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Summary record of the 1730th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
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1730th MEETING

Friday, 18 June 1982, at 10.05 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.4/339, ILC (XXXIV)/Conf. Room Doc.3)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*concluded*)

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

ARTICLE 12 (Trading or commercial activity)[4] (*concluded*)

1. Mr. RIPHAGEN said that he was impressed by the quality of the discussion, which showed that international lawyers had a common interest in promoting peaceful and harmonious relations between States. He was concerned, however, at the situation that arose when international lawyers had to discuss the present topic with municipal lawyers, who had little regard for State immunity and virtually considered it a source of injustice. For example, if a company had sold goods to a foreign State, failed to receive payment and was then told that it could not sue the foreign State in the courts, it would consider itself the victim of an injustice and would ultimately demand payment from the Government of its own country. That type of case showed that there was little or no chance of getting municipal lawyers to adopt an understanding attitude towards State immunity.

2. Mr. BARBOZA said that he wished first to thank the Special Rapporteur for his laudable endeavours in submitting to the Commission material which would enable it to discuss and eventually take decisions on a topic of such importance.

3. Article 11, as a number of members had pointed out, had to be read in conjunction with article 6, yet it had in fact been deemed repetitive because it reiterated the provision contained in article 6. But that was not so. Article 11 unambiguously set forth the general principle, the general rule, of State immunity, by making non-immunity an exception thereto. Article 6, on the other hand, was not so clear and should therefore be changed so as better to reflect that general principle, that general rule or, to say the least, that general trend long discernible in international relations. Changes were required because the exception, in other words, the non-immunity, had to be interpreted restrictively, and also because if immunity was made the exception even in the legislation of the United Kingdom and the United States of America, which led the move towards a restrictive interpretation of State immunity, the Commission should not favour a formula which was even more restrictive of such immunity.

4. Article 12 lay at the heart of the set of draft articles and the differing opinions thereon merely reflected in some sense the divisions of present-day relevant doctrine. In his opinion, the Commission must seek to elaborate a draft which would, in practice, facilitate foreign trade and related international activities by protecting the interests of the developing countries and affording them the best safeguards possible. The first point was not so much how State trading or commercial activity should be defined as whether such activity should constitute an exception to the principle of State immunity. The matter was not an easy one to decide, but in view of the current overall trend, it was likely that the Commission would in the long term have to accept that State trading or commercial activity did form an exception to that principle. For all that, it would be easier to apply the exception to activities of State enterprises rather than to activities of the State itself.

5. Certainly, it was an exacting task to arrive at a universally valid definition of "trading or commercial activity" and the Commission would therefore do better to try and signpost the way. If article 12 did indeed contain an implicit referral to internal law, as Mr. Reuter had pointed out at the previous meeting, a conflict could arise with article 3, paragraph 2, which set pre-eminence on the nature of the course of conduct or particular transaction or act, because the internal law to which the interpreter was referred might not give such pre-eminence. This would interfere with the pure and simple *renvoi* by introducing a foreign element in it. Besides this aspect, emphasis on the nature of the act would also signify leaving aside some aspects of State activity which had to be taken into consideration, particularly if the Commission was to place a restrictive interpretation on trading or commercial activity as an exception to the rule.

6. Mr. CALERO RODRIGUES said that, in the interesting practical example given by Mr. Riphagen, the point to be borne in mind was that if the company in question was allowed to sue the foreign State and won its case, it would be unable to secure execution. It had of course been agreed that the question of execution measures would be dealt with separately in the draft, but it was none the less relevant to the present discussion.

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

[2] Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunites 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, *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.

7. In Brazil, the courts had often declined jurisdiction in cases against a foreign State purely on the grounds that it was better not to deal with a case at all than to hand down a decision which could not be executed. If he were to take the Brazilian view, he would have to uphold the doctrine of absolute State immunity, to which the Brazilian Supreme Court was firmly attached. His personal opinion, however, was that it was essential to seek some middle ground in order to devise a solution acceptable to all. Clearly, the Commission could not frame a set of draft articles embodying an extreme view of State immunity; equally clear was the fact that it could not reject the concept of State immunity altogether. To revert to Mr. Riphagen's example, the company had to realize that it would not obtain payment by suing in the local courts and that it had other means available to it, such as diplomatic channels.

8. Mr. USHAKOV said that, regretfully, he was compelled to reiterate that nothing made it possible to infer from State practice, as such practice was described in the Special Rapporteur's fourth report (A/CN.4/357), that there was a generally accepted exception to the principle of State immunity. The Special Rapporteur had simply sought to back up his view that jurisdictional immunity did not apply in the case of trading or commercial activity and, in so doing, had based himself on an analysis of State practice. However, with regard to the Soviet Union and other socialist countries, the Special Rapporteur's interpretation was completely incorrect. Accordingly, the fourth report should be objectively supplemented, for which purpose a brief description of the doctrine and practice in the USSR might prove helpful.

9. So far as doctrine was concerned, any State could make purchases in the Soviet Union through the foreign trade agencies, which were persons under private law, totally independent of the State, and consequently did not enjoy any immunity. If the foreign State concluded a contract containing no express clause specifying that it would subject itself to the jurisdiction of a Soviet or any other court, in the event of litigation, it would then enjoy jurisdictional immunity under both international law and Soviet law. The same was true when a foreign State sold products in the Soviet Union, and they too were sold through the same foreign trade agencies. That was so because foreign trade, even in the socialist countries and not only in market-economy countries, was always in the hands of persons under private law. It was extremely rare for foreign trade to be carried out by the State. Accordingly, what was the purpose of the set of draft articles? In his opinion, it was to undermine international law, which was based on the sovereignty and the sovereign equality of States, and hence the immunity of the State.

10. In matters relating to practice, the USSR, through its trade delegations, which formed an integral part of its embassies, frequently entered into agreements to guarantee contracts concluded by its foreign trade agencies and, of its own accord, waived jurisdictional immunity for such guarantees. If, in some instances, the USSR was compelled to invoke jurisdictional immunity, it was because the courts in some countries adopted a tendentious attitude towards it. For example, if a Soviet foreign trade agency concluded a contract for the sale of aircraft abroad and litigation arose in that connection, the purchaser instituted legal proceedings not against that particular agency but against the Soviet State as such. The Soviet State then invoked jurisdictional immunity on the basis of both international law and its own law.

11. No State wished to conclude with Soviet foreign trade agencies a contract containing a clause on jurisdiction, for in the Soviet Union, State immunity existed in principle and no litigation arose in practice. Again, it should be remembered that foreign trade, although conducted by persons under private law, necessarily formed part of the economic and trade policy of States, a policy that must be governed by the new international economic order so as to take account of the needs of the developing countries, which suffered from discrimination, exploitation and unfavourable terms of trade.

12. Article 11 merely reproduced the provision contained in article 6. As to article 12, the phrase "In the absence of agreement to the contrary" in paragraph 1 suggested that the agreement should provide for immunity, yet the principle of immunity was already enunciated in article 6. Some members of the Commission had also proposed that the exception should include financial and industrial activity—in other words, the entire range of the economic activity of States—and any action under civil law would thus be permissible. If that proposal was adopted, what purpose would be served by the articles dealing with consent? Furthermore, like other members, he considered that it was virtually impossible to provide a definition of the expression "trading or commercial activity". He was firmly opposed to any attempt to exclude the whole field of economic activity from the scope of jurisdictional immunity.

13. Mr. FRANCIS said that, with reference to Mr. Barboza's interesting view that the provisions of article 12, paragraph 1, were more suitable for State enterprises than for the State itself, a number of practical examples could be cited to illustrate the need for caution in order to ensure that a State did not claim immunity when it engaged in commercial transactions. It was true that, as pointed out by Mr. Ushakov, commercial transactions on behalf of the State were usually conducted through enterprises organized under private law—sometimes State-owned but sometimes purely private. In countries with mixed economies, however, certain difficult problems arose from time to time. In 1973, a State had purchased wheat on the world market in order to remedy a local shortage of flour and had concluded the contracts itself because it had not had the machinery of State-owned enterprises at its disposal. Again, the same State had made international purchases of food products for its school feeding programme, the aim being to supplement the donations in kind received from friendly Governments. In that instance too, the

question arose of whether the State concerned could be said to have been conducting a commercial activity within the meaning of article 12.

14. Mr. McCAFFREY said that he welcomed Mr. Barboza's constructive observations and his view that the Commission's task was to formulate a practical draft which would reflect present trends and safeguard the interest of developing and developed countries alike. The articles had to deal with the very real problem that arose when foreign States claimed immunity from jurisdiction in suits brought by private persons. Indeed, the volume of cases involved was large, as illustrated by a published list of over 100 sovereign immunity decisions of the United States Department of State between 1952 and 1977.[5] Clearly, the Commission should endeavour to provide some guidance for the courts that were called upon to deal with the matter, but it was not easy to achieve unanimity in that regard. Therefore, the provisions to be adopted should not be unduly specific. For example, the test of the "nature" of an act for the purpose of determining its commercial character, which was also found in the United States Foreign Sovereign Immunities Act of 1976,[6] might, if retained, come into conflict with certain systems of internal law. The same was true of the territorial connection embodied in article 12, if it was interpreted restrictively. The best course would be to remove those elements and deal with them in the commentary; otherwise, they could well militate against acceptance of the draft by Governments.

15. Mr. BARBOZA, commenting on the remarks made by Mr. Francis, said he would like to point out that, should the Commission agree to an exception in the case of State trading or commercial activity, for obvious reasons such activity could be brought under a foreign jurisdiction or the jurisdiction of the territorial State much more easily when it was conducted by State enterprises than was the case when it was carried out by the State itself. He fully realized that the system in the Soviet Union described by Mr. Ushakov was very practical, but he had not really discarded the possibility of subjecting a trading or commercial activity undertaken by the State to a foreign jurisdiction or the jurisdiction of the territorial State.

16. Mr. JAGOTA said that he wished, in the light of Mr. Ushakov's comments, to clarify his own position. He fully agreed that the political and policy aspects of trade and commerce were important, but they were not directly germane to article 12. The article dealt with specific kinds of trading activity, rather than with the policies on such matters as the flow of goods and commodities and the earnings therefrom, which were regulated by agreements or under special arrangements made within the framework of institutions like the EEC. While his attitude was basically similar to Mr. Ushakov's, he none the less considered that the concern of developing countries in regard to economic development matters and the related trading and commercial activities would be met by the terms of paragraph 2, since any joint venture involving an activity in a foreign State would, in most cases, be regulated by agreements at government level that provided for settlement of disputes. Accordingly, paragraph 1 was residual in character and would apply only to the case of State corporations or agencies engaged in trading and commerce and vested with that function under internal law, and in the absence of an agreement to the contrary. That should not undermine the foundations of international law, save perhaps at the level of principle.

17. Lastly, as Mr. Ushakov had explained, in the Soviet Union it was never the State but the State agencies, vested with legal personality under Soviet law, that engaged directly in a trading activity. To cover the point, the term "State" could perhaps be elaborated in the commentary so as to indicate whether it referred to the State as such, to a State undertaking, or to a statutory corporation controlled by the State.

18. Mr. KOROMA said that article 12 was central to the draft as a whole and the Special Rapporteur should not be suprised if it had aroused controversy. Mr. Jagota had suggested that paragraph 1 dealt with specific activities of States in their commercial or trade relations, whereas paragraph 2 dealt with policy matters. Article 2, however, defined "trading or commercial activity" as either a regular course of commercial conduct or a particular commercial transaction or act, and he had himself observed earlier (1712th meeting) that there was no rationale for the distinction between *jus imperii* and *jus gestionis*. What was perhaps more crucial was the fact that the article did not, to his mind, differentiate between the commercial activities of States as such.

19. Developing countries might well engage in activities which, though seemingly commercial, were in fact, part of their development effort. For example, if a Government purchased a staple food for sale to the population at a subsidized price, it might make a certain profit, but the alternative—lack of the staple food—could prove very serious. Although the definition contained in article 2 seemed to encompass activities of that kind, article 12 labelled them as trading or commercial activities of States and they were therefore subject to the jurisdiction of another State.

20. He was not sure, despite the wealth of legislation, case law and practice, whether a rule of customary law had in fact been established. Article 12 in its present form appeared to provide that if a State engaged in a trading or commercial activity it did not enjoy immunity; however, what was needed was to reflect the dual position that existed in international trade and economic relations. Hence, the aim should be to strike a balance between States that engaged in purely commercial activities for profit and States that engaged in activities which might seem commercial but were in fact

[5] See J. A. Boyd, ed., *Digest of United States Practice in International Law, 1977* (Washington, D.C., U.S. Government Printing Office, 1979), pp. 1017 *et seq.*

[6] See 1709th meeting, footnote 13.

important for the integrity or stability of the State. The article did not fully mirror existing trading relationships, particularly as between the developed and the developing countries. It required further consideration if the article, and indeed the draft as a whole, were to gain general acceptance.

21. Mr. BALANDA, referring to the comments by Mr. Ushakov, said that it would be useful to consider article 12 from the standpoint of the developing countries, where the State, in contrast perhaps with the situation in the developed countries, was playing an increasingly greater role in commercial transactions conducted with private persons. That tendency could be illustrated by examples from his own country. Zairian companies might need to seek on the external market products which were not available on the domestic market, in which case their trade partners regularly required a Government guarantee. Again, foreign groups interested in the Zairian market might conclude contracts with private persons in Zaire, and they too required a State guarantee. In either instance the intervention by the State was necessary in order to guarantee the transaction, and it also afforded proof of the *bona fide* nature of the contract and its value to the country. In addition, the guarantee provided the foreign partners with the assurance that they would be dealing directly with the State in the event of insolvency or any difficulties concerning the performance of the obligations of the parties. It was at that level that the problem of jurisdictional immunity arose. Most contracts of that type, which were initially concluded between private persons but could only be performed by means of a State guarantee, contained a clause to the effect that either the courts of the foreign State had jurisdiction or the State could not plead jurisdictional immunity. Faced with the needs of development and unable to do without the device of furnishing guarantees for their own enterprises, the developing countries were in fact compelled to waive their jurisdictional immunity.

22. The growing intervention of the State in the developing countries was to be seen also in the field of marketing. For example, three major Zairian companies, the General Quarry and Mining Company (*Société générale des carrières et des mines*), the Ore Marketing Company (*Société de commercialisation de minerais*) and the National Insurance Company (*Société nationale d'assurance*) did not enjoy complete freedom in their commercial transactions. At all times the State exercised a kind of supervision over almost all of their activities. For example, the General Quarry and Mining Company could not set prices without consulting the Government, and in the case of the National Insurance Company the appropriate Ministry established insurance rates in an effort to maintain an equitable balance between the constraints on the Company and its value to society. Similarly, trading in ores was not left entirely to the discretion of the Ore Marketing Company. The State always stood behind those companies and was in reality a partner in all their commercial transactions with foreigners. That was where the new international economic order should come into play. Copper prices, for instance, were not determined by the producer countries, which were compelled to agree to prices established by a whole range of international mechanisms. The new international economic order was intended to deal precisely with injustice of that kind.

23. As to the topic at hand, it was gratifying to note that, in paragraph 2 of article 12, the Special Rapporteur had reserved transactions concluded between States and contracts concluded on a government-to-government basis, a wise course that could strengthen the position of the developing countries. If the Commission's work was to prove useful, it was essential to take account of the interests of all States.

24. Mr. SUCHARITKUL (Special Rapporteur) said that he was most grateful for members' comments, which would assist him in arriving at a solution that would be acceptable to all States. He had long been aware that, so far as the Soviet Union and other socialist countries were concerned, the problem of trading activities had virtually been solved, as could be seen from the fact that not a single judicial decision on the subject had been handed down in those countries. Had all traders been familiar with the doctrine explained by Mr. Ushakov, much tendentious litigation would have been avoided. Problems had none the less arisen elsewhere and his aim therefore had been to reach some degree of compromise that would not offend the basic principles of any legal system. In that connection, he had been pleased to hear Mr. Jagota's view that policy matters relating to commerce and trade, being political in nature, lay outside the scope of the draft.

25. There was, however, a lurking danger, and Mr. Ushakov had cited an example of the way in which the national legislation of certain countries could give rise to a protest on the part of other countries. In Thailand, as in the Soviet Union, State organs and agencies were separate legal entities, and liability could not be attributed to the State, something which was borne out by a decision in which the Supreme Court of Thailand had held that it had no jurisdiction to entertain a suit brought by Thai subjects against the Government and the Council of Ministers. The decision had been based not on immunity but on the fact that, under Thai law, the Government of Thailand did not have legal personality. Protests of another kind had also occurred. For instance, Thailand had initially protested against any claim to a 200-mile limit for the economic zone, but had ultimately been compelled to make a proclamation to that effect because of its fishing interests. For all that, the main danger was that, if the Commission failed to put forward specific proposals, States would be left to enact their own legislation, as many had indeed already done. Such legislation would not be uniform, with the result that a plaintiff would look to the court that was most likely to protect his interests.

26. There were, of course, many theories of State immunity, one being that it was not a principle of international law, owing to the lack of any universal State prac-

tice. Another was that a doctrine of State immunity did exist and that it was well established in State practice. Naturally, a State could consent to the exercise of jurisdiction by another State, thus providing a basis for the recent tendency to confine immunity to certain categories of activities. Yet another theory was that, from the very outset, immunity had been founded in customary international law and in State practice, but solely in so far as sovereign acts were concerned. It was supported not only by the decisions of the courts of the United Kingdom and the United States of America, but also by the practice and case law of other countries.

27. Nevertheless, the majority in the General Assembly seemed to endorse the view that there was a general rule of immunity, involving certain exceptions. Some countries, in his opinion, placed undue restrictions on immunity. For example, in one case concerning an embassy bank account it had been held that, because the account was a mixed account, the embassy was responsible for separating it and, because it had failed to do so, the account could be attached. He was not criticizing such decisions but considered that they should be taken into account in arriving at a final solution.

28. He agreed that it might be necessary to elaborate on the definition of "trade or commercial activity" contained in article 2, subparagraph 1 (*f*), and the interpretative provision in article 3, paragraph 2. Furthermore, having examined in more detail practice and decisions that had caused hardship, particularly to the developing countries, he believed that the test of the nature of the act, advocated by the Austrian and German courts, should not be an absolute one. For the purpose of a more acceptable compromise, an effort could perhaps be made in the Drafting Committee to spell out the idea that the main purpose of the activity should be to provide relief for the country or to assure its stability, particularly in terms of the developmental effort. He had noted Mr. Balanda's reference to contracts of guarantee and recalled in that regard that, in a sale of Airbuses to Thailand by France, he had himself been instructed to sign such a guarantee and, at the same time, a clause waiving immunity. Such an occurrence was not the first of its kind and was an indication of the way in which matters were developing.

29. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer articles 11 and 12, together with the definitions contained in article 2, subparagraph 1 (*f*), and article 3, paragraph 2 to the Drafting Committee.

It was so decided.

The meeting rose at 1 p.m.

1731st MEETING

Monday, 21 June 1982, at 3 p.m.

Chairman: Mr. Paul REUTER

State responsibility (A/CN.4/342 and Add.1-4,[1] A/CN.4/344,[2] A/CN.4/351 and Add.1-3, A/CN.4/354 and Add.1 and 2, A/CN.4/L.339)

[Agenda item 3]

Content, forms and degrees of international responsibility (part 2 of the draft articles)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLES 1 to 6

1. The CHAIRMAN invited the Special Rapporteur to introduce the topic of State responsibility.

2. Mr. RIPHAGEN (Special Rapporteur) said he would attempt to do three things: to situate the topic of State responsibility within the entire field of international law; to introduce the topic as a whole; and to make some general comments on the draft articles proposed in his third report (A/CN.4/354 and Add.1 and 2, paras. 145-150), which read as follows:

Article 1

An internationally wrongful act of a State entails obligations for that State and rights for other States in conformity with the provisions of the present part 2.

Article 2

The performance of the obligations entailed for a State by its internationally wrongful act and the exercise of the rights for other States entailed by such act should not, in their effects, be manifestly disproportional to the seriousness of the internationally wrongful act.

Article 3

The provisions of this part apply to every breach by a State of an international obligation, except to the extent that the legal consequences of such a breach are prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law.

Article 4

An internationally wrongful act of a State does not entail an obligation for that State or a right for another State to the extent that the performance of that obligation or the exercise of that right would be incompatible with a peremptory norm of general international law unless the same or another peremptory norm of general international law permits such performance or exercise in that case.

Article 5

The performance of the obligations entailed for a State by its internationally wrongful act, and the exercise of the rights for other States entailed by such act, are subject to the provisions and procedures embodied in the Charter of the United Nations.

Article 6

1. An internationally wrongful act of a State, which constitutes an international crime, entails an obligation for every other State:

(*a*) not to recognize as legal the situation created by such act; and

(*b*) not to render aid or assistance to the author State in maintaining the situation created by such act; and

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

[2] *Ibid.*