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Summary record of the 1711th meeting

Topic:
Jurisdictional immunities of States and their property

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stated negatively in terms of the exceptions thereto. Therefore, for the time being the words "in accordance with the provisions of the present articles" could well be deleted from paragraph 1, but retained in paragraph 2. Paragraph 1 would then simply state the principle of immunity as such, while paragraph 2 would provide for some flexibility in applying it.

30. Mr. USHAKOV said that, in his opinion, there could be no clash between the sovereignty of the territorial State and that of the foreign State which was acting upon its territory. The principle of the sovereign equality of States meant that States were free to establish the political, legal, social, cultural or other systems that they deemed most appropriate. Each one of those systems fell within the domain of internal affairs. Being equal, States were therefore duty bound to recognize one another's different systems. Although they enjoyed immunities, they must respect the internal law of any State in whose territory they were acting. That was stated in article 41 of the Vienna Convention on Diplomatic Relations, under which all persons enjoying the privileges and immunities set forth in the Convention had the duty, without prejudice to those privileges and immunities, to respect the laws and regulations of the receiving State.

31. Obviously, by reason of their sovereignty, States were free to disallow any activity by another State in their territory, including trading or commercial activities. But if a State accepted certain activities, it accepted those activities along with all of their consequences. When the political, legal or other system of a State disallowed certain activities by other States, the latter must respect that prohibition. It followed that the sovereignty of the territorial State was safeguarded, since it was for that State to allow or disallow activities by other States in its territory. Under article 2 of the Vienna Convention on Diplomatic Relations, a State was not even required to establish diplomatic relations with other States, for such relations were established by mutual consent. Plainly, that rule stemmed from the principle of the sovereign equality of States. There again, if a State allowed diplomatic missions into its territory, it allowed them with all of the consequences laid down in customary or written international law, more particularly in the matter of privileges and immunities.

32. In connection with another question raised during the discussion, he emphasized that, when a State concluded a contract with a legal entity under private law, such as a bank, it concluded a private law contract and not a contract under international law. The law applicable to the contract could be determined by the rules of private international law and was internal law, for example, the law of the place at which the contract was signed. The State which had concluded the contract must obviously respect the law governing the contract. But the question of the applicable law and the obligation to respect that law had to be differentiated from the question of legal proceedings that could be instituted. Because of State sovereignty, proceedings could not be

instituted in one State against another State without the latter's consent. Any State compelled to appear before the court of another State without enjoying jurisdictional immunity would be subjected to the public authority of that other State, something that would be a serious breach of the principle of the sovereign equality of States.

The meeting rose at 11.40 a.m.

1711th MEETING

Friday, 21 May 1982, at 10 a.m.

Chairman: Mr. Constantin FLITAN

Jurisdictional immunities of States and their property (continued) A/CN.4/340 and Add.1,¹ A/CN.4/343 and Add.1-4,² A/CN.4/357, A/CN.4/L.337, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 3)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPporteur (continued)

GENERAL COMMENTS ON PARTS I, II AND III OF THE DRAFT ARTICLES³ (continued)

1. Mr. JAGOTA said that the Commission's enlarged membership and the new element of regional representation that it afforded would certainly enhance the Commission's contribution to international law.

2. With the fourth report (A/CN.4/357), in which the Special Rapporteur had encapsulated his broad knowledge of the subject of jurisdictional immunities of States, the Commission was now entering into the heart of the matter, namely, the exceptions to the rule of sovereign immunity. Opinions on how to state the rule were divided. On the one side it was rightly felt that, since all sovereign States were equal, no court of one sovereign State could sit in judgement on another State and, hence, that fundamental principle must be stated unequivocally. The other side, however, queried

¹ *Yearbook ... 1981*, vol. II (Part One).

² Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).

³ The texts of draft articles in part I and part II of the draft are reproduced as follows: (a) art. 1 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (b) arts. 2 to 5, in *Yearbook ... 1981*, vol. II (Part Two), pp. 153-154, footnotes 655-658; (c) art. 6 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (d) arts. 7 to 10, revised at the Commission's thirty-third session, in *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671. Part III of the draft contains articles 11 and 12, submitted in the Special Rapporteur's fourth report (A/CN.4/357, paras. 29 and 121).

whether there was a rule of immunity at all. It recognized the existence of principles of comity but considered them as so different from a rule of international law imposing obligations that it was necessary to look to the conduct of States in seeking to restore a balance between the sovereignty of the territorial State and the sovereignty of the claimant State. Between those two schools of thought lay the majority view, namely, that there was indeed a rule and that there should be exceptions thereto.

3. The question then arose as to the exact nature of the rule and of the exceptions. The need to achieve a balance between two sovereign States had resulted in two affirmations: one being that the rule should recognize the sovereignty of the territorial State and that immunity should form the exception, the other being that the rule should recognize sovereign immunity and that the exception should apply in instances in which the sovereignty of the territorial State would prevail. Instead of the dual approach of specifying the cases in which immunity did or did not apply, the best course would be to state a rule of sovereign immunity and then list the exceptions, for the object and purpose of such a rule was basically to provide a framework for friendly and co-operative relations between States.

4. The reason for the increasing number of exceptions to immunity lay in the enormous growth in State trading and commercial activities in various forms. If such activities were made subject to the jurisdiction of the territorial State, the economic relations of States would be affected. For example, the developing countries were in need of economic aid and a donor, whether of money, technology or know-how, usually requested that its agents should be immune from the jurisdiction of the local courts. If that request was refused, the project or programme was withdrawn. The Commission should therefore carefully examine the precise nature of the activities in question with a view to ascertaining whether they were of a commercial, trading, financing or other type, and then determine the matters in respect of which a foreign individual, foreign State or foreign entity of a foreign State conducting such activities in another State would or would not be immune. That was why it would be preferable first to state the rule and then to list the exceptions, with greater clarity and in more detail: in matters not covered by conventions, the rule would then apply as a kind of residual rule.

5. The first exception discussed in the fourth report concerned trading or commercial activity (draft article 12), although eight other exceptions were also listed as possibilities (*ibid.*, para. 10, subpara. (c)). In his view, the Commission should reserve judgement on those possibilities until later, always bearing in mind that the rule should not be whittled away by exceptions. It should also examine the conflicting decisions adopted by States, and sometimes even within one and the same State, on whether or not a trading or commercial activity was to be deemed a public or a private act. In that connection, the Special Rapporteur had cited the case of the purchase by Bulgaria of bullets, which had been

deemed to be a private act (*ibid.*, para. 59), whereas the purchase of cigarettes for an army had been held to be a public act for which immunity would lie (*ibid.*, para. 66). Again, a contract for a survey of water distribution in Pakistan, although apparently a private arrangement, had none the less been deemed a public act since its object and purpose was public service (*ibid.*). Accordingly, it was essential to be meticulous in laying down the exceptions, for their content would indicate whether or not there was any residual rule. Such a rule was indispensable for mutual respect among States and would promote co-operation and mutual development; something that would not be the case if all State activities were made subject to the jurisdiction of the courts of another State.

6. There was also the question of what was meant by the expression "State claiming jurisdictional immunity". If it was understood to embrace the agency or instrumentality of a State, what was meant by agency or instrumentality? Did it include a State entity, a State organization, a statutory corporation created and totally owned and directed by the State, or a registered company in which the State was the majority shareholder? Where was the dividing line? Again, was a diplomatic mission an agency of the State? Could its acts be made subject to the jurisdiction of the local courts—for instance, when it rented housing for its diplomats? Were the recruitment and termination of the contracts of local employees by the mission subject to local laws? If any dispute arose, could proceedings be instituted against the head of the mission before the local courts? Admittedly, the Special Rapporteur had provided in article 4 that the draft did not apply to diplomatic privileges and immunities, but that provision was subject to the rider in subparagraphs (a) and (b). The Commission must therefore ensure that there was a clear demarcation between State immunity and diplomatic immunity and eliminate any possible duplication.

7. As to draft article 6, in his opinion paragraph 1 did not signify that there was no sovereign immunity unless some other provision of the draft specified the contrary. Rather, it meant that a State was immune from the jurisdiction of another State and the content and the modalities for the exercise of immunity were determined by the provisions of the draft. The modalities of the exercise of immunity were a procedural matter and could, for example, involve contacts with a foreign ministry. That, until recently, had been the case in the United States of America, but a foreign State now had to plead immunity before the local courts. With regard to the content of immunity, it was better to retain paragraph 1 largely in its present form, although it might be possible to incorporate an immediate reference to the exceptions by redrafting it to read: "A State is immune from the jurisdiction of another State, except as provided in articles ... and ...".

8. In draft articles 8, 9 and 10, the Special Rapporteur had set forth the concept of consent in negative terms, in other words, absence of consent would imply that the

forum had no jurisdiction and, conversely, instances of express or implied consent would preclude a plea of sovereign immunity. On the thorny question of the point at which the draft should deal with consent, his initial feeling was that, in view of its intent and effect, the matter should be treated separately in part III, among the exceptions, rather than as part of the general rule. Indeed, there was a precedent for so doing, since consent had been made an exception to State responsibility and was covered by a separate article on that topic in part I of the draft.⁴

9. The scope of the term “trading or commercial activity”, as used in article 12, also called for careful consideration. In ordinary everyday language, a trading or commercial activity was one that involved the purchase, sale or exchange of goods or services and the financing thereof. However, in the fourth report (*ibid.*, para. 120, subpara. (b)), reference was made to activities “in a commercial, industrial or financial field”. If the exception under article 12 was confined to trading or commercial activity, industrial and manufacturing activities would not be encompassed. It was those latter activities that had gained so much importance in the past decade, and they were precisely the ones to which the question of jurisdiction was so germane. The Commission should therefore determine whether article 12 ought to extend to industrial and manufacturing activities or should be confined solely to the sale, purchase and exchange of goods and services. For that purpose, it should also review the definition of “trade or commercial activity” contained in article 2, subparagraph 1 (f).

10. Furthermore, the rule laid down in article 12 would tend to perpetuate, rather than resolve, the difficulty inherent in the question of the relationship between the nature of the act and the purpose of the act. In that connection, article 3, paragraph 2, provided that

In determining the commercial character of a trading or commercial activity ... reference shall be made to the nature of the course of conduct or particular transaction or act, rather than to its purpose.

In his opinion, it was the latter part of that provision which had given rise to all the controversy. In India, for example, under section 86 of the Code of Civil Procedure⁵ it was for the Government to give consent for a suit to be filed against a foreign State. Accordingly, the Foreign Ministry would examine any facts submitted to it and, on that basis, could take the view that even though the acts in question were apparently of a trading type, they involved a function that was a function of the State and a public service. The issue was a sensitive one and it called for careful examination in order to avoid controversy.

11. Mr. AL-QAYSI said that the discussion had highlighted the differing views on the concept of State immunity. Even though the Commission already had before it a number of draft articles, there was a virtually automatic inclination to discuss at almost every stage of

the debate questions such as the correct point of departure or the most appropriate approach—questions that he would have thought had already been dealt with. While there was no harm in that, given the complexity and importance of the issue, it was essential, if any measure of progress was to be achieved, to arrive at a degree of understanding which, while not deliberately ignoring any viewpoint, would aim at a collective agreement that would provide the basis for a universally acceptable set of draft articles.

12. It was worth recalling certain simple and clear premises. The topic under consideration involved the interplay between two fundamental principles of international law, namely, those of territoriality and of State personality. The interplay was not theoretical; problems of State immunity had arisen with considerable frequency, although admittedly they had not always been resolved in a uniform manner. In that connection, attention must be paid to the changes in the international community, particularly in the present century. The shift in the forms of government, the changes in the functions of the State, decolonization, the ever-increasing trend towards socialist and welfare concepts in managing societies, the quest for development, the universality and heterogeneity of the international community, the interdependence of State relations—all those, together with other factors, underlined the need to codify the topic. As subjects of international law, States were sovereign as of right. As sovereign entities, however, they existed not in a vacuum but in constant relations with one another. Hence it was logical that the legal norms for the exercise by a State of its territorial sovereign authority and for the assertion of its sovereign right to be exempt from the exercise of a similar authority by another State should be made more readily ascertainable in the interests of all States.

13. So far, the Commission had seemed to speak with one voice, but divergent opinions were apparent when it came to the point of departure. The question of whether jurisdictional immunities of States should be treated as a general principle of international law or as an exception to the more fundamental principle of territorial sovereignty had yet to be settled unanimously. Some members felt that jurisdictional immunity of States could be viewed as a general rule which itself admitted of certain exceptions. The other viewpoint asserted that jurisdictional immunity was an exception to the principle of territorial sovereignty, since the basis for such immunity was the cardinal principle of the sovereign equality of States that lay at the very foundation of international law.

14. In determining how important that difference of opinion was for the Commission's task, he wished to point out that theoretical questions, no matter how interesting and thought-provoking, gave rise to views that inevitably differed, as had been amply demonstrated in the course of the discussion. Although that aspect of the work was fundamental at the initial stage, it was certainly not so at the present stage, when every effort

⁴ Art. 29 of part I of the draft articles on State responsibility (*Yearbook ... 1980*, vol. II (Part Two), p. 33).

⁵ See 1708th meeting, footnote 31.

should be made to prepare draft articles designed primarily to solve specific problems.

15. It was abundantly clear that the two positions regarding the point of departure depended on the standpoint from which the topic was being treated, namely, the point of view of the State which benefited from immunity or that of the State which granted it. Equally clear was the fact that, in provisionally adopting one approach rather than the other, the Commission had done so simply because it wished to prepare the ground for the future draft articles and did not want to foreclose the possibility of reverting to the matter for the purposes of settling it later. Neither of the two opposing views, therefore, was compromised. Another, and perhaps the most important factor, was that neither of those two views seemed to be free of doctrinal shortcomings. For example, the Special Rapporteur stated in his fourth report (A/CN.4/357, para. 14) that:

even in dealing with aspects of State sovereignty, from the standpoint of the State claiming jurisdictional immunity, it is asserting its own sovereignty and not an exception or waiver of its sovereign powers.

It should none the less be remembered that the proponents of the "exception approach" seemed to conceive the exception in relation to the sovereignty of the territorial State, and not to that of the State claiming jurisdictional immunity. Yet there was no denying that sovereign equality of States was the very foundation of international law, something which signified, to borrow the terms of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations,⁶ that States had equal rights and duties and were equal members of the international community, notwithstanding differences of an economic, social, political or other nature. Since rights and duties were corollaries, however, it was evident that the concept of sovereign equality, while mutually exclusive, could not remain so juridically in a situation involving a conflict of sovereignties between States as a result of the presence of one sovereign authority within the jurisdiction of another. In such a situation, the conflict had to be settled in a manner that respected the law of the jurisdiction in question, failing which the equality of States in regard to duties would be impaired.

16. Mr. Ushakov (1710th meeting) had given a number of interesting theoretical examples in support of his analysis, which, in his own view, were perfectly but not necessarily absolutely legitimate. For instance, Mr. Ushakov had spoken of a State that had concluded a contract with an individual and had rightly said that such a contract was governed not by public international law but by private international law, which was a branch of internal law. He had also said that a State could not act in two capacities and could not be treated as an artificial person (*personne morale*) because that notion was governed by internal law, which emanated from the State itself. If the question was one of the applicable law, in other words, of the choice of law rather

than the choice of jurisdiction, it was well known that the cardinal rule governing choice of law in cases like that cited by Mr. Ushakov was that the matter depended on the law chosen expressly or implicitly by the parties. On the other hand, choice of law did not necessarily carry with it choice of jurisdiction, in other words, the sphere with which the present topic was concerned.

17. Generally speaking, the rules governing choice of jurisdiction conformed to certain internationally acceptable standards, although certain differences were to be seen in situations falling outside the sphere of contractual obligations. Mr. Ushakov's reasoning, if carried to its logical conclusion, might well mean that mutual consent prevailed in the case of applicable law, but in the case of jurisdiction, the unilateral consent of one party—the State, in the present instance—would alone be decisive in settling the final outcome of the question. It could be argued that that was inevitable, since the State was sovereign and the individual was not. All the acts of the former were political, but those of the latter were not. In a sense that might be true, but it could also be argued with some force that, if it had been possible to distinguish between the official and private functions of the individual, why should a similar distinction not be made in the case of States as well? Again, any immovable or incorporeal property within the territorial State could be acquired by another State only in accordance with the former's internal law, which covered the conditions relating to the competence of judicial bodies. How then was it possible to separate immunity from non-immunity in a case of that kind?

18. His remarks were made in an endeavour to show that the best course of action would be to assume for the time being that the question of point of departure had been settled, so that the Commission could move ahead. In that connection, he pointed out that Mr. Tsuruoka, speaking at the thirty-second session of the Commission,⁷ had recalled that the role of the Commission was different from that of a university or a parliament. The inductive approach had much to commend it, but the Commission should seek at the same time to screen, in so far as possible, State practice, national legislations, and internal judicial decisions. The wider the screening, the greater the likelihood of a broadly acceptable set of rules. No avenue should be dismissed out of hand. For instance, the useful dual approach proposed by Mr. Riphagen⁸ might, at a later stage in the Commission's work, prove to be the only way of dealing with the formulation of the exceptions to the general rule of State immunity. There was no lack of precedent in the annals of the Commission for adopting a novel approach if it seemed more promising. He was not calling for such a drastic change at present and was merely urging that the possibility should be borne in mind for the future, in the interests of a successful outcome to the task in hand.

⁶ General Assembly Resolution 2625 (XXV) of 24 October 1970.

⁷ See *Yearbook ... 1980*, vol. 1, p. 204, 1624th meeting, para. 19.

⁸ See 1708th meeting, footnote 11.

19. Lastly, the link which article 11 formed between parts II and III of the draft had been expressed in article 6, paragraph 2, which dealt with the question of giving effect to State immunity. While that was broadly in conformity with the Special Rapporteur's approach, as provisionally endorsed by the Commission, namely, that there should be a statement of a general rule followed by a statement of the exceptions to it, he felt that the misgivings regarding article 6 related more to the statement of the principle in paragraph 1 rather than to the effect. He therefore wondered whether it would not be possible for the Drafting Committee to consider resolving the controversy on the point of departure by deleting from the statement of principle in paragraph 1 of article 6, and keeping in paragraph 2 thereof, the phrase "in accordance with the provisions of the present articles". He wished to make that suggestion simply because he believed the difficulty that some members experienced in connection with article 6 was not insurmountable.

20. Mr. LACLETA MUÑOZ said that he wished to comment on some of the draft articles in the course of the general discussion, because he would be unable to attend the meetings in which the Commission would be engaged in considering each one in turn.

21. Paragraph 1 of article 7, both in alternative A and in alternative B, posed some difficulties because it was tied in with article 6 and contained the words "A State shall give effect to State immunity ...". Article 6 should in fact be recast to provide a better formulation of the idea underlying the entire draft, namely, the existence of the principle of immunity and of exceptions to that principle. The exceptions would not stem from the fact that, in certain situations, effect would not be given to State immunity. Where exceptions existed, there would be no immunity and there could be no question of giving effect to immunity which did not exist.

22. Alternatives A and B differed more particularly in the terminology employed to designate the jurisdiction from which a State could be exempt. Whereas alternative B spoke simply of "jurisdiction", without further qualification, alternative A referred to the "jurisdiction of its ... judicial and administrative authorities". The term "jurisdiction", at least in its English meaning, appeared to designate the public authority which the State exercised on its territory and which was the manifestation of its sovereignty. In his opinion, the draft should not adopt that approach, for it was concerned with the immunity from the exercise of the functions of the authorities of another State that were required to apply and state the law, whether they were civil, administrative or criminal courts. For that reason, he preferred alternative A.

23. As to alternative B, he wondered whether a State really allowed proceedings to be instituted against another State. Admittedly, States had to establish rules so that proceedings would not be instituted in their courts against a foreign State if the foreign State enjoyed jurisdictional immunity, but was it possible in

practice for a State to allow proceedings to be conducted against another State? Again, under alternative A, a State should not allow proceedings to be conducted against another State when the latter was entitled to jurisdictional immunity. Lastly, apart from difficulties of substance, both alternative A and alternative B required drafting changes.

24. Paragraphs 2 and 3 of the article, which sought to indicate when a legal proceeding was considered to be one against another State, were fairly satisfactory, but the wording could well be improved. The term "State" was to be taken to mean not only the State itself but also State organs, bodies and entities. In that connection, he fully endorsed the views expressed by Mr. Jagota in connection with diplomatic missions.

25. Articles 8 and 9 were largely acceptable in terms of substance, but the drafting could be considerably simplified. Apparently the Special Rapporteur had endeavoured to satisfy everyone, as could be seen from the simultaneous use of the notions of consent and waiver. For example, under the terms of article 9, paragraph 3, consent could be given by an express waiver of immunity. However, waiver always implied consent. The mention of both notions made the wording unnecessarily cumbersome. The 1961 Vienna Convention on Diplomatic Relations (art. 32, para. 2) dealt concisely with the question of waiver by specifying that an express waiver sufficed. Accordingly, it should prove possible to simplify paragraph 3 of article 9.

26. Similarly, article 10 was unnecessarily long. The first five lines should be enough, for the main point was that, in any legal proceedings instituted by a State or in which a State took part or took a step relating to the merit in a court of another State, jurisdiction could be exercised in respect of any counter-claim arising out of the same legal relationship or facts as the principal claim.

27. Article 11 was not really required if article 6 was to be interpreted as signifying that there was a general rule which admitted of exceptions. It was pointless, at the beginning of part III of the draft, concerning exceptions to the principle of State immunity, to point out that, subject to those exceptions, effect had to be given to jurisdictional immunity.

28. The merit of article 12 was that it covered all cases of trading or commercial activity and their effects on jurisdictional immunity. Paragraph 1 covered the most important case, namely, the case in which a State organ, in the exercise of its sovereign power, engaged in trading or commercial activity with a private person. Fortunately, paragraph 2 also took account of the fact that States could directly engage in commercial activities among themselves, in a private capacity. Trade in goods and the sale of products by one State to another were perfectly conceivable, and States could carry on such activities without making themselves subject to a special system of internal law, in which case international law appeared to apply. Thus, article 12 covered all eventualities.

29. Mr. JACOVIDES congratulated the Special Rapporteur on his erudite and comprehensive report on a topic which was more complicated and fraught with difficulties than might appear to be the case at first sight.

30. Controversy had arisen, both in the Commission and elsewhere, regarding the doctrinal basis for the jurisdictional immunity of States and the method of approach to the subject. On the one hand, there were those who argued that the legal basis was the principle of respect for national sovereignty and equality of States that underlay the classical theory of sovereign immunity. On the other hand, it had been argued that what was involved was conflict of sovereignties, which could be resolved by the expression of consent by one sovereign State or by the application of the more recent restrictive theory that immunity was limited solely to the public acts of a sovereign State. The problem was compounded by the fact that much of what was encompassed by the topic lay in the grey area of usage and comity among nations, in which reciprocity could be a relevant factor. Moreover, despite a wealth of judicial precedent and legislation at the national level, some of those precedents, even within the same national jurisdiction, were mutually contradictory, although the general trend had been towards limited immunity.

31. In his view, a valid starting-point lay in the principle of *par in parem imperium non habet*, which should operate both on behalf of and with respect to the territorial sovereign. The Commission's objective should be to reconcile the two conceptual approaches, using the inductive method, with a view to achieving a generally acceptable pragmatic compromise. In the matter of sovereign immunity, where no question of *jus cogens* arose, there was much to be said for balance, for a spirit of give and take and for realistic adjustment to contemporary conditions. Moreover, in such a large and important area of the law, there was ample scope for progressive development of the rules of international law—and even of the rules of comity and usage—in order to achieve the desired objective.

32. In its new and expanded form, the Commission should forge ahead and be concerned less with doctrinal differences and more with achieving practical results. The main thesis upon which it could rely was that there was a rule of State immunity and that it was subject to certain exceptions. Another relevant factor was that, in recent years, there had been a marked tendency to adopt the restrictive approach in specific cases of *acta jure gestionis*, as distinct from *acta jure imperii*. While the line of demarcation was not clearly definable in all cases, abundant State practice had been adduced by the Special Rapporteur and other members of the Commission to substantiate that view. He hoped that, once the Commission had arrived at a final formulation of the basic thesis and the exceptions to it, it would be possible to draft a generally acceptable compromise text that would remove the existing uncertainties and inconsistencies and would unify and harmonize the different approaches currently evident at both the international and the national levels. It was the most constructive and

positive course to follow, and one which fell squarely within the Commission's mandate.

33. Draft article 6 in its present form suggested that jurisdictional immunities existed solely in so far as they were established in the draft articles themselves. In that regard, he agreed with Mr. Yankov (1710th meeting) that it was better to leave the door open for greater flexibility rather than to prejudge specific issues by including the words "in accordance with the present articles". One possible solution might be to adopt the wording used in the 1972 European Convention on State Immunity.⁹ While, at the current stage, he was not formally proposing the deletion of the words in question, the matter might usefully be re-examined to determine how the concerns expressed could be more satisfactorily met as a way of facilitating the desired consensus.

34. Mr. CALERO RODRIGUES said that, while he agreed with the approach adopted by the Special Rapporteur, he did not believe that the Commission should base its deliberations exclusively on the materials available, which consisted solely of decisions by national courts, did not cover all the problems to be dealt with in the draft articles and reflected only one approach to the problem.

35. With regard to article 6, he had been somewhat surprised to hear doubts expressed as to the existence of the principle of State immunity. Acceptance of that principle, whether as an exception to the principle of territorial sovereignty or as an independent principle, was basic to the work of the Commission. Rather than take an excessively doctrinaire view, the Commission, as a technical body, should attempt to reconcile the different views and interests involved. He agreed almost entirely with the substance of the observations made by Mr. Ushakov (1709th meeting). Indeed, Mr. Ushakov's view that State immunity was a well-established principle was not new, for the principle had been stated long ago by Chief Justice Marshall.¹⁰ Moreover, in his second report,¹¹ the Special Rapporteur had also made it clear that he concurred in that regard. However, Mr. Ushakov appeared to believe that the phrase "in accordance with the provisions of the present articles" in article 6 could be interpreted as meaning that the principle could not exist independently of the articles. Personally he did not agree, but it might be advisable to redraft the text so as to make it plain that the principle did exist, subject to the exceptions or limitations set out in the provisions of the articles. A number of possible solutions had been suggested, and the problem was essentially one of drafting rather than substance.

36. As to article 7, and particularly the use of the words "give effect to State immunity", the view of the Special Rapporteur in that regard was not unacceptable

⁹ See 1708th meeting, footnote 12.

¹⁰ In *The Schooner "Exchange" v. McFaddon* (1812) (*ibid.*, footnote 9).

¹¹ See *Yearbook ... 1980*, vol. II (Part One), pp. 217-218, document A/CN.4/331 and Add.1, paras. 75-76.

(A/CN.4/340 and Add.1, paras. 9 *et seq.*). Nevertheless, the alternative version of paragraph 1 could be dispensed with entirely if article 6 gave a clear and complete definition of "State immunity". Alternative B contained a reference to "competence", which the Special Rapporteur insisted was necessary for immunity to come into play (*ibid.*, paras. 11-16). If a court was not competent, then the question of State immunity did not arise. Since that idea was totally implied in the concept itself, it was unnecessary for it to be stated specifically.

37. Paragraphs 2 and 3 of article 7 were quite acceptable, subject to a number of drafting changes, provided the Commission approved the Special Rapporteur's basic approach to articles 6 and 7.

38. The structure of articles 8, 9 and 10, dealing with the notion of consent, was satisfactory, but the concept itself had given rise to a number of difficulties. In his opinion, the very concept of immunity implied non-consent, for if a State gave its consent, then the question of immunity did not apply. However, with a few drafting improvements, articles 8, 9 and 10 could provide a useful working basis.

39. Mr. NJENGA said he agreed with the conclusion reached by the Special Rapporteur (1708th meeting) that there had been a general trend towards limiting the principle of immunity. The Special Rapporteur himself had never questioned the existence of the principle, and the Commission should start from the premise that the principle did exist and then proceed to identify exceptions to it. A number of speakers had affirmed quite categorically that the basis for the principle was the concept of the sovereign equality of States, a view which had been expressed by Chief Justice Marshall in *The Schooner "Exchange"* case. If the Commission accepted that as a useful starting-point, then it must also agree with the Special Rapporteur's rejection of the dual approach (A/CN.4/357, para. 26), since it would call into question the very existence of the principle of immunity.

40. He endorsed Mr. Ushakov's views (1709th meeting) concerning the wording of article 6. As it stood, paragraph 1 appeared to question the existence of the principle, since it implied that there could be no immunity except under the terms of the draft. Consequently, article 6 should be recast in an acceptable form, perhaps even by using the wording of the provision of the European Convention on State Immunity stipulating that a State was immune except where otherwise provided.¹²

41. On the question of exceptions, the trend towards the restriction of immunities in the field of trading and commercial activity did not mean that such activity did not fall within the area of State sovereignty. In all cases, a State acted as a sovereign entity, regardless of the type of activity in which it engaged. The fact that a State acted in a private capacity could not serve as a basis for

the limitation of immunity. The move towards making such activity subject to the jurisdiction of the territorial State was based on the premise that the limitations were without prejudice to the vital interests of States. Furthermore, contracts could be entered into with greater confidence if it was known that they could be enforced by adjudication, something which was borne out by the practice of a number of countries which, in trade agreements, always indicated their willingness to accept local jurisdiction.

42. However, in providing for exceptions to, or limitations of, State immunity, the Commission should be careful not to go too far. If, for example, State trading and commercial activities were made the subject of an exception, would that mean that the commercial attachés of embassies enjoyed no diplomatic immunities when engaged in trade activities on behalf of their Governments? It was difficult to see how such an exception could be reconciled with the provisions of the Vienna Convention on Diplomatic Relations. The Commission should not engage in an exercise which had the effect of diminishing the privileges and immunities provided for in that Convention. There was a broad area in which the trading and commercial activities of States could be made subject to local jurisdiction without thereby infringing existing conventions. For example, many countries whose trading activities were conducted by members of their diplomatic corps entered into specific agreements governing those activities. Consequently, article 12 should be drafted in such a way as to avoid any possibility of conflict with the Vienna Conventions.

43. Mr. FRANCIS said that, in an exercise of the kind in which it was now engaged, the Commission should proceed with care, caution and patience, because it was dealing with a very sensitive issue and the inductive approach would lose its effectiveness if the sampling of State practice studied was not truly representative of the attitude of the international community as a whole.

44. State practice did not exist in a vacuum, but was invariably influenced by social and political factors. Attitudes prevailing at any given time might be totally discarded within a decade. In the early 1960s, for example, newly-independent States had generally been in favour of total acceptance of the rights and obligations provided for in treaties entered into by their former administering Powers, an attitude reflected in the wording of article 6 of the draft code on the law of treaties.¹³ Within a decade, that idea had been supplanted by the concept of unilateral declarations and was never reflected in the final version of the Vienna Convention on the Law of Treaties.

45. As to the question of restriction of immunity, he knew of one Caribbean State which had been arraigned before the court of a metropolitan Power in respect of an action arising out of an incident that had taken place, not within the territory of the metropolitan Power but

¹² Art. 15 of the Convention; see 1708th meeting, footnote 12.

¹³ See *Yearbook ... 1959*, vol. II, p. 98, document A/4169, chap. II, sect. II.

within that of the Caribbean State. The very idea of a sovereign State or State organ being arraigned before another State in such circumstances was a very serious matter, and the frequency with which it occurred should be a matter of concern to the Commission. A series of questions pertinent to the exception provided for in article 12 was bound to emerge from the North-South and South-South dialogues. Another factor to be considered was that the new diplomacy occasioned by the emergence of newly-independent States would bring into focus new concepts of international relations centring on basic needs rather than issues of high politics.

46. The Commission should bear in mind that few developing countries had any recorded State practice in the area in question, except to the extent that they had been adversely affected by the restriction of immunity. Consequently, it had a duty to be patient and to endeavour to ascertain the attitude of developing countries with regard to the very important question of limitation of State immunity, since it was those countries that stood to lose most from any restriction of immunities.

The meeting rose at 1.05 p.m.

1712th MEETING

Monday, 24 May 1982, at 3.05 p.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Jurisdictional immunities of States and their property (continued) (A/CN.4/340 and Add.1,¹ A/CN.4/343 and Add.1-4,² A/CN.4/357, A/CN.4/L.337, A/CN.4/L.339, ILC(XXXIV)/Conf. Room Doc. 3)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR (continued)

GENERAL COMMENTS ON PARTS I, II AND III OF THE DRAFT ARTICLES³ (continued)

1. Mr. RAZAFINDRALAMBO joined in congratulating the Special Rapporteur, who had con-

¹ *Yearbook ... 1981*, vol. II (Part One).

² Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).

³ The texts of the draft articles contained in parts I and II of the draft are reproduced as follows: (a) art. 1 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (b) arts. 2 to 5, in *Yearbook ... 1981*, vol. II (Part Two), pp. 153-154, footnotes 655-658; (c) art. 6 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (d) arts. 7 to 10, revised at the Commission's thirty-third session, in *Yearbook ... 1981*, vol. II (Part Two), pp. 158, footnotes 668-671. Part III of the draft contains articles 11 and 12, submitted in the Special Rapporteur's fourth report (A/CN.4/357, paras. 29 and 121).

siderably facilitated the Commission's task by putting before it a working document (A/CN.4/357) of exceptional scientific value on a most delicate subject.

2. The exhaustive study made by the Special Rapporteur, with masterly recourse to the inductive method, convincingly demonstrated the existence in both the common law systems and the civil law systems of a close link between the principle of absolute sovereignty and that of immunity. That link had tended to weaken in the course of the centuries, and the notion of absolute immunity based on absolute sovereignty had been progressively run down because of the appearance, in the very countries which had professed that notion, of new factors inherent in the evolution of the State's duties and role in the sphere of economic and industrial activities.

3. It should be asked, however—and many of the Commission's members had done so—whether the resulting trend towards restricting and limiting immunity, which might seem quite normal in the market-economy countries and consumer societies, made allowance for the situation of the developing countries, particularly those which had achieved their independence since the 1960s. Many of those countries had come, for overriding reasons pertaining to their economic development, to extend considerably the limits of the public sector. They had done so either through the nationalization of private companies or through the exercise of public authority in spheres of activity considered in industrialized countries to come under *acta jure gestionis*.

4. It would have been interesting to see an evaluation from the Special Rapporteur of the effects of the new concept of non-immunity based on the distinctions mentioned in his fourth report (*ibid.*, paras. 35-45) between the principles of the sovereignty, equality and dignity of all States, particularly the economically and politically least advantaged and powerful among them. It was true that in paragraph (31) of the commentary to article 6⁴ a deficiency was noted with regard to the situation in Africa, but that could be explained by the fact that there were in some African countries public establishments of an industrial or commercial nature which had expressly been given the status of a trading company; it was those institutions, therefore, which undertook the activities subject to the non-immunity principle. In addition, developing countries were almost unanimous in inserting in the contracts they concluded in the context of their development, including those in the sphere of commercial activities, clauses assigning competence, and so avoiding the problem of domestic remedies.

5. Whatever the situation, the attachment of third world countries to the principles of sovereignty and independence needed no further proof, as two instances would suffice to show. To take, first, nationalization: recently, in *Libyan-American Oil Company v. Socialist*

⁴ *Yearbook ... 1980*, vol. II (Part Two), p. 149.