Document:-
A/CN.4/SR.1833

Summary record of the 1833rd meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
1984, vol. I

matic bag entrusted to the captain of a commercial aircraft or of a merchant ship was not supposed to leave the aircraft or ship: it was supposed to be dispatched direct to the destination. If a merchant ship whose captain was carrying a diplomatic bag entered the port of a State other than the receiving State, could that State be regarded as a transit State within the meaning of draft article 3? The same question might be asked in the case of a commercial aircraft which landed in the territory of a State other than the receiving State but kept the diplomatic bag on board. The difficulty might be solved by specifying that, in those instances too, the diplomatic bag was inviolable. Yet if the bag did not leave the merchant ship or commercial aircraft, it could not benefit from facilities, nor could the captain, since the captain was not considered to be a diplomatic courier.

35. Lastly, with reference to paragraph 1 of draft article 30, it was dangerous to specify that an authorized member of the crew under the command of the captain of a commercial aircraft or merchant ship could be employed for the custody and transportation of the diplomatic bag. Who would give such authorization? The captain had complete authority on a commercial aircraft or merchant ship. Admittedly, he could designate a crew member to watch over the diplomatic bag during the journey, but the authority to do so lay with him alone. The State as such could entrust the bag only to the captain of the aircraft or ship. Hence the only person to be mentioned in the paragraph should be the captain.

36. He had by no means pointed to all of the problems posed by draft article 30 and therefore urged the Special Rapporteur to review the article, both in substance and in form. On the question of form, the word "master" in the English text, could be replaced by "captain", so as to employ the expression used in the corresponding provisions of the conventions on diplomatic law.

37. Mr. CALERO RODRIGUES said that the title of draft article 30 was somewhat misleading. Paragraphs 1 to 3 did, in fact, deal with the status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew, but paragraph 4 went much further. Also, it was unnecessary to provide for an authorized member of the crew to be entrusted with the bag, even though a limited amount of State practice could be cited in that connection. For the purposes of the draft, responsibility in the matter should remain with the captain or master.

38. Paragraph 4 of draft article 30 was not as clear as article 27 of the 1961 Vienna Convention on Diplomatic Relations or article 35 of the 1963 Vienna Convention on Consular Relations and he therefore considered it essential to state in unambiguous terms that facilities should be accorded to a member of the diplomatic mission or consular post to enable him to have access to the aircraft or ship in order to take delivery of or to deliver the bag. Possibly a provision to that effect could be embodied in draft article 33; alternatively, paragraph 4 of draft article 30 should be reworded to make the position quite clear. Furthermore, paragraph 4 referred solely to access for members of the diplomatic mission. Presumably consular officers and members of a delegation were covered too, but that point could perhaps be referred to the Drafting Committee.

39. With regard to draft articles 31 and 32, he agreed that, strictly speaking, and according to the definitions, a bag without any external markings was not a diplomatic bag; but for the sake of clarity, and even at the risk of repetition, it would be preferable to retain both articles.

40. Draft article 32 raised a difficult problem, since it was virtually impossible to verify the contents of the bag. Nevertheless, he did not think it possible to use any more precise terminology. So far as the expression "official use" was concerned, it could of course be interpreted in several ways. In that connection, he noted that a diplomatic mission could import or export whatever it wished simply by applying for exemption from customs dues: in such cases, the receiving State at least knew what was entering and leaving its territory, whereas there was no such guarantee in the case of the diplomatic bag. In the circumstances, draft article 32 must specify that on no account should the diplomatic bag contain articles whose export or import was prohibited by the law or controlled by the quarantine regulations of the receiving State. Lastly, the second clause of paragraph 2, relating to prosecution and punishment of any person responsible for misuse of the bag, was unnecessary.

The meeting rose at 1 p.m.

1833rd MEETING

Monday, 4 June 1984, at 3 p.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Balanda, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

Jurisdictional immunities of States and their property (A/CN.4/363 and Add.1,[1] A/CN.4/371,[2] A/CN.4/376 and Add.1 and 2,[3] A/CN.4/L.369, sect. C, ILC (XXXVI)/Conf.Room Doc.1 and Add.1)

[Agenda item 3]

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[1] Reproduced in *Yearbook ... 1983*, vol. II (Part One).

[2] *Idem*.

[3] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR [4]

ARTICLES 16 TO 18

1. The CHAIRMAN invited the Special Rapporteur to introduce his sixth report on jurisdictional immunities of States and their property (A/CN.4/376 and Add.1 and 2) and draft articles 16, 17 and 18, which read:

Article 16. Patents, trade marks and other intellectual properties

1. The immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdiction in a proceeding which relates to the determination of:

(a) the right to use a patent, industrial design, trade mark, service mark, plant breeders' right or any other similar right or copyright which has been registered, deposited or applied for or is otherwise protected in another State, and in respect of which the State is the owner or applicant; or

(b) the right to use a trade name or business name in that other State.

2. A court of another State shall not be prevented from exercising jurisdiction in any proceeding brought before it which relates to:

(a) an alleged infringement by or attributable to a State, in the territory of that other State, of a patent, industrial design, trade mark, service mark, plant breeders' right or any other similar right or copyright belonging to a third person and protected in that other State; or

(b) an alleged infringement by or attributable to a State, in the territory of that other State, of the right to use a trade name or business name belonging to a third person and protected in that other State.

Article 17. Fiscal liabilities and customs duties

1. Unless otherwise agreed, a State cannot invoke immunity from the jurisdiction of a court of another State in a proceeding relating to its liability for:

(a) value added tax, any duty of customs or excise or any agricultural levy; or

(b) *ad valorem* stamp-duty or a charge or registration fee for registration or transfer of property in the forum State; or

(c) income tax derived from commercial activities conducted in the forum State; or

(d) rates or taxes on premises occupied by it in the forum State for commercial purposes.

2. Nothing in paragraph 1 shall be interpreted as an exception to the immunity of a State for its diplomatic and consular premises from seizure, attachment or measures of execution, or to allow foreclosure, sequestration or freezing of such premises or of State property otherwise internationally protected.

Article 18. Shareholdings and membership of bodies corporate

1. A State cannot invoke immunity from the jurisdiction of a court of another State in a proceeding relating to the determination of its rights and obligations arising from its shareholdings or membership of a body corporate, an unincorporated body or a partnership between the State and the body or its other members or, as the case may be, between the State and the partnership or the other partners, provided that the body or partnership:

(a) has members other than States; and

(b) is incorporated or constituted under the law of the State of the forum or is controlled from or has its principal place of business in that State.

2. Paragraph 1 does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body or partnership in question.

2. Mr. SUCHARITKUL (Special Rapporteur) said that the draft articles on jurisdictional immunities of States and their property consisted of three parts: part I, "Introduction"; part II, "General principles"; and part III, "Exceptions to State immunity". The status of work on the draft articles in parts I and II was explained in the introductory note of the sixth report (A/CN.4/376 and Add.1 and 2, paras. 2-12). Article 11 (Scope of the present part), the first article in part III of the draft, would be re-examined by the Drafting Committee after it had considered all the exceptions. The intention was to relate the exceptions to the general principles and make it possible to accept various conditions as agreed between the parties or States concerned.

3. One such condition often referred to was reciprocity. But reciprocity was not in itself an essential element for jurisdictional immunity, the basis for which lay in the sovereign equality of States. Reciprocity had, however, a very important part to play in the development of the application of the principles of jurisdictional immunity. Its invariable effect was to restrict the application of those principles in various ways. One way was to apply the principle of reciprocity as a kind of condition subsequent: for instance, if immunity was recognized in one State but another State did not apply it or restricted its application, then, if that other State was brought before the courts of the first State, its immunity could be similarly ignored or restricted. Another way in which the principle could operate was as a condition precedent, when it would play a suspensive role, in that the immunity of foreign State property from execution or attachment would be subject to proof that the law of the State owning the property provided for such immunity. In practice, of course, the executive normally had to intervene before the court would be satisfied. There were also other ways in which the principle of reciprocity was applied. The overall trend, however, was towards restriction of immunity.

4. The Commission had already provisionally adopted article 12 (Commercial contracts) and article 15 (Owner-

[4] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (*a*) art. 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (*b*) art. 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—para. 1 (*a*) and commentary thereto: *ibid.*, p. 100; para. 1 (*g*) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), p. 21; (*c*) art. 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; para. 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), p. 21; (*d*) arts. 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (*e*) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (*f*) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (*g*) art. 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22-25.

Part III of the draft: (*h*) art. 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised text: *ibid.*, p. 99, footnote 237; (*i*) art. 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (*j*) arts. 13 and 14: *ibid.*, pp. 18-19, footnotes 54 and 55; revised texts: *ibid.*, p. 20, footnotes 58 and 59; (*k*) art. 15 and commentary thereto adopted provisionally by the Commission: *ibid.*, p. 22.

ship, possession and use of property). Those were the two main exceptions or specified areas in which the doctrine of State immunity had been considered and delimited with a view to determining precisely when immunity would apply. Two other areas were dealt with in articles 13 and 14, relating respectively to contracts of employment and to personal injuries and damage to property; both those articles were before the Drafting Committee.

5. During the debate in the Sixth Committee of the General Assembly, a number of important points had emerged (see A/CN.4/L.369, sect. C). The first related to the irrelevance of differences in ideology. The Commission had avoided the various distinctions drawn, for instance, between *acta jure imperii* and *acta jure gestionis*, or between public and private activities, preferring to examine the specific areas with a view to precise determination of the extent to which the principle of State immunity would apply and not to base its application upon various distinctions that might depend on differences in ideology. The Commission's approach would therefore provide an acceptable solution regardless of any differences in ideology or in conceptions of the official and non-official, or public and private, functions of States.

6. The second point that had emerged related to subtle differences in practice and procedure. It had become clear that some differences were more apparent than real; for instance, whether a court was or was not competent or whether, even though it did have jurisdiction, it could decide not to exercise it. Under some systems there was no option for a court not to exercise its jurisdiction. There was, however, always the possibility of intervention by the executive branches of Government, and recent practice showed a trend in that direction.

7. The third point was that, as the topic became more widely understood, criticism appeared to be abating. There was a growing acceptance of the need to regulate State immunity internationally, rather than allow each country to develop its own case-law irrespective of the case-law of other countries.

8. The previous year had seen some progress in terms of legal development. There had, for instance, been a sharp increase in restrictive practice and there was clear evidence of a strong tendency in favour of further restriction of State immunity in various areas. The most alarming feature was the allowance of attachment of State property and execution in cases that affected the means by which diplomatic intercourse or interchange were conducted. At the same time, there had been a reaction by the courts themselves against that sharp increase in restrictive practice. Courts in the United States of America appeared to have imposed self-restraint by holding that they had no jurisdiction on the grounds, for example, that the injury in question had occurred outside the territory of the forum State or that the commercial transaction in question had had no adverse effect in the United States.

9. The trend towards placing a liberal interpretation on legislation restricting immunity was quite marked. Concern had, however, been expressed in various quarters, including the Asian-African Legal Consultative Committee, that in practice it was the developing countries which were most often the subject of proceedings and that the costs of litigation were relatively high. In one case quoted in the report of the November 1983 meeting of the legal advisers to the Consultative Committee, the Government of a developing country had had to pay $US 200,000 in legal costs simply to establish its immunity at first instance, and those costs would have risen to $600,000 at the appeal stage. That concern had been corroborated by a very recent judgment delivered by Lord Diplock in the United Kingdom House of Lords, in which he had deplored the fact that the costs incurred had exceeded the amount of the judgment debt even before the appeal had reached the House. [5] Because of such cases it had been suggested that, when questions of the immunity of a foreign State and especially of a developing country were at issue, legal assistance could perhaps be furnished, for example, in the United States, the United Kingdom and other developed countries, without the need to involve the foreign State concerned.

10. The law itself had developed in a more balanced way, although as far as the attachment or freezing of the bank accounts of embassies were concerned, there had been some conflicting decisions. The matter would, of course, be dealt with in part IV of the draft, but he raised it at this point to highlight the urgency of the whole topic. Some members of the Asian-African Legal Consultative Committee had even advocated enacting their own national legislation, but it had eventually been decided that the Commission should be allowed time to produce a set of draft articles aimed at uniform regulation of what was a highly complex topic.

11. He had also noted in his sixth report (A/CN.4/376 and Add.1 and 2, para. 47) that there was a continuing absence of judicial practice upholding absolute immunity—which had been recognized in *Berizzi Brothers Co.* v. *SS "Pesaro"* (1926) and *The "Porto Alexandre"* case (1920) but had since been abandoned.

12. As noted in the report (*ibid.*, para. 51), draft article 16 grouped together three categories of intellectual and industrial property. Industrial and intellectual property rights within the meaning of article 16 were thus rights protected by States, nationally as well as internationally. In that connection, he drew attention to the two different aspects of the protection accorded to literary, musical and other artistic works, which he mentioned in his report (*ibid.*, para. 52 *in fine*).

13. The important feature of article 16 was the basis for jurisdiction and application of the law, namely the protection afforded by the State or by an international convention. A State could be concerned with the article in two ways. First, as the holder of rights protected under the article, it could claim protection under the copyrights laws of another State; secondly, it could be involved in the infringement of such rights in a foreign State. The important element with regard to the exercise of jurisdiction was the existence of an indissociable territorial

[5] *Alcom Ltd.* v. *Republic of Colombia* (1984) (*The All England Law Reports, 1984*, vol. 2, p. 6, at p. 14).

connection with the State of the forum. In other words, the availability of protection within the territory of the State of the forum constituted the basis of jurisdiction.

14. There was a close analogy between the exceptions provided for under article 16 and those provided for under article 12 for commercial contracts and under article 15 for the use of property. So far as article 12 was concerned, the infringement did not have to result from commercial activities conducted by a State; it could take the form of reproduction or performance for public and non-commercial purposes. But there was some analogy with trade in that, whatever the motivation for the infringement by the State, the marketability of the rights for which the parties were seeking protection would be adversely affected. In that respect the matter might be covered by the wider concept of trading activities, rather than commercial contracts of the State. So far as the connection with article 15 was concerned, industrial and intellectual properties could be viewed as incorporeal hereditaments and, once again, the *lex situs* was that of the place where the protection was afforded. Accordingly, the *forum conveniens* would be the forum of the State in which the system of registration and protection was applicable and in which the rules for protection were recognized.

15. An alternative basis for the exercise of jurisdiction was consent. A State could become involved either as a claimant of a right, in which case it consented to the exercise of jurisdiction, or, if a right was being disputed, as a subject of proceedings, in which case it also had to assert its own right. Accordingly, there was a possibility of implied consent on the part of a State whenever a question of infringement of a right arose, whether for commercial or non-commercial purposes.

16. So far as the practice of States was concerned, there were two important cases, the first of which was *Dralle* v. *Republic of Czechoslovakia* (1950) (*ibid.*, para. 65), in which the Czechoslovak Government could be said to have been as much a claimant of foreign trade mark rights as the party seeking relief from the court and in which, therefore, an exception had been recognized. Another, less well-known case in which compensation for infringement of copyright had been sought had involved the Spanish Government Tourist Bureau (*ibid.*, para. 67). In that case, the activities of the Spanish Tourist Bureau had been held to be of a private-law nature and hence not entitled to immunity. That exception must be distinguished from the commercial contract exception.

17. With regard to governmental practice, he had cited section 7 of the United Kingdom *State Immunity Act 1978* (*ibid.*, para. 70). Although that provision had no counterpart in the United States *Foreign Sovereign Immunities Act of 1976*, it had been reproduced *inter alia* in Singapore's *State Immunity Act, 1979* and in Pakistan's *State Immunity Ordinance, 1981* (*ibid.*, para. 71). He had also cited article 8 of the 1972 European Convention on State Immunity (*ibid.*, para. 73). It appeared from those provisions that there was a trend towards recognizing an exception to jurisdictional immunity where protection for the use of patents, trade marks and intellectual property was claimed. It was on that basis that he had formulated draft article 16 for consideration by the Commission.

18. Introducing draft article 17, he pointed out that, as noted in his report (*ibid.*, para. 81), the liability of one State for taxation or customs duties levied by another arose only in exceptional cases. But as States extended their activities beyond the confines of their own frontiers, such cases were becoming more numerous. The basis for tax collection was, of course, to be found in the territorial connection with the source of income or the entry of goods into the territory of another State. The territorial State had the power to tax, but if it exercised that power beyond its territorial limits, a dispute could arise. The power to tax could be based on nationality, origin of revenue or residence.

19. He recognized that an express provision on the subject would be of marginal utility, although the exception was quite clear. Fiscal liability and customs duties, once recognized, were payable by all, including foreign States, although collection might prove difficult. He had examined judicial practice and, as he had noted (*ibid.*, paras. 90-92), there had been some cases, especially in the United States, of foreclosure proceedings for tax collection. In the event, the court had not allowed foreclosure procedures, but the tax assessment had not been reversed. Liability had been established and no immunities had been recognized. In international law, however, it was recognized that tax should not be assessed on foreign-owned property used for public, non-commercial purposes. In one case, *Republic of Argentina* v. *City of New York*, the Court of Appeals of New York (1969) had held that foreign State property devoted to public governmental uses was immune under customary international law from local real estate taxes, but that Argentina's claim for a refund was not timely (*ibid.*, para. 92).

20. Thus immunity was recognized up to a point, but the Commission would have to be careful about its exact extent. Attachment of foreign embassies should not be allowed, but exemption from taxes in the form of services and rates would not be in order. Governmental practice was in a state of flux, some Governments being more willing than others to allow exemptions or reductions of certain duties. For instance, in some cases the fees for registration of transfer of title deeds could be waived either wholly or, on the basis of reciprocity, in part.

21. With regard to national legislation, he had cited section 11 of the United Kingdom *State Immunity Act 1978* (*ibid.*, para. 99), which denied immunity in the case of value added tax and certain other duties. In the United States, the Department of the Treasury's "Notice of proposed rulemaking" provided guidance for taxing foreign sovereigns on their income from commercial activities within the United States. Broadly speaking, income of foreign Governments from investments in the United States in stocks, bonds or other domestic securities, or from interest on bank deposits, was exempt from taxation under section 892 of the *Internal Revenue Code*, whereas amounts deriving from commercial activities were taxable under sections 881 or 882 of that Code (*ibid.*, para. 100). Hence a balance had to be struck in

determining the extent to which States should be exempt from the taxes and duties of another State.

22. He had also examined international and regional conventions, as well as international opinion, but had not reached any final decision. There was a twilight zone where fiscal liabilities and customs duties were concerned, and he felt some doubt about the need for a specific provision on the matter. In case one were deemed necessary in the interests of the progressive development of international law, however, he had proposed draft article 17.

23. If a State bought or held shares in a company constituted and registered under the company law of another State, or acquired equities in or became a member of an association or partnership formed, organized or chartered under the law of another State, it could be said to have entered into a legal relationship in that State. Such action by a State indicated its willingness to recognize the validity of the legal relationship it had entered into under the law of the other State. It was therefore bound to respect the local laws of the State of incorporation or registration and the purpose of draft article 18 was to define the exception to State immunity in that regard.

24. Although doubtful cases could arise, for example, through succession, whether testate or intestate, or some other form of devolution, in the final analysis it was the law of the State of incorporation that would govern the title or rights of the successor as a shareholder or member of a body corporate. Therefore the only *forum conveniens* would appear to be the State in which the company had been formed or the body corporate constituted.

25. Judicial practice was scanty. Where governmental practice was concerned, some evidence was provided by section 8 of the United Kingdom *State Immunity Act 1978*, which provided for the exceptions in question. A similar provision was to be found in the legislation of other countries, such as Singapore and Pakistan. Canadian and United States law, however, had included the matter under the wider exception of commercial activities, as had the 1972 European Convention on State Immunity and other conventions. However, as draft article 12 referred solely to commercial contracts, there might be grounds for including a draft article based on the applicability of the law of the State of the forum, which was the place of incorporation. It was on that basis that he proposed draft article 18 for the Commission's consideration.

26. Mr. USHAKOV said that the three draft articles under consideration dealt with matters involving very specialized terminology which raised problems of meaning and translation. The Special Rapporteur should therefore make sure that the French translation of certain expressions borrowed from the common-law systems was correct.

27. Draft article 16, paragraph 1, was intended to protect the right of every person and every State to use a patent or other intellectual property. That provision covered the rather rare case in which the plaintiff was a State holding the right whose use was to be protected. When that State applied to the court of another State for protection and the laws of that other State permitted such action, there was no question of immunity from jurisdiction. For the plaintiff State which applied to the court of another State thereby consented to the exercise of jurisdiction, as was clear from the general principles established at the beginning of the draft articles.

28. He wondered whether the notion of copyright could really be applied to a State and whether the terms "owner" and "applicant" has been correctly translated into French by the words *titulaire* and *déposant*. Under the terms of article 16, paragraph 2 (*a*), a court of another State could not be prevented from exercising jurisdiction in any proceeding brought before it which related to "an alleged infringement by or attributable to a State, in the territory of that other State, of a patent ...". For an internationally wrongful act to be attributable to a State, it must take the form of an act or omission by one of its organs. But how could infringement of a patent be attributed to a State if that State had not made use of it? Should it be understood that infringement of a patent by a private person could be attributed to a State? It would also be advisable to define the moment at which infringement of a patent began. Was it only from the time of entry into force of a copyright convention to which a State was a party that that State could be considered as having infringed a patent covered by the convention?

29. In view of all those questions, he urged the need to make the provisions of article 16 more specific, for fear that they might raise more difficulties than they resolved. It would be wrong to think that the problems raised by article 16 came under private international law. Indeed, they often involved the application or interpretation of international instruments and led to disputes between States which should be settled by the peaceful means recognized by international law.

30. Draft article 17, on fiscal liabilities and customs duties, did not seem really necessary in the context of jurisdictional immunities. The case in point did not depend on the immunities of States, but rather on privileges recognized in bilateral, multilateral or international agreements or by international custom. In the absence of such privileges, every person and every State had a duty to pay taxes. Any dispute between States on the question of whether one of them was required to pay taxes or customs duties to the other was a dispute under international law relating to interpretation of the provisions of an international agreement or of international custom—in other words, a dispute concerning the existence of the privilege of not paying those taxes or customs duties. Such disputes were not within the competence of national courts; they should be resolved by the means of pacific settlement of disputes provided for in Article 33 of the Charter of the United Nations.

31. Moreover, the Special Rapporteur's sixth report (A/CN.4/376 and Add.1 and 2) gave the impression that everything depended on the existence of a privilege established by an international agreement or by international custom. When it had been established that the State in question was required to pay taxes or customs duties and that it had not done so, there was another dispute under international law, which could not be settled by national

courts either, but must be settled by the peaceful means recognized by existing international law. It was because the disputes arising were in all cases international disputes that he doubted the need for article 17.

32. The difficulties raised by draft article 18 were due mainly to the fact that that provision relied on notions peculiar to the common-law systems, which were often difficult for a continental civil jurist to grasp. Moreover, article 18 dealt with problems which did not seem to lend themselves to the statement of a general rule. In principle, when a State participated in an enterprise having the nationality of another State, its participation was governed by the law of that other State, and it appeared impossible to enunciate a general rule applying to an infinity of particular cases. In those circumstances, it would be better to leave the matter to practice, which, according to the Special Rapporteur (*ibid.*, paras. 112-117), was so scanty that no single rule could be derived from it at present. As to the instruments relating to jurisdictional immunities, they generally ignored the problems covered by article 18. To try to cover all the imaginable cases in a single article at the present time would be carrying the progressive development of international law to excess. In view of the complications which draft article 18 would be sure to involve, he seriously doubted its value.

33. Mr. REUTER, referring to Mr. Ushakov's comments, agreed that the French translation of some of the terms should be revised. In draft article 16, paragraph 1, the word "owner" was correctly rendered by *titulaire*; the term "applicant" referred to the provisional status of a person who had carried out one of the formalities for the protection of industrial property, but who had not yet consolidated his rights. In all systems of industrial protection, the acquisition of rights went through several stages. The "owner" was in the last stage, whereas the "applicant" was in a preliminary stage at which he did not enjoy full rights. For the text to be understandable in all languages, it would probably be necessary to refer to the fact that the State was the owner of definitive rights or provisional rights. In draft article 16, paragraph 2, the words "alleged infringement by... a State" had been rendered in French as *non-respect présumé par un Etat*. The term *allégué* would be preferable to *présumé*, though of course it could not be used with the term *non-respect*, since it would appear that the infringement had been alleged by a State.

34. Unlike Mr. Ushakov, he thought that the three draft articles under consideration were very useful. Apart from minor translation problems, article 16 should not raise any great difficulties of principle, for as soon as a State engaged in certain activities, whether commercial or not, which involved the protection of intellectual property, it was required to comply with the rules. On that score, paragraph 2 was as well justified as paragraph 1. If a State was protected as to its rights in intellectual property, it was protected against the acts of private persons, but it could also be protected against the acts of another State. For instance, it might happen that, for a great sporting event, a State chose an emblem for which it had intellectual property rights in accordance with an international convention, that another State subsequently made use of that emblem and that a dispute arose in a third State.

35. It did not seem possible to assert, as Mr. Ushakov had done, that the rights referred to in article 16 were rights established by conventions and that any question of interpretation of those conventions came under public international law and was not within the competence of national courts. His own view was that conventions relating to copyright were first interpreted in national courts. If a State party to the convention disagreed with the interpretation, it had a right of action under public international law, generally through the mechanism of an international organization. In the first instance, therefore, the State was subject to national law, since it had taken its position on the ground of a property right. True, intellectual property was not like other forms of property, but it had real characteristics: the rights in it were available against others and the protection of rights *in rem* must certainly be entrusted to national courts.

36. As to draft article 17, Mr. Ushakov had been right in saying that it must be presumed that a State was liable to pay taxes. If it was not liable, by virtue of an international exemption, the article would not be applicable. But once a State had acknowledged that it was liable to pay tax, there could be a dispute about the amount of the tax. It must then come to an arrangement with the tax authorities. If it claimed that, by virtue of an international right or convention, it was not subject to the tax because it enjoyed exemption, an international dispute might arise. In that case, however, the foreign State would not be contesting the amount of the tax, but the principle.

37. It did not appear to be the practice of foreign ministries in such cases to instruct the tax authorities to take proceedings in court. Those details could be included in the commentary to the article. After all, nothing justified the deletion of an article providing that a State which had placed itself in the position of a tax payer according to public international law must discuss the question of its taxation with the tax authorities, with the safeguard of a judgment by the courts.

38. Referring to draft article 18, the Special Rapporteur had said that there was little doctrine on the financial participation of States in companies and hardly any practice. In fact, practice was abundant, but it was not known. International jurisprudence was also scarce; at the most, mention might be made of the *Oscar Chinn* case [6] and the *Anglo-Iranian Oil Company* case, [7] tried respectively by the PCIJ and the ICJ.

39. As to the presence in Switzerland of numerous private companies wholly owned by foreign States, that came under public international law and raised the question to what extent there were rules of international law or internal law which denied a foreign State the capacity to hold equity in a private company. That was a question which each country regulated as it saw fit. The

[6] Judgment of 12 December 1934, *P.C.I.J., Series A/B, No. 63*, p. 65.

[7] Judgment of 22 July 1952, *I.C.J. Reports 1952*, p. 93.

Special Rapporteur had prudently excluded from article 18 the case of a private company whose only shareholder was a foreign State, which would raise the problem of capacity. He had also excluded the case of a private company which had only foreign States as shareholders, which would make it an international enterprise, if not an international organization such as the World Bank group. The Special Rapporteur required that at least two members should not be States. In accepting that situation, the State placed itself under private law and accepted jurisdiction. Perhaps it should be specified that the members which were not States must be private persons; it would then be understood that the Commission considered that the State had had recourse to a form of private law and that it accepted jurisdiction. It could not be said that that was a form of commercial law, for the question depended on internal law. Under the law of some countries, the adoption of a particular form of company, such as the limited liability company, meant that all its activities, whatever the company's object, were commercial activities. But there were cases in which the activities were not commercial, and in the absence of a special text covering them, the Commission would be left with the provision on commercial activities and those cases would not be covered. However, that situation did not seem to present any great danger.

40. Lastly, he believed that a State could be the owner of copyrights. The same applied to international organizations, though, for reasons of caution, few of them were recognized as having that faculty. Those organizations should be protected not only against other organizations or private persons, but also against States.

The meeting rose at 6 p.m.

1834th MEETING

Tuesday, 5 June 1984, at 10 a.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Balanda, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/363 and Add.1,[1] A/CN.4/371,[2] A/CN.4/376 and Add.1 and 2,[3] A/CN.4/L.369, sect. C, ILC (XXXVI)/Conf. Room Doc.1 and Add.1)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[4] (*continued*)

ARTICLE 16 (Patents, trade marks and other intellectual properties)

ARTICLE 17 (Fiscal liabilities and customs duties) *and*

ARTICLE 18 (Shareholdings and membership of bodies corporate)[5] (*continued*)

1. Mr. OGISO said that draft articles 16 to 18 were mainly a follow-up to the contents of articles 12 and 15, which the Commission had provisionally adopted. Accordingly, he had no major difficulty with regard to the substance of those articles and his comments would be confined largely to drafting matters.

2. Draft article 16 was unduly detailed and his own preference would be for a text stating as succinctly as possible the general principle of the limitation of State immunity with regard to patents, trade marks and the like. In paragraph 1 (*a*), it seemed hardly necessary to refer to "a patent, industrial design, trade mark, service mark, plant breeders' right or any other similar right or copyright", a form of language taken from the United Kingdom's *State Immunity Act 1978*, where it was of course quite appropriate. A detailed list of that kind, however, was not suitable for an international convention, since some Governments would have to enact national legislation to implement the principles of the convention in their domestic law. Hence the best course was to make the provisions as general as possible, in order to allow the necessary flexibility for implementation in the different national legal systems. The list in paragraph 1 (*a*) could be replaced with advantage by a formula such as "a patent, trade mark or other intellectual property" and paragraph 1 (*b*) could then be deleted altogether, for the expression "other intellectual property" would cover trade names and business names.

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[1] Reproduced in *Yearbook ... 1983*, vol. II (Part One).

[2] *Idem*.

[3] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[4] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (*a*) art. 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (*b*) art. 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—para. 1 (*a*) and commentary thereto: *ibid.*, p. 100; para. 1 (*g*) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), p. 21; (*c*) art. 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; para. 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), p. 21; (*d*) arts. 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (*e*) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (*f*) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (*g*) art. 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22-25.

Part III of the draft: (*h*) art. 11, *Yearbook ... 1982*, vol. II (Part Two), p. 95; footnote 220; revised text: *ibid.*, p. 99, footnote 237; (*i*) art. 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (*j*) arts. 13 and 14: *ibid.*, pp. 18-19, footnotes 54 and 55; revised texts: *ibid.*, p. 20, footnotes 58 and 59; (*k*) art. 15 and commentary thereto adopted provisionally by the Commission : *ibid.*, p. 22.

[5] For the texts, see 1833rd meeting, para. 1.