Document:-
A/CN.4/SR.1835

Summary record of the 1835th meeting

Topic:
Jurisdictional immunities of States and their property

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

there was a rule of immunity which could interfere with the way in which companies ran their businesses.

34. Mr. SUCHARITKUL (Special Rapporteur), replying to points raised, said he agreed entirely that the Commission should not rely unduly on the distinctions that were drawn by States. Nevertheless, it had to be recognized that they loomed large in the case-law of many countries and could not be dismissed out of hand. His purpose therefore had simply been to point out the irrelevance of such distinctions in certain respects, without dwelling further on their philosophical or conceptual implications. He likewise agreed that it was first necessary to establish that a court did have jurisdiction; otherwise there could be no question of jurisdictional immunity. That assertion, however, was not always accepted by legal writers. In that connection he recalled that, on one occasion, a former member of the Commission had said that, if he had to defend a foreign Government before a United Kingdom or a United States court, he was not sure whether, in addition to jurisdictional immunity, he would not also raise the question of some other defence. Normally, of course, the court was not bound to decide the question of jurisdictional immunity before other questions.

35. The expression "owner or applicant", in paragraph 1 (*a*) of draft article 16, raised questions of both substance and translation. In the matter of substance, "applicant" had been included to denote the fact that, in the period before a patent was actually registered, the applicant for registration had a kind of inchoate title to property. So far as questions of translation were concerned, *déposant ou titulaire* ("owner or applicant"), in the French text, appeared in article 8 of the 1972 European Convention on State Immunity, but the Drafting Committee might wish to make some improvement. He agreed, however, that the expression *non-respect présumé* ("alleged infringement"), in paragraph 2, was inelegant. It might be best to adopt the same expression as the one used in the 1972 European Convention.

36. With regard to paragraph 2 of draft article 16, he would not go into the question of the interests of the developing countries, since it was already dealt with, *inter alia*, in declarations adopted by WIPO and in UNCTAD resolutions on the transfer of technology. He would merely say that, in regard to cultural rights, which could be considered as a species of intellectual property, the developing countries were surely as advanced as the developed.

37. A point had been raised in connection with the term "agricultural levy" in paragraph 1 (*a*) of draft article 17. It had been translated into French as *toute redevance agricole*, but the expression used by the Common Market was *prélèvement*, which meant the sum over and above the import duties payable.

38. The expression "an agreement in writing between the parties to the dispute", in paragraph 2 of draft articles 18, had been included because the choice of law was open to the parties to a dispute. Again, the term "constitution or other instrument" in the same paragraph referred to any instrument regulating the body in question, such as the Charter of the United Nations. Lastly, although there was little judicial practice, actual practice was constantly on the increase as States invested in companies within or outside their own territory. In such cases they would, of course, be amenable to the local jurisdiction of the State of incorporation.

39. Mr. USHAKOV said he wished to reaffirm that, in his opinion, paragraph 1 of draft article 16, which was concerned more particularly with cases in which the State was the plaintiff, was superfluous. A State could always apply to a court of the forum State for protection of its intellectual property rights. As to paragraph 2, he unreservedly endorsed the argument by Chief Akinjide, for the paragraph was not only entirely contrary to, but also seriously jeopardized, the interests of the developing countries.

40. With regard to draft article 17, he agreed with Mr. Reuter (1833rd meeting) that a State, like any other taxpayer, could institute proceedings relating to, for example, calculation of the amount of taxes or duties, if the court was competent in the matter. But there was really no need for such a provision.

41. Lastly, concerning draft article 18, he too considered that cases in which the State held shares in a company raised formidable problems. He still believed that the formulation of general rules on the basis of concrete, special or highly delicate cases would run into difficult, if not insurmountable, problems.

The meeting rose at 12.55 p.m.

1835th MEETING

Wednesday, 6 June 1984, at 10.05 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. Stavropoulos, 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]

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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] (*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. NI, congratulating the Special Rapporteur on his comprehensive and lucid report (A/CN.4/376 and Add.1 and 2), said that despite the wide divergence of views and practices reflected in the debate in the Sixth Committee of the General Assembly, there did not seem to be any real cause for pessimism. A careful analysis of the material available, with the object of arriving at conclusions acceptable to the great majority of the international community, was central to the inductive method, and the Commission was rightly proceeding with caution, since conclusions should follow—not precede—analysis. As noted by several representatives in the Sixth Committee, in determining the extent to which State immunity should receive world-wide recognition, the interests of all States, irrespective of their size or economic or social system, should be taken into consideration. Failure to devise a set of widely acceptable rules would only plunge the world into greater turmoil.

2. It had been frequently observed in the Commission and in the Sixth Committee that an unduly broad acceptance of exceptions unsupported by a sufficient body of State practice could make the principle of State immunity illusory and the adoption of a set of draft articles extremely difficult. Some representatives in the Sixth Committee had even maintained that the draft articles on exceptions would "erode", "nullify" or "undermine" the principle of State immunity, or restrict it to such an extent as to reduce it to a "sheer jurisdictional fiction", or lead to the "extinction of the basic rule itself". It was noteworthy that the delegations in question came from countries with different socio-economic systems.

3. In the articles in part III of the draft, frequent use was made of presumptions of consent or implied consent as grounds for the exercise of jurisdiction. Even before draft articles 16 to 18 had been prepared, one delegation in the Sixth Committee, which was among the foremost advocates of a restrictive attitude to State immunity, had felt obliged to speak against undue recourse to presumptions of waiver of immunity.

4. Reference had been made to the emergence of a trend towards a restrictive practice regarding immunity, but the materials showing that trend came from just a few countries, mainly in Europe and North America; and some European representatives in the Sixth Committee had even pointed out that certain laws of their countries providing for unrestricted immunity had not been taken into account. In a memorandum presented to the thirty-seventh session of the General Assembly, in 1983, [6] the Asian-African Legal Consultative Committee had likewise referred to the limited application of restricted immunity, pointing out that, for the most part, developing countries had not placed any restrictions on the traditional doctrine of sovereign immunity. In the Sixth Committee, it had been said that in drafting exceptions to State immunity, some rethinking appeared to be essential, that the discussions in the Sixth Committee should be taken more fully into account, and that a more detailed study of the legislation and practice of developing and socialist States was necessary if the draft articles were to be widely acceptable. In that connection he referred members to the topical summary prepared by the Secretariat (A/CN.4/L.369, paras. 143-144, 147, 150 and 155). He fully agreed with the Special Rapporteur that the question of jurisdictional immunities of States deserved international attention and should not be left for decision by national courts, or solely to national legislation (A/CN.4/376 and Add.1 and 2, para. 28).

5. He very much doubted the validity of the argument that the absence of judicial decisions in support of unrestricted immunity in recent years was proof of a trend towards restricted immunity. In the first place, State immunity was still firmly established on the basis of the sovereign equality of States as a general rule of international law, and that would continue to be the position so long as States remained sovereign and equal. Even assuming that State immunity was based on a custom that could change with new circumstances, it was for the proponents of restricted immunity to prove that the customary rule had been changed—or had been "eroded" or "nullified"—by contrary practices of such magnitude and consistency that they could be said to reflect the constant and uniform usage of States. Publicists agreed that, for a customary rule to develop, it had to be possible at some stage to infer from the conduct of a group of States that they regarded it as a legal duty to act in a certain way. Such a rule would become a general rule of

[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.

[6] The section of this memorandum covering the topic of the jurisdictional immunities of States and their property was distributed at the Commission's thirty-fifth session as document ILC(XXXV)/Conf. Room Doc.6.

international law only if a sufficient number of States accepted it as binding and if the rest of the international community made no protest regarding its application.

6. The restrictive practice of State immunity involved a legal duty of one sovereign State to submit to the jurisdiction of the courts of another sovereign State. Many voices had been raised in protest against that situation, for instance: the diplomatic correspondence and the statements made on behalf of States named as defendants in the courts of other States; the briefs of counsel who appeared for defendant States; and the opinions of regional organizations such as the Asian-African Legal Consultative Committee. It was thus clear that international law was not evidenced by judicial decisions alone, particularly when such decisions had been made in only a few of the States forming the international community. Indeed, to hold that only the decisions of the courts of certain States—which, moreover, were contested by other States—were authoritative evidence of international law would be a gross misinterpretation of article 38 of the Statute of the ICJ and, worse still, would be detrimental to the interests of the newly independent States. Since States which abided by the principles of the sovereign equality of States and their unrestricted immunity did not exercise jurisdiction over foreign States, there was naturally a paucity of cases in which States had appeared as defendants. And since most major business transactions were conducted in the industrially developed States, proceedings against foreign States were for the most part instituted in the courts of the industrial States.

7. Furthermore, the judgments of the courts of States which espoused the theory of restricted immunity were far from constant or uniform. For instance, no criterion had been found by which to distinguish *acta jure imperii* from *acta jure gestionis*, and different States had different views on what constituted an act under public law and an act under private law. A court of the same State could even arrive at a different conclusion at a different time on the same or a similar set of facts. The Special Rapporteur had therefore been right to state in his sixth report that such a distinction was not applicable to the draft articles (*ibid.*, para. 21). Another source of confusion was the question whether the determinative issue was the nature of the transaction or its purpose. Thus it was not only its limited application in geographical terms, but also its lack of uniformity that would prevent restricted immunity from replacing the long-established rule of absolute State immunity. Admittedly, the States of a particular region which all followed a similar practice could set up a régime that was applicable between themselves alone; but such instances were few, and ratification was difficult to secure, as in the case of the 1972 European Convention on State Immunity.

8. The keynote of the whole draft was article 6. A number of representatives in the Sixth Committee had expressed their opposition to that article because it did not clearly establish the principle of immunity as a general rule. But as the Special Rapporteur had stated in his sixth report that there was "sufficient general agreement that immunity is a fundamental principle of international law" (*ibid.*, para. 9), he would have no objection if the final revision of article 6 was left until later.

9. Other difficulties arose in regard to article 12 of the draft, because of the uncertainty of the applicable rules of private international law and unfairness in the presumption of consent. Some difficulty also stemmed from socio-economic systems in which the State played a major role in the economy, and the relevant comments made in the Sixth Committee should not be lightly dismissed. If a set of draft articles was intended for universal application, it was inadvisable to urge the international community to accept a régime that was mainly suited to a particular region or legal system, when other choices were available or appropriate revisions might alleviate the hardship suffered by a number of States. He considered that a territorial link in the form of an office or agency operating within the forum State, as suggested by the Special Rapporteur, could provide a valid ground for exercising jurisdiction, as provided by article 7 of the 1972 European Convention. It would be even easier if the office or agency was established not by the foreign State itself, but by a State enterprise having independent personality.

10. There was little enthusiasm for the two exceptions provided for in draft articles 13 and 14, and little support for them in the general practice of States. So far as draft article 13 was concerned, the fact that an employee was placed under the social security system of another State could not, in his view, be reasonably construed as consent to accept the jurisdiction of that State. Moreover, such a presumption would not only discourage the foreign State from placing its employees under the local social security system, which would be to their disadvantage, but would also be contrary to the interests of the forum State. Besides, there appeared to be no consistent legal basis for such an exception.

11. With regard to draft article 14, it had been said that there was an emergent trend in favour of the exercise of jurisdiction; but that trend had been deduced from very limited practice, the legislation of just a few countries and one regional convention that had been ratified by only a few States. The requirement of insurance against transport risks would greatly reduce the difficulties on both sides and there was therefore little justification for opening the door to litigation against foreign States.

12. Referring to draft article 16, he noted that in his sixth report (*ibid.*, para. 58), the Special Rapporteur had stated that:

> If a State is seeking the protection of another State for the registration of a patent, invention or industrial design, it has clearly consented to the exercise of jurisdiction by the territorial authority from which it is seeking protection ...

and that:

> ... It would seem logical for consent to be presumed or implicit in the event of infringements, just as in the event of contestation.

That statement was a further extension of the presumptions already adopted in previous articles dealing with exceptions. State practice was not abundant and the two cases cited in support of the draft article (*ibid.*, paras. 65-67) were both mainly concerned with whether the dispute

had arisen out of legal relations in the sphere of public law or of private law: that was the criterion which had given rise to so much controversy and which the Special Rapporteur had therefore rightly abandoned. There was also very little national legislation on the subject. It had, however, been generally recognized that if a State initiated proceedings in the court of another State as a claimant or otherwise in respect of a patent, trade mark or other intellectual property, there would be no grounds on which it could invoke immunity in respect of those proceedings or of any counter-claim arising out of the same legal relationship or facts as the principal claim.

13. As to the impact of article 16 on the developing countries, while in theory both the developed and the developing countries could be said to be protected under its terms, he was inclined to think that in practice more protection would be given to the industrialized countries, because they were far more advanced scientifically and technologically. So far as cultural development was concerned, given the vast number of publications in the developed countries, it seemed to him that copyright holders in those countries were more in need of protection than copyright holders in the developing countries, though he had no statistics on which to base such a finding.

14. There appeared to be little support for draft article 17. The judicial decisions relied upon (*ibid.*, paras. 91-93) came from one country only and seemed merely to suggest that foreign Government-owned property used for public and non-commercial purposes was not taxable, but that any taxes already paid were not recoverable. Case-law on the subject was scanty and a case from another country which had been cited (*ibid.*, para. 95) even went in the opposite direction. There was little national legislation on the matter and it was not supported by judicial practice. Reference had been made to certain instances of the liability or non-liability to tax of the incomes and other revenues of foreign States; but liability to tax was one matter and enforcement by the courts quite another.

15. In his sixth report (*ibid.*, para. 96), the Special Rapporteur had stated that "governmental practice seems to be preponderantly in favour of settlement of this delicate point by bilateral agreements" and had advised that the rules in what he had subsequently described as "a twilight zone" (*ibid.*, para. 103) should be reformulated. To draft a rule that would be acceptable to the international community at large, however, it was necessary to have a firm foundation based on clear and consistent State practice, rather than hastily drawn conclusions.

16. Where State-owned corporations or State enterprises with independent legal personalities had been set up by States that carried on business in other countries, such corporations or enterprises would have little difficulty in complying with the tax laws and regulations of the host States. State enterprises of his own country instituted proceedings and appeared as defendants in the courts of foreign countries. He would, however, sound a note of warning: the inclusion of provisions along the lines of articles 12, 17 and 18, either in internal law or in an international instrument, would incline foreign plaintiffs to sue the State rather than a State enterprise, in order to force the State either to agree to an out-of-court settlement or to defend the suit in the foreign court, which might involve undesired waiver of its immunity. That should be avoided. If, on the other hand, the State carried on business abroad in its own name or through an agency acting on its behalf, any tax dispute would be between two sovereign States and could not be adjudicated by the national courts of the host State. That, of course, was a matter beyond the scope of the topic.

17. Draft article 18, too, relied heavily on a presumption of consent, and little support for it was to be found in judicial decisions, national legislation or regional conventions. The question of the applicability of the law of incorporation, referred to by the Special Rapporteur (*ibid.*, paras. 107-109), might be relevant to the choice of law or to the competence of the courts under private international law, but it did not settle the question of State immunity. Again, if a State enterprise, as an entity distinct from the State itself, held shares in or became a member of a body corporate in another State, there would be no problem. The difficulty seemed to arise from the question as to how the term "State" should be defined. A mere presumption of consent without any convincing reason was rather artificial and would not, in his view, lead to a satisfactory result.

18. The views he had expressed were not perhaps in complete accord with those of the Special Rapporteur, but it had certainly not been his intention to launch an ideological debate. His sole concern had been to put forward some constructive suggestions for dealing with a complicated subject. It should be possible to find some common ground, provided that a one-sided attitude was not adopted. As he saw it, immunity was the basic rule and exceptions must not be too far-fetched if they were to be acceptable to the majority of States. No one system applied in a particular region could conveniently apply in all others. If the Commission was unable to reach agreement at the present stage, it would have time to reflect before the second reading.

19. Mr. BALANDA paid tribute to the Special Rapporteur for the breadth of outlook he had shown in his sixth report (A/CN.4/376 and Add.1 and 2) covering the progress made since the Commission's last session. He was sorry to say, however, that the French text appeared to contain some errors: the words he had in mind were *lettres explosives* in paragraph 17 and *incompétence d'attribution* in paragraph 24.

20. Generally speaking, he fully endorsed the view expressed by the Special Rapporteur concerning the irrelevance of differences in ideology (*ibid.*, para. 20). The Commission would indeed be well advised to avoid taking sides between the two existing theories: that of absolute immunity and that of restricted immunity. The pragmatic middle way proposed by the Special Rapporteur was the way of wisdom.

21. He agreed with the Special Rapporteur on the importance of the notion of reciprocity. The examination of that notion (*ibid.*, para. 32) did not, however, fully

convey the two-way action of reciprocity. It seemed to suggest that it would take effect in one direction only, that was to say that it would determine whether to extend, or not to extend, jurisdictional immunities. But the application of reciprocity, in the primary sense of the word, could equally well mean either extending jurisdictional immunities or restricting them, according to the line taken by the other State concerned in a well-defined field.

22. Having regard to the legal system in force in his own country, which was modelled mainly on the continental and, more particularly, the Franco-Belgian legal system, he was reluctant to agree that a court seized of a case could have discretion to decline to exercise jurisdiction, as stated in the report (*ibid.*, para. 24). In Zaire, the rules governing attribution of competence were a part of public law and were determined by legislation on the organization of the courts and their jurisdiction. Hence a Zairian court seized of a case did not have discretion to exercise or not to exercise jurisdiction.

23. He was grateful to the Special Rapporteur for inviting the Commission to be very cautious in dealing with the question of exceptions to State immunity, especially as views on that question were not unanimous. The restrictive trend, as the Special Rapporteur had described it in his reports, was shown by one particular group of States. It could not be regarded as a trend so general that the existence of a legal rule could be deduced from it, especially since, besides being geographically limited, it reflected only internal case-law. It would be hazardous to derive rules applicable at the international level from national decisions, however valuable they might be for information purposes. The underlying reasons for the restrictive trend were difficult to determine, because of their diversity and their connection with questions of political interest, and also because States tended increasingly to engage in commercial or related activities which went beyond the exercise of their governmental authority.

24. It should be noted, nevertheless, that the trend manifested itself among developed countries which, in their dealings in the territories of other States, had not hesitated to create, as it were, the exception of extraterritoriality to their own advantage, so as to evade the application of local laws. But when less developed States entered into business relations in the territory of developed States, the latter set up barriers and tried to restrict the application of jurisdictional immunities. It was also important to note that the developed countries had shown a curious reluctance to apply among themselves the 1972 European Convention on State Immunity, which had come into force in 1976 only for Austria, Belgium and Cyprus. Lawyers should not remain indifferent to that attitude, especially in a matter as delicate as the jurisdictional immunities of States and their property.

25. Turning to draft article 16, he observed that its provisions were the counterpart, by extension to incorporeal property, of the provisions which protected the movable and immovable property of all States under internal law. Since Mr. Ushakov (1833rd meeting) had raised the question whether article 16 could be applied to States, he would point out that, if a State could be the owner of movable or immovable property, it was not impossible for it to have rights and obligations relating to intellectual or industrial property. The case of nationalization referred to by the Special Rapporteur (A/CN.4/376 and Add.1 and 2, para. 63) provided the best illustration. But since, as the Special Rapporteur admitted, practice was not plentiful and applications in internal law were rather limited, he wondered whether it was appropriate to speak of "an irreversible trend in support of restriction in this particular area" (*ibid.*, para. 68). The Commission should rather confine itself to taking note of the new situation developing in that new area, and perhaps draw conclusions from the conduct adopted. Nothing, at least for the present, authorized the Commission to affirm without risk of error that there was "an irreversible trend", although in some cases the proposed application of the law of the forum State as the basis for exercise of jurisdiction did seem to be perfectly justified.

26. Referring to the undoubtedly legitimate concern expressed by Chief Ankinjide at the previous meeting regarding the effects of the application of article 16 on developing countries, he noted that a reading of the Special Rapporteur's analysis (*ibid.*, paras. 53-55) and of article 16 itself showed that, for the article to come into play, the right to intellectual or industrial property first had to exist and, secondly, that right had to be protected with respect to the territory of the forum State. Those two conditions were cumulative and indissociable. If the second condition was not satisfied, nothing would prevent a developing country from using, in its territory, techniques protected in other countries. He associated himself with the question put by Sir Ian Sinclair at the previous meeting in reply to Chief Akinjide: was it in the developing countries' interest that developed States should exercise with impunity in the territory of the developing countries rights in intellectual or industrial property which were protected there? In his view, it was in the interest of all States to protect rights in intellectual or industrial property regularly registered in their territory when other States tried to use them or exploit them there. The explanation by analogy with commercial contracts—dealt with in article 12—given by the Special Rapporteur (*ibid.*, para. 56) was not appropriate, because the right to intellectual or industrial property was a right *sui generis* based on the doctrine of unjust enrichment. That was simply a problem of doctrine, however, and he would not dwell on it.

27. As to paragraph 2 of article 16, he was not sure that it was logically consistent with paragraph 1 or that its inclusion was justified. If the object was to provide protection of the right to intellectual and industrial property solely within the territory of the State where that right had been registered, he saw no objection of principle; but if the object was to provide protection of the right beyond that territory, he shared the concern expressed by Chief Akinjide.

28. Draft article 17 was fully justified: it was simply the application of the principle of territoriality. States were

sovereign in their respective territories and had the power to make rules there. Hence there seemed to be no reason why a State carrying out *acta jure gestionis* in the territory of another State should be exempt from fiscal liabilities and customs duties relating to those activities, unless, of course, it was otherwise agreed between the States concerned. The article was useful in that it dispelled doubts as to whether a State actually enjoyed jurisdictional immunity in the territory of a foreign State when carrying on commercial activities there.

29. The expression "Unless otherwise agreed" in paragraph 1 was justified, because it allowed specific relations between the States concerned to be taken into account. The paragraph could be simplified, however, by making it apply only to general situations and not to particular cases. He would submit suggestions for that change to the Special Rapporteur for the attention of the Drafting Committee. At the present stage, he would only propose the addition of the words "as a private person" at the end of paragraph 1 (*c*), since the acts of a State were *acta jure gestionis* in some cases and *acta jure imperii* in others, and States might carry on commercial activities, for example, as part of the exercise of their sovereign rights. That was true of the State of Zaire, for instance, which engaged in ore and coffee marketing abroad through the Société zaïroise de commercialisation des minerais (SOZACOM) and the Office zaïrois du café (OZACAF), respectively, those activities being conducted under governmental authority. Paragraph 1 (*d*) was acceptable. Paragraph 2 of article 17 seemed useful, because it clearly showed the important difference between situations permitting exceptions and the recognized jurisdictional immunities.

30. With regard to draft article 18, he subscribed to the propositions put forward by the Special Rapporteur (*ibid.*, paras. 105-106 and 110). A State entering into business relations in the territory of another State by participating in companies constituted and registered under that State's company law had no right to invoke jurisdictional immunity; it was required to observe the law of the forum State, which was the only law applicable, as all the rules of private international law confirmed; and it was considered to have accepted the exclusive jurisdiction of the State in which the company was constituted. Article 18 was useful as a complement to article 12 as provisionally adopted, which dealt only with commercial contracts. Before taking a definitive position on paragraph 1 of article 18, however, he would like to know why the proposed exception would apply only if the company was "a body corporate" and had members other than States.

31. Paragraph 2 of article 18, as worded, was valuable in that it made for greater flexibility and took account of special relations between States. He wondered, however, why there had to be "an agreement in writing". The legal system of his own country made a principle of freedom in the production of evidence in commercial matters. It would be logical to guarantee freedom in the manner in which proof was produced.

32. Mr. REUTER said he did not share the pessimism of some members; the Commission might be going round in circles, but it was moving in an upward direction. He agreed with Chief Akinjide (1834th meeting) that the cost of justice, whether national or international, was much too high. An attempt should be made to remedy the regrettable situations which resulted, but the problem was so delicate that the Commission could only tackle it in private, if at all. Whereas individuals without means received legal aid, most developing countries could not afford the cost of a major lawsuit.

33. With regard to draft article 16 and the régime governing intellectual property, he also agreed with Chief Akinjide that the present system had aspects which were hardly acceptable to developing countries. He shared the view predominant in UNCTAD that the problem could only be solved by increasing transfers of technology; but the organization of intellectual property raised very great difficulties, besides those arising from the brain drain, which affected developed as well as developing countries. There were not more than 10 countries in the world whose balance of accounts on transfers of intellectual property showed a surplus.

34. It was also true that developing countries could have excellent reasons for not becoming parties to international conventions on the protection of intellectual property. There was no question of giving advice to the developing countries on that point; as sovereign States they were perfectly free to refuse, wholly or partly, to become parties to such conventions. That Chief Akinjide should speak in favour of bilateral agreements and provisions of internal law was perfectly understandable. A case worth considering was that of a remote country with an ancient culture and a rich language whose use was confined to a small area. Works written in that language had only a small market, so it was understandable that the country in question had not become a party to any copyright conventions; thus it could publish in its own language, without paying royalties, any work appearing abroad. It was not surprising that the developing countries adopted a reserved attitude towards copyright conventions when the developed countries themselves carefully selected the conventions on copyright or intellectual property to which they became parties.

35. On one point, however, he did not entirely agree with Chief Akinjide, and still less with Mr. Ushakov. In international law, every problem should be approached from what already existed, namely sovereignty and territoriality. But the existence of international relations made it necessary to add to those concepts. Thus intellectual property first presented a territorial aspect, since it was a purely artificial institution which existed only within a given legal framework. Consequently, it was for the developing countries to decide whether it was in their interest to participate wholly or partly in that institution or to remain outside it.

36. For the moment, the question that had to be settled was, as Mr. Balanda had explained, whether a product or service coming from one State and entering the territory of another State was subject to the laws in force in that other State. In his own view, article 16 meant that when a product or service entered the territory of another State and enjoyed protection there, the protection was gov-

erned by the laws of that State; conversely, if the product or service entered a country where such protection was unknown, it had no protection. In the former case, the State could ask to be protected, but there were limits to such protection, and those limits could bring it into conflict with an interest or right protected under the same system. For it could be held that the State had infringed the right of protection to which it was entitled, in which case it became a defendant. That was why it was not possible to accept paragraph 1 of article 16 and reject paragraph 2. Paragraph 1 was not based on implicit consent, but on the fact that the granting of special protection which existed only in one particular system and one particular territory implied that all questions relating to the limits of such protection would be settled within that system. The situation was the same when a State recognized the capacity of foreign embassies to be owners of real estate. Any private-law dispute relating to such real estate came under the jurisdiction of the local courts.

37. The problem of territoriality raised the more general issue of what position to adopt in regard to immunities. He could conceive of absolute State immunity without any exception, but only if it was associated with a rule which at present did not exist—the rule that a State had no capacity under the internal law of another State: it enjoyed immunity, but could not own property or perform any act, such as an act of commerce. What he would never accept was that States should be left free to participate in international trade, either directly or through an entity they had created. Most of the socialist States resorted to the latter solution, without claiming immunity for entities of that kind. As things stood at present, that choice by States was an exercise of sovereignty. But if absolute immunity was to be established, it would be necessary to abolish that freedom and to specify that henceforth States could act beyond their frontiers only through an intermediary. Such a solution would obviously have advantages and disadvantages. In many cases, theories which seemed to attack the sovereign equality of States and which drew a distinction between *acta jure imperii* and *acta jure gestionis* operated in favour of immunity, because the jurisprudence of States accorded immunity to acts performed by public entities other than States. For instance, issuing banks enjoyed immunity as decentralized entities having the privileges of governmental authority.

38. The Commission would thus have to choose one solution or the other, it being understood that no absolute theory was wholly satisfactory. If it proclaimed the principle of absolute immunity and prohibited States from performing acts within the internal legal systems of other States, the situation would no doubt be clearer, but it would also be more difficult than at present, because immunity had hitherto been granted to entities which were not States. The courts of the foreign State would then be competent to hear all cases relating to acts performed by intermediary entities.

39. If it was prepared on that basis, the draft would no doubt be imperfect, since no legal system provided absolutely safe solutions; but it would not cover all the aspects of the problem either. It should, indeed, be noted that both States and decentralized entities distrusted foreign courts. One of the major problems in international relations and international trade in general was which State should prevail over the other when two States were equally entitled to make conflicting claims. To that problem there was only one solution, which was beginning to gain acceptance, namely recourse to a third party, whether for arbitration or for conciliation. There was little doubt that the Commission would finally arrive at a more or less satisfactory solution, but it was essential to know whether it would be possible to set up institutions capable of dispelling the misgivings which the draft articles were bound to evoke.

40. Mr. USHAKOV urged the Special Rapporteur to say whether the judgments cited in his report (A/CN.4/376 and Add.1 and 2) had been accepted by the States against which they had been given. Only in that case could they be regarded as valid precedents. The same was true of national laws, which could only be of value from the point of view of international law if they were genuinely endorsed by other States.

41. In his report (*ibid.*, para. 46), the Special Rapporteur maintained that States whose courts had not made any judicial decisions upholding absolute immunity could not be regarded as having adopted a position in favour of that doctrine. In the memorandum (A/CN.4/371) which he (Mr. Ushakov) had submitted to the Commission the previous year, it was pointed out that the vast majority of States, in their written comments, had pronounced in favour of absolute State immunity. On what grounds, then, did the Special Rapporteur assert that an opposite trend was emerging?

42. Referring to draft article 16, paragraph 2, he observed that in many cases that provision would be contrary to the interests of developing countries. If a developing country which was not party to any copyright convention held a cultural exhibition in the territory of another country, showing works translated into its national language, it was exposed to legal proceedings which a third party, the author of those works, could institute against it in the State where the exhibition was held. Developing countries were particularly exposed to such risks because they were seldom parties to the relevant conventions or only acceded to them with reservations. Their national production depended in part on inventions by third parties which were protected abroad, so that any attempt to generalize such protection might place them in an intolerable position. Paragraph 2 of article 16 should therefore be re-examined, so that the development of international law would not be regressive rather than progressive.

43. Sir Ian SINCLAIR drew attention to a basic problem which had bedevilled the Commission's work throughout its deliberations on the present topic. Some members, including Mr. Ni and Mr. Ushakov, assumed that there was a well-established principle of international law whereby absolute immunity had to be accorded to foreign States in respect of proceedings instituted against them in the courts of another State, whereas other members—and certainly he himself—contested that position.

44. Historically, going back to the earliest cases, such as *The Schooner "Exchange" v. McFaddon and others* (1812), [7] one found that basically all that had been decided was that the courts of a foreign State in which proceedings had been taken against a vessel would not encroach upon the sovereign rights of another State. That had been the origin of the concept of sovereign immunity. At that stage in the early case-law, there had been no necessary concept of absolute immunity; it was the sovereign rights of foreign States that had to the protected in proceedings instituted before domestic courts.

45. It was really only at a later stage—in the late nineteenth century—that there had begun to emerge in the courts of some States, including the United Kingdom, a movement towards a more absolute doctrine of immunity. That movement had not been a uniform one; an examination of the decisions of Italian, Belgian and Egyptian courts showed that as early as the 1880s a case-law had begun to develop which applied the so-called "restrictive theory of immunity". And as early as 1891, the Institute of International Law had adopted a draft resolution which in large measure propounded that restrictive theory. [8] It would therefore be inappropriate to start from the presumption that there was an uncontested and well-established principle of international law which accorded absolute immunity to foreign States in proceedings before domestic courts.

46. In the context of domestic legislation embodying the restrictive theory of immunity, Mr. Ushakov had raised the question whether that legislation was contested. As far as the United Kingdom was concerned, he could say that the State Immunity Bill—that was to say, the draft which later became the *State Immunity Act 1978*—had been circulated to the diplomatic missions of all States represented in London, in effect asking for their comments. No immediate adverse comments on that draft had been received and it had then been submitted to Parliament and adopted as law. In considering contestation, one had to bear in mind silence in that type of situation.

47. Chief AKINJIDE said that his remarks on draft article 16 at the previous meeting had related to what actually happened in practice. At the present meeting, Mr. Reuter and Mr. Ushakov had referred to the question of copyright on books. There was of course an international convention on copyright, but his country had decided not to accede to it, and the same decision had been taken by many developing countries. That experience showed that a draft convention containing a provision like article 16 would not be accepted by many developing countries.

48. In the world balance of copyright, the developed countries accounted for 98 per cent and the developing countries for 2 per cent. The developing countries had therefore decided that copyright had to be controlled by internal law; otherwise, half their budgets would be absorbed by royalty payments. At the moment, countries like his own relied for books on the United Kingdom and some other English-speaking countries such as New Zealand. If they acceded to the international conventions for the protection of intellectual property, their situation would simply be disastrous. Those were stark realities which had to be faced.

49. A very important point had been raised by Mr. Ushakov in regard to the cases cited by the Special Rapporteur, namely that the State involved in a case might not have accepted the decision given. He himself had been concerned, on behalf of his country, in a number of cases, including one in the United Kingdom Court of Appeal [9] and another in a United States court. [10] In both cases, following an adverse decision, millions had had to be paid to the plaintiffs, in addition to enormous costs. In those cases, the losing party had had no choice but to comply with the judgments, since otherwise its aircraft and other property would have been attached; but that did not mean that Nigeria had accepted those judgments. The cases cited should not be taken at face value; they might perhaps indicate a trend, but it was essential also to take into account the reaction of the States concerned.

The meeting rose at 1.05 p.m.

[7] W. Cranch, *Reports of Cases argued and adjudged in the Supreme Court of the United States* (New York, 1911), vol. VII (3rd ed.), p. 116.

[8] "Draft international regulations on the competence of courts in proceedings against foreign States, sovereigns or heads of State" (Institute of International law, *Tableau général des résolutions (1873-1956)* (Basel, 1957), p. 14).

[9] See 1834th meeting, footnote 8.

[10] *Ibid.*, footnote 9.

1836th MEETING

Thursday, 7 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. Stavropoulos, Mr. Sucharitkul, 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]

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

[2] *Idem.*

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