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Summary record of the 1728th meeting

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cordance with Article 13, paragraph 1, subparagraph *a*, of the Charter.

43. Two points were of course certain. First, a conference of plenipotentiaries would be held under United Nations auspices, and second, the conference would examine the draft articles. However, the Commission could not deal with the question of the rights of participants in the conference. In the past, as a general rule, international organizations had usually participated in plenipotentiary conferences only as observers; that had been true even in the case of the Third United Nations Conference on the Law of the Sea, when the position of those very organizations was being considered. It was essential to bear in mind that, in international law, law-making was essentially the task of States.

44. The United Nations specialized agencies and the IAEA would certainly be invited to participate in the conference. As for other intergovernmental organizations, it would be appropriate to examine their relationship with the Economic and Social Council. In that connection, he recalled the serious problems that had arisen in the special sessions of the General Assembly on disarmament regarding the participation of organizations concerned with disarmament problems. All those questions had significant political connotations, which the Commission should leave to the competent organs of the United Nations.

45. There was also the problem of the large number of intergovernmental organizations which might be eligible for participation. It was not at all improbable that as many as 350 intergovernmental organizations might wish to participate, thus outnumbering the 150 States that would be invited. With regard to Mr. Ni's interesting suggestion that a preliminary survey should be conducted before establishing the final list of invitations, he felt that the matter could not be left to the Secretary-General to decide. That was a matter which should be decided by a resolution of the General Assembly. Such a resolution would not be of a merely procedural character, as shown by the case of the Third United Nations Conference on the Law of the Sea. Clearly, it was not for the Commission to request the Secretary-General to conduct the survey proposed by Mr. Ni; the whole question should first be examined thoroughly by the Sixth Committee. The Commission, for its part, should draw the matter to the attention of the Sixth Committee by means of some appropriate reference in the report. That would give Governments a clear indication on the subject, with a view to the work of the thirty-seventh session of the General Assembly.

46. Mr. QUENTIN-BAXTER agreed with previous speakers on the need for the Commission to be very careful and restrained in its suggestions. It should remember that it was not a decision-making body and should confine its action to drawing the attention of the General Assembly to some relevant considerations. He therefore favoured the adoption of a recommendation to the effect that a conference of plenipotentiaries should be convened to consider the draft articles,

qualified by the comment that the case was a very special one. The General Assembly might then wish to consider the special interest of intergovernmental organizations in relation to the treaty which should be the outcome of the draft. The point should also be made that the United Nations must do its best to obtain the reactions of intergovernmental organizations to the draft.

47. The question of participation raised some very real problems. There must be adequate representation of States at the proposed conference. Clearly, States would not be represented at the conference in the same manner as they had been at the two sessions of the United Nations Conference on the Law of Treaties. As he saw it, there was a very real danger that States would be not only outnumbered, but even outshone, by the intergovernmental organizations. There was also the question of the participation of intergovernmental organizations in the future treaty. He earnestly hoped, in that connection, that organizations which did not signify their desire to be bound by the treaty would not thereby automatically be assumed not to be bound by it. It would be most unfortunate for the future if any such precedent were established. In conclusion, he supported the proposal to refer the draft articles to a conference of plenipotentiaries, since those articles were no less worthy of such treatment than earlier drafts relating to the law of treaties.

48. Mr. CALERO RODRIGUES supported the proposal to refer the draft articles to a conference of plenipotentiaries and agreed with previous speakers that caution should be exercised with regard to the question of participation in the conference. There was, of course, no certainty that the Commission's recommendation for the holding of the conference would be accepted. There was currently some reluctance on the part of States to convene conferences, because of the feeling that too many of them were being held. That being so, he believed that the Commission would not be exceeding its mandate if it were to add to its recommendation the comment that, in view of the nature of the draft, intergovernmental organizations with treaty-making capacity should be permitted to participate. There was of course no need for the Commission to go into details regarding such questions as invitations.

The meeting rose at 1 p.m.

1728th MEETING

Wednesday, 16 June 1982, at 10.05 a.m.

Chairman: Mr. Paul REUTER

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) /A/CN.4/341 and

Add.1,¹ A/CN.4/350 and Add. 1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:
SECOND READING² (*concluded*)

RECOMMENDATION TO THE GENERAL ASSEMBLY (*concluded*)

1. The CHAIRMAN, speaking as Special Rapporteur, said that a number of conclusions could be drawn from the exchange of views that had taken place at the previous meeting. In its recommendation to the General Assembly on what was to be done with the draft articles on treaties concluded between States and international organizations or between two or more international organizations, the Commission should first indicate clearly and concisely its choice from among the four options set forth in article 23, paragraph 1, of its Statute and, secondly, justify that choice.

2. With respect to the operative part of the recommendation, members had been unanimous in the view that the General Assembly should convene a conference for the purpose of concluding a convention. One member of the Commission had suggested that all the relevant considerations should be indicated in the justification for that choice. However, as Special Rapporteur—indeed, as Chairman of the Commission—his own view was that the reasons should be stated simply and concisely, in keeping with the Commission's tradition and, in particular, with the position adopted in the past by the General Assembly itself, which had convened conferences to confirm the results of the Commission's work on the law of treaties, succession of States in respect of treaties and the representation of States in their relations with international organizations of a universal character. The Commission would therefore recommend the convening of a conference, on the understanding, of course, that it would not be required to consider the many problems that might arise in that regard and that were a matter for the General Assembly alone to determine, together with the understanding that the General Assembly, precisely on account of such problems, might be impelled to take a different decision.

3. In any event, the General Assembly would have to decide on the manner in which international organizations might be bound by the draft articles—and they would necessarily be bound by any convention—and also on the modalities for their participation in the work of the conference. With respect to the first question, international organizations might be bound by the set of draft articles by becoming full parties to the ensuing in-

strument, by a system similar to that provided for in the Convention on Privileges and Immunities of the Specialized Agencies,³ or by some other means. That again was a policy matter, which the General Assembly alone could decide. Similarly, the Commission should leave to the General Assembly the question of which international organizations would participate in the conference and on what basis—as of right, by special status, and so on—to which the Assembly would doubtless find an appropriate solution.

4. The exchange of views had also focused on the formulation of a preliminary draft recommendation, and it had been left to him to judge whether he should prepare it alone or submit it to a group, to a few members of the Commission or to the Drafting Committee. He intended to prepare a text without delay and submit it to some, if not all, members of the Commission for their consideration, but the matter need not be settled at the present meeting. When the text was ready, he would consult the Commission, as its Chairman, in order to determine whether it wished to examine the text before taking up the draft report on the work of the session, whether it wished simply to refer it to the Drafting Committee, or whether it preferred some other procedure.

5. Speaking as Chairman, he said that, if there were no objections, he would take it that the Commission agreed to accept the proposals he had made as Special Rapporteur.

*It was so decided.*⁴

6. The CHAIRMAN announced that the set of draft articles on treaties concluded between States and international organizations or between international organizations, including the annex, had been considered in its entirety and referred to the Drafting Committee.

Jurisdictional immunities of States and their property (*continued*)* (A/CN.4/340 and Add.1,⁵ A/CN.4/343 and Add.1-4,⁶ 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 RAPPORTEUR⁷ (*continued*)

³ United Nations, *Treaty Series*, vol. 33, p. 261.

⁴ For the discussion in the Commission and its decision concerning the recommendation to the General Assembly, see 1748th meeting, paras. 3-5.

* Resumed from the 1718th meeting.

⁵ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

⁶ 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).

⁷ The texts of draft articles submitted at previous sessions of the Commission 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.

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

² The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

ARTICLE 11 (Scope of the present part) *and*

ARTICLE 12 (Trading or commercial activity)

7. The CHAIRMAN proposed that the Commission take up draft articles 11 and 12, submitted by the Special Rapporteur in his fourth report (A/CN.4/357, paras. 29 and 121), which read:

Article 11. Scope of the present part

Except as provided in the following articles of the present part, effect shall be given to the general principles of State immunity as contained in Part II of the present articles.

Article 12. Trading or commercial activity

1. In the absence of agreement to the contrary, a State is not immune from the jurisdiction of another State in respect of proceedings relating to any trading or commercial activity conducted by it, partly or wholly in the territory of that other State, being an activity in which private persons or entities may there engage.

2. Paragraph 1 does not apply to transactions concluded between States, nor to contracts concluded on a government-to-government basis.

8. Mr. MALEK said he shared the view of other members of the Commission that article 11 in its present form tended to duplicate article 6. He had pointed out on an earlier occasion (1709th meeting) that article 6 set forth the rule of State immunity but made the rule subject to the provisions of other draft articles. Moreover, under article 6 immunity could be viewed only within the limits laid down by the various provisions of the draft, including those forming part III, entitled "Exceptions to State immunities". However, article 11 enunciated the same rule in slightly different terms by stipulating that effect should be given to the General principles contained in part II, except as provided in part III. Consequently, he saw no great objection to maintaining article 11, but is present wording made it appear to be an introduction to part II rather than to part III. If it was to remain in part III, it should be amended accordingly.

9. As to article 12, paragraph 1, he wondered whether it would not be preferable for the phrase "being an activity in which private persons or entities may there engage" to appear instead in article 2, relating to the use of terms, for it was doubtful whether such clarification was appropriate in a substantive article. In any event, the word "*telle*", in the French version, was out of place in a legal text of that kind, and it should perhaps be replaced by the expression "*de nature à*". In paragraph 2, the use of the word "States" in the expression "transactions concluded between States" and the use of the word "government" in the expression "contracts concluded on a government-to-government basis" did not seem felicitous, even though the distinction between the concepts of "State" and "government" was justified in the context.

10. Mr. RAZAFINDRALAMBO observed that, in considering part III of the draft, concerning exceptions to State immunities, the Commission was once again confronted with problems relating to the scope of the

rule on immunity and the need to maintain a balance between the sovereignty of the territorial State and that of the foreign State. Those problems were assuming growing importance because of the accession to independence of new States whose political and economic interests had apparently been subject to conflicting demands—political interests that called for a clear confirmation of sovereignty and of its corollary, immunity, and economic interests that prompted an easing of the immunity rule, in view of the trend in industrialized capital-supply countries towards narrower immunity. The new States had been compelled to yield to efforts to encompass trade and development needs in the exceptions to immunity: first, by waiving immunity through clauses on jurisdiction that were regularly included in contracts concluded with foreign partners in the financial, commercial or industrial fields and were designed to prevent any recourse to domestic jurisdiction; and secondly, by increasingly conceding to the distinction—one which had become traditional in industrialized countries—drawn between *acta jure imperii* and *acta jure gestionis*, or a similar differentiation.

11. The fourth report (A/CN.4/357) and the draft articles submitted by the Special Rapporteur were based on that distinction, and it was difficult not to endorse, in principle, the approach followed by the Special Rapporteur, who had devoted part III of the draft to the exceptions to State immunities. Nevertheless, in common with other members of the Commission, and most recently, Mr. Malek, he wondered too whether article 11 did not duplicate article 6, particularly paragraph 2 thereof. An introductory provision to part III was undeniably useful, provided part III dealt with more than one exception, in which case the exceptions should be introduced directly by some such formula as "A State is not immune from the jurisdiction of another State in the cases set forth in the following articles", as was done in the Foreign Sovereign Immunities Acts in the United Kingdom and the United States.⁸ In any event, article 11 began with a reservation whose meaning was not altogether clear, since the phrase "Except as provided in the following articles of the present part" appeared to refer to article 12, which stipulated "In the absence of agreement to the contrary ...", thus obviating the need for the reservation at the beginning of article 11.

12. Article 12, which had to be considered in the light of articles 2 and 3, made the exception to immunity subject to two conditions: the State must be conducting a trading or commercial activity, and the activity must be one in which private persons or entities might engage. "Trading or commercial activity" was defined in article 2, subparagraph 1 (f), as a regular course of commercial conduct or a particular commercial transaction or act, and that definition was further explained by the interpretative provision in article 3, paragraph 2, to the effect that the commercial character of a trading or commercial activity was determined by the nature of the

⁸ See 1709th meeting, footnotes 12 and 13.

course of conduct or particular transaction or act, rather than by its purpose. Unfortunately, however, those explanations did not solve all the problems. What indeed was the meaning of the expression "nature of the course of conduct"? Malagasy law, following French law, enumerated a number of acts which, by their nature, were deemed commercial, together with some activities that were not covered by the Commercial Code. Case law had developed two criteria for establishing the commercial character of an act by laying down essential conditions: the part the act played in distributing wealth, and the concept of speculation and pecuniary gain. Since the French versions of article 2, subparagraph 1 (*f*), and article 3, paragraph 2, both spoke of the "nature" of the activity, it was essential to take account of those criteria, which were generally acknowledged under the civil law system. Since one of them was pecuniary gain, could activities be described as commercial when they were non-profit making and had no speculative intent?

13. In his opinion, it was the abandonment of the formalistic criterion, and thus the concept of public service that accounted for the somewhat curious decisions mentioned by the Special Rapporteur (*ibid.*, para. 48), decisions whereby, for example, a contract for the purchase of bullets had been deemed a private act, whereas the purchase of cigarettes for a foreign army had been judged to be an act of the public authority. Hence it was difficult, in the absence of objective criteria for determining the nature of the commercial activity, to avoid running into distinctions that bordered on the arbitrary. Some activities, such as those relating to contracts for the transfer of technology or technical assistance agreements, were of a somewhat intellectual nature and it was not easy to say *a priori*, whether they constituted a commercial activity. A trading or commercial activity should therefore be defined by a combination of various criteria.

14. The second condition laid down in article 12, namely, that the activity was one in which private persons or entities might engage, could not easily be applied on a universal basis because the legal systems in the world were varied, if not at variance with one another. In order to determine whether or not a private person might engage in a particular activity, would his position have to be regarded from the standpoint of the territorial State or that of the foreign State? In many countries, private persons or entities could carry out many acts that were considered elsewhere as commercial. Moreover, a Government would only have to decree that a particular activity fell outside the private sector for it to consider that the activity was covered by immunity. Accordingly, the use of the phrase "being an activity in which private persons or entities may there engage", at the end of article 12, paragraph 1, had more drawbacks than advantages. In principle, paragraph 2 of the article met with his support and could be referred to the Drafting Committee in its present form.

15. Mr. NI noted that, in his fourth report (A/CN.4/357, paras. 27-28), the Special Rapporteur had dwelt on the relations between rules and general exceptions, but the prevailing opinion, and one he himself shared, was that State immunity itself constituted a rule and not an exception to another rule. Indeed, the very terms of article 6 clearly showed that that was true, as he had had occasion to point out earlier in the discussion (1712th meeting).

16. He too agreed that article 11, was of doubtful value in its present form and that it partly repeated the contents of articles 6 and 7, and perhaps even article 8. It could well be redrafted by using a formulation such as: "A State is not immune from the jurisdiction of another State in the cases provided for in the articles of the present part", but even then the article would have little meaning, except as an introductory provision to part III. It would in fact restate what was already clear from the title of part III of the draft, which covered the exceptions to the general principle of State immunity.

17. Mr. EVENSEN agreed that article 11 seemed superfluous. The basic principle was already embodied in article 6, and it was obvious that the general principles set forth in part II applied to all of the articles in other parts of the draft. The very heading of part III was sufficient to indicate that the articles in it contained exceptions to State immunity, something which tended to militate against the alternative formulation for article 11 proposed by Mr. Ni.

18. In article 12, paragraph 1, the phrase "conducted by it, partly or wholly in the territory of that other state" was unduly restrictive. Under the general principles of conflict of laws, venue was possible in a State without need for the transaction to have been concluded in the territory of that State. He therefore proposed that the words "or where the authorities of that State have jurisdiction over such activity" should be inserted after the words "in the territory of that other State".

19. In his opinion, a broader interpretation should be placed on the formula "trading or commercial activity". In Norway at least, it covered fishing and hunting, which were of great practical significance, especially in the North Atlantic area. Again, under Norwegian law the placing of a Government loan in the international bond market was deemed a commercial activity and, accordingly, foreign bondholders could sue the Norwegian Government in the Norwegian courts in connection with suppression of the gold clause. Lastly, the end of paragraph 2 of article 12 might be reworded to read: "... transactions or contracts concluded between States or on a government-to-government basis".

20. Mr. CALERO RODRIGUES said he shared the views of previous speakers that article 11 was superfluous, something which the Special Rapporteur himself appeared to have recognized, judging from his remarks in the fourth report (A/CN.4/357, paras. 27-28).

21. Clearly, article 12 stated an exception to the rule, rather than the principle, of State immunity, for it should be remembered that the Commission was engaged in drafting legal rules for the application of a certain principle. Indeed, article 12 was of great importance and lay at the heart of the rule and the exceptions thereto. The terms of the article hinged largely on the rather difficult interpretation of the expression “trading and commercial activities”. Under the definition contained in article 2, subparagraph 1 (f), “trading or commercial activity” signified a regular course of commercial conduct or a particular commercial transaction or act, but that definition raised the question of the determination of the commercial character of an act, which could be decided on the basis of either the legislation of the forum State or that of the foreign State. A number of Governments had stated that consideration must be given strictly to the nature of the act, to the exclusion of its purpose. However, the use of such criteria was rendered difficult by the fact that the precedents were inconsistent not only between countries but even between courts in one and the same country.

22. In view of the uncertainties, a clearer definition of the expression “trading or commercial activity” was obviously required. Admittedly, the nature of the act must be the major factor in determining whether it had a commercial character, but account must also be taken of its purpose. At the same time, the element of profit could not be excluded altogether.

23. Mr. FRANCIS referring exclusively to article 11 for the time being, said that it was not necessary as it stood but might none the less be included in the draft in some other form. The provisions of the article should be couched in terms of a statement on the boundaries of the exceptions and on the general plan and scope of the subsequent articles, rather than affirm that effect should be given to the general principle of State immunity.

24. Mr. BALANDA said he too felt that article 11 was not indispensable. To begin with, the title did not seem consistent with the article’s place in the draft, and it should be amended to show that it related to exceptions either to the rule, or the principle, of jurisdictional immunities of States and their property, in which connection Mr. Al-Qaysi (1711th meeting) had rightly pointed out that the Commission should decide whether it intended to make such immunities a principle or a rule. Moreover, the provision itself appeared to duplicate article 6, paragraph 2, and articles 7 and 8.

25. Fortunately, the relativity of the jurisdictional immunity of States was implied in the formulation of paragraph 1 of article 12, but he fully endorsed the comments by Mr. Calero Rodrigues concerning the expression “commercial activity”, which differed in meaning from one country to another, so that in all likelihood it would be difficult to propose a comprehensive and universally applicable definition. Plainly, a trading or commercial activity in which a State might engage should not be covered by jurisdictional immunity,

but the adjective “commercial” alone was too restrictive. It might therefore be helpful to use additional adjectives such as “industrial” and “financial” before the word “activity”, as did the Special Rapporteur in his fourth report (A/CN.4/357). One alternative, if such a course proved to be too cumbersome, would be to explain in the commentary what the expression “commercial activity” signified within the meaning of the draft.

26. Again, although the reference to “private entities” in paragraph 1 was intended to preclude immunity from jurisdiction when States carried out activities in which private persons also normally engaged, it could easily be deleted without in any way making the text less understandable, firstly, because the nature of a State differed entirely from that of a private entity, and, secondly, because the reference appeared to conflict with article 12, paragraph 2, under which the exception provided for in paragraph 1 would not apply to transactions concluded between States or to contracts concluded on a government-to-government basis.

27. As to article 12, paragraph 2, he wondered why it had to be assumed *a priori* that all contracts, of whatever nature, concluded on a government-to-government basis were not to be considered as exceptions, when the Special Rapporteur had specifically proposed from the outset that the criterion for exceptions would be the nature of the act. Furthermore, why could not all transactions concluded between States also be covered by exceptions, when Mr. Razafindralambo had just observed that the notion of pecuniary gain should also be taken into account? Were all activities in which a State might engage, either with other States or with other entities, to be considered as activities of the public authority and thus entitled to immunity? He did not think so, for the Special Rapporteur had in fact drawn attention in his fourth report (*ibid.*, paras. 35-45) to a number of cases in which the State could behave in precisely the same way as a legal person, whether natural or juridical. That indeed was what had led the Special Rapporteur to propose, as a criterion for exceptions, activities in which private persons or entities might engage.

28. He agreed with the Special Rapporteur that account must be taken of the nature of the act, but it was not the sole yardstick, since the purpose of the act should also be employed as a criterion in determining whether it came within the category of *acta jure imperii* or *acta jure gestionis*, along with any other criteria for establishing in each case whether the activity involved was commercial or one conducted by the State as the public authority.

29. Mr. RIPHAGEN said that article 11 might well seem redundant in the light of article 6, but there was some difference between them. Article 6, which reflected the best approach, left open the possibility that not all matters might be regulated by the set of draft articles, something which did not hold true in the case of article 11.

30. Article 12 afforded a good illustration of the problems posed by the wording of article 11, for it was couched in terms that gave rise to difficulties of interpretation and an element of ambiguity was introduced by the concluding words in paragraph 1, "being an activity in which private persons or entities may there engage", which should be deleted. Again, with regard to the expression "trading or commercial activity", the nature of the act involved was of course relevant, but the problem of determining the character of an act did not arise only in respect of commercial contracts, and State immunity was equally pertinent in such matters as acquisition of property, contracts of employment and wrongful acts. Accordingly, some effort should be made to clarify the concept of the commercial nature of the act. However, the element of profit had no place in the law of State immunity and there was no need to draw any distinctions in that regard. Obviously, any person making a transaction entered into it for his own benefit and that would also be true of a Government.

31. With reference to the formulation in paragraph 1, "conducted by it, partly or wholly in the territory of that other State", it had to be remembered that many activities—especially those of a general character—could be connected with several States. In such instances, the national legislations and judicial precedents in the various countries offered very different criteria for solving the resultant problems.

32. As to the question "Immunity from what?", there were cases in which the very fact that the law of a State was applicable entailed the necessity of some form of "sitting in judgement" or even some form of execution. For example, intellectual property was not of a physical character and was simply a creation of the law, but the rights in question had also to be administered by the courts and authorities of the State by virtue of whose law the property had been created. If a State applied on its own behalf for a patent in another State, it had to accept the jurisdiction of the authorities of that State in all matters pertaining to the application or enforcement of the rights involved. Similarly, it was not uncommon for a State to enter into a company governed by the law of another State and, for the purposes of its relations with the other participants in the company, it had to accept the jurisdiction of the foreign courts concerned. Yet another example was provided by arbitration, which was always connected with the legal system of a particular State: the law of the forum applied to all the consequences of arbitration. Such points would have to be dealt with somewhere in the draft.

33. Lastly, another important matter was that, even when a State engaged in trade, some element of immunity always remained, quite apart from the question of immunity from execution. For instance, it was doubtful, to say the least, whether a judge could order an injunction against a foreign State, even in connection with its commercial activities. The same was true of penalties for non-completion of contracts, the remedy known in French law as "*astreinte*", which seemed to be ruled out

by the status of a foreign State. The award of punitive damages against a foreign State would also seem to be excluded in most cases.

34. He wished to emphasize that his remarks had not been made in a spirit of criticism. They related to extremely difficult problems, and he much admired the skill with which the Special Rapporteur had striven to solve them.

35. Mr. McCaffrey, noting that several members had queried the need for article 11 on the grounds that it had the same effect as article 6 and served basically to introduce part III of the draft, said that the article could be construed as performing two other functions, both of which were of a limiting nature. In the first place, the opening phrase "Except as provided in the following articles of the present part ..." could be interpreted as limiting the possible exceptions to the ones set forth in part III of the draft; consent and waiver would also be recognized, of course, by the article's subsequent reference to part II. Secondly, the words "... effect shall be given to the general principles of State immunity as contained in part II of the present articles" arguably performed the same limiting function, since it could be interpreted as meaning that the scope of the doctrine of State immunity was confined to the rules set forth in part II. Thus, in the absence of a specific provision in part II, there would be no rule of State immunity. The phrase "... as contained in part II..." was an explicit reference to article 6, the wording of which was of paramount importance. In its current form, that article could be interpreted as restricting the scope of State immunity to the rules set forth in the draft articles. However, if article 6 were to be reworded to establish that a State would be immune from the jurisdiction of another State except as provided in part III of the articles, it could then be read as purporting to codify State jurisdictional immunity as a rule of general international law.

36. If the Commission did not consider those two functions necessary, and did not wish to confine the exceptions to those specifically enumerated in part III of the draft, then the introductory element of article 11 could perhaps be deleted, each exception instead being prefaced by some introductory wording along the lines he had suggested earlier: "A State immune from the jurisdiction of another State except ...".

37. As to article 12, it would be possible to take the view that trading and commercial activities were not, and never had been, an "exception" to the doctrine of sovereign immunity; rather, one could take the view that the doctrine simply never extended so far as to immunize States in respect of such activities. By that he did not mean to object to the title of part III; it was simply a theoretical point which might bolster the argument that trading or commercial activities should not enjoy immunity under the draft or, indeed, in general international law.

38. In regard to the requirement under paragraph 1 of the article that the trading or commercial activity should

be conducted partly or wholly in the territory of the other State, a number of speakers had stressed that care should be taken not to depart from the realm of public international law. However, conduct of the activity wholly or partly in the forum State was not a requirement under public international law and was relevant only in so far as the competence of the court under the State's internal rules was concerned. Consequently, it would be appropriate either to modify the requirement by making the determination dependent upon the jurisdiction of the forum States, as suggested by Mr. Evensen, or simply to omit it and allow each State to decide for itself whether the nexus between the activity in question and the forum State was sufficient to enable that State's courts to assert jurisdiction over the defendant State. That, too, would be achieved with Mr. Evensen's proposed formulation. Either alternative would be preferable to the existing wording.

39. He was also inclined to agree that while, in general, the nature of the activity should be the decisive factor, consideration of such factors as the purpose of the activity should not be excluded, but it might well prove dangerous to establish an exhaustive list of all the factors involved, since some of them might be omitted. Rather than lay down any criterion, it might be better to leave it to the court of the forum to determine the meaning of trading and commercial activities in accordance with its own law. Lastly, he concurred in the view that the interpretation of the requirement that the activity should be one in which private persons or entities might engage could vary, according to the different systems and jurisdictions. It really depended upon the forum State, and the fact that private persons could not engage in a particular activity in the forum State should not necessarily mean that the defendant State was immune from jurisdiction. Possibly that particular requirement, even though it was established in certain national legislations, might not be appropriate in a set of internationally applicable articles.

40. Mr. USHAKOV said that the conclusions drawn by the Special Rapporteur in his fourth report (A/CN.4/357) were totally unsatisfactory. In the report, the Special Rapporteur dealt with the question of exceptions to the principle of the jurisdictional immunity of States, a principle which stemmed from the sovereign equality of States and was a fundamental principle of general international law. Any exceptions to that principle must also be embodied in accepted rules of general international law. If the Commission intended to engage in the task of codification, it must establish the existence of such rules. If, on the other hand, it intended to concentrate on the progressive development of international law, it did not have to establish the existence of those rules; it must propose new rules, when it was convinced that there was a general tendency to respect them and that they would be accepted by all States. In his view, there was nothing to justify either step in the case at hand.

41. As the Special Rapporteur had indicated (*ibid.*, para. 52), international case law on the subject was

practically non-existent and he had therefore limited himself to studying the internal case law of States. Yet internal case law alone was not sufficient to establish the existence of a legal rule that was valid as between States. A judicial decision taken by a court of one State could be applied to another State only if the second State accepted it voluntarily. The Special Rapporteur had never said that the internal judicial decisions he had cited, which held that jurisdictional immunity did not exist, had been accepted by the States in question. In that area, the Soviet Union followed a well-established practice in that it never agreed that a foreign court might take a decision affecting it without its consent, regardless of whether the decision was favourable or otherwise. That practice was followed, not only by the other socialist countries, but by many other States as well. Admittedly, in the absence of any international case law, it was possible to study the internal case law of States. However, no conclusions could be drawn unless a practice emerged and was generally accepted by the States directly involved. The conclusion reached by the Special Rapporteur from the judicial decisions he had reviewed was quite contrary to the practice of States.

42. State legislation could also be invoked. Nevertheless, it should be pointed out that, alongside laws affirming the existence of exceptions, there were, in the Soviet Union for example, laws whereby the courts of one State were not empowered to judge another State without the latter's consent. He wondered what conclusion could be drawn from the co-existence of such conflicting laws. A law providing for exceptions to the principle of the jurisdictional immunity of States could be taken as evidence of the existence of a rule of general international law only if it were accepted by other States. Such was not the case, for example, with regard to the legislation enacted on the subject by the United Kingdom and the United States of America, which had been the subject of protests by the Soviet Union. The reason for the protests had been that the legislation in question was not purely internal in nature, but concerned international relations and ran counter to a basic principle of international law.

43. In order for treaties or agreements between States to be invoked, it must be possible to establish that they were all based on a rule that State immunity did not exist in respect of commercial activities. The Special Rapporteur's analysis of agreements concluded by the Soviet Union and other socialist countries appeared to be erroneous, not to say tendentious. Those agreements were all based on the fundamental rule of jurisdictional immunity, a rule which all the co-contracting States, whether they were socialist States, market-economy countries or developing countries, had always accepted. While it was true that the Soviet Union had been known to waive the application of that rule voluntarily in specific treaties, that fact did not justify the Special Rapporteur's conclusion that those treaties established the existence of a general rule making an exception in the case of commercial activities, since they proved the

existence of the general rule of unlimited jurisdictional immunity. It had perhaps been the Special Rapporteur's anxiety to support his position that had caused him to misinterpret the meaning of the treaties and agreements he had analysed. For example, in his report (*ibid.*, para. 99), the Special Rapporteur quoted the Treaty of Trade and Navigation, signed at Peking on 23 April 1958 between the Soviet Union and the People's Republic of China,⁹ under which the trade delegations of both countries enjoyed all the immunities to which a sovereign State was entitled, and which related also to foreign trade, with certain exceptions. Only after having laid down the principle of jurisdictional immunity, including immunity in matters of foreign trade, had the parties consented to exceptions to that principle. On the basis of that example, however, the Special Rapporteur had concluded that a generally accepted rule of exception existed. Nor was it possible to infer that such a rule existed from the Agreement concluded in 1951 between France and the Soviet Union,¹⁰ which was also quoted in the report (*ibid.*, para. 100). In that agreement, as in others of the same type concluded with other developed countries, the Soviet Union had given its consent to exceptions to the general principle of the jurisdictional immunity of States.

44. The situation was no different with regard to international conventions. States parties to the 1972 European Convention on State Immunity¹¹ had allowed a number of exceptions to the principle of immunity, exceptions which did not exist as rules of general international law. It was therefore impossible to draw the opposite conclusion, namely that such rules did exist. In the final analysis, he believed that further study should be made of State practice in order to determine whether an identifiable rule exempting commercial activities existed. Personally, he was convinced that the accepted general rule was immunity from jurisdiction and that exceptions could be made to that rule only by express consent.

45. The Special Rapporteur had stated repeatedly in his report that foreign trade was not really of a political nature and that States could conduct commercial activities on the same basis as private persons or entities. His own view was that, on the contrary, foreign trade was currently of very great political importance. All States, and in particular market-economy States, regulated their foreign trade; the free-trade era was ended for ever. Because the very existence of States depended on their foreign trade, they regulated it by setting quantitative and qualitative limits for imports and exports, by issuing licences and by levying customs duties. The reason why one State took economic sanctions against another and prohibited individuals and legal entities under its jurisdiction from conducting com-

mercial activities with that State was that its political interests were at stake. Although States, and particularly market-economy States, did not normally conduct foreign trade activities themselves, those activities, in principle, were still of a highly political nature. It was not possible to overlook that political reality and assert that foreign trade activities could be conducted by private persons or entities. A distinction must be made between the State, which conducted foreign trade activities for the benefit of its population, and the private person or entity, which sought to make a profit. Since the aim was totally different in each case, they could in no sense be placed on the same footing.

The meeting rose at 1 p.m.

1729th MEETING

Thursday, 17 June 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

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 RAPPORTEUR³ (*continued*)

ARTICLE 11 (Scope of the present part) *and*

ARTICLE 12 (Trading or commercial activity)⁴ (*continued*)

1. Mr. SUCHARITKUL (Special Rapporteur) said that, since he had omitted to make an introductory statement in the present discussion on articles 11 and 12, some clarification was required in response to the comments by a number of members of the Commission.

¹ Reproduced in *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 submitted at previous sessions of the Commission 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.

⁴ For the texts, see 1728th meeting, para. 7.

⁹ United Nations, *Treaty Series*, vol. 313, p. 152.

¹⁰ Agreement (with Protocol) concerning reciprocal trade relations and the status of the Trade Delegation of the Union of Soviet Socialist Republics in France, signed at Paris on 3 September 1951 (*ibid.*, vol. 221, p. 92).

¹¹ See 1708th meeting, footnote 12.