cannot invoke immunity from jurisdiction in a proceeding arising out of that commercial contract unless the State enterprise is a legal entity separate from the State with rights of possessing, using and disposing of a definite segregated part of State property, subject to the same rules of liability relating to commercial contracts as a natural or juridical person, and for whose obligations the State is in no way liable under its domestic law.
>
> "2. In a proceeding arising out of a commercial contract indicated in the preceding paragraph, a certificate signed by the diplomatic representative or other competent authorities of the State to whose nationality the State enterprise belongs and directly communicated to the foreign ministry for transmission to the court shall serve as definite evidence of the character of the State enterprise."

25. Article 12, on contracts of employment, should be deleted altogether, as certain Governments had suggested. In his fifth report,[8] the previous Special Rapporteur had in fact drawn the Commission's attention to the scarcity of judicial decisions and of evidence of State practice in that specific area. The need for the exception was therefore not borne out by reality.

26. Article 13, which provided for an exception to State immunity in respect of proceedings relating to compensation for personal injuries and damage to property, was designed to give more protection to private individuals. That was fully understandable. Under article 31 of the 1961 Vienna Convention on Diplomatic Relations, however, diplomatic agents enjoyed immunity from proceedings in tort in the receiving State. Should the State not enjoy the same immunity as its agents? Secondly, article 13 was a complete negation of the principle of the jurisdictional immunities of States, since it made no distinction between sovereign acts and private-law acts, as required by the restrictive doctrine. Thirdly, the attribution to a State of a wrongful act or omission fell within the domain of the international responsibility of States and it would be contrary to the principles of sovereignty and sovereign equality of States if a domestic forum could attribute a wrongful act to a foreign State. Even the previous Special Rapporteur had admitted in his fifth report that customary international law did not provide for the exercise of the jurisdiction of the State in whose territory a wrongful act had been committed when that act was attributable to a foreign State. It was clear therefore that article 13 had no legal basis other than the legislation recently adopted by a very few countries. Moreover, as noted by the secretariat of the Asian-African Legal Consultative Committee in a memorandum prepared in 1982 for the thirty-seventh session of the General Assembly, to make personal injuries and damage to property an exception to State immunity could open the floodgate to litigation against Governments and be a constant irritant to relations between States.

27. For all those reasons, article 13 should be deleted. That did not mean that private individuals would have no redress, but it might be better if the cases covered by the article were settled by the Governments concerned through diplomatic channels, as had been suggested at previous sessions. And if it was traffic accidents that were being contemplated, they were covered by insurance.

28. The Special Rapporteur had proposed the deletion of paragraph 1 (*b*) to (*e*) of article 14 (Ownership, possession and use of property) and the reasons he had given were convincing. In the first place, subparagraphs (*c*) to (*e*) were concerned with the legal practice in common-law countries and could be completely alien to other legal systems. Also, they could be so interpreted as to open the door to foreign jurisdiction even in the absence of any link between the property and the forum State. As the Special Rapporteur had noted, the United States *Foreign Sovereign Immunities Act of 1976* made no provision of that kind.

29. Article 16 (Fiscal matters) was totally unacceptable. Under its terms, States would be able to institute proceedings before their own courts against a foreign State

[7] *Yearbook . . . 1983*, vol. I, p. 300, 1806th meeting, para. 73.

[8] *Yearbook . . . 1983*, vol. II (Part One), p. 25, document A/CN.4/363 and Add.1.

for the recovery of taxes and duties. Its adoption would be contrary to the very concept of sovereignty and the sovereign equality of States.

30. In article 18, the Special Rapporteur had recommended the deletion of the term "non-governmental" and the addition of a new paragraph 1 *bis* (A/CN.4/422 and Add.1, para. 26). He could agree to that deletion and had no criticism to make of the new paragraph, although drafting improvements were required. Also, as noted by the Special Rapporteur, no specific provision was needed with respect to aircraft. The 1944 Chicago Convention on International Civil Aviation, to which the majority of States were parties, made a sufficiently clear distinction between State aircraft and civil aircraft. In any event, a large number of airlines were State-owned and no problems of jurisdictional immunities seemed to have arisen.

31. With regard to article 19, which related to the effect of an arbitration agreement between a State and a foreign natural or juridical person, he noted that the courts of certain countries could exercise a kind of supervisory jurisdiction with respect to commercial arbitration. Conceivably, therefore, consent to arbitration by a State could imply consent to the exercise of supervisory jurisdiction by a forum of another State. One point at issue was whether that exception to immunity should cover arbitration of differences relating to a "commercial contract" or a "civil or commercial matter", which latter expression might widen the scope of the exception. Since exceptions should be kept to a minimum, he considered that the scope of article 19 should be confined to commercial contracts as defined in paragraph 1 (*c*) of the new article 2 (A/CN.4/415, para. 29). He could also accept the Special Rapporteur's proposal to add a new subparagraph (*d*) to article 19 relating to recognition of the arbitral award, on the understanding that it would not be interpreted as implying a waiver of immunity from execution.

32. As for article 20 (Cases of nationalization), there could be no doubt that a measure of nationalization taken by a State in its own territory constituted an act of State and could not be made an exception to State immunity. However, article 20 was by no means clear: was it or was it not intended as an exception? If it was, no definite conclusions could be drawn from its wording; and if it was not, it should not be included in part III of the draft. In any event, he could not agree with the interpretation of the article given by the Special Rapporteur in his second report (A/CN.4/422 and Add.1, para. 41). Moreover, the article stood little chance of acceptance by States; it might as well be deleted or at least be placed in the introductory part of the draft, as suggested by some Governments.

33. Turning to part IV of the draft (State immunity in respect of property from measures of constraint), whose importance he recognized, he noted that the principle which it embodied and which was quite separate from that of the jurisdictional immunity of the State constituted an essential counterweight to the exceptions to State immunity set forth in part III. It was well established that waiver of immunity from jurisdiction did not imply waiver of immunity from execution, from which it followed that the exceptions to immunity from jurisdiction embodied in the draft did not entail non-immunity from measures of constraint. It should be noted, however, that article 21 as it now stood, and especially its subparagraph (*a*), significantly limited that principle of the inadmissibility of measures of constraint against the property of a State. In particular, he could not accept the recommendations made by the Special Rapporteur on the basis of the views of some Governments that the words "non-governmental" and "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed" be deleted. Those deletions would have the unfortunate effect of limiting the principle of the immunity of the State from measures of constraint to a far greater extent than was the case, for example, under the United States *Foreign Sovereign Immunities Act of 1976*. If subparagraph (*a*) were amended as suggested by the Special Rapporteur, it might be an irritant to relations between States, especially in the event of the execution of a judgment by default.

34. In his view, article 21, which was the introductory article of part IV, should spell out in no uncertain terms the principle of State immunity in respect of property from measures of constraint and be worded along the lines of article 23 of the 1972 European Convention on State Immunity, while incorporating some of the elements of article 22 of the present draft articles. Paragraph 1 of article 21 would thus read:

> "1. No measures of constraint, including measures of attachment, arrest and execution, against the property of a State may be taken in the territory of another State except where and to the extent that the State has expressly consented thereto, as indicated:
>
> "(*a*) by international agreement;
>
> "(*b*) in a written contract; or
>
> "(*c*) by a declaration before the court in a specific case."

Paragraph 2 would reproduce the text of paragraph 2 of article 22:

> "2. Consent to the exercise of jurisdiction under article 8 shall not be held to imply consent to the taking of measures of constraint under part IV of the present articles, for which separate consent shall be necessary."

35. The present article 22 should be replaced by the following text:

> "The property of a State against which measures of constraint may be taken under article 21 shall be the property that:
>
> "(*a*) is specifically in use or intended for use by the State for commercial, non-governmental purposes and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed; or
>
> "(*b*) has been allocated or earmarked by the State for the satisfaction of the claim which is the object of that proceeding."

36. With regard to article 23, he could not agree to the deletion of the term "non-governmental" in square brackets in paragraph 1. In that context, the term had a somewhat different meaning than in article 18. Moreover, paragraph 2 should be deleted, as suggested by some Governments, since its provisions defeated the very purpose of paragraph 1.

37. Referring to part V of the draft (Miscellaneous provisions), and to article 24 (Service of process) in particular, he said that he could accept the revised text proposed by the Special Rapporteur for paragraphs 1 and 2 (A/CN.4/415, para. 248), subject, however, to the deletion of the words "if necessary" in paragraph 3. The translation of documents relating to service of process should be mandatory, for it was essential to the proper conduct of the proceedings and gave the defendant State the necessary protection.

38. Article 25 (Default judgment) appeared to focus exclusively on proper service of process. That point was, of course, important, but it should also be specified that no default judgment could be entered by a court unless the complainant had established the jurisdiction of the court and his claim or right to relief by evidence satisfactory to the court. He therefore suggested that paragraph 1 be revised accordingly and that the words "if necessary" in paragraph 2 be deleted for the reasons which he had indicated in connection with article 24, paragraph 3.

39. Lastly, he believed that it might not be appropriate to include in the draft articles a set of rules on the settlement of disputes concerning interpretation and application. If the draft was to take the form of an international convention, experience showed that it would be wiser to deal with the settlement of disputes in a separate optional protocol. In any case, it would be for a future diplomatic conference to decide that matter.

40. Although the Commission had completed its first reading of the draft articles, there were still some differences of opinion among its members and among Governments. The second reading of the draft would therefore be no easy task, but there was no doubt that the Commission was well prepared to overcome the existing obstacles and to complete the second reading during the term of office of its present members.

41. Mr. REUTER, noting that he would confine his remarks to the first eleven articles and congratulating the Special Rapporteur on his loyalty to his predecessor, his spirit of compromise and his talent for synthesis, said that, in his second report (A/CN.4/422 and Add.1) and in his oral introduction, the Special Rapporteur had concentrated mainly on the controversial provisions of the draft. That approach would enable members of the Commission to take a clear stand on those provisions and then to agree on compromise solutions—even though compromises on matters of principle were always risky.

42. The position was that there were two opposing views: there were those who considered that a principle existed and that it was an established rule of international law having absolute value; and there were those, including himself, who believed that several principles of international law were involved in the present case—State immunity, of course, but also the incapacity of the State to engage in trade in the territory of another State, a principle which had, in fact, radically changed over the years. It so happened that there were no precise and logical rules of international law constituting a body of law that would be applicable at the present time. There were, however, some national directives or guidelines. Precisely what made the present topic so difficult was that national rules had to be converted into international rules. The task the Commission faced therefore required caution. However, the regional agreements concluded by States with similar structures and the wide range of bilateral agreements that had been signed clearly showed that the problem of State immunity was not hampering international trade, which was developing even between States with very different ideologies, structures and principles. Thus, if the Commission was not successful in its task, it would at least have learned that some topics were ripe for codification, while others were not.

43. It therefore had to be determined whether the topic under consideration was ripe for codification in the form of rules acceptable to the two opposing groups of interests and structures. In his preliminary report (A/CN.4/415), the Special Rapporteur had discussed with great clarity the problems of structures, in other words the freedom which internal law gave the State to decentralize, to apportion the powers and responsibility of the agencies which it entrusted with carrying on trade and to commit or not commit itself, as it saw fit. It was usually the socialist countries which availed themselves of that freedom and claimed the benefit thereof. In terms of international law, however, it was open to question whether States could be given absolute freedom to define the legal personality of entities which were one of the components of sovereign authority. In the topic of State responsibility, the Commission had answered that question in the negative by establishing a special régime for acts of regional, communal or other decentralized entities which were vested with sovereign authority; the criterion applied was not that of the definition of the term "State", but, rather, an objective criterion, namely that the State was responsible for certain entities to which sovereign authority had been delegated. The fact was that, in international law, the choice of legal personality made by private interests could not be invoked against States, even those under whose jurisdiction such private interests might operate.

44. Turning to the draft articles, he drew attention to the fundamental importance of the expression "commercial contract", as referred to in article 2, and also in article 3 and article 11. It would be necessary to apply objective criteria in order to formulate a fair and acceptable text on commercial contracts. It would then have to be decided whether the purpose of a commercial contract was a valid objective criterion. He would not mind if the Commission took account of that criterion, provided that it did so with complete objectivity. In that connection, it was not enough to state that purpose was a criterion which could by itself serve to determine the nature of a contract, because in the socialist system, for example, all purposes corresponded to a general interest: the interest of the State. While he therefore agreed with the approach of maintaining absolute immunity, he did not think that it was desirable to do so by such an indirect method. It must be borne in mind that an ordinary commercial contract that did not give rise to State immunity could later become a contract which brought that immunity into play: that would happen in the case—mentioned at a previous session—of a contract for the supply of foodstuffs during the performance of which a famine occurred, thus requiring the State that had concluded the contract to invoke all sorts of privileges, such as amending the contract or imposing new obligations on the other contracting party in order to achieve a basic objective. A suitable formula would have to be found, perhaps by supplementing the texts proposed by the Special Rapporteur. It was not enough to refer to State practice: mention would

have to be made of the existence of treaties and agreements. He therefore proposed the addition of a provision specifying that, if a commercial contract lost its commercial character as a result of exceptional circumstances, the Government authorities had the right to amend it and, consequently, to consider that State immunity applied. He believed that a compromise solution should be easy to reach on that point.

45. With regard to the problem raised by the reference to "organs of government", which, under the draft articles, were covered by the term "State", he noted that article 3, paragraph 1, had to be read in conjunction with article 7, paragraph 3, which supplemented it. In his view, however, the question of the representation of the State had not been dealt with in sufficient detail in those provisions. Some members and former members of the Commission had been addressing that question: he was thinking in particular of the publications by Mr. Tomuschat. He had also received an advance copy of an article by Jean Salmon and Sompong Sucharitkul which was to be published in the *Annuaire français de droit international, 1987* under the title "*Les missions diplomatiques entre deux chaises: immunité diplomatique ou immunité d'Etat?*". For example, could a diplomat representing a State in a court case enjoy both types of immunities, namely those to which he was entitled as a diplomat, as well as those of the State against which the case had been brought? What should the court do in such a case? In other words, did the mandate given to the representative by the entity being represented entail all of the latter's immunities? To take another example, what would happen in the event of an action brought against a decentralized State agency? Were there not cases in which such agencies represented the State? The problem should not be treated lightly. While, in some respects, it could be resolved fairly easily without raising major political issues, in other respects—particularly in the case of segregated property—it might lead to serious differences of opinion.

46. The question that arose in connection with article 6, whose wording needed to be reconsidered, was whether the phrase in square brackets, which was unacceptable to some members, should be retained or replaced by another. He personally found it hard to believe that the proposed wording could resolve the major issues at stake. He also had doubts about the appropriateness of the words "subject to the provisions of the present articles". Would it not be possible, after amending the beginning of the article, to use neutral wording along the following lines: "A State . . . from the jurisdiction of the courts of another State under the provisions of the present articles"? Any claim to the enunciation of a principle would thus be removed from the text. He would be interested to hear the views of other members of the Commission on that suggestion. As to the compromise solution proposed by the Special Rapporteur in his second report in the form of a new article 6 *bis* (A/CN.4/422 and Add.1, para. 17), he was a little worried that such an ingenious mechanism might pave the way for further limitations on, or exceptions to, diplomatic immunity. As there was a strong likelihood that the draft articles would become a draft convention, the future instrument might form the subject of reservations; and, despite the strict provisions of the 1969 Vienna Convention on the Law of Treaties, reservations were widely accepted in practice. Draft article 6 *bis* would thus be a gift to States which were opposed to immunity.

47. Out of a sense of fairness, the Special Rapporteur wanted article 28 to serve as a kind of compensation for those in favour of the bracketed phrase in article 6 in case that phrase were deleted. In that connection, Mr. Shi had just made some comments which defined the scope of article 28, and the German Democratic Republic had pointed out in its comments and observations (A/CN.4/410 and Add.1-5) that the principle of reciprocity was a fundamental one, but that no one knew how far that principle might lead. He shared that view. A draft article on reciprocity was necessary and it had to be broad and generous; but the matter needed further study. He could not, however, support Spain's proposal that the bracketed phrase be deleted from article 6 and that the following provision be added to the preamble to the future convention: "*Affirming* that the rules of general international law continue to govern questions not expressly regulated in this Convention" (*ibid.*). That proposal went to the very heart of the problem: who had a right to say that there were lacunae in the convention? It would be best to avoid wording that cast doubt on principles.

48. He supported articles 8 and 9 and, in particular, the recommendations made by the Special Rapporteur in his preliminary report (A/CN.4/415, paras. 89-92 and 98-99). However, although he agreed with the principle stated in article 9, paragraph 3, he thought that the text needed redrafting, since the words "shall not be considered as consent" were too general. The words "shall not necessarily mean consent" would be enough, for there were circumstances where absence might well be equivalent to an appearance.

49. With regard to the title of part III of the draft, he said he was not sure that there really was a difference between the terms "limitations" and "exceptions". It might be better to find another term that would not give rise to problems. He had never been convinced by the previous Special Rapporteur's explanations concerning article 11 and, more particularly, regarding a "commercial contract concluded between States or on a Government-to-Government basis". A problem of representation arose in that connection as well: did not the Government represent the State?

50. Lastly, referring to the proposed new article 11 *bis* (*ibid.*, para. 122), he again noted that the problem of representation, which involved the relationship of the State with entities separate from it in internal law, was a delicate one. He had no major objection to draft article 11 *bis*, but he would like the matter to be considered in greater depth by the Commission.

51. Mr. TOMUSCHAT said that, thanks to the Special Rapporteur's exemplary report and to the work of his predecessor, the draft articles deserved to be adopted on second reading during the Commission's present quinquennium. He therefore hoped that the Commission would succeed in overcoming the remaining difficulties. Instead of going into issues of principle to which the draft articles gave rise, he intended to concentrate on drafting points, taking into account the comments made by Governments.

52. Article 2 (Use of terms), in both its old and proposed new forms, raised a considerable number of problems. It was to be welcomed that, in defining the term "State" in the proposed new text (A/CN.4/415, para. 29), the Special Rapporteur had decided not only to refer to the central State

and its various organs, but also to take account of other entities: that was a natural consequence of the functional interpretation of the privilege of immunity embodied in articles 6 *et seq.* It had to be pointed out, however, that, if the decisive criterion in determining immunity was that of commercial activity, then it did not matter whether it was the head of State or a civil servant employed by a local government who had acted; but, if immunity was to be regarded as a personal privilege attaching to the nature of the corporate body, then the provisions on the use of terms might have to be re-examined.

53. He had serious doubts about the key concept of "sovereign authority", as opposed to the expression "government" or "governmental" authority used in part 1 of the draft articles on State responsibility.[9] In that connection, he noted that the commentary to article 3 (Interpretative provisions) of the present draft explained that subdivisions of the State at the administrative level of local or municipal authorities did not normally perform acts in the exercise of the sovereign authority of the State.[10] He also noted that a commentator on the United Kingdom *State Immunity Act 1978*, in which the expression "sovereign authority" was also used, had equated "sovereign authority" with "supreme authority" and concluded on that basis that a separate entity would be entitled to immunity only in rare instances. He considered it wrong to try to narrow down the scope of the draft articles, particularly since the French text referred to *prérogatives de la puissance publique*, an expression also to be found in the draft articles on State responsibility. There, the Commission had taken the view that the correct translation of that expression into English was "government" or "governmental" authority. If it now chose a different expression, erroneous conclusions would be drawn. The previous Special Rapporteur might have wished to follow the terms of the 1972 European Convention on State Immunity, which equated "sovereign authority" with *puissance publique* and *acta jure imperii*. The Commission must, however, remain faithful to the logic of its own drafts. He would therefore prefer the word "sovereign" to be replaced by "governmental", at least in paragraph 1 (*b*) (iii) of the new article 2. The Commission could also rewrite the commentary, indicating that it did not matter at what level sovereign or governmental authority was exercised. It should be made crystal clear, for instance, that a decision of a lower court was as much an act of State authority—not to be challenged in proceedings abroad—as a judgment of higher courts of the foreign country concerned.

54. He was also unhappy with the wording of paragraph 1 (*b*) (ii) of the new article 2. To say that political subdivisions of the State were those which were entitled to perform acts in the exercise of the sovereign or governmental authority of the State might be correct in the case of States with provinces or regions, but that wording did not do justice to the situation of federal States where both the central State and the component units were States, the component units sometimes taking pride in asserting that, historically, they had come first and that the power of the central State derived from their prior existence as political entities. In any event, the component states never acted in the exercise of the sovereign authority of the State, which could be vested only in the central State. He would therefore prefer the following wording: "political subdivisions of the State vested with sovereign or governmental power". With regard to the components of a federal State, it was indeed appropriate to speak of "sovereign" authority, and his earlier criticisms of the use of that term did not apply in that context.

55. He also had a slight doubt about the expression "agencies or instrumentalities", which had been borrowed from the United States *Foreign Sovereign Immunities Act of 1976*. Unfortunately, that Act extended the privilege of immunity to private corporations owned primarily or exclusively by the State. He did not think that business corporations, whoever their owner, deserved any kind of privileged treatment. That, however, could also be clarified in the commentary.

56. He would have liked the words "commercial contract" to be replaced by "commercial activity", for the fact that a State had concluded a business contract with a private individual or corporation implied that it had not made use of governmental powers; but it might be too late for such a change, because article 11, which set forth the only rule to which paragraph 1 (*c*) of the new article 2 applied, referred to "commercial contracts". However, even if the change were not made, the word "commercial" should be deleted in paragraph 1 (*c*) (i), since it was only logical that the term being defined and the definition should not be identical.

57. Paragraph 1 (*c*) (iii) was also illogical: in view of the text of paragraph 1 (*c*) (i), "any other" contract or transaction could hardly be of a commercial nature. There, too, the adjective "commercial" should be deleted.

58. Paragraph 3 of the new article 2 was an improvement on the text adopted on first reading (para. 2 of former article 3). He nevertheless took it that, according to the present wording, a contract between the parties had to state explicitly that a public governmental purpose was to be served. That might well be a viable compromise. It seemed to him, however, that the best results could be achieved by relying on the nature of the transaction. To have recourse to the purpose of the transaction would always, of necessity, lead to doubt, inasmuch as a governmental authority always had to bear the public interest in mind. A State was not a private person acting with a view to making a profit; he agreed with Mr. Reuter on that point.

59. With regard to paragraph 2, he continued to be of the view that it was not necessary to specify that the draft articles were without prejudice to other international instruments or to the internal law of States. It would, however, be useful to state that the use of terms employed in other international instruments or in internal laws did not necessarily mean that the Commission accepted them with the meaning attached to them in their original context. For example, in the particular case of the words "agencies or instrumentalities", it would be well to indicate that the Commission did not follow the precise interpretation given them in the United States *Foreign Sovereign Immunities Act of 1976*, which qualified private corporations as "instrumentalities". All the terms used by the Commission would receive their own connotation by the mere fact of being included in the draft articles, and to underline that autonomy would be more useful than to make a disclaimer to the

[9] *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

[10] *Yearbook . . . 1986*, vol. II (Part Two), p. 14, para. (3) of the commentary.

effect that the present articles were not intended to encroach on the internal law of States or on international instruments in force.

*The meeting rose at 1.05 p.m.*

---

## 2116th MEETING

*Friday, 9 June 1989, at 10 a.m.*

*Chairman*: Mr. Bernhard GRAEFRATH

*Present*: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

---

### Jurisdictional immunities of States and their property (*continued*) (A/CN.4/410 and Add.1-5,[1] A/CN.4/415,[2] A/CN.4/422 and Add.1,[3] A/CN.4/L.431, sect. F)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CONSIDERATION OF THE DRAFT ARTICLES[4] ON SECOND READING (*continued*)

1. Mr. TOMUSCHAT, continuing the statement he had begun at the previous meeting, said that he questioned the wisdom of confining the reservation in article 4, paragraph 2, to heads of State, since it was highly probable that they were not the only persons to enjoy the privileges and immunities to which the article referred. It might therefore be appropriate to add the phrase "or other government officials" after "heads of State", in order to take account of the applicable rules of international law and thus leave open the possibility that there were other persons to whom certain privileges and immunities extended.

2. The bracketed words in article 6, "and the relevant rules of general international law", were highly problematic, but they might prove necessary if the limitations and exceptions were framed too restrictively. Rules of customary law could be set aside only if a fair balance was established. The objective in any case should be to submit a text based on consensus to the General Assembly.

3. In his view, the proposed new article 6 *bis* (A/CN.4/422 and Add.1, para. 17) was unworkable, since it could not be considered as a reservation. The effect of a reservation was to restrict the obligations a State would otherwise undertake under a multilateral treaty. Under article 6 *bis*, however, a State would acquire rights *vis-à-vis* other States by virtue of a unilateral declaration. Even if such a subterfuge were obviated by an objection, it would not constitute a sound precedent in international law.

4. The problem raised by article 7 lay in the words "so long as the proceeding", in paragraph 2, which were ambiguous. If the intention was to rely on a specific point in time, the text should specify the moment at which the proceeding was initiated.

5. The proposed changes in article 11 (A/CN.4/415, para. 121) were acceptable. The original wording in paragraph 1, "the State is considered to have consented to the exercise of that jurisdiction", was clumsy and departed significantly from the standard phrase used in other articles, namely "A State cannot invoke". It could be interpreted as meaning that States could do away with the limitation or exception by declaring that they had no intention of forgoing their privilege of immunity when entering into a commercial contract. The interests of legal certainty would thus be served by bringing article 11 into line with the other relevant provisions.

6. With regard to the use of the word "State", he agreed with the comments made by the Government of Australia. The draft would be more readily comprehensible if reference were made consistently to the "forum State" on the one hand and the "foreign State" on the other. The usefulness of such a change was evidenced, in particular, by article 3, paragraph 2. In the text adopted, reference was made to "that State", but it remained uncertain which of the two States was meant, a point clarified only by the commentary.

7. Mr. CALERO RODRIGUES said that he had made his views on the draft articles known on many occasions. The only points on which he felt he should express himself now concerned possible amendments on second reading. The Special Rapporteur's two reports should be seen as a commendable attempt to reconcile opposing points of view.

8. The Special Rapporteur's proposal to combine articles 2 and 3 was acceptable, and he himself would be happy to dispense with the title of article 3, "Interpretative provisions". The only important change to result from merging the two articles related to contracts. The adopted text of article 3, paragraph 2, established that the purpose of the contract should be taken into account in order to determine whether it was, or was not, commercial in character when that purpose was relevant in the practice of the State concerned. The Special Rapporteur had pointed out that elimination of the purpose criterion could lead to difficulties, and the solution he proposed in paragraph 3 of the new article 2 (A/CN.4/415, para. 29) might be acceptable. States would be given the right to determine, in advance and by agreement, whether a contract was to be regarded as commercial. While that proposal reduced somewhat the scope of the reference to purpose, it served the interests of clarity.

---

[1] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[2] *Ibid.*

[3] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[4] For the texts, see 2114th meeting, para. 31.