

Document:-  
**A/CN.4/SR.1762**

**Summary record of the 1762nd meeting**

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

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Commission was to resume consideration of the draft code towards the end of the session, before taking a decision on its preliminary report on the topic to the General Assembly.

50. Mr. MALEK, referring to Mr. Yankov's suggestion, said that he personally thought it might be desirable to set up a small informal working group of about five members, chaired by the Special Rapporteur, to prepare a compendium of the instruments covered by document A/CN.4/368. That compendium could be submitted to the Commission at the end of the current session or the beginning of the next session.

51. Mr. BARBOZA supported that idea, but stressed that the Commission must submit to the General Assembly, as part of its sessional report, a preliminary report, whether prepared by the proposed working group or by the Special Rapporteur, on the scope and structure of the draft code.

52. Sir Ian SINCLAIR said that it was not clear to him what the mandate of the suggested working group would be. Moreover, he subscribed to the remarks by Mr. Barboza. He suggested that it should be left to the Special Rapporteur to engage in whatever consultations he felt appropriate before submitting to the Commission a report on the basis of which the Commission could resume its discussion towards the end of the present session. He was not at all convinced that a working group would be useful at the present stage.

53. Mr. CALERO RODRIGUES agreed that it should be left to the Special Rapporteur to decide whether to undertake formal or informal consultations or to propose the establishment of a small working group.

54. Mr. YANKOV said that his suggestion had actually been a question to the Special Rapporteur concerning the best way of making use as source material of the valuable Secretariat compendium of relevant international instruments (A/CN.4/368). The purpose of such action would, of course, be to respond to the instructions of the General Assembly, which had asked the Commission to report on the problems of scope and method with regard to the topic of the draft code. He agreed with previous speakers that it should be left to the Special Rapporteur to decide how to go about preparing his preliminary report for the next stages of the Commission's discussion of the topic and, in particular, whether he needed the assistance of a small working group or preferred to engage in purely informal consultations with members of the Commission. It went without saying that document A/CN.4/368 would serve as a valuable further source of information to the Special Rapporteur and the Commission.

55. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to leave it to the Special Rapporteur to propose, if he so wished, the setting up of a working group to assist him.

*It was so agreed.*

*The meeting rose at 6.05 p.m.*

## 1762nd MEETING

*Tuesday, 17 May 1983, at 10 a.m.*

*Chairman: Mr. Laurel B. FRANCIS*

*Present: Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stravropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.*

### **Jurisdictional immunities of States and their property (A/CN.4/357,<sup>1</sup> A/CN.4/363 and Add.1,<sup>2</sup> A/CN.4/371,<sup>3</sup> A/CN.4/L.352, sect. D, ILC(XXXV)/Conf.Room Doc.1)**

[Agenda item 2]

#### **DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR<sup>4</sup>**

1. The CHAIRMAN invited the Commission to consider item 2 of the agenda concerning jurisdictional immunities of States and their property and called upon the Special Rapporteur to introduce his fifth report on the topic (A/CN.4/363 and Add.1) and, in particular, draft articles 13, 14 and 15, which read as follows:

##### *Article 13. Contracts of employment*

1. Unless otherwise agreed, a State is not immune from the jurisdiction of the courts of another State in respect of proceedings relating to a "contract of employment" of a national or resident of that other State for work to be performed there.

2. Paragraph 1 does not apply if:

(a) the proceedings relate to failure to employ an individual or dismissal of an employee;

(b) the employee is a national of the employing State at the time the proceedings are brought;

(c) the employee was neither a national nor a resident of the State of the forum at the time of employment; or

(d) the employee has otherwise agreed in writing, unless, in accordance with the law of the State of the forum, the courts of that State have exclusive jurisdiction by reason of the subject-matter.

<sup>1</sup> Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

<sup>3</sup> *Idem*.

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

*Part I* of the draft: (a) art. 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook* . . . 1982, vol. II (Part Two), pp. 99–100; (b) art. 2: *ibid.*, pp. 95–96, footnote 224; revised text (para. 1 (a)): *ibid.*, p. 100; (c) arts. 3, 4 and 5: *ibid.*, p. 96, footnotes 225, 226 and 227.

*Part II* of the draft: (d) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook* . . . 1980, vol. II (Part Two), p. 142; (e) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook* . . . 1982, vol. II (Part Two), pp. 100 *et seq.*; (f) art. 10, revised: *ibid.*, p. 95, footnote 218.

*Part III* of the draft: (g) arts. 11 and 12: *ibid.*, p. 95, footnotes 220 and 221; revised texts: *ibid.*, p. 99, footnote 237.

*Article 14. Personal injuries and damage to property*

Unless otherwise agreed, a State is not immune from the jurisdiction of the courts of another State in respect of proceedings relating to injury to the person or death or damage to or loss of tangible property, if the act or omission which caused the injury or damage in the State of the forum occurred in that territory, and the author of the injury or damage was present therein at the time of its occurrence.

*Article 15. Ownership, possession and use of property*

1. Unless otherwise agreed, a State is not immune from the jurisdiction of the courts of another State in respect of proceedings relating to:

(a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, any immovable property situated in the State of the forum; or

(b) any right or interest of the State in any immovable or movable property in the State of the forum, arising by way of succession, gift or *bona vacantia*; or

(c) the distribution of assets in connection with the estates of deceased persons or persons of unsound mind or insolvency, the winding up of companies or the administration of trusts, in which a State has or claims a right or interest in any property; or

(d) any property in the possession or control of a State or in which a State claims a right or interest, if the claim is neither admitted nor supported by *prima facie* evidence, and the proceedings have been brought against a person other than a State, if the State itself would not have been immune had the proceedings been brought against it.

2. Paragraph 1 is without prejudice to the immunities of States in respect of their property from attachment and execution, or the inviolability of premises of diplomatic or special missions or consular premises.

2. Mr. SUCHARITKUL (Special Rapporteur) said that, when he had taken up the duties of Special Rapporteur, he had been warned by older members of the Commission of the difficulties inherent in the subject, which was extremely complex. It involved delicate problems not only of public international law but also of private international law. In the Sixth Committee of the General Assembly, Sir Ian Sinclair had sounded a similar warning regarding the nature of the topic and the abundance of the material to be sifted and analysed. For his own part, he had been comforted by the advice of Mr. Tsuruoka that, if the topic was approached in a conciliatory spirit of give-and-take, it would be possible to formulate a draft that was generally acceptable.

3. He wished to lay particular stress on certain recent developments, in the form not only of changes in legislation but of judicial decisions, legal writings and international instruments. Since the submission of his fourth report (A/CN.4/357), a significant amount of material had appeared and should enable the Secretariat to publish in the Legislative Series of the United Nations a second volume to its excellent compilation entitled *Materials on Jurisdictional Immunities of States and their Property*,<sup>5</sup> one that would contain additional information on recent legislation, cases and draft international conventions. For example, the Inter-American Juridical Committee had in 1983 prepared an Inter-American Draft Convention on Jurisdictional Immunity of States.<sup>6</sup> In the case of the 1972

European Convention on State Immunity, which had come into force in 1976,<sup>7</sup> he had endeavoured to obtain information on the legislative background but had been informed that the material in question was of a restricted character and could not be made available. Schools of opinion among international lawyers should also be taken into account. For example, the International Law Association, at its Sixtieth Conference at Montreal in 1982, had adopted a set of draft articles proposed by its Committee on State Immunity.<sup>8</sup>

4. Interest among international lawyers regarding the topic under discussion went back a long time. As early as 1891, the Institute of International Law had prepared "Draft international regulations on the competence of courts in proceedings against foreign States, sovereigns or heads of State" (*projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etat étrangers*).<sup>9</sup> Hence, the phenomenon of instituting proceedings against a foreign State was nothing new and the international lawyers of the past had come to certain conclusions in that connection. Plainly, the more modern trends could not be halted, nor could they be ignored. Within the past 10 years alone, a number of countries, including Australia, Pakistan, Singapore, Trinidad and Tobago, the United Kingdom, the United States of America and, recently, Canada, had enacted legislation on the subject of State immunity.

5. It was not altogether desirable that every State should adopt its own legislation on a subject of that kind, independently of other States, and the task before the Commission was to seek to harmonize the differing trends. The aim should be to uphold the basic principle of international law in the matter, namely the principle of the immunity of the State, while making provision for certain instances in which it should reasonably be set aside for a number of reasons, notably in cases of waiver and disclaimer. In that regard, he welcomed the constructive attitude taken by the Commission, one which, as he saw it, had been endorsed by the General Assembly.

6. Previously there had been some misunderstanding about his use of the inductive approach and he hoped that the present report, based firstly on judicial decisions, secondly on State practice and conventions, and thirdly on the opinion of writers, would serve to dispel those misgivings. He had not resorted to any particular theory and, in particular, had avoided the functional concept and the distinction between acts performed *jure imperii* and acts performed *jure gestionis*. He had sought to avoid unnecessary theoretical controversies and to remain faithful to available judicial precedents, while facing up squarely to the existing realities of emerging State practice.

<sup>7</sup> Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series (Strasbourg), No. 74 (1972).

<sup>8</sup> See ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 5-10, resolution No. 6: "State Immunity".

<sup>9</sup> See Institute of International Law, *Tableau général des résolutions (1873-1956)* (Basel, Editions juridiques et sociologiques, 1957), pp. 14-16.

<sup>5</sup> United Nations publication, Sales No. E/F.81.V.10.

<sup>6</sup> OEA/Ser.G-CP/doc.1352/83 of 30 March 1983, subsequently distributed in the Commission as document ILC(XXXV)/Conf.Room Doc.4.

7. The dangers faced by the Commission were well illustrated by the recent United Nations Conference on Succession of States in Respect of State Property, Archives and Debts,<sup>10</sup> at which opposition had arisen between different groups, more particularly between developed States and developing States. As a result, the greatest difficulty had been experienced in achieving a general consensus. As far as the present topic was concerned, there was a danger of division between socialist and non-socialist countries, capitalist and non-capitalist countries, and worst of all, between developed and developing countries. There was, however, one important positive aspect, namely that every State was both the giver and the taker of State immunity. There was thus complete parity of interest in the subject.

8. As a citizen of a developing country, he felt bound to point out that some inequalities which developing States had complained of in the past were no longer matters of concern. He had in mind more particularly the system of extraterritorial jurisdiction, or capitulations, by virtue of which not only foreign States but also foreign nationals fell outside the jurisdiction of the territorial State. Such situations, however, had long since been done away with. At the same time, it was essential not to go to the opposite extreme and to claim that a State was absolutely sovereign within its own territory, without any limitation whatsoever. Where another State was concerned, the principle *par in parem imperium non habet* was still valid.

9. The articles presented in his fifth report came under part III of the draft, entitled "Exceptions to State immunity". If part II (General principles) were to be entitled "General provisions", the concept of "exceptions to State immunity" might perhaps be replaced by a reference to certain concrete areas of activity that required further specification of the rules of State immunity. Such an approach would make it possible to cover certain areas of future interest that did not represent exceptions to State immunity, if only because no question of immunity had ever arisen in the past. Later in the present session, he hoped to submit an addendum containing draft articles 16 (Patents, trade marks and other intellectual properties), 17 (Fiscal liabilities and customs duties) and 18 (Shareholdings and membership of bodies corporate) and, at the next session, a report containing articles 19 (Ships employed in commercial service) and 20 (Arbitration), as well as part IV of the draft, on the immunity of State property from attachment and execution, a question that was much less controversial.

10. With regard to draft article 13, the problem of contracts of employment as an exception to State immunity was closely bound up with the possibility of proceedings being instituted by an employee of a foreign State. The problem did not arise at all where no jurisdiction existed, for there was no occasion to invoke State immunity if, in the ordinary course of events, the courts would not have jurisdiction over the dispute. A similar situation arose with respect to the question of the

applicable law. In some countries, certain members of diplomatic staff were considered as parties to a contract of employment, but the contract was covered exclusively by the law of the sending State and not by that of the receiving State, in which event the courts of the latter State would have no jurisdiction.

11. As for judicial practice in the matter, it would be seen from the Italian cases cited in his fifth report (A/CN.4/363 and Add. 1, para. 44) that the local courts had been held to have no jurisdiction in matters concerning the employment of an Italian citizen by foreign State-owned entities.

12. On the other hand, the recent legislative practice of States revealed a different trend. According to section 4 of the United Kingdom's *State Immunity Act 1978*,<sup>11</sup> proceedings could be instituted against a foreign State in respect of a contract of employment where the contract was made in the United Kingdom or the work was wholly or partly performed there (*ibid.*, para. 52). That rule was none the less subject to certain exceptions, namely where the employee was a national of the State concerned or was neither a national of the United Kingdom nor habitually resident there. Canada and Singapore, as well as the Republic of South Africa, had adopted similar legislation. An analogous provision was included in article 5 of the 1972 European Convention on State Immunity (*ibid.*, para. 55).

13. The 1983 Inter-American Draft Convention provided for an exception to State immunity for employment contracts between a State and one or more individuals when the work was performed in the forum State (*ibid.*, para. 56), and a somewhat similar provision was to be found in the draft convention adopted by the International Law Association at Montreal in 1982 (*ibid.*, para. 58).

14. A State was supreme in its own territory and it therefore had the right to lay down conditions for other States employing persons on that territory. It would indeed be very difficult to prevent a State from compelling other States or State-owned bodies to comply with its labour law in such cases, yet it had to be admitted that the outcome was a confusing situation in terms of international relations. Since the aim now was to bring some harmony to differing trends, it was essential to formulate some well-balanced principles in order to safeguard the interests of all concerned, and particularly those of all Governments.

15. Just as draft article 13 dealt with the problem of contracts, draft article 14 dealt with the problem of tort. It was confined to personal injuries and damage to property and did not cover financial and economic losses. The exceptions set forth in the article were comparatively new and their legal basis was closely connected with the kind of damage claimed and the place at which the tort or wrongful act had been committed. National laws on the matter had been prompted largely by the problem of road

<sup>10</sup> The Conference was held at Vienna from 1 March to 8 April 1983.

<sup>11</sup> United Kingdom, *The Public General Acts, 1978*, part I, chap. 33, p. 715.

accidents and, to a lesser extent, accidents arising from maritime and inland navigation. The risks involved were in almost all cases insurable and, indeed, were required to be insured. In practice, the claim by the victim was one against the insurance company and the State was not directly involved. The fact that proceedings could go ahead in the local courts did not in any way offend the sovereignty of the State concerned. In recent times, the law had changed somewhat. In the past, the essential difference had been between *acta jure gestionis* and *acta jure imperii* and State immunity had fully applied in cases where the person responsible for the accident had been acting in an official capacity. That distinction had been largely abandoned, although it was still applied in Belgium and Egypt. In that connection, it was interesting to note the developments in United States judicial practice (*ibid.*, paras. 84–85).

16. As to Government practice, section 5 of the United Kingdom's State Immunity Act 1978 precluded State immunity in cases of death or personal injury or damage to or loss of tangible property caused by an act or omission in the United Kingdom (*ibid.*, para. 88), an exception that was indeed very broad. Similar legislation had been enacted or was being drafted in several other common-law countries. Article 11 of the 1972 European Convention contained an analogous provision (*ibid.*, para. 92), but it should be noted that the provision in the United Kingdom Act applied to all States and not merely those that were parties to the European Convention. With regard to international opinion, article III of the International Law Association's draft convention (*ibid.*, para. 97) was akin to the European provision. The Commission would realize that, in drafting article 14, he had attempted to select salient points and pinpoint certain emerging trends.

17. In respect of draft article 15, State immunity did not apply in all cases involving property, a point that had been made as long ago as 1891 in the *projet de règlement international sur la compétence des tribunaux* of the Institute of International Law, article 4 of which drew a distinction by excluding from immunity those claims relating to real property and actions relating to inheritance.<sup>12</sup> By and large, the exception was based on the sovereign authority of the local State to regulate the legal relations on its territory concerning land, ships, aircraft and certain types of movable property. It should be remembered that, in most cases where an exception did apply, the foreign State appeared as a claimant endeavouring to assert its title to property or its claim to an inheritance; it was then natural that the State concerned should be deemed to have submitted to the jurisdiction of the territorial State to adjudicate on its claim. Once title had been recognized, however, the court might well decline jurisdiction thereafter.

18. With regard to Government views, he wished to draw special attention to the position in Hungary (*ibid.*, para. 125) and in Madagascar (*ibid.*, para. 126). It was gratifying to note the practice of certain States, and in

particular the legislation adopted in the United Kingdom and other common-law countries.

19. Lastly, he had introduced draft articles 13, 14 and 15 together in order to save time, but it would be advisable for them to be considered and discussed one by one.

20. Mr. CALERO RODRIGUES said he wished to make it clear that the text described in the Special Rapporteur's fifth report as an inter-American draft convention was not really an international instrument. It was a draft prepared in 1983 by the Inter-American Juridical Committee—a technical body similar to the Commission itself—and had not yet been examined by the political organs of OAS. If the Council of OAS approved the draft, it would come before the General Assembly, which would then convene a conference in order to convert the draft into a convention. At the present time, therefore, the draft prepared by the Inter-American Juridical Committee was not on the same footing as the 1972 European Convention on State Immunity, which was a binding international instrument.

21. Mr. USHAKOV drew the attention of members to the memorandum which he had prepared (A/CN.4/371) on the basis of the first four reports of the present topic. Unlike the Special Rapporteur, he did not believe that a general trend existed in favour of the concept of "limited" or "functional" State immunity. The concept of restricted State immunity was entirely without foundation, whether theoretical or practical.

22. With regard to the fifth report of the Special Rapporteur (A/CN.4/363 and Add. 1), he wished to point out first of all that it gave a wrong interpretation of the Soviet Union's position. The Special Rapporteur had himself stated in his report (*ibid.*, para. 39) that his treatment of the exception of trading or commercial activities had been criticized for not covering the practice of all Member States of the United Nations, or for distorting that of some. The Special Rapporteur had stated (*ibid.*, para. 23) quite erroneously that the rule of immunity "was from the beginning subject to various qualifications, limitations and exceptions", adding: "This is recognized even in the recent legislation adopted in socialist countries." Yet the recent Soviet legislation mentioned in the footnote relating to that assertion contained no qualification of, limitation on or exception to the sovereign immunity of States. The legislation in question recognized the complete and absolute immunity of States. Consequently, it could not be viewed as a trend towards restricting State immunity. At the Commission's previous session he had cited examples of commercial agreements concluded by the USSR in which the USSR had in fact voluntarily consented to submit its commercial representatives to foreign jurisdiction by waiving the principle of immunity only in certain instances.<sup>13</sup> Furthermore, in its replies to the questionnaire circulated by the Secretariat, the Soviet Union had specified that it respected the principle of the sovereign immunity of all States and that the consent of a foreign State was neces-

<sup>12</sup> See footnote 9 above.

<sup>13</sup> *Yearbook* . . . 1982, vol. I, pp. 187–188, 1728th meeting, para. 43.

sary in order for proceedings to be instituted against it before a Soviet court.<sup>14</sup>

23. Lastly, he suggested that the new draft articles submitted by the Special Rapporteur should be considered one by one.

24. Mr. NI, referring to the Special Rapporteur's fourth report (A/CN.4/357), said that the topic of jurisdictional immunities was particularly important, yet highly controversial. It had been discussed at considerable length both in the Commission and in the General Assembly. In the light of the comments made by delegations in the Sixth Committee, further deliberations would be necessary, since the articles should be drafted in such a way as to be acceptable to a large majority of States.

25. Of the draft articles previously proposed by the Special Rapporteur,<sup>15</sup> articles 6 and 12 lay at the heart of the matter. As most members of the Commission had agreed, draft article 6 should be revised in order to make it clear that immunity was a rule based on the principle of sovereign equality embodied in the Charter of the United Nations. To that end, the words "in accordance with the provisions of the present articles" might be replaced by the words "except as otherwise provided in the present articles". Account might, of course, also be taken of the suggestions made by Mr. Yankov, Mr. Calero Rodrigues<sup>16</sup> and other members. The sole purpose of revising draft article 6 would be to make it clear that immunity was subject to certain exceptions. The principle that the rule should come first and then be followed by specific exceptions had not been observed in article 15 of the 1972 European Convention on State Immunity, which read: "A Contracting State shall be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within articles 1 to 14".

26. At the present stage, the crux of the matter was the question of trading or commercial activity as an exception to the rule enunciated in article 6. What constituted a commercial activity was by no means clear and the definition given in article 2, paragraph 1 (f), was far from satisfactory. What was meant by "a regular course of commercial conduct, or . . . a particular commercial transaction or act"? It had been suggested that the definition should include financial and industrial activities, as well as other economic activities, such as investment, fishing and hunting. The question of selecting a criterion for determining how an activity was to be characterized as commercial gave rise to further difficulties. At the thirty-seventh session of the General Assembly, one delegation in the Sixth Committee had pointed out that the present wording of article 2, paragraph 1 (f), was virtually identical to the corresponding provisions of the United States *Foreign Sovereign Immunities Act of 1976*<sup>17</sup> and had drawn the

Commission's attention to the difficulties caused by their application by United States courts.<sup>18</sup> Another delegation had rightly argued that immunity should not be denied when the activities were of a commercial nature but were conducted for specifically State purposes, such as deliveries for national defence.<sup>19</sup> Other delegations had expressed the view that the purpose of the transaction should be taken into account. At recent sessions of the Commission, several members had also taken the view that the nature of the transaction should not be taken as the sole criterion for determining whether an activity was to be regarded as commercial. That was especially important for the socialist countries and for developing countries with planned economies, in which trading and commercial activities were undertaken by the State for the benefit of the people as a whole. The principle stated in the United States Supreme Court decision in the case *Berizzi Brothers Co. v. The S.S. "Pesaro"* (1926)<sup>20</sup> had been that the maintenance and advancement of the economic welfare of the people was no less a public purpose than the maintenance and training of a naval force. Although that decision had been overruled, the principle was a sound one.

27. Under the restrictive theory of immunity, the problem of determining what constituted a commercial activity was a source of endless dispute. Consequently, judicial decisions and national laws on the topic varied from country to country and even from court to court in the same country. They tended to diversify, rather than unify, the rules. One delegation had appealed to the Sixth Committee to help prevent a further proliferation of national legislation that was plunging international relations and trade into a state of utter chaos.<sup>21</sup> Another had suggested a "legislative moratorium" while the Commission sought to complete its work on the topic.<sup>22</sup> Indeed, during the thirty-seventh session of the General Assembly, many delegations had pointed out that a source of growing concern was the increasing tendency of some developed countries to limit unilaterally the scope of jurisdictional immunities by giving their domestic courts jurisdiction.

28. In that connection, it should be remembered that many Asian, African and Latin-American countries and many socialist countries still adhered to the unrestricted theory. Admittedly, because of the long-standing affiliation of their legal systems with those of certain western countries, a few Asian and African States had associated themselves with the restrictive theory of immunity. It was also true that, in 1960, a committee set up by the Asian-African Legal Consultative Committee had recommended that a State which entered into transactions of a

<sup>14</sup> See United Nations, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), p. 616.

<sup>15</sup> See footnote 4 above.

<sup>16</sup> *Yearbook* . . . 1982, vol. I, pp. 72-73, 1710th meeting, para. 29, and p. 78, 1711th meeting, para. 35, respectively.

<sup>17</sup> United States of America, *United States Code, 1976 Edition*, vol. 8, title 28, chap. 97.

<sup>18</sup> *Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 47th meeting, para. 54 (Mexico).

<sup>19</sup> *Ibid.*, 38th meeting, para. 20 (France).

<sup>20</sup> *United States Reports* (1927), vol. 271, p. 562, at p. 574.

<sup>21</sup> *Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 44th meeting, para. 21 (Thailand).

<sup>22</sup> *Ibid.*, 49th meeting, para. 43 (Sierra Leone).

commercial or private character ought not to raise the plea of sovereign immunity if sued in the courts of a foreign State in respect of such transactions.<sup>23</sup> Yet, a memorandum of the same Asian-African Legal Consultative Committee, dated 11 September 1982 and distributed at the thirty-seventh session of the General Assembly,<sup>24</sup> had pointed out that a large number of Latin-American, Asian, African and socialist States had not in fact adopted the restrictive doctrine. It had gone on to assert that the State practice and the emerging trend referred to by the Special Rapporteur were confined largely, though not exclusively, to the western countries and that it was extremely doubtful whether that trend was in the interest of developing countries and whether it should find a place in the process of codification and progressive development of law on the topic by the Commission. That statement certainly deserved the most careful attention.

29. It had been maintained that acceptance of the restrictive theory was a general trend and that the absolute theory would eventually give way to the restrictive approach. Much emphasis had been placed on the judicial decisions and national laws of certain States. While it was true that such precedents and legislation abounded in the municipal systems of the western countries, they continued to be relevant only at the domestic level in a limited part of the world. In the Sixth Committee, one delegation had rightly stated that, since a large number of developing countries shared a more unqualified view of State immunity that led to a notable absence of judicial decisions in their municipal systems, excessive reliance on judicial decisions as evidence of State practice would naturally shift the balance against the developing countries.<sup>25</sup> Another third world delegation had corroborated that affirmation by saying that, although an imposing body of case law from many States provided evidence that State immunity was restrictive, any exception to a general rule of international law must be founded on analogous recognized rules and not on the domestic practice of a few States.<sup>26</sup> Still another delegation had pointed out that the long list of court decisions contained in the Special Rapporteur's fourth report (A/CN.4/357) reflected only the practice of a dozen, mainly capitalist, States and their internal judicial practice. That delegation had regretted the fact that the position of the overwhelming majority of nations, and in particular the attitude of those which were denied immunity by the courts of developed countries, had not been taken into consideration.<sup>27</sup> Asian and African States summoned against their will by the courts of developed

States often preferred to absent themselves and to suffer the consequences of judgments by default. One Latin-American delegation had complained of the requirement to be represented at great expense by a local attorney to plead in the courts of a developed State and of the possibility of being involved in endless procedural quibbles that resulted in total disregard for sovereign immunity.<sup>28</sup> Those were obvious examples of irritants to international relations.

30. It was extremely questionable whether the alleged trend towards restrictive immunity constituted a progressive development away from the absolute theory. First of all, restrictive immunity ran counter to the principle of sovereign equality embodied in the Charter of the United Nations. Secondly, restrictive practice disrupted good relations among States because it was anomalous, to say the least, for the courts of one State to judge another sovereign State without its consent. Even in the ICJ, a sovereign State could not be sued without a prior agreement to be sued in a specific case. It was unthinkable that a national law could make another sovereign State a defendant in a case without its consent. Admittedly, it might be argued that the so-called absolute theory of State immunity would place the plaintiff and the defendant foreign State on an unequal footing, but could equality between the plaintiff (an individual or entity) and the foreign State override the equality of the sovereign States? Moreover, immunity did not absolve the foreign State of its obligations. The plaintiff, however, was not left without a remedy: more often than not, arbitration or some other mode of settlement could be pre-arranged. As stated by Chief Justice Stone of the United States Supreme Court in a case relating to the Republic of Peru, national interests would be better served if wrongs to suitors that involved United States relations with a friendly foreign power were righted through diplomatic relations rather than through the compulsion of judicial procedures.<sup>29</sup>

31. Again, the argument had been advanced that the trend towards restrictive immunity was irreversible, something that was not borne out by the historical facts. In his fourth report (A/CN.4/357), the Special Rapporteur had described the course of developments in certain western countries as a zigzag between unqualified immunity and restrictive immunity. The change of attitude of the Asian-African Legal Consultative Committee, to which he had referred earlier (see para. 28 above), confirmed the fact that the tendency was not always to move from general immunity towards restrictive immunity.

32. It had been asked whether the evolutionary process of the law required the positive or active participation of all States. That question could only be answered in the negative. However, if only a small number of States positively or actively participated, while the majority of States reacted unfavourably or remained committed to

<sup>23</sup> See Asian-African Legal Consultative Committee, *Report on the Third Session (Colombo, 20 January to 4 February 1960)* (New Delhi [n.d.], p. 68).

<sup>24</sup> The relevant chapter of this memorandum was subsequently distributed in the Commission as document ILC(XXXV)/Conf.Room Doc.6.

<sup>25</sup> *Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 50th meeting, para. 68 (Bangladesh).

<sup>26</sup> *Ibid.*, 51st meeting, para. 70 (Trinidad and Tobago).

<sup>27</sup> *Ibid.*, 40th meeting, para. 70 (German Democratic Republic).

<sup>28</sup> *Ibid.*, 47th meeting, para. 53 (Mexico).

<sup>29</sup> *Ex parte Republic of Peru* (1943) (*United States Reports* (1943), vol. 318, p. 578, at p. 589).

the general rule in conformity with the fundamental principles of law, the latter could hardly be said to have acquiesced in the process, particularly when it was incompatible with their social and economic systems. Under such circumstances, general acceptance or even acquiescence could not be implied. It was difficult to see how the national laws of a few States could, in the name of international law, be imposed on the rest of the international community.

33. Accordingly, he was of the opinion that the exception of commercial activity embodied in draft article 12 was not valid. The reference to any activity conducted “partly or wholly” in the territory of a forum State was entirely unsatisfactory. In order to strike a balance, an alternative might be to draw on article 7, paragraph 1, of the 1972 European Convention on State Immunity, which was worded: “. . . if [the Contracting State] has on the territory of the State of the forum an office, agency or other establishment through which it engages . . . in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment”; action could be taken only against such an office, agency or establishment. A foreign State *eo nomine* could not be sued without its consent, but State enterprises or similar entities having independent legal personality could not claim State immunity. Consequently, it would be necessary to reformulate, in draft article 3, paragraph 1(a), the definition of a “foreign State” and, in draft article 3, paragraph 2, the criterion for determining whether an activity was commercial by reference to its nature rather than to its purpose.

34. He reserved the right to speak at a later stage on the Special Rapporteur's fifth report (A/CN.4/363 and Add.1).

35. Mr. SUCHARITKUL (Special Rapporteur) said that, when Mr. Ni had mentioned the work on State immunity done by the Asian-African Legal Consultative Committee, he had realized that he had perhaps been wrong not to refer to it in his fifth report. In 1980, Sir Ian Sinclair had given a lecture at the Academy of International Law in which he had noted that the Asian-African Legal Consultative Committee had established a Committee on Immunity of States in respect of Commercial and Other Transactions of a Private Character and that, in 1960, it had adopted the committee's final report.<sup>30</sup> The report had made the following two recommendations:

(1) State trading organizations which have a separate juristic entity under the municipal laws of the country where they are incorporated should not be entitled to the immunity of the State in respect of any of its activities in a foreign State. Such organizations and their representatives could be sued in the municipal courts of a foreign State in respect of their transactions or activities in that State.

(2) A State which enters into transactions of a commercial or private character ought not to raise the plea of sovereign immunity if sued in the courts of a foreign State in respect of such transactions. If the plea of

immunity is raised, it should not be admissible to deprive the jurisdiction of the domestic courts.<sup>31</sup>

At that time, the members of the Asian-African Legal Consultative Committee had been Burma, Ceylon, India, Indonesia, Iraq, Japan and Syria. Indonesia alone had expressed reservations regarding those recommendations.

36. He wished to make it clear that the memorandum prepared by the secretariat of the Asian-African Legal Consultative Committee to assist members attending the meetings of the Sixth Committee of the General Assembly did not necessarily reflect the views of the member Governments of the Asian-African Legal Consultative Committee. It merely gave an idea of the work being done by the Commission.

37. The CHAIRMAN said that he had represented the Commission at the most recent session of the Inter-American Juridical Committee, held at Rio de Janeiro in January/February 1983, and that he greatly appreciated the warm welcome he had received. On 2 February 1983, he had made a statement describing the Commission's work at its thirty-fourth session, and placing particular emphasis on the most important topics discussed.

38. In the course of his visit, a working group of the Inter-American Juridical Committee had been discussing the Inter-American Draft Convention on Jurisdictional Immunity of States, which differed somewhat from the draft now under discussion in that it was not quite so broad in scope. The Secretariat would make copies of that draft convention available to members of the Commission.<sup>32</sup>

*The meeting rose at 12.40 p.m.*

<sup>31</sup> See footnote 23 above.

<sup>32</sup> See footnote 6 above.

## 1763rd MEETING

*Wednesday, 18 May 1983, at 10 a.m.*

*Chairman:* Mr. Laurel B. FRANCIS

*Present:* Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

<sup>30</sup> I. Sinclair, “The law of sovereign immunity: Recent developments”, *Collected Courses of The Hague Academy of International Law, 1980—II* (Alphen aan den Rijn, Sijthoff & Noordhoff, 1981), vol. 167, p. 140.