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Summary record of the 1729th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
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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 Immunity[11] 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 commercial 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 RAPPORTEUR[3] (*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.

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[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.

[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.

2. Article 11 served a number of purposes. First, it acted as an introduction to the subsequent articles in part III and, in that connection, he wished to thank Mr. Ni for his valuable drafting suggestions (1728th meeting, para. 16). Indeed, it had been suggested that such an introductory article was not necessary because of the very title of part III, but the matter was not so straightforward as it might seem. To take the English version alone, he had used the form "exceptions *to* immunity", in keeping the United States legislative practice. However, the form "exceptions *from* immunity" was used in the practice of the United Kingdom, Pakistan and Canada. It would be for the Drafting Committee to make a choice and submit a proposal on that point. Secondly, article 11 provided a link to ensure the necessary transition between parts II and III of the draft, and it was in the nature of a signpost that warned of the difficulties that lay ahead in subsequent articles. Thirdly, the article could serve to dispel some doubts and highlight the relativity of the rule on State immunity, as well as the exceptions thereto. Articles 7 and 8 were couched in unduly absolute and unqualified terms, and article 11 therefore afforded a suitable place for qualifying those provisions. Again, it would be useful to keep article 11 in reserve as a substantive introduction to part III, bearing in mind the controversial character of the topic, which gave rise to great divergence of views and should therefore be approached with caution.

3. Article 12, however, dealt with the exception to the rule of State immunity that was least open to dispute, as could be seen from recent trends in State practice in connection with trading or commercial activity, practice which had no bearing on the distinction between acts performed *jure imperii* and acts performed *jure gestionis*. From some thirty years' experience he could vouch for the abundance of evidence in support of the provision contained in article 12.

4. Article 31, subparagraph 1 (*c*), of the 1961 Vienna Convention on Diplomatic Relations set forth an exception to the immunity of diplomatic agents for the case of an action relating to "professional or commercial activity". No definition of "commercial activity" was provided in the Convention and there was no reference to that point in the Commission's commentary[5] to the draft articles which had been used as a basis for the work of the 1961 United Nations Conference on Diplomatic Intercourse and Immunities. However, the concept of "commercial or trading activities" had been defined by learned bodies, such as the Harvard Law School,[6] and some definitions of that kind had found their way into certain national legislations. The Havana Charter[7] had also attempted to lay down certain criteria, which drew a clear distinction between purchase and sale and, with regard to the former, between purchase for own use (which was not commercial) and purchase for commercial resale. Naturally, sale always constituted trading, regardless of the presence or absence of the profit motive. For example, Mr. Riphagen had pointed out that practically all airlines operated at a loss, but they were none the less highly commercial in character. Nevertheless, in the present instance the Commission had to go beyond such concepts and define the kinds of activities that were covered by article 12. Mr. Evensen (1728th meeting) had given the useful example of hunting and fishing, and there was also the problem of investments, the commercial character of which was sometimes doubtful.

5. The territorial connection established by the words "partly or wholly in the territory of that other State" was intended to serve not only the purposes of private international law but also those of public international law, which laid down the supremacy of the territorial State. Lastly, he wished to thank the members who had made valuable suggestions regarding the formulation of paragraph 2 of article 12, and noted that no objection had been raised to the exception set forth in that paragraph.

6. Mr. JAGOTA said that several different views had been expressed with regard to the approach to the problem of the relationship between a rule and an exception to the rule. For his part, he fully endorsed the Special Rapporteur's decision to use the inductive approach and to enunciate the rule on State immunity and then enumerate the exceptions.

7. The legal position in the matter had been clarified by Mr. Ushakov (*ibid*), whose remarks appropriately conveyed the position not only in the socialist countries but also in many developing countries. The practice of India, for example, followed the same general direction as that indicated by Mr. Ushakov. Section 86 of the Code of Civil Procedure[8] laid down that a foreign State engaging in commercial acts could be sued in the Indian courts but added that the prior consent of the central government was essential before any suit could be brought. Accordingly, the consent of the Indian Foreign Office was required in all such cases, but had in fact rarely been given, even in respect of commercial and trading activities. An exception was made only when the foreign State concerned had previously given its consent to the jurisdiction of the Indian courts, either in general terms under an international agreement or, in respect of a particular transaction, in the form of a waiver in a specific contract. Such provisions were, of course, common in State trading activites and in contracts concluded with State enterprises of foreign States. The con-

[5] See *Yearbook ... 1958*, vol. II, pp. 98-99, document A/3859, chap. III, sect. II, commentary to article 29 (Immunity from jurisdiction).

[6] "Draft Convention and comment on competence of courts in regard to foreign States", prepared by the Research in International Law of the Harvard Law School, art. 11, in *Supplement to the American Journal of International Law*, (Washington, D.C.), vol. 26, No. 3 (July 1932), p. 597.

[7] Havana Charter for an International Trade Organization (*United Nations Conference on Trade and Employment, Final Act and Related Documents* (Havana, Cuba, 1948), E/CONF, 2/78, sect. II.

[8] See 1708th meeting, footnote 31.

tracts in those cases usually included arrangements for the law applicable and for submission to the jurisdiction of the courts of a given country. Another option was reciprocity action. If the Indian Government did not enjoy State immunity in respect of certain acts in a particular foreign State, the Indian Foreign Office would give its consent under section 86 of the Code of Civil Procedure for action to be taken in the Indian courts in respect of similar activities conducted in India by the foreign State in question.

8. To his mind, State practice along those lines corroborated the substance of article 12, which contained an exception that could be said to be in a fairly advanced stage of formation as a customary rule of international law. It was much more than *lex ferenda*, although not quite *lex lata*. The wording of article 12 took due account of the fact that the rule embodied in it was still in the emergent stage, and the opening phrase, "except as provided in the following articles of the present part", of article 11 also made it clear that the rule involved was residual in character. Mr. Evensen's welcome suggestion (*ibid.*, para. 19) would prove useful in redrafting the formulation of article 12, paragraph 2, and the rule set forth in article 12 would thus be made more flexible. Hence, although he could agree to article 12, in the main, two basic questions should be dealt with in the definitions, or at least in the commentary.

9. First, the meaning of the term "State" would have to be defined so as to encompass State-owned enterprises. Second, in international law, the term "territory" signified a State's land territory, together with its territorial sea and the superjacent airspace. Technically, however, it did not include the 200-mile exclusive economic zone. An additional problem lay in activities conducted outside a State's territory but having an effect in that territory. One example was that of a State's deep sea-bed mining activities which did not take place in its territory but had effects therein because the mining products were sold in that territory. In cases of that kind, it would be necessary to determine whether the courts of the territorial State had jurisdiction and whether the rule of State immunity applied.

10. The test embodied in the proviso "being an activity in which private persons or entities may there engage", quite apart from the technical problems involved, was unlikely to prove politically acceptable and its application would lead to unbalanced situations. In fact, the expression "an activity in which private persons ... may engage" would clearly have a totally different meaning in a socialist country, as compared with a market-economy country. Accordingly the proposed test would thus produce totally different results, depending on the economic systems of the two States involved. Since the proviso was simply intended to indicate that the activities in question were activities governed by private law, it could well be deleted from paragraph 1 and reflected in paragraph 2 or even relegated to the commentary.

11. The expression "trading or commercial activity", raised the delicate question of the relationship between the nature and the purpose of the activities concerned. Article 3, paragraph 2, placed emphasis on "the nature of the course of conduct or particular transaction or act, rather than ... its purpose". In that regard, State practice in the developing countries was still hesitant. Difficulties arose because, in those countries, it had been found necessary for the State to take the lead in certain matters simply to further the cause of development, a fact which made the test in article 3, paragraph 2, difficult to apply.

12. Again, article 11 would lead to difficulties of interpretation if retained in its present form. As a link between parts II and III of the draft, it merely specified that effect must be given to the general principles of State immunity, except in the situations covered by articles 12 *et seq.* In so doing, it emphasized the rule of State immunity and the conclusion was that the exceptions to that rule must be interpreted restrictively. However, the matter could be dealt with in article 6, which already enunciated the main rule. Accordingly, article 11 should be deleted and the exceptions in part III would commence with what was now article 12.

13. Mr. McCAFFREY said that his earlier remarks (1728th meeting) had been made on the assumption that the exception to the general rule of State jurisdictional immunity in the case of trading or commercial activity was accepted by the Commission. Meanwhile, certain comments had called into question the very existence of the exception and had prompted him to consider the status under general international law of State trading or commercial activity as it related to jurisdictional immunity.

14. Mr. JAGOTA had pointed out that in some countries no immunity would be granted in respect of claims involving a State's trading or commercial activity if the defendant State did not grant immunity to the forum State in similar circumstances. However, a somewhat broader interpretation could be placed on the exception in an endeavour to show that it could be treated not as an exception but as a rule of public international law, which stood on a par with the rule of State jurisdictional immunity itself. That proposition could be analysed more particularly in the light of the comments made by Mr. Ushakov (*ibid.*), who had examined three different matters—municipal and international case law, legislation, and treaties—and had concluded that none of them was the source of an exception under international law for trading or commercial activity.

15. The first question to be considered, therefore, was whether the exception in article 12 merely reflected the case law and legislation of various jurisdictions or whether it was a principle as fundamental as the rule of sovereign immunity itself. The starting point in that regard was Mr. Ushakov's affirmation that the basic reason why the principle of State jurisdictional immunity did not involve a conflict of sovereignties was that one State could enter the territory of another State and

act within it only with the consent of the other State. In other words, one State could refuse to allow entry by another State, for trading or even for diplomatic purposes, as was apparent from article 2 of the Vienna Convention on Diplomatic Relations. Accordingly, if jurisdictional immunity itself was a rule, it came into play only when a State had given its consent to another to conduct activities within its territory.

16. Yet it was clear that one State could permit another to enter its territory without making all the activities of the latter State immune from its jurisdiction, something that was evident from article 31, subparagraph 1 (*c*), of the Vienna Convention on Diplomatic Relations and article 43 of the Vienna Convention on Consular Relations, which illustrated the basic proposition that immunity might not be coextensive with permission to enter. A State could consent to the presence of another within its borders but might not guarantee the other State jurisdictional immunity with regard to anything it might do within those borders.

17. To determine the type of activity covered by jurisdictional immunity, it was therefore necessary to look to the purpose for which immunity was granted in the first place. If, as Mr. Jagota had suggested, the aim of granting States immunity was to establish a basis for peaceful and friendly relations among States, at the very least immunity would have to be extended to the diplomatic and consular activities involved in intergovernmental relations, as well as to the persons of diplomatic and consular officials with respect to acts performed in the course of their official duties. Presumably, however, the mere fact that the person of the official was immune would not mean that the State would be immune in respect of a contract entered into by such an official with a private party.

18. What about cases in which the foreign Government entered into relations with private individuals? It could be argued, by analogy with article 43, subparagraph 2 (*a*), of the Vienna Convention on Consular Relations, that where the agency of the foreign State did not expressly or implicity identify itself as such in its dealings with a private individual, no immunity would be granted. But this analogy may not be accepted and, in any event, does not cover all cases.

19. The *laissez-faire* era had spawned judicial pronouncements on the doctrine of sovereign immunity like that of Chief Justice Marshall in *the Schooner "Exchange"* case (1812),[9] when there had been virtually no "grey areas", since the State had rarely entered the realm of private commercial activity. Hence, the absolute theory of sovereign immunity had made perfectly good sense at that time. The question now was whether it still did. Towards the latter part of the nineteenth century, the *laissez-faire* doctrine had given way to increasing State intervention in the private sphere as Governments had begun to regulate private activities and perform entrepreneurial functions such as the operation of railway, shipping and postal services, something which had obviously placed private interests in competitive activities at a distinct economic and legal disadvantage and had resulted in recognition that the jurisdictional immunity of the State was not absolute but was limited to acts of a sovereign or public nature—*acta jure imperii.*

20. Indeed, from the very outset, the doctrine of the jurisdictional immunity of foreign States had never been intended to apply to cases in which the State engaged in commercial or trading activities with private individuals. The practical need to distinguish between government acts of a public and private character had been recognized by States with major commercial and trading operations even though, at one time or another, such States had adhered to the so-called "absolute" theory of jurisdictional immunity. For example, the United States of America and the Soviet Union had frequently agreed by treaty to waive immunity with regard to shipping and other commercial activities. Again, the 1958 Geneva Conventions on the Territorial Sea and Contiguous Zone, and on the High Seas,[10] in effect treated government ships operating for commercial purposes as private merchant ships. That was concrete evidence of State recognition of the functional importance of differentiating between types of government activity, and the distinctions drawn were buttressed by such multilateral agreements as the 1972 European Convention on Sovereign Immunity,[11] by a wealth of municipal judicial decisions and by recent legislation on the subject.

21. The need for an exception in the case of trading or commercial activity therefore seemed clear, since it not only reflected current State practice, but also enhanced the ability of States to provide for the vital needs of their people by making it safe for private parties to enter into commercial relationships with them and thus ensure the ability of States to acquire the requisite goods and services. Consequently, practical considerations also militated in favour of recognition of such an exception. In any event, it would not really restrict the immunity of the State to recognize that the State could be sued in connection with trading or commercial activities with private parties, if "restrict" was taken to mean "cut back" on a plenary immunity that had existed at one time. In fact, sovereign State immunity had never been designed to cover activities such as those mentioned in article 12. Conceptually, the view could be taken that trading and commercial activities were not, and never had been, an exception to the doctrine of sovereign immunity. The doctrine had simply never extended so far as immunity for States in respect of actions arising out of such activities.

22. Mr. FRANCIS said that article 12 caused some concern because State immunity should be qualified, in

[9] See 1708th meeting, footnote 9.

[10] United Nations, *Treaty Series,* vol. 516, p. 205, and *ibid.,* vol. 450, p. 11.

[11] See 1708th meeting, footnote 12.

some respects, but any qualification must take a count of certain basic considerations. Care should be taken in order to avoid jeopardizing the interests of the developing countries, which were in a special position. He had pointed out previously that, whereas the older concept of trade and commerce might have had real significance in the past, its application in the modern world could be counter-productive in the absence of proper safeguards.

23. Three items reported recently in the media could illustrate his argument. The first was an editorial in *The Times* of London on food as a foreign policy issue in Zimbabwe. The second was an item in the *International Herald Tribune* reporting that the present British Prime Minister had decided that the trading arm of the British National Oil Corporation should remain in public ownership, a decision that had been taken by a Prime Minister who held political views different from those of the Labour Party, which had originally set up the company in question. The third item was an interview on the Swiss radio with an American who had come to Geneva to try to develop the barter trade between developed and developing countries and had affirmed that, given the developing countries' lack of foreign exchange, the barter system would grow in popularity. In that regard, reference had been made to a recent agreement between the United States and a Caribbean country under which the United States undertook to supply powdered milk in exchange for bauxite from the country concerned. Such an arrangement might be hard to understand in the developed countries, where it was left to the commercial sector to supply such commodities. In poor countries, however, Governments could not afford, in terms of human resources, to rely on the private sector to meet basic needs in times of difficulty. Lastly, at a conference held in Geneva in 1978, the developing countries had formed a Council of associations of developing country producers and exporters of raw materials, with a view to rationalizing the resources of those countries in primary commodities.[12]

24. Such developments were a clear indication that the State, particularly in the developing world, was becoming increasingly involved in trading and commercial activities and would continue to be so in future, not out of any desire for profit but out of dire need. It was for those reasons that he had some doubts about the way article 12 codified the principle involved, and more specifically about the phrase "being an activity in which private persons or entities may there engage".

25. In the United States of America, there was a notion that a foreign Government could act in two capacities, commercial and political, and that notion seemed in some way to permeate the draft article, so that any activities of the State which fell outside the political sphere would be deemed commercial and, consequently, would attract the jurisdiction of the territorial State. The matter was being over-simplified, since what might appear *prima facie* to be an exclusively commercial arrangement—a barter agreement, for instance—was in fact totally political, inasmuch as it was concerned with the well-being of the people. An examination of the article revealed that it was based on the legislation of the United States and the United Kingdom and on the State practice of countries whose thinking was cast in the same mould.

26. Of course, such State practice as existed must necessarily be taken into account, but something more was needed, both qualitatively and quantitatively. His concern, bearing in mind the decision in the *Krajina* v. *The Tass Agency and Another* case (1949),[13] was that many State organs, particularly from the developing countries, might be exposed to the jurisdiction of the territorial State. The developing countries, unlike the developed, lacked the necessary infrastructure and therefore had to create State agencies to serve as arms of government and perform certain functions that would otherwise grind to a halt. Great care was therefore needed in drafting article 12 to ensure that all factors were taken into account, with a view to doing justice to the countries concerned.

27. It appeared that certain United States legislation, which had been the subject of some criticism in the Sixth Committee of the General Assembly, more particularly as it was applied in the Court of Claims, sought to draw a parallel between the treatment of private United States citizens and of foreign States. While the ease with which that court could entertain a suit from American nationals, or indeed from one of the constituent States, could not be questioned, he did not think that the same should apply in the case of foreign States.

28. Lastly, the activity which was deemed under article 12 to be of a trading or commercial nature could be something quite different from that under certain national laws, and it was therefore important not to draw too indiscriminately on the elements of the various national legislations in coming to a decision on the article. It would be wrong to use the analogy of a sovereign who, in a bygone age, lost his immunity if he engaged in some activity in a personal capacity, and go on to assert that in the modern world a State would also lose its immunity if it did likewise. In his opinion, no State could divest itself of its public character. Naturally, he was not opposed to exceptions to the rule of State immunity, but it was essential to weigh up the various factors that could affect all countries, including the developing countries.

29. Mr. NI , referring to article 12, said he would like to pose the question of whether there were in fact any exceptions to the principle of State immunity. In that connection, he had noted with interest Mr. Ushakov's repeated assertion that a State was a sovereign body which never lost its public personality and, regardless of the activities it engaged in, it always acted *jure imperii.*

[12] "Report of the Plenipotentiary Conference on the Establishment of a Council of Associations of Developing Countries Producers-Exporters of Raw Materials", Geneva, 5-7 April 1978 (NAC/PC/1).

[13] *Annual Digest and Reports of Public International Law Cases, 1949* (London), vol. 16 (1955), case No. 37, p. 129.

His own view, however, was that efforts should be pursued to find a solution to a problem that had troubled the minds of lawyers for years, particularly in recent years, for developing States could not achieve their desired objective if they were constantly subjected to the jurisdiction of foreign developed States which were concerned to protect their investments abroad. Part III of the draft would not be required if no exceptions to State immunity were allowed. Nevertheless, he realized that that was not Mr. Ushakov's claim and, for his own part, he was ready to proceed to consider specific aspects of the problem. The actual structure of the draft articles and the advisability of including a list of areas of immunity and non-immunity, and indeed of "grey areas", could be decided at a later stage.

30. At the present stage, the question to be decided was what constituted trading or commercial activity, yet article 12 was silent on the matter. Article 2, subparagraph 1(*f*), defined such activity as: "(i) a regular course of commercial conduct, or (ii) a particular commercial transaction or act". But what was meant by "a regular course" and "a particular commercial transaction or act"? Different States, and even different courts within the same State, attached different meanings to the expression "trading or commercial activity", as was abundantly clear from legal writings and jurisprudence. In prescribing a rule of law to be observed by States, it was essential to have something to rely on, and if everything was to rest upon the decisions of the domestic courts, the value of the draft articles would be greatly diminished.

31. Yet another question related to the distinction between *acta jure imperii* and *acta jure gestionis*. In that connection, in Belgium, the Cour de Cassation had held that the operation of a Government railway was a private act,[14] while many other countries regarded it as a public act. Romania considered that the tobacco monopoly involved a private act, whereas the United States of America thought the contrary. Italy deemed the purchase of military boots to be a private act, whereas France and the United States took the opposite view. Lauterpacht had given a long list of such contradictions in his writings, and legal literature on the topic reflected a similar divergence of views. In the course of the discussion, a number of questions had been raised—for example, whether "trading or commercial activity" signified trading for profit. Could every transaction for profit be termed a trading or commercial activity? Could a monopoly on certain commodities declared to be of strategic importance by Governments be considered commercial? Such points were difficult to answer, but leaving the matter to the decisions of domestic courts alone could only lead to more numerous conflicts in future. Hence, lawyers must see that justice was done.

32. A third question of concern to a number of members of the Commission related to article 3, paragraph 2, for if the emphasis that it placed on the nature of the transaction were carried to extremes, every transaction could be deemed to be a private act; it would invariably involve buying, selling, profit-making, and possibly speculation. In the *Berizzi Bros. Co.* v. "*S.S. Pesaro*" case (1925),[15] the Supreme Court of the United States had denied that there was any international usage that regarded the maintenance and advancement of the public welfare of the people in time of peace as any less a public purpose than the maintenance or training of a naval force. Mr. Balanda (1710th meeting) had also referred to the Belgian case of *Monnaie* v. *Caratheodory Effendi*,[16] in which the court had held that the criterion of the nature of the act should not preclude other factors, in particular the purpose of the act performed by the State. In a socialist State with a planned economy, trade or commerce was always carried on for the benefit of the people as a whole and not for private gain.

33. He had raised those points because a rule of international law could not, in the words of Mr. Díaz González, be drafted on the basis of one trend alone. The Special Rapporteur (1713th meeting) had said that the interests of all countries, and especially those of the developing countries, must be taken into account. In fact, the interests of the developing countries lay in asserting not only their territorial sovereignty but also, in appropriate cases, their sovereign immunity from foreign jurisdiction. In that respect, there had been a trend in recent years towards a broader jurisdiction in civil procedural law. Formerly, it had been customary to sue the defendant at his domicile or place of business, but now defendants could often be brought into the jurisdiction at which the plaintiff had his domicile or place of business. Moreover, in State contract practice, developing countries were often required to sign contracts waiving their immunity in advance. For those reasons, developing States should be ever more vigilant in ensuring that they were not caught up in litigation without sufficient means to defend themselves properly.

34. The CHAIRMAN, speaking as a member of the Commission, said that he wished first of all to congratulate the Special Rapporteur both on his research into the very essence of the entire set of draft articles and on the compromise that he was proposing, one which, subject to inevitable drafting improvements, could alone command general acceptance. For his own part, he was only too aware of the radical differences in the views of the members of the Commission, differences which lay in the conflict between three different theories: first, that there was a rule of public international law establishing the immunity of the State in all cases, other than in clearly demonstrated exceptions; second, that such a rule did exist, but was accompanied

[14] *Société anonyme des chemins de fer liégeois—luxembourgeois* v. *Etat néerlandais (Ministère du Waterstaat) (1903) (Pasicrisie belge, 1903* (Brussels), part. 1, pp. 294, 301-302).

[15] *United States Reports: Cases adjudged in the Supreme Court* (Washington, D.C., U.S. Government Printing Office, 1927),vol. 271, p. 562.

[16] See 1710th meeting, footnote 4.

by demonstrated or demonstrable exceptions relating to trading or commercial activity; and third, that immunity did exist in a number of cases but not in others, as could be seen from the lack of a general practice.

35. In his opinion, the rule of immunity did not exist. The real rule was the territorial sovereignty of States, and the consequences of the activities of foreign States on another State's territory were open to numerous interpretations. In the political field, for example, did a State have the right to arrange for its nationals in the territory of another State to participate in elections? Many countries, more particularly the former colonial countries, challenged such a right, whereas others accepted it. Did a foreign State have the right to establish a court in its embassy for the purpose of judging its nationals? Some States answered in the affirmative, others in the negative. Switzerland, for example, did not even allow international arbitration on its territory without specific permission from its authorities. In the economic field, some States did not recognize the right of foreign States to engage in economic activities on their territory, whereas other States did, and yet others imposed particular conditions. Those conflicts were the root of the problem facing the Commission in connection with article 11 and its relationship to article 6. But in the final analysis, State immunity came down to the problem of a State's activities, including its economic activities, on foreign territory, in the context of the law of the other State concerned. For all that, the three theories did exist and the set of draft articles would have to be structured in such a way as to afford no exclusive advantage to any one of them.

36. Article 12 contained a referral to the internal law of the territorial State concerned, in other words, the State on whose territory the activity was being carried out. In view of the present wording of paragraph 1, the questions that arose was which legal system was to be used to determine the trading or commercial activity in which the private persons or entities "may" engage. The relevant legal writings contained no precise indication as to the exact right of foreign States to engage in social, financial and commercial activities on a territory other than their own. In his opinion, the Special Rapporteur had chosen the proper and indeed the only possible formulation, even though many members of the Commission were pressing for an accurate and valid description of the term "trading or commercial activity".

37. He agreed with Mr. Jagota that no problem arose in practice. It was perfectly legitimate for the socialist and semi-socialist countries to prohibit foreign States from engaging in certain activities on their territory and, if they wished, to grant them immunity in order to carry out the activities in question. If, in connection with a transaction, a developing country or a socialist country were to claim in vain the immunity that it normally granted to others, it might not agree to the transaction, but it could obtain satisfaction by agreement or otherwise; the future of international trade did not lie in the rule to be enunciated in article 12 but in the furtherance of the international commercial arbitration practised by the socialist, the capitalist and the developing countries. Obviously, if the Commission formulated a rule such as that contained in article 12, a country which considered that it was injured would be perfectly entitled to avail itself of the principle of reciprocal action.

38. Article 12, paragraph 2, called for some clarification and for some changes. He was convinced that two States could subject their transactions to a particular system of internal law. Some developing countries had concluded contracts in a third State so that some of their relations would be brought under the local law, and they had not taken up the question of acceptance of jurisdiction. He therefore hoped that the text would be drafted carefully, so as to preserve the freedom of Governments. In fact, many countries were wise enough to accept recourse to the private law of a third country. Even a highly industrialized State, when it stood in need of money and floated a loan, was not oversensitive about its privileges and was content to turn to private law, without even taking the initiative of raising the problem of jurisdiction.

39. Mr. McCAFFREY, referring to the remarks made by Mr. Francis, said that there was a certain parallelism between the United States Court of Claims Act[17] and the Foreign Sovereign Immunities Act,[18] but only to the extent that the Court of Claims Act allowed suit to be brought by private citizens against the United States Federal Government. That, and other administrative procedures whereby private citizens could challenge Government action, indicated that there was something of a trend away from the notion of absolute sovereign immunity, but he did not think it went any further than that. The purpose of the Foreign Sovereign Immunities Act was to provide guidance regarding the circumstances in which foreign States could be sued in the United States courts, a function that had previously been performed by the Department of State, albeit in a far less formal manner than in certain other countries. Hence, it could not be said that foreign States were treated like the United States Federal Government so far as suits by private individuals were concerned. Both domestic practice and the practice vis-à-vis foreign Governments reflected the need to allow private individuals to bring an action against Governments, but it could also be argued that they reflected the notion that no immunity for Governments had ever existed in respect of certain types of action.

The meeting rose at 1 p.m.

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[17] *United States Code, 1976 Edition* (Washington, D.C., U.S. Government Printing Office, 1977), vol. 8, title 28, chap. 7, p. 171.

[18] See 1709th meeting footnote 13.