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Summary record of the 2116th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
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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.

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[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.

9. He supported the change proposed by Australia for article 4, namely to add the words "under international law" after the word "State" in the introductory clause of paragraph 1.

10. Article 6 had given rise to many difficulties and was of crucial importance. He had already indicated his preference for deleting the words in square brackets, since they would effectively undermine the scope of the draft articles. He had no objections to incorporating in the future convention a preambular paragraph along the lines suggested by Spain. But he had doubts concerning the Special Rapporteur's suggestion in his second report (A/CN.4/422 and Add.1, para. 17) that it would be appropriate to include a new article 6 *bis*. In his view, the usefulness of the new article was not certain: the wording was not at all clear and the resulting régime was likely to prove unduly complex.

11. The drafting changes suggested by Australia for article 7 met with his support. However, the new wording proposed by the Special Rapporteur for article 8 (*c*) (A/CN.4/415, para. 93) did not represent any great improvement on the existing text. It might be preferable simply to use the phrase "by written declaration submitted to the court".

12. The comments made by the United Kingdom and Mexico on article 9 were well-founded and could be duly reflected in a revised text. On the other hand, the proposal by the Special Rapporteur to incorporate a new paragraph 4 in article 10, as suggested by Thailand, was of doubtful validity, since the new text (*ibid.*, para. 107) was less than clear. Immunity would, according to the new text, be accorded if the counter-claim sought excessive or different relief, a criterion which might prove impracticable. The proposal by Australia to merge paragraphs 1 and 2, however, had much to recommend it.

13. As to article 11, the Special Rapporteur was right in saying that the reference in paragraph 1 to "the applicable rules of private international law" should be retained and that the words "is considered to have consented" introduced an unnecessary complication.

14. The proposed new article 11 *bis*, on segregated State property (*ibid.*, para. 122), had already been extensively discussed and was basically acceptable. It should none the less be reformulated. The important element to be borne in mind in the context of article 11 *bis* was the need to ensure that the contractor did not gain the impression that the enterprise with which he was dealing was automatically underwritten by the State.

15. Mr. MAHIOU said that, while he found the comments and observations of Governments on the draft articles highly interesting, the presentation of the topic was not ideally clear, and it was not always easy to discern the views of the Special Rapporteur in his reports. It was plain that there were two divergent approaches to jurisdictional immunity, namely absolute immunity and restricted immunity, but it should be possible to find common ground with regard to the underlying purpose of the draft. In fact, he doubted whether there were only two conceptions or positions regarding immunities. The two extreme conceptions of so-called "absolute" or "restricted" immunity had indeed been evident in the debates, but they appeared to be the views of the minority, both in the Commission and in the Sixth Committee of the General Assembly. In the presentation of the problem, therefore, emphasis should not be placed on the two extreme positions: it would be better to bring out the flexible and pragmatic approach which appeared to be predominant and which offered a basis for the elaboration of a generally acceptable draft convention. Any extreme interpretation would make the task of codification difficult or impossible. The restrictive interpretation, it would be recalled, was embodied in the 1972 European Convention on State Immunity, but only a minority of European States had so far acceded to that Convention, whereas the Commission's aim in drafting the present articles was to arrive at a text acceptable to the international community at large. Thus, although the European Convention merited close consideration, it should not be followed slavishly in every respect.

16. With regard to judicial precedents, mention had already been made of cases in which State immunity was restricted, but it should be borne in mind that, in most of those cases, the States concerned had contested the rulings of the courts. It was therefore inappropriate merely to refer to those court rulings in discussing State practice. In general, it was difficult to concur with the Special Rapporteur in detecting in State practice an implicit acquiescence to the restrictive rule of immunity. African and Asian State practice, in particular, would not bear out that assumption.

17. The Special Rapporteur had cited the case-law of a number of countries to show the developing trends in the treatment of immunity by domestic courts. It was necessary, however, to examine the points of controversy in the case-law of European countries. In his second report (A/CN.4/422 and Add.1, para. 40), the Special Rapporteur mentioned a decision by the *Tribunal de grande instance* of Paris in 1970, according to which a foreign State, by becoming party to an arbitration clause, had agreed to waive its immunity from arbitral jurisdiction, up to and including the procedure for granting an *exequatur*. The same position had been taken by the Court of Appeal of Paris in 1981. Yet those decisions were disputed in French doctrine. One jurist, Pierre Bourel, a specialist on international arbitration, had argued in an article in the *Revue de l'arbitrage* (1982) that both decisions confused the arbitration agreement with an acceptance of the procedure for an *exequatur*. The same writer had warned against reading too much into an arbitration clause, since the existence of such a clause was not sufficient to show that the disputed act was a commercial act performed *jure gestionis*. Even among States which favoured the restrictive approach, the same clause was sometimes interpreted differently. Regarding contracts of employment—dealt with in article 12 of the draft—article 5 of the 1972 European Convention expressly barred immunity from jurisdiction for such contracts, whereas article 32 made an exception to that rule for diplomatic personnel. In a case brought by a staff member of a foreign embassy before the United Kingdom Employment Appeal Tribunal, *Bengupta* v. *Republic of India* (1982), the court had held that the respondent had immunity; yet in a similar case—in which the same country was a party—before the Swiss Federal Tribunal, *S.* c. *Etat indien* (1984), the court had given a contrary interpretation of the European Convention. Because of such conflicting precedents, caution was needed in interpreting the trends in different countries and regions.

18. In many respects, the Special Rapporteur had been able to make improvements on the adopted texts of art-

icles 1 to 11. Article 7, on modalities for giving effect to State immunity, had been substantially improved in the proposed new version (A/CN.4/415, para. 79). Similarly, the new text of subparagraph (*c*) of article 8 (*ibid.*, para. 93) was a useful clarification. However, the word "matter" in the introductory clause should be replaced by "dispute". He also favoured the proposed new text of article 9 (*ibid.*, para. 100), and had no objection in principle to the new paragraph 4 of article 10 (*ibid.*, para. 107), although he would like to know the reasons for including it. Quite plainly, the controversy surrounding the respective merits of "limitations" and "exceptions" in the title of part III of the draft should now be brought to an end. Again, article 11, paragraph 1, was better in the simplified version (*ibid.*, para. 121).

19. Nevertheless, several points in the draft articles required clarification. The first was the relationship between the draft and existing diplomatic conventions, and the implications of the restrictive approach. According to article 4, existing privileges and immunities were not affected. But the Commission had not properly considered the point. According to the restrictive view, all acts of a State *jure gestionis*, such as commercial contracts, did not enjoy immunity; but the same acts, if carried out by diplomatic personnel, had diplomatic immunity under article 31 of the 1961 Vienna Convention on Diplomatic Relations. The Commission must ask itself whether it intended to arrive at the paradoxical result that a State could be subject to proceedings for certain acts which would be beyond the reach of the domestic courts when carried out by its diplomatic officials. He would urge the Special Rapporteur to consider that question and seek to remove the ambiguities.

20. Secondly, there were some difficulties of terminology, especially where the French and English texts of the draft articles diverged. In articles 3 and 7, the expressions "sovereign authority" and *puissance publique* were treated as equivalents, whereas in article 7 of part 1 of the draft articles on State responsibility,[5] the English expression used for *puissance publique* was "governmental authority". The discrepancy was also a substantive one, because *puissance publique* could mean a State entity not exercising sovereign authority. The point should be clarified and the texts harmonized.

21. His third criticism related to the criteria used to define a commercial contract. In articles 2 and 3, reference was made both to the purpose and to the nature of the contract, in an effort to reconcile different approaches to the question. There were situations in which the nature of the contract was not sufficient to show its character. That was true in the field of defence, or of action to alleviate public distress such as drought or famine, and such situations must be taken into account in the definitions in article 2. It must also be borne in mind that States could not always foresee what exceptional situations might arise. The formulation should be considered again in that light.

22. The phrase in square brackets in article 6, "and the relevant rules of general international law", was ambiguous: it might admit the application of future rules and could be interpreted in different ways to accommodate both the restrictive and the traditional approach to State immunity. The new article 6 *bis* proposed by the Special Rapporteur (A/CN.4/422 and Add.1, para. 17) did not resolve the problem. According to the new article, a State could make a declaration of exceptions in addition to the cases falling under articles 11 to 19; however, a long list of exceptions would defeat the object of the draft. Obviously, some redrafting was necessary to avoid that consequence.

23. It was difficult to understand the precise scope of the proposed new article 11 *bis* (A/CN.4/415, para. 122), especially since the explanations given were so brief. The idea of "segregated State property" was a new one which required explanation. He did not understand the meaning of a contract "on behalf of a State", and wondered whether State entities were to be treated as the equivalent of States in that context. If, under contract, a State enterprise made use of property, such as aircraft, belonging to the State, the enterprise alone would be liable under the contract, and it was not clear what role the State itself would play. He agreed, in that connection, with the German Democratic Republic's comments on article 3, paragraph 1, and also largely supported its suggestion for a new paragraph 2 (A/CN.4/410 and Add.1-5).

24. Mr. RAZAFINDRALAMBO said he agreed with Mr. Mahiou that the tendency to restrict immunity was far from universal. Since the jurisdictional immunity of States and their property was a fully recognized concept, based on the sovereign equality of States, the Commission must codify the topic to take account of exceptions in State practice and of those necessitated by the conduct of international relations. The Special Rapporteur favoured a system of functional immunity and showed much dexterity in reconciling the two different approaches. A proper balance was needed to reflect the interdependence between market economy countries and socialist countries and between States which exported capital and technology and States which exported raw materials.

25. The idea of combining articles 2 and 3 in a single article, entitled "Use of terms", made for greater simplicity, and he could support the amended paragraph 3 of the new combined article 2 (A/CN.4/415, para. 29), which eliminated the difficulties of interpretation in the previous text (para. 2 of former article 3). He wondered, however, whether the new paragraph 3 might not restrict the criterion of the purpose of the contract. Quite possibly, the contracting State might not divulge to the other party that the contract was to be concluded for a public purpose, something that might well happen in the case of developing countries seeking to obtain capital goods. In his view, the previous text was better from the standpoint of third world countries, which would have been able to rely on their own practice in determining the nature of their contracts.

26. As to article 6, he could not accept the idea of allowing an arbitrary restriction of immunity through the "relevant rules of general international law". If the phrase in square brackets were retained, the reservation could defeat the Commission's purpose in codifying the topic. In his second report (A/CN.4/422 and Add.1, para. 17), the Special Rapporteur proposed a new article 6 *bis*, under which, by a mere declaration, any State party could proffer a long list of exceptions to immunity. The time-limit of 30 days for objections would be unworkable. As Mr. Reuter (2115th meeting) had argued, that proposal would defeat the object

[5] See 2115th meeting, footnote 9.

of the draft, and he reserved his own position until the matter could be studied further, especially in connection with article 28.

27. In essence he did not object to article 7, but it might in practice duplicate the provisions of article 3, paragraph 1, or paragraph 1 (*b*) of the new article 2. In fact, the definition in article 7 reflected the "interpretative provisions" of article 3 and it should be reviewed by the Drafting Committee.

28. The new text proposed for subparagraph (*c*) of article 8 (A/CN.4/415, para. 93), on express consent to the exercise of jurisdiction, emphasized the nature of the express consent and specified that the declaration must be written—a highly relevant change. However, there seemed little sense in saying that the declaration must be submitted to the court "after a dispute between the parties has arisen": if a case reached the court, it necessarily concerned a current, not a future, dispute. Generally speaking, he agreed with the Special Rapporteur that the option of invoking a fundamental change of circumstances would have a destabilizing effect on contractual relationships and that an agreement on the applicable law should not be treated as consent to the exercise of jurisdiction by a given State. Those points should be dealt with in the commentary.

29. The new text proposed by the Special Rapporteur for article 9, paragraph 1 (*ibid.*, para. 100), was acceptable, but he could not agree to the new paragraph 3, since appearance as a witness did not constitute participation in the proceeding.

30. Article 10 offered considerable room for improvement and the proposal made by Australia could be studied by the Drafting Committee. Paragraph 3 might well take the place of paragraph 1, for it represented a typical case of a State seeking to invoke immunity. The idea of an additional paragraph along the lines suggested by Thailand was to be welcomed. If the objects of the claims were different, the counter-claim would in any case encounter a jurisdictional objection *ratione materiae*. Nevertheless, the new paragraph 4 proposed by the Special Rapporteur (*ibid.*, para. 107) should be more clearly worded to show that the State invoking immunity could only be the foreign, and not the forum, State.

31. The amended text proposed by the Special Rapporteur for article 11, paragraph 1 (*ibid.*, para. 121), on the basis of the comments made by Governments, met with his support. In particular, the use of the formula "by virtue of the applicable rules of private international law" was satisfactory in substance, but he would draw attention to the useful drafting suggestion made by Australia (A/CN.4/410 and Add.1-5).

32. By and large, he approved of the new article 11 *bis* proposed by the Special Rapporteur (A/CN.4/415, para. 122), particularly the inclusion of the proviso: "unless a State enterprise, being a party to the contract on behalf of the State, with a right of possessing and disposing of a segregated State property, is subject to the same rules of liability relating to a commercial contract as a natural or juridical person". However, the adjective "private" should be inserted so as to make it clear that the State enterprise should be placed on the same footing as a private individual or corporation. The wording as it stood, namely "natural or juridical person", was ambiguous, since State enterprises were themselves juridical persons.

33. In paragraph 1 of article 12, on contracts of employment, he could accept the suggestion to eliminate the non-immunity rule with regard to social security. In countries with a social security system, registration of a worker constituted a supplementary form of protection that was mandatory for the employer. Hence it would not be appropriate to allow a State which was an employer to invoke its immunity on the grounds that it had voluntarily omitted to register an employee under the social security system.

34. The comments made by the United Kingdom Government on the lack of clarity in paragraph 2 (*b*) of article 12 were interesting. He did not object to the provision in substance, but doubted whether it was really necessary, especially in view of article 26, on immunity from measures of coercion. On the other hand, paragraph 2 (*a*), which made an exception where "the employee has been recruited to perform services associated with the exercise of governmental authority", was a necessary provision. The services in question were connected with the exercise of governmental authority. In countries such as Madagascar, the contracts of employment of public officials fell outside the jurisdiction of the ordinary labour courts; disputes relating to those contracts fell within the competence of the administrative courts.

35. Mr. AL-QAYSI said that the Special Rapporteur's excellent reports would be of great assistance in the second reading of the draft articles. They demonstrated the Special Rapporteur's great ability to present a wealth of controversial material in a framework of compromise.

36. The basic differences of principle at the very foundation of the present topic were well known. They had often come to the fore in the Commission's past discussions and reflected deep-rooted political, social and economic differences. The Commission had not yet succeeded in bridging that gap, and it was unlikely to achieve that goal by going over the same ground now. Consequently, it should focus on a middle-ground approach and aim at solutions which struck a reasonable balance between the need to preserve established principles, on the one hand, and the policy considerations of certainty in the rules of law and uniformity of solutions, on the other, while meeting the justified expectations of the parties concerned and ultimately the requirements of fairness.

37. The two schools of thought on the issue of immunity—those of absolute immunity and of restricted immunity—had advanced abundant arguments in support of their respective positions. At the same time, each school had also adduced strong arguments against the other. At the end of the day, however, a choice had to be made. For the Commission, the choice lay in seeking a consensus which could serve the collective interests of the international community, consisting as it did of sovereign States whose relations were becoming more and more interdependent. He did not propose to dwell on the theoretical aspects of the topic, since that would not be in consonance with the nature of a second reading of draft articles. Moreover, the opinion of an individual member of the Commission on the prospects of success of the draft was not very important. The essential thing was to try to forge concrete draft articles by consensus. It would then be for States to decide the fate of the draft.

38. He agreed with the Special Rapporteur's proposals to confine article 1 to the determination of scope alone and to merge articles 2 and 3 in a single new article 2, on the use of terms. It was precisely the purpose of an article on the use of terms to clarify the meaning of the most fundamental terms recurring in a legal instrument. The article would thus have an interpretative effect, so that another one like former article 3, on interpretative provisions, would be unnecessary. Indeed, such an article could prove confusing at times. The text of the new combined article (A/CN.4/415, para. 29), however, posed some drafting problems. The new paragraph 3 set out the criteria for determining whether a contract had a commercial character. In that connection, he drew attention to the very pertinent observations made by the Government of Qatar on paragraph 2 of article 3 (A/CN.4/410 and Add.1-5). The new paragraph was a better formulation and, while he agreed with Mr. Calero Rodrigues that it reduced the scope of the provision, it none the less had the merit of clarity.

39. The question also arose as to the meaning of the word "parties" in the new paragraph 3. It was clear from the language of the provision that the criteria for determining the commercial character of a contract applied only to contracts "for the sale or purchase of goods or the supply of services", i.e. those referred to in paragraph 1 (*c*) (i). Did the same criteria cover subparagraphs (*c*) (ii) and (*c*) (iii) as well? It was plain from the words he had quoted that the answer was in the negative. Again, if a contract of loan between two States was concluded for a public purpose, the contract would not seem to have the characteristics of a commercial contract. He would be grateful to the Special Rapporteur for a clarification on that point.

40. The recommendation of the Special Rapporteur was that the privileges and immunities under article 4, paragraph 2, should be confined to heads of State. In fact they should be extended also to heads of Government and to ministers for foreign affairs, who represented their States in international relations. In that connection, the Government of Spain, in its very pertinent comments (*ibid.*), had referred to article 21, paragraph 2, of the 1969 Convention on Special Missions, which read: "The Head of the Government, the Minister for Foreign Affairs and other persons of high rank . . . shall enjoy . . . the facilities, privileges and immunities accorded by international law." Such privileges and immunities had to be extended pursuant to the rules of international law, and not merely as a matter of courtesy as the Special Rapporteur suggested.

41. It had been suggested that the square brackets around the words "and the relevant rules of general international law", in article 6, should be removed in the interests of making allowance for the development of rules of international law relating to jurisdictional immunity. For his part, he did not believe that the argument was a decisive one. The Commission was primarily engaged in the task of codifying the law as it stood. In the event of further significant developments in the matter, the draft articles could be reviewed.

42. The Special Rapporteur proposed a new article 6 *bis* (A/CN.4/422 and Add.1, para. 17) apparently for the purpose of making a concession to those who upheld the restrictive theory of State immunity. The provisions of the new article would make it possible to add further exceptions to those set forth in articles 11 to 19. However, the provisions of articles 11 to 19 were already too wide and, if anything, should be limited still more. Viewed in that light, article 6 *bis* did not represent the compromise the Special Rapporteur conceived it to be. As indicated by Mr. Reuter (2115th meeting), its provisions might well prove unruly, a point which had also been made by Mr. Mahiou. Moreover, Mr. Tomuschat and Mr. Calero Rodrigues had rightly pointed out that the article was unworkable and, if retained, would prove a source of complications. He was prepared to accept article 6 with the elimination of the square brackets, on the understanding that it would be read in conjunction with article 28.

43. The Special Rapporteur, in response to a proposal by Australia, had recommended that article 7, paragraph 1, should start with the words "A forum State", instead of "A State" (A/CN.4/415, para. 79). That change would clarify the text, but unfortunately the words "forum State" thus appeared twice in the same short paragraph. He himself would suggest that, in the second case, the words "in a forum State" could be replaced by "in a court". In the proposed new text, the opening words of paragraph 2, "A proceeding in a forum State", were correct: they were a clear reference to a court. The new wording of paragraph 3 referred to the provisions of paragraph 1 of former article 3, rather than to those of the new article 2 that was the outcome of merging former articles 2 and 3. Paragraph 3 thus referred to "subparagraphs (*a*) to (*d*) of article 3, paragraph 1", an overloaded cross-reference that could be made simpler and more accurate by saying: ". . . when the proceeding is instituted against any State as defined in article 2, paragraph 1 (*b*). . . ".

44. The new text proposed by the Special Rapporteur for article 9, paragraph 1 (*ibid.*, para. 100), which Mr. Calero Rodrigues had aptly described as covering the case of "intervention by mistake", was largely acceptable. The form of language used, however, implied that the reservation contained in that provision would apply not only to the case mentioned in paragraph 1 (*b*), namely where the State concerned had intervened in the proceeding, but also to the situation covered by paragraph 1 (*a*), namely where the State had "itself instituted that proceeding". It was unthinkable for a State which had instituted proceedings to be allowed to say that it had appeared before the court solely in order to obtain a knowledge of the facts with a view to determining whether it could claim immunity or not. The effect of the reservation should therefore be limited to the situation covered by paragraph 1 (*b*), as was clearly indicated in the United Kingdom's comments on the article (A/CN.4/410 and Add.1-5). The proposed new paragraph 3 was intended to accommodate a proposal by the Government of Mexico, but the last part of the paragraph could be reworded along the following lines: ". . . does not affect the immunity of that State from the jurisdiction of that court".

45. He could agree to the Special Rapporteur's recommendations regarding article 11, but the amended text proposed for paragraph 1 appeared to equate choice of jurisdiction with choice of law. Actually, in private international law, the rules on those matters were not identical in all cases, a point that would have to be clarified in the commentary.

46. As rightly pointed out by Mr. Mahiou, the expression "segregated State property" in the proposed new article 11 *bis* (A/CN.4/415, para. 122) required clarification. The article had been introduced apparently in order to deal with an institution which existed under the Soviet legal system and in the legal systems of a number of other socialist countries. As the Special Rapporteur had indicated in his preliminary report (*ibid.*, para. 14), the Constitution of the USSR specified that State property was the "common property of the Soviet people" and declared it to be "the principal form of socialist property". The concept of segregated property had emerged in connection with State enterprises and their submission to the jurisdiction of a court of a forum State in respect of that property. In fact, a similar situation could arise with regard to certain non-socialist developing countries, and the provisions of article 11 *bis* would apply to the State enterprises of those countries. Clearly, the expression "on behalf of a State", at the beginning of the article, required further scrutiny and the Drafting Committee could improve the overall wording.

47. Mr. BARSEGOV thanked the Special Rapporteur for a painstaking report on a difficult topic and for his clear presentation, which would facilitate the Commission's work.

48. The question of the jurisdictional immunities of States went to the core of international law, since it involved the principles of sovereignty and sovereign equality of States. With the increasing interdependence of States and the expansion of their economic, scientific and cultural relations, the legal regulation of international trade and international economic relations was assuming growing importance. The interest of Soviet jurists in the issue had grown considerably with the restructuring of the economic mechanism and particularly of foreign economic activity. Since the rule of State immunity was directly based on a *jus cogens* rule of international law, the relevant provision in the draft articles could obviously not be based on limited or functional immunity. A solution to the problem could be found only on the basis of the reaffirmation of the jurisdictional immunity of States and their property, with clearly defined exceptions laid down in the interest of strengthening international economic relations. It was precisely in that area that a compromise must be found. The task could be tackled only if account were taken of the legislation and practice of States from the various economic and social systems, including those of the capitalist, socialist and developing worlds.

49. In that connection, he would draw attention to the reforms under way in the USSR, which underlined the need for a definite solution to the problem and also opened up new perspectives in the search for a compromise on the basis of clearly defined exceptions. Legislative instruments had been enacted with a view to bringing about an in-depth renewal of relations with respect to socialist property, the establishment of a fully-fledged socialist market, and the formation of a system of economic relations that might be termed the "legal economy". The role of the main actors in the economy in the Soviet Union would be assumed by enterprises, concerns, joint ventures and co-operatives. The economic management functions currently carried out by ministries would be transferred to those bodies. As for the reaffirmation and strengthening of the jurisdictional immunities of States, efforts should, in his view, be directed at finding solutions of a pragmatic nature with a view to achieving a clear but flexible legal régime governing such immunities, with specific rules to govern all exceptions.

50. Turning to the draft articles, he said that article 1 was on the whole acceptable to him, since, in addition to defining the scope of the articles, it implicitly recognized that State immunity existed independently of the convention that was to be drawn up. That was a long-established and generally recognized principle of international law based on the sovereign equality of States which should, in his view, be reflected in unambiguous terms at the outset of the draft convention.

51. Articles 2 and 3 had the same objective, namely to define and clarify the terms used. In his view, the Special Rapporteur's proposals concerning article 2 could be adopted, bearing in mind the comments made by Bulgaria, the Byelorussian Soviet Socialist Republic, the German Democratic Republic and Mexico. It also seemed reasonable to adopt the Australian proposal to replace the word "State" by "forum State" or "foreign State", as appropriate. In paragraph 1 of article 3, the division of State organs into categories did not embrace all the existing forms of State. Also, the terms used in the provision—"agencies or instrumentalities of the State", "its various organs of government" and "political subdivisions of the State"—were unclear and did not facilitate an understanding of the term "State". In defining the content of that concept, it must be remembered that States exercised their international legal capacity through the activities of the bodies or persons representing them, whose powers were defined by national legislation. In order to carry out their functions, those organs and persons were vested with the sovereign authority of the State and were entitled to invoke jurisdictional immunity. On that basis, the Commission might wish to consider the definition of the term "State" proposed by the Byelorussian Soviet Socialist Republic, which read:

> "The 'State' means the State and its various organs and representatives which are entitled to perform acts in the exercise of the sovereign authority of the State." (A/CN.4/410 and Add.1-5.)

52. Furthermore, since, as pointed out by the Federal Republic of Germany and Australia in their comments on the articles, there were no specific provisions for federal States, clear provisions should be included in the definition of the term "State" with the effect of granting constituent units of federal States the same immunities as those of a central Government, without any additional requirement to establish sovereign authority. In that connection, the Soviet Union was interested in creating legal safeguards for the participation of the Union Republics and their State organs and institutions in international economic relations, one of the aims of the political reforms under way in his country being to vest the sovereignty of the Union Republics not only with a political, but also with an economic content. In that context, Soviet jurists considered that self-management and self-financing should apply not only to the Union Republics, but also to autonomous and administrative territorial entities.

53. He agreed with the comment made by the German Democratic Republic that article 3, paragraph 1, did not make it clear that State-owned self-supporting legal entities, which were established exclusively for the purpose of performing commercial transactions and which acted on

their own behalf, did not represent the State and were therefore not entitled to immunity in respect of themselves and their property, and also with its proposal for a new paragraph 2 (*ibid.*).

54. Under the terms of paragraph 2 of article 3, in determining whether a contract for the sale or purchase of goods or the supply of services was commercial, reference should be made primarily to the nature of the contract. The nature of the contract was thus being treated as the basic criterion and its purpose as an additional one. He believed that the purpose criterion was justified and should have its proper place in the draft, but was prepared, in the interests of arriving at agreed solutions, to subscribe to the views of Yugoslavia as to the possibility of using both criteria and giving them the required degree of importance. The proposal that a definition of the nature of the act at issue should be based on the law of the forum State rather than of the foreign State concerned was unwarranted, in his view. His stand was dictated in particular by the lack of any effective safeguards for the observance of the principle of equity which was broadly applied in the judicial practice of Western States. The declaratory requirement concerning the inadmissibility of the abuse of that right on the part of the forum State confirmed that his approach was justified.

55. He endorsed the Special Rapporteur's recommendation that the words "under international law" should be added in article 4, paragraph 1, to make it clear that the privileges and immunities referred to were recognized under international law.

56. The basic concept underlying article 6 was that a State enjoyed immunity from the jurisdiction of the courts of another State subject to certain exceptions. He agreed with the nine Governments referred to in the preliminary report (A/CN.4/415, para. 61) as favouring the deletion of the words "and the relevant rules of general international law". He was also persuaded by Brazil's argument that those words "might be interpreted as admitting that, in addition to the limitations and exceptions expressly contained in the articles, there are further unspecified conditions to be found in other rules of international law" (A/CN.4/410 and Add.1-5). Presumably, if there were any relevant rules of general international law, they would have to be taken into account; but it would be wrong to say that international law had not progressed sufficiently, while at the same time referring back to that law. The inclusion of the words in question would open the door to broad and arbitrary interpretations and to unilateral restrictions on the immunity of a State and its property, which would not be conducive to the further development of a clear legal régime.

57. With regard to article 7, he shared the doubts expressed concerning the expressions "interests ... of ..., [a] State" and "property in its ... control" and agreed with the Special Rapporteur that the Drafting Committee should examine those terms. The proposed new text of the article (A/CN.4/415, para. 79) was preferable, in his view.

58. He agreed with the new wording proposed by the Special Rapporteur for subparagraph (*c*) of article 8 (*ibid.*, para. 93). From the standpoint of legal guarantees, and in the context of the relations considered, it would be dangerous in practice to apply the concept of changed circumstances, which could result in abuse and instability in international economic and legal relations.

59. He also agreed with the opinion expressed by Mexico that it was necessary to provide in article 9 that the mere appearance of the representative of a State before a foreign tribunal in performance of the duty of affording protection to persons of the same nationality or with a view to reporting crimes or giving evidence in a case should not be deemed to constitute assent to the exercise by the court of jurisdiction over the State represented.

60. He further endorsed the new paragraph 4 proposed for article 10 (*ibid.*, para. 107) on the basis of the suggestion made by Thailand.

61. The title of part III of the draft raised the question of the choice between the words "limitations on" and "exceptions to". It was no simple drafting matter, for it affected the whole concept of jurisdictional immunities. His own feeling was that the words "exceptions to" more accurately reflected the content of the doctrine of immunity as understood by most countries. The fundamental principle of State immunity was the general *jus cogens* norm: there could be exceptions to that norm, but no limitations.

62. Article 11 would provide additional safeguards if, as suggested by the German Democratic Republic and the Nordic countries, it contained a rule concerning the jurisdictional link between the commercial contract and the State of the forum for the purpose of determining whether differences relating to commercial contracts fell within the jurisdiction of a court of another State. He noted in that connection that the position of the German Democratic Republic, as expressed in the proposal made in its comments and observations (A/CN.4/410 and Add.1-5), reflected the trend in private international law towards applying to contractual legal relationships a foreign law by application of the rules of conflict of laws. It seemed to him that, under the contemporary doctrine of conflict of laws of the Western and certain other countries, it was possible to do so if the transaction in question had a "close link" with a given legal system or if there was a "prevailing" interest in the application of the rules of the latter as opposed to those of the legal system by which the transaction was governed. Indeed, that criterion was acknowledged in the 1972 European Convention on State Immunity, whose main feature, according to Western writers, was recognition not of the doctrine of limited immunity, but of the territorial link necessary to establish jurisdiction for the purpose of recognizing and executing the decision handed down by the courts against a foreign State. Under the European Convention, any type of activity listed as an exception to immunity must have some kind of territorial link with the State before whose courts proceedings were taken to determine the jurisdictional basis of the claim in question.

63. The proposed new article 11 *bis*, on segregated State property (A/CN.4/415, para. 122), was particularly important, and the USSR Constitution of 1977 had been cited in that connection. It was important to remember that the Soviet Constitution was about to be amended, so that, as stated at the Congress of People's Deputies of the USSR currently meeting in Moscow, it should not be construed in isolation from the laws being adopted under the process of *perestroika*. The concept of segregated property reflected the current stage of *perestroika*, in particular in the area of foreign economic activity.

64. For the codification of the rules of international law on the immunity of the State, its organs and its property, it was the definition of what was understood by the State and State organs to which immunity should be granted which was of significance and that was of particular importance for socialist States where State-owned property was the predominant feature. In accordance with the fundamental principles of international law, the matter could be dealt with first on the basis of domestic legislation, in which case it was a matter for Soviet law which organization or instrumentality was to be considered as an organ of the Soviet State enjoying immunity. The trend towards decentralization of foreign economic activity in the Soviet Union, together with the restructuring of the whole system of economic management, had a direct bearing on that question, which could therefore not be considered outside the context of such profound changes. As part of that reform, foreign economic activity was being carried on directly by industrial enterprises and by scientific research and design organizations. Moreover, under the new arrangements, enterprises acquired legal personality when engaging in economic transactions and could therefore not be regarded as State organs enjoying immunity.

65. Furthermore, under the terms of the USSR's *State Enterprise (Association) Act*, which had entered into force on 1 January 1988, a State enterprise had a segregated part of the nationally owned property and its own independent balance sheet. Its property consisted of fixed and working capital, other tangible assets and financial resources, and it had the right to administer, use and dispose of its property. It was an independent legal entity. The State was not responsible for the obligations of the enterprise, and vice versa. The enterprise operated on principles of full accountability and self-financing. Under article 19 of the Act, the foreign economic activities of an enterprise were an important part of its entire operation. A major provision of the Act was that an enterprise which was a major supplier of goods or services for export might be granted the right to engage directly in export/import operations and also on markets in the capitalist and developing countries. Accordingly, a distinction had to be made between two types of State property: on the one hand, property which was directly administered by the State or its organs and which, regardless of the nature of the activity that was the subject of the claim against the State or its organs, enjoyed full immunity from foreign jurisdiction; and, on the other, segregated State property administered by State enterprises (associations), which were independent legal persons and did not enjoy immunity in the event of any claim against the enterprise before the courts of a foreign State.

66. Thus each State determined for itself the régime governing State property. The Soviet State, for its part, segregated part of that property, transferring it to State legal persons, including enterprises, or granting the latter certain property rights. Only in cases relating to the obligations of the enterprise did its property not enjoy immunity with respect to the preliminary submission of a claim or the enforcement of a decision. However, if a plaintiff applied for attachment of the property of a State enterprise in a claim brought not against the enterprise, but against some other legal person or the State itself, no proceedings could be taken against such property, for in such cases the Soviet State was entitled to plead that the State property enjoyed immunity.

The meeting rose at 1.10 p.m.

2117th MEETING

Tuesday, 13 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Prince Ajibola, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, 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. BARSEGOV, continuing the statement he had begun at the previous meeting, said that, in the case of the Soviet Union, State property administered by foreign trade organizations or industrial enterprises did not enjoy immunity in the event of an action brought against the organization or enterprise in connection with its statutory activity. That was, however, not the case in the opposite situation, where, if the property was attached as State property, it could no longer be segregated from socialist State property. Like any other State property, namely non-segregated property, such property enjoyed immunity. In that connection, he said that the proposed new article 11 *bis* (A/CN.4/415, para. 122) contained a legal inaccuracy; contrary to what it stipulated, a State enterprise did not enter into a contract "on behalf of a State". In the light of those considerations, he proposed the following alternative text for article 11 *bis*:

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[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.