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Summary record of the 1836th meeting

Topic:

Jurisdictional immunities of States and their property

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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).

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. JAGOTA noted that the Special Rapporteur had begun his sixth report (A/CN.4/376 and Add.1 and 2, paras. 1-29) with an analysis of the background—including the debate in the Sixth Committee of the General Assembly—against which he was proposing the remaining articles dealing with exceptions to State immunity.

2. As had been stressed in the Sixth Committee, it was essential not to lose sight of the objective pursued in dealing with the present topic and of the approach to be adopted to it in the light of contemporary developments. As he saw it, there was a clear choice between two very different approaches. The first started from the principle of State immunity and the second from that of the sovereignty of a State over its territory. The second approach treated immunity as an exception to the supreme norm of territoriality; it followed that immunity, being an exception to a fundamental norm, must necessarily be interpreted restrictively. If, on the other hand, immunity was treated as a basic principle of international law essential to the stability of international relations, the exceptions would be allowed only in so far as was necessary to protect other legitimate interests.

3. The Commission was clearly following the second approach and taking the fundamental norm of State immunity as a starting-point. That norm was stated in article 6, and the exceptions were set out in the subsequent articles of the draft. Being exceptions to the basic norm, they would have to be interpreted restrictively. Those remarks took account of the discussion on article 6, to which the Commission had decided to revert after it had dealt with all the exceptions, including those set out in articles 16 to 18.

4. The exceptions provided for in articles 12 to 15 related to activities connected with development, technology and trade. They were intended to take account of contemporary conditions in the world community, including the great increase in the number of independent States and the needs of the developing countries in regard to technology. The exception relating to commercial contracts, set out in article 12, was acceptable. Article 13, on contracts of employment, and article 14, on personal injuries and damage to property, had proved controversial and he thought the Commission would have to re-examine their contents at a later stage. Article 15 should clearly state the basic principle of State immunity and then indicate the exceptions to that principle.

5. The broad rationale of the exceptions stated in articles 16 to 18 was that they were consequential on the restrictive provision adopted in article 12 concerning commercial contracts or had a direct link with the definition of State property in article 15. Articles 16 to 18 dealt with matters that were the outcome of commercial activity by a State and were not covered by article 12, and with matters relating to property which fell outside the scope of article 15.

6. His main criticism of article 16 was that it appeared to change the approach to the whole question of exceptions to immunity: it seemed to treat State immunity as an exception to the principle of territoriality. The article emphasized the concept of territoriality and mainly applied principles of private international law, rather than rules of public international law. It dwelt on the problem of determining how the interests and rights of the owner of a patent, trade mark or other intellectual property would be protected, and laid down that a State owning a patent or other intellectual property was subject to the court of the State of the forum. By virtue of the fact that a State has registered a patent, trade mark or other intellectual property in another State, it was assumed to have waived its immunity from jurisdiction. He could not accept that position, which appeared to him to disregard the facts of the matter.

7. Paragraph 1 of article 16 referred specifically to a "patent", an "industrial design", a "trade mark", a "service mark" and a "plant breeders' right". All those terms would have to be defined in accordance with the law of the forum State. The law of that State would therefore determine the very essence of the right to be protected and would, in that respect, prevail over the law of the State which owned the patent or other intellectual property.

8. Another important point to be borne in mind was that the use and protection of patents, trade marks and other intellectual property was not always related to a commercial activity: the activity could well be purely cultural. In his sixth report, the Special Rapporteur himself had drawn attention to the need for "recognition of an author's rights, regardless of the commercial or non-

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[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.

commercial nature of the reproduction, performance, publication or distribution" (*ibid.*, para. 52 *in fine*).

9. Patents and trade marks had, of course, a direct connection with trade and development. And because of the existing disparity in development, the developing countries were in constant need of the patents of developed countries covering advanced technology which could speed up their development. For the right to use his patent, the patentee in the developing country was entitled to payment of a royalty, but a condition usually imposed was that of production. If the patent was not used to produce goods, the usual sanction was to grant a licence to someone else, known as a "compulsory licence", which normally did not deprive the patentee of his royalties. But in some cases, the patentee's right might be forfeited or be taken over by the State in the public interest, possibly with compensation. The essential point was that the patentee's right to a royalty had its counterpart in the right of the State concerned to insist on the patent being used for production of the appropriate product, which should be sold at a reasonable price. Provisions to that effect were contained in *The Patents Act, 1970* of India,[6] which also specified the possibility of acquisition of the patent by the State in the public interest. Most developing countries had similar legislation.

10. When a State nationalized a patent, or otherwise acquired it, it would use that patent to produce the products concerned, which it would sell and possibly export. In the State importing the products, however, it might well be faced with a claim from the original patentee alleging that his patent rights had been infringed. In that State, which would be the forum State, the State holding the patent would thus have to defend a suit in which the original patentee asked that the sale of the goods be disallowed and that compensation be paid to him for the infringement of his patent rights. In that situation, the terms of article 16 seemed to him unsatisfactory. They would appear to place the defendant State in the position of having to justify its nationalization or acquisition in the court of the forum State. That court would thus be called upon to give judgment on the validity of a public act of the defendant State. That situation was altogether unsatisfactory, as regards both the promotion of economic development and the fostering of good international relations.

11. He had spoken of that problem as arising for developing countries in their relations with developed countries; but it could equally well arise between developed countries. In any case, it was clear that the remedy could not be left to the courts of any one country. As Mr. Reuter had pointed out (1835th meeting), remedies should not be available in the courts of one State against a public act of another State. The terms of article 16 appeared to ignore the international aspects of the principle of territoriality, which had been expressly recognized by the Special Rapporteur when he had written:

> The present inquiry is limited to the protection of patents, trade marks and other intellectual properties at the national level; beyond that there exists another layer of protection, at the international level, which might be inter-State or intergovernmental relations or protection offered by an international system or organization ... (A/CN.4/376 and Add.1 and 2, para. 62).

The Special Rapporteur had gone on to refer to the "not ... uncommon phenomenon" of nationalization, not only by developing countries, but also by socialist as well as capitalist countries (*ibid.*, para. 63).

12. The decision to nationalize on the grounds of public interest was a public act, and scrutiny of such an act by the courts of a foreign State would not be countenanced by the nationalizing State. He therefore urged the Commission to concentrate on commercial activities, leaving the public acts of States outside the scope of the draft. Any attempt to combine consideration of both matters would inevitably lead to resistance by States, and by no means only developing States.

13. It was worth noting that the present subject had attracted the attention of UNCTAD, for obvious practical reasons. Three reports had been produced by that organization on the subject of "Economic, commercial and developmental aspects of industrial property in the transfer of technology to developing countries"; they had been issued in 1975 (patents), 1977 (trade marks) and 1982, respectively.[7] That work by UNCTAD clearly showed the interest of the developing countries in the use of patents, interest that had led to a request for the revision of the Convention of Paris for the Protection of Industrial Property.[8] The Berne Convention for the Protection of Literary and Artistic Works, as revised at Stockholm in 1967,[9] recognized the rights of developing countries to translate and reproduce copyrighted material. But if the forum State was not a party to the revised conventions and did not take the interests of the developing countries into account, its courts would regard any such translation or reproduction as an infringement of copyright.

14. Article 16 as proposed by the Special Rapporteur took the position that a State which registered a patent in another State thereby submitted to the jurisdiction of the courts of that State. That position was not correct: the State effecting registration did so in order to seek protection, but it did not thereby waive its immunity. If mere registration in another State were to have the effect of waiver, the State concerned would not register the patent; its goods would be sold in that other State without registration, or possibly not sold there at all. To create a situation of that kind would not be conducive to the improvement of trade relations between States.

15. As he saw it, the act of registration, deposit or ap-

[6] Sections 86 and 102 (India, Ministry of Law and Justice, *Acts of Parliament, 1970* (New Delhi, 1971), p. 207).

[7] *The role of the patent system in the transfer of technology to developing countries* (United Nations publication, Sales No. E.75.II.D.6); *The role of trade marks in developing countries* (United Nations publication, Sales No. E.79.II.D.5); "Report of the Group of Governmental Experts on the economic, commercial and developmental aspects of industrial property in the transfer of technology to developing countries" (TD/B/C.6/76-TD/B/C.6/AC.5/6).

[8] United Nations, *Treaty Series*, vol. 828, p. 107.

[9] *Ibid.*, p. 221.

plication was simply a measure for obtaining protection; it did not amount to a waiver of immunity. Waiver should be related to the invoking of protection against infringement in the courts of a foreign country, or to some other express action. There could be no question of waiver being assumed from the mere fact of registration. In that connection, he drew attention to the terms of article 9, on the effect of participation in a proceeding before a court. Paragraph 1 of that article made it clear that waiver of immunity resulted from a State instituting proceedings in the courts of a foreign State or intervening in such proceedings. He suggested that a similar approach be adopted in article 16, paragraph 1, which could provide that submission to the jurisdiction of the courts of the forum State resulted from invoking the protection of the laws of that State, not merely from registration of a patent there.

16. Accordingly, he suggested that two clauses should be introduced into the text of article 16, paragraph 2. The first was that its provisions would operate only in the event of express waiver of immunity by the State party to the proceeding. The second was that the court of the forum State could not scrutinize the public act from which the State concerned derived its title. Unless that second point was covered, the court would be sitting in judgment on acts of a foreign State which were not of a commercial character. The two amendments he suggested would have the effect of protecting the interests of all concerned—developing countries and inventors alike.

17. To the best of his knowledge, there had not been a single case in which the acquisition of a patent by a State had been investigated by the courts of a foreign State. For information on that point, it might be useful to approach WIPO and UNCTAD. He recalled that when the Commission had been studying the most-favoured-nation clause, it had received valuable information from GATT.

18. In article 17, he could accept the exception to immunity relating to taxation of the commercial activities of a State, on the understanding that it would take the form of a residual rule, as indicated by the expression "Unless otherwise agreed" at the beginning of paragraph 1. It should be remembered that States often entered into bilateral agreements granting each other complete tax exemption in respect of their shipping or commercial activities in each other's territory. His own country, India, had concluded a number of such agreements with foreign States.

19. The element of commercial activity was expressly referred to in subparagraphs (*c*) and (*d*) of paragraph 1. Subparagraph (*b*), relating to charges for registration or transfer of property in the forum State, would involve difficulties where the property was purchased to house a diplomatic mission or consular post; he therefore suggested that it be deleted. Lastly, a suitable reference to commercial activity should be introduced into subparagraph (*a*).

20. The enumeration "seizure, attachment or measures of execution ... foreclosure, sequestration ..." in article 17, paragraph 2, could be misinterpreted as being an exhaustive list of the measures of execution from which the State was immune in respect of its diplomatic or consular premises. The enumeration should be replaced by some broader formula which left no room for such an interpretation. It was also necessary to redraft paragraph 2 in the form of a residual rule.

21. Article 18, as he understood it, dealt with joint bodies consisting of States and other bodies or persons —international organizations, private individuals, private companies, etc. Paragraph 1 of the article provided that a State which was a shareholder or participant in such a joint venture would have no immunity from jurisdiction. The purpose of paragraph 2 was to indicate that the provision in paragraph 1 was a residual rule. That point should be emphasized by introducing at the beginning of the article some proviso such as "Unless otherwise agreed".

22. He drew attention to the fact that many joint ventures of the kind contemplated were not commercial. One example was clearing-houses. He therefore suggested that article 18 should be restricted to cover only commercial activities, besides being framed as a residual rule.

23. Mr. FRANCIS congratulated the Special Rapporteur on his excellent report (A/CN.4/376 and Add.1 and 2) and said that he was particularly grateful for his review of draft articles 1 to 15. He fully agreed that the draft should embody a general statement on State immunity.

24. In his view, the Commission would be well advised to concentrate on specifying the fundamental elements of State immunity and formulating the known exceptions within that context. As matters stood, however, the direction the work was taking was frankly alarming. That was due not to any fault of the Special Rapporteur, but to circumstances.

25. With regard to the notion of reciprocity, referred to in the Special Rapporteur's sixth report (*ibid.*, para. 32), he agreed that any State which adopted a restrictive approach was in fact narrowing the scope of application of State immunity. It should be borne in mind, however, that States which adopted an unrestricted approach in their legislation, such as India and the Soviet Union, might be subjected to restrictive practices by another State, in which case there would naturally be a tendency to reciprocate. He endorsed the remarks made by Mr. Balanda on that point (1835th meeting).

26. The current trend towards restrictive practice could induce States having no direct relationship with States that adopted a restrictive approach to enact "blanket" legislation of a restrictive nature. It could also place other States which had not resorted to restrictive practice in a position where they could only wait and see or, at most, endeavour to resist the new trend. It was not usually developed countries, which could afford the high costs of litigation, but the developing countries that were the victims of any move in the direction of restrictive practice. The question was, therefore, what should the developing countries do? One thing they certainly should not do was to make a general practice of restriction, since that would clearly be disastrous. Rather, they should continue to practice traditional State immunity among

themselves, without any restriction, on a reciprocal basis. It would be pointless for them to try to negotiate with the developed countries, since there was no likelihood of the latter amending their legislation just to accommodate the interests of the developing countries. For the time being, therefore, the developing countries would have to follow the principle of reciprocity, but on the clear understanding that it was no more than a fiction: genuine reciprocity was based on a wide range of mutual interests, and the objectives and priorities of the developed countries and the developing countries were diametrically opposed.

27. There was another respect in which the developing countries differed from the developed, in a very practical sense. The fact that multinational corporations served, in effect, as quasi-agents of the developed countries meant that States could be arraigned before the courts of other countries, and that the whole matter of their immunity could be regulated by the law of those countries. The developing countries should therefore co-operate with one another to devise ways and means of meeting that particular challenge.

28. Article 12, on commercial contracts, was in his view one of the most crucial in the draft. Despite the objections to it, he believed, in the light of members' comments, that a generally acceptable text could still be found. The basic objection, of course, was to the reference to private international law; but there was also another question, namely whether a State could be arraigned before the court of a foreign State when it had an agency that was a distinct legal entity in that foreign State. That was a point on which the Commission could, and should, make progress so as to narrow its differences on article 12. He presumed that if any such agency defaulted on payment of a judgment debt, the State to which the agency was answerable could negotiate with the forum State, so that there would be no need for it to appear before a foreign court.

29. He considered that the Special Rapporteur's discussion of differences in ideology (A/CN.4/376 and Add.1 and 2, para. 20) was misleading, especially the statement that the theory that a sovereign State could not have two different personalities was not only prevalent among socialist States, but also adhered to in some other States. In his view, those differences, though genuine, should be regarded as conceptual rather than ideological. With that in mind, he was particularly concerned about the fact that, under the United States *Foreign Sovereign Immunities Act of 1976*, when an agency of a foreign State had entered into a contract with a United States citizen who subsequently suffered injury, the foreign State could be arraigned before the United States courts. The implications for all developing countries, particularly as to the costs involved, were enormous.

30. He was unable to agree with the statement by the Special Rapporteur that recent case-law in the United Kingdom went further than United States practice (*ibid.*, para. 41), since the House of Lords decision in the "*I Congreso del Partido*" case (1981) involved ships plying waters that concerned only the United Kingdom and hence would not have a very wide application. On the other hand, under the United States Act of 1976, all developing countries, and indeed the developed countries as well, were exposed to an extensive range of restrictive provisions. All nations had a right to legislate, of course, but some had more right than others, in that they could back up their right with armed force and diplomatic and financial power.

31. No one nation or person had a prescriptive right in the concept of how States should be organized or administered or what their agencies should do. Thus there was a need for developing and developed countries alike to pause, take stock and decide whether they were moving in the right direction. That need was increased by the lack of judicial practice upholding absolute immunity, as the Special Rapporteur recognized (*ibid.*, para. 45). So long as a draft convention provided that a State could be arraigned before the courts of another country when it already had an agency in that country with the legal capacity to appear in court, it would be difficult to secure a significant number of ratifications. He was in favour of State immunity, but he also considered that a realistic set of exceptions was necessary: such exceptions must, however, be fair, and countries should not be forced into a corner by legislative provisions.

32. His immediate concern where draft article 16 was concerned related to copyright. Many of the poorer countries were experiencing a cultural explosion, and those various forms of artistic expression required protection. Consequently, while he was in favour of a liberal measure of State immunity, he believed that an exception was advisable in that area. There was no reason why a State should be allowed to do what an individual could not do.

33. If he had understood him correctly, Mr. Jagota had suggested that, under the terms of article 16, the nationalization or expropriation legislation of a defendant State would be subject to examination by the forum State. His own impression, however, was that under expropriation legislation, a State could acquire rights covered by copyright or patent which would then extend to any infringements committed abroad, and that it was partly with that situation in mind that article 16 had been drafted. It would be quite improper for any State to question the validity of legislation that was in force in a foreign State. Developing countries had been reluctant to become parties to earlier copyright conventions mainly because of the restrictions placed on educational material for primary, secondary and other institutions and on technical research material.

34. He agreed in principle with the provisions of draft article 17. Lastly, with regard to draft article 18, while he was in favour of State immunity in the broader sense, he agreed that if a State had a shareholding or other direct interest in a foreign company, it could hardly resist the local jurisdiction. Assuming that its rights in the foreign company were threatened, it would presumably seek redress before the forum of the *locus* of the company and, that being so, must inevitably be bound by its obligations before that forum. He therefore considered that article 18 had a place in the draft and agreed with the Special Rapporteur that a separate article was justified.

35. Mr. RAZAFINDRALAMBO observed that, in examining in his sixth report (A/CN.4/376 and Add.1 and 2) the debate in the Sixth Committee of the General Assembly, the Special Rapporteur had noted the continuing ideological differences with regard to the personality, capacity and functions of the State. At the same time, he had pointed out that the Commission had tried to avoid taking sides in the confrontation of such unavoidable differences and had stressed that the solutions he proposed did not rely on any distinctions between socialist and non-socialist law, civil and common law, or other classifications of legal systems. He had also pointed out that the Commission had been able to reach the conclusion that State immunity was a general principle and that its limitations were exceptions to the general principle (*ibid.*, paras. 20-21).

36. The Special Rapporteur could have stopped there, but after studying the legal evolution of the question, he had expressed the view that there was a marked tendency to increase the restriction of immunity. That meant reopening the controversy on the historical origin of the rule of immunity and the dispute between the supporters of absolute immunity and those who favoured restricted immunity—a new quarrel between ancients and moderns, in which the countries of the Old World, oddly enough, played the part of the moderns, while the young countries supported the thesis of the ancients.

37. The Special Rapporteur had recognized that "in the same way that it cannot be said that a particular legal system has adopted a restrictive practice, nor can the opposite be inferred simply from the absence of practice to the contrary" (*ibid.*, para. 28). He noted, however, that the Special Rapporteur had not drawn from that statement the conclusions which appeared to be necessary. Indeed, the Special Rapporteur considered that the marked increase in restrictive practice which had taken place since the submission of his fifth report was partly due to the absence of judicial practice confirming absolute immunity during the period which had elapsed (*ibid.*, paras. 38-47). It seemed, however, that the pertinent observations put forward by Mr. Ni (1835th meeting) convincingly showed the real significance of that absence of practice. Paraphrasing the assertions of the Special Rapporteur quoted above and simply changing the adjective "absolute" to "restricted," it would be possible to affirm that "care should be taken lest lack of practice in a given State be misconstrued as existence of practice favouring restricted immunity, when in actual fact there has been no decision upholding any State immunity anywhere". Formulated thus, that assertion made it possible to reach a conclusion diametrically opposite to that of the Special Rapporteur.

38. Much had been said during the discussion about the interests of developing countries. In fact, the whole problem of the jurisdictional immunities of States and their property revolved around economic and financial interests. If there was no judicial practice anywhere in the third world supporting State immunity of any kind, it was because all disputes relating to economic, commercial or financial intervention by a foreign State or a foreign company in a developing country were entirely outside the competence of that country's courts. In modern international economic and financial relations there were two kinds of partners: on the one hand, exporters and suppliers of goods, investments, credit and technology—in practice, the industrialized countries—and on the other, those receiving or importing such goods and services, all of which were countries of the third world. Those countries were always in the position of applicants, because they were economically weak. To promote their economic development they needed their partners and submitted to the conditions imposed upon them, among the first of which were jurisdiction or arbitration clauses. They were always required to accept, willy-nilly, an explicit clause on the settlement of disputes by a third party or sometimes events by the courts of the exporting country. That situation resulted in waiver of jurisdictional immunity, which explained the absence of judicial practice relating to such immunity in the countries of the third world.

39. There was also, as Mr. Reuter has rightly pointed out (*ibid.*), a very real psychological cause which might be highlighted for a proper understanding of the problem: that was the distrust of foreign courts in general and of the courts of young countries in particular. It must be recognized that, rightly or wrongly, the judges of those courts did not inspire much confidence in European investors, who were reluctant to entrust them with disputes involving a high financial stake or the interests of the foreign company, still less the interests of a foreign public body. It was true that that distrust was not always felt in one direction only and that a State of the third world was sometimes unwilling to appear before the court of a developed country.

40. In any case, it seemed pointless to base the Commission's work on the practice of States, either because it was fragmentary—often consisting only of the practice of a few large States—or because it was nonexistent. It would be wiser to conclude, as the Special Rapporteur had done, that "State immunity as a principle is to be upheld, but several specified areas should be investigated to determine the precise extent of immunity, its applicability or the conditions or limitations qualifying its application" (A/CN.4/376 and Add.1 and 2, para. 29).

41. In connection with draft article 16, the question arose as to whether a State could register a patent or other intellectual property right and whether it could be charged with failing to respect a right of that kind belonging to another person. In the light of the very instructive explanations given during the discussion, especially by Mr. Reuter (1835th meeting), an affirmative answer to that question was no longer in doubt. It remained to be decided whether the article itself was viable and whether it was of any value to States, or whether, on the contrary, it was unnecessary or even harmful.

42. To answer those questions it would be necessary to examine the two paragraphs successively, since they dealt with two quite different situations. Paragraph 1

dealt with the case in which a State itself registered a patent or other intellectual or industrial property right, or used a trade name or business name, and in which a proceeding was initiated concerning the use of those rights. If the State had been willing to take action to secure the protection of the State of registration, it was not clear at first sight why it should not accept the jurisdiction of that State. The Special Rapporteur had explained that point very well in his report (A/CN.4/376 and Add.1 and 2, para. 78). As Mr. Balanda had emphasized (1835th meeting), since the right to use a patent, for example, was exercised within the territory of the State of registration of the patent, any dispute about it should be within the competence of the courts of that State. The State holding the right could, moreover, be the plaintiff if it wished to enforce its right against another person and, by so doing, it appeared implicitly to waive its immunity. That did not present any insurmountable difficulty; the difficulty arose when the State was a defendant. It was the possibility of summoning a State to appear in court which raised the problem of the retention of article 16, paragraph 1. The solution proposed by Mr. Jagota might be attractive, but only in theory. For he feared that it might run counter to the international provisions in force regarding intellectual and industrial property. Must the Commission rely on internal law in that respect? That would only multiply disputes. He would be inclined to accept the provision on exceptions to immunity relating to patents, on condition that the scope of the registration was clearly defined.

43. Paragraph 2 of article 16 raised even more doubts. It dealt with the case in which a third person—private or public—as the holder of a patent or other similar right, took legal proceedings against a State in another State for infringement of that right. The State charged with infringement could not claim immunity from jurisdiction. In his opinion, that was going too far in making exceptions to immunity. There were, of course, international conventions which protected intellectual property, such as the 1971 Universal Copyright Convention.[10] But few countries of the third world had ratified those instruments, for understandable reasons. The point of grave concern was that, under a provision such as that in paragraph 2, any State could be summoned to appear in the court of another State because some third party accused it of infringing a patent or other intellectual or industrial property right held by that third party. Such cases might be multiplied by reason of nationalization. If the charge was unfounded, the State unjustly accused, if it could not invoke immunity from jurisdiction, would have been brought before a foreign court with all the consequences such proceedings would have for it, moral and especially financial. The objections to those provisions raised by Chief Akinjide and Mr. Ushakov (1834th meeting) seemed entirely justified and he was in favour of deleting paragraph 2.

44. As to article 17, the question was whether it should be included in the draft. It was impossible seriously to challenge the justification for the principle—so well expounded by the Special Rapporteur (A/CN.4/376 and Add.1 and 2, para. 86)—that a State had the power to tax any natural or juridical person, private or public, by virtue of the territorial connection. But under the terms of article 17, paragraph 2, the whole matter of seizure of diplomatic or consular premises or other internationally protected State property would escape the exception to State immunity; and paragraph 1, subparagraphs (*c*) and (*d*), referred to taxation of commercial activities, which in his opinion could be covered by the exception to immunity provided for in article 12, on condition that the notion of a commercial contract as defined in article 2, paragraph 1 (*g*), was very broadly interpreted; hence it was difficult to see what remained of article 17. Many countries did not collect the value added tax on goods destined for export and it generally benefited foreigners. Customs duties were generally not payable by public-law corporate bodies, either under exemption or by virtue of temporary admission. As to stamp-duty and registration fees, they were not payable by foreign States, at least in countries such as Madagascar, where the law on registration and stamp-duty was similar to that of France. Hence it was not surprising that the Special Rapporteur himself had spoken of the "marginal utility" of an express provision on the subject (*ibid.*, para. 88). It should be noted, however, that in matters of taxation, a proceeding could be instituted before a national court either following unsuccessful recourse to the competent authorities, or following a complaint by the Inland Revenue or Customs department. As had been pointed out during the discussion, however, a dispute of that kind might be settled at the foreign office level. Hence article 17 did not appear to be really necessary.

45. Article 18, on the other hand, appeared to have a place in the draft. In his opinion, that provision had the same legal foundation as article 16. Both articles dealt with incorporeal property, possession of which implied the will of the State to submit to the jurisdiction of the State with which the property in question was legally connected. Article 18 concerned shares in a company which might be of a commercial nature, with the reservation that it must satisfy the conditions laid down in paragraph 1, subparagraphs (*a*) and (*b*). As the Special Rapporteur had rightly pointed out, a court of the forum State was the only *forum conveniens* (*ibid.*, para. 109).

46. He would like some clarification on points of detail. First of all, he did not see the need to make a distinction between a partnership and a body corporate where legal proceedings were concerned. Secondly, the notion of control might raise problems, since it might be simply a matter of legal control, whereas economic or financial control was often more real in practice.

47. He found paragraph 2 of article 18 completely justified, since the required "agreement in writing" appeared to refer to arbitration clauses or jurisdiction clauses. He would propose some drafting changes to the Drafting Committee in due course.

The meeting rose at 1 p.m.

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[10] United Nations, *Treaty Series*, vol. 943, p. 178.