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Summary record of the 1837th meeting

Topic:
Jurisdictional immunities of States and their property

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1837th MEETING

Friday, 8 June 1984, at 10.05 a.m.

Chairman: Mr. Alexander YANKOV

Present: Mr. Balanda, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Pirzada, 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]

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. McCaffrey said that he wished to emphasize the point already made by Sir Ian Sinclair (1834th meeting), namely that there was no historical basis for the proposition that international law contained a rule specifying the absolute immunity of one State from the juris-

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

² *Idem*.

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

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

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

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

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

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

diction of another. He would cite but one authority in support of that argument, the decision in *The Schooner "Exchange" v. McFaddon and others*⁶ in 1812, in which Chief Justice Marshall of the United States Supreme Court had expressed the opinion that any exemption from the territorial jurisdiction of a State must derive from the consent of the sovereign of the territory, which could be express or implied. Such implied permission for one State to enter the territory of or engage in intercourse with another was, according to Chief Justice Marshall, an "implied licence", in other words permission that was revocable on proper notice by the territorial State. Hence the notion that there had always been a rule of absolute jurisdictional immunity had no basis in fact. It was also untenable in theory, for the argument that absolute immunity was the necessary corollary of the sovereign equality of States could not withstand close scrutiny: once States A and B were equal, how could State A act with impunity within State B except with the consent of State B? Chief Justice Marshall had further stated in the case in question that any exception to the full and complete power of a nation within its own territory must be traced to the consent of the nation itself and could flow from no other legitimate source. Those words were as true in 1984 as they had been in 1812 and he was therefore unable to agree with Mr. Jagota (1836th meeting) that State immunity was an exception to territorial sovereignty.

2. The judgment in *The Schooner "Exchange"* also demonstrated that, under the doctrine of the sovereign equality of States, one State would not be absolutely immune from the jurisdictional power of another State, at least so far as acts conducted or effects produced within the territory of that other State were concerned. Rather, any jurisdictional immunity must necessarily be based on the consent of the forum State, and that consent would in turn necessarily be limited in terms of the purposes for which it was given. The inescapable conclusion seemed to be that the jurisdictional immunity of States should be viewed in functional terms, which was why the expressions "absolute theory" and "restrictive theory" were not very helpful in understanding why States were granted immunity from the jurisdiction of other States in some circumstances, but not in others. One basic difficulty with the expression "absolute immunity" was that little, if anything, was absolute in the law. One only had to consider the universal practice of withholding immunity on the basis of reciprocity in order to understand that "absolute" immunity was never truly absolute.

3. It had been suggested that the functional theory of immunity was recognized only in Europe and North America. But, as was clear from the Special Rapporteur's sixth report (A/CN.4/376 and Add.1 and 2), States such as Singapore, Pakistan, Australia and Malaysia had followed a similar line. Moreover, the Inter-American Juridical Committee, a body composed chiefly of legal experts from South America, had in 1983 adopted a draft convention⁷ which recognized that State

⁶ See 1835th meeting, footnote 7.

⁷ See OEA/Ser.G-GP/doc. 1352/83, of 30 March 1983. See also *International Legal Materials* (Washington, D.C.), vol. XXII, No. 2 (March 1983), p. 292.

immunity did not exist in a number of cases, while the committee of the International Law Association that had prepared the Montreal Draft Convention on State Immunity in 1982⁸ had been composed of experts not only from Western Europe and North America, but also from Egypt, Japan, Pakistan, the Philippines, Poland, the USSR, Yugoslavia and Zambia.⁹ It was difficult to support the proposition that only the Western industrialized States analysed the jurisdictional immunity of States in functional terms when such an approach was in fact followed by a broad range of countries, and all the new legislation adopted some form of functional approach.

4. He wished in that connection to lay to rest the fears expressed by Mr. Francis (1836th meeting) regarding the United States *Foreign Sovereign Immunities Act of 1976*. In order for a United States national to be able to bring an action in the United States courts in respect of a tort, the tort must, under section 1605 (a) (5) of the Act, have occurred in the United States itself. Similarly, in the case of commercial activities, under section 1605 (a) (2) of the Act, there had to be a direct connection with the United States.

5. With regard to the question of reciprocity, he noted that in his report (A/CN.4/376 and Add.1 and 2, paras. 39 *et seq.*), the Special Rapporteur referred to the "sharp increase in restrictive practice" and stated that reciprocity would inevitably lead to an expansion of the functional approach to jurisdictional immunity. Since a growing number of States allowed, or even directed, their courts to exercise jurisdiction over foreign States in certain categories of cases, it seemed to follow automatically that the States which based control of immunity on reciprocity would withhold immunity in a correspondingly growing number of cases. In other words, since States such as Hungary, India, Poland and the USSR granted immunity from the jurisdiction of their courts on the basis of reciprocity, it seemed that the growing interdependence of the world, coupled with the increasing prevalence of functional practice, would lead inevitably to an ever larger number of cases in which such States would withhold immunity.

6. Against that general background, he had no objections in principle to draft articles 16 to 18, the content of which was covered by the trading and commercial activities rubric of the United States *Foreign Sovereign Immunities Act*. As the Special Rapporteur pointed out in his report (*ibid.*, paras. 56-57), article 16 followed on logically from articles 12 and 15. With regard to article 12, the definition of "commercial contract", as laid down in paragraph 1 (g) (iii) of article 2, could be interpreted to cover the subject-matter of article 16, but the latter was closer to article 15 inasmuch as patents, trade marks and other intellectual property were in effect property rights conferred by a State upon the inventor or producer. The fact that a State conferred such a right was an indication that it followed a strong policy of encouraging innovation and investment of labour and cap-

ital; that policy would be thwarted if it could be evaded by the simple expedient of, for example, causing an item patented by company A in State X to be manufactured by another company owned by State Y and sold in State X in violation of the patent owned by company A. As Chief Justice Marshall had held in *The Schooner "Exchange"*, the implied licence under which the foreign State entered the territory or commerce of the forum State could never be construed as granting such an exemption from jurisdiction.

7. As for the concern voiced by Mr. Jagota (1836th meeting), the reason why there did not seem to be any problem regarding article 16 could be illustrated by two hypothetical situations. Assuming, first, that there were two States, X and Y, which were not parties to any multilateral or bilateral agreement on patents, and that company A, incorporated under the laws of State X, patented a product in State X; assuming further that company B, incorporated under the laws of State Y, patented the same or a similar product in State Y and that State Y then nationalized company B and its patent and sought to sell the patented product in State X; it was clear that company B could not do so, nor was it sensible to allow State Y to be immune from challenge by company A in the courts of State X. The Supreme Court of Austria, in an extremely well-reasoned opinion, had agreed with that view in *Dralle v. Republic of Czechoslovakia* (1950), when it had held that what could not be done by a private company could not be done by a foreign State either (A/CN.4/376 and Add.1 and 2, para. 65).

8. Assuming, secondly, that company A, incorporated under the laws of State X, has registered a patent in State X and also in State Y, to which company A exported its product; assuming further that State X nationalized company A and then applied to the authorities in State Y for the patent in State Y to be reissued or registered in the name of State X; then if State Y's patent office refused to reissue the patent and State X wished to challenge that refusal, it could appeal against the action of State Y's patent office. State X would then be a claimant and would waive immunity, as provided for under draft article 9. If State Y's patent office did reissue the patent, company A could presumably appeal. In any such appeal, or indeed in an original action brought by company A for patent infringement, the question of the validity of State X's nationalization might be raised. That was the point of concern to Mr. Jagota, but his own interpretation of article 16 was that it did not cover the question of whether one State could examine the validity of nationalization effected by another State. The matter had been considered by the Austrian Supreme Court in the *Dralle* case and had been dealt with in some States as an issue of sovereign immunity or as an "act of State", but it was important not to confuse that question, which could arise in a wide variety of contexts, with the entirely separate issue covered by article 16, which did not seem to present any problem regarding examination of the validity of foreign nationalization.

9. Again, in *The Schooner "Exchange"*, Chief Justice Marshall had also stated that: "A prince, by acquiring private property in a foreign country, may possibly be

⁸ See ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), p. 5.

⁹ *Ibid.*, p. 325.

considered as ... assuming the character of a private individual." That was not to suggest that there was no distinction between the immunity of the sovereign, on the one hand, and of the State, on the other—a distinction which could in fact be supported on the basis of the immunity *ratione personae* of foreign sovereigns. But *The Schooner "Exchange"* case had provided an early indication that even a sovereign was not immune from the jurisdiction of other States if he, or *a fortiori* a State, acquired private property in a foreign country.

10. He would like to reassure Chief Akinjide that article 16 would in no way affect the ability of countries to decide on the extent to which they wished to grant the rights provided for under the article. Indeed, it would enable States to do exactly what Chief Akinjide had said (1834th meeting) they should be allowed to do, namely to regulate the matter under bilateral agreements and municipal legislation. Thus, if a State chose not to become a party to a copyright convention, nothing in article 16 would prevent it from reproducing books copyrighted in other States and selling or distributing them within its borders. On the other hand, it would not be allowed to reproduce a book copyrighted in another State and sell it in that other State, unless it subjected itself to the jurisdiction of the courts of that other State. Consequently, he saw nothing in article 16 that was inimical to the interests of the developing countries, which were, in any event, also beneficiaries under the article.

11. The Special Rapporteur had pointed out in the report (A/CN.4/376 and Add.1 and 2, para. 51) that article 16 covered three categories of intellectual and industrial property; the wording used in the article could perhaps be simplified by naming those three categories and defining them. Both paragraphs of the article were essential. Paragraph 1 related to the determination of the right in question in proceedings which might be brought by the State holding the right or by another party. In either case, the foreign State's interest might well be affected. Paragraph 2 concerned a situation in which the foreign State was alleged to have infringed the right in question in the territory of the State of the forum, which was the State granting the right in question. In that case, the competence of the State granting the property right to make a determination with respect to that right could not be doubted. Lastly, care should be taken to draft the article in broad enough terms to cover new technology such as computer firmware and software.

12. With regard to article 17, it was important to make it clear, first, that the draft articles did not affect existing immunities for diplomatic and similar premises, and, secondly, that States would not normally enjoy jurisdictional immunity in respect of fiscal liabilities and customs duties arising out of trading and commercial activities. The first point was covered by paragraph 2 and the second by paragraph 1. He none the less agreed with Mr. Ogiso (1834th meeting) that the wording could be simplified without sacrificing clarity.

13. Article 18 seemed simply to state the proposition that, when a State became a member of a commercial organization that also had private individuals or entities as members, the price of admission was in effect agreement

not to claim immunity in any proceedings concerning the determination of its rights and obligations as a member of the organization. There was, of course, good reason for such a provision, since the alternative would be the enactment of legislation stipulating that States could not participate in commercial organizations. In other words, article 18 was merely saying that, when it came to investing in, or participating in the control of, a commercial organization in another country, a State could not have its cake and eat it. It could hardly be otherwise, for a rule of immunity would not only adversely affect the organizations themselves, but would also frustrate the implementation and enforcement of the statutory schemes that governed the way in which such companies operated. Article 18, therefore, was a logical and necessary element of the draft.

14. Mr. PIRZADA, referring to certain judicial decisions in which Pakistan had been involved, said that although a plea of sovereign immunity had ultimately prevailed in the House of Lords in the well-known case *Nizam of Hyderabad and State of Hyderabad v. Jung and others* (1956),¹⁰ a rider had been added to the effect that the bank need not release the funds until the parties had established their claims. As a result, millions of pounds sterling had been frozen for more than 30 years. Fortunately, India and Pakistan had arrived at an amicable agreement, but the sums in question had yet to be recovered from the bank. It was in the light of that costly experience, and on the grounds of reciprocity, that the *State Immunity Ordinance*, which was patterned on United Kingdom legislation, had been promulgated in Pakistan in 1981 (see A/CN.4/376 and Add.1 and 2, para. 71).

15. In *The Secretary of State of the United States of America v. Messrs. Gammon-Layton* (1971),¹¹ the High Court of Karachi had rejected a plea of sovereign immunity and allowed the arbitrators' award. In another arbitration arising out of a claim against the Government of Sri Lanka for alleged breach of contract, a difference of opinion had arisen between the arbitrators and the matter had been referred to the umpire, who had rejected the submission by the Government of Sri Lanka to the effect that the transaction was not of a commercial nature because the rice that was the subject-matter of the contract was being imported to meet an acute shortage throughout the country. The umpire had awarded a token sum which the contractor had ultimately accepted. The High Court, however, had left open the question of whether, in the circumstances of the case, a plea of sovereign immunity was available. In *A.M. Qureshi v. Union of Soviet Socialist Republics and another* (1981),¹² the Supreme Court of Pakistan had held that sovereign immunity did not extend to commercial transactions and had referred the case to the High Court. In the event, the Soviet Union had voluntarily paid all the plaintiff's costs. In all three cases, he had appeared as counsel.

¹⁰ United Kingdom, *The Law Reports, Chancery Division, 1957*, p. 185.

¹¹ *All Pakistan Legal Decisions* (Lahore), vol. XXIII (1971), p. 314.

¹² *Ibid.*, vol. XXXIII (1981), p. 377.

16. He noted that the Special Rapporteur had referred in his sixth report, in connection with the "sharp increase in restrictive practice" (*ibid.*, paras. 39-47), to *Birch Shipping Corporation v. Embassy of the United Republic of Tanzania* (1980), the "I Congreso del Partido" case (1981) and the *National Iranian Oil Company* case (1983), in which the Federal Constitutional Court of the Federal Republic of Germany had allowed the attachment of assets of a foreign sovereign State, as well as to the cases in which Italian courts had upheld the attachment of the bank accounts of embassies for the payment of social security and other emoluments under a contract of employment. The *State Immunity Ordinance* of Pakistan, in section 3, recognized immunity of the State from jurisdiction but went on to provide for certain exceptions, three of which were covered to a certain extent by draft articles 16, 17 and 18. Under section 13 of the Ordinance, the State was given great latitude even with regard to commercial activities, inasmuch as they were exempt from a number of procedures. Section 14 provided that no penalties could be imposed upon the State nor any attachment, injunction or specific performance ordered. Section 15 provided that a separate entity would also be immune from the proceedings in the courts if it was acting in the exercise of sovereign authority, and section 16, the most important provision, laid down that the federal Government could extend immunity in certain instances.

17. It was significant that, in their report on their meeting in New York in November 1983, the legal advisers to the Asian-African Legal Consultative Committee had expressed the view that, in the present state of development of the law, it would be futile to contemplate application of the doctrine of sovereign immunity in its traditional form, but that, even tested by the restrictive doctrine, it would appear that certain provisions of the United States *Foreign Sovereign Immunities Act of 1976*, and particularly their judicial interpretation, went far beyond what the international community could legitimately be expected to accept. They had further observed that a restrictive doctrine of sovereign immunity might well be justified in the modern context, particularly having regard to the manifold activities of States in the commercial trading sector, and that it would not be reasonable to expect immunity to be allowed in regard to activities of a purely commercial nature in the true sense. Nevertheless, they had hoped that even the restrictive doctrine would have some limitation, since no State had the right or competence, under the guise of applying a restrictive doctrine, to encroach upon the jurisdiction of other States.

18. The report contained a number of suggestions, including one on arbitration and another on the possibility of member countries adopting legislation to provide for reciprocal restriction of immunity in regard to foreign States whose legislation provided for such restriction. The 1961 Vienna Convention on Diplomatic Relations contemplated such a solution. The legislation in question would provide that a foreign Government could not be sued without the consent of the executing Government. Another matter mentioned in the report had been the colossal costs of proceedings pertaining to pleas of sovereign immunity. A good illustration in that regard was

provided by the decision of the House of Lords in *Alcom Ltd. v. Republic of Colombia* (1984)¹³ that the parties should bear their own costs, which exceeded the amount of the claim itself. The Special Rapporteur's constructive suggestions in that regard should be given full consideration. Mr. Ni (1835th meeting) had also rightly pointed out that if commercial activities were carried on by an agency as an independent entity, the foreign State concerned should not be dragged into proceedings as a co-defendant.

19. As to draft article 16, Chief Akinjide's interesting comments (1834th meeting) on the wide disparity between the developed countries and the developing countries with regard to intellectual property and the prejudicial effects of the proposed provisions on the developing countries must be taken into account. Moreover, article 16 even went beyond the terms of section 7 of the United Kingdom *State Immunity Act 1978* (A/CN.4/376 and Add.1 and 2, para. 70) and seemed to be similar to article 8 of the 1972 European Convention on State Immunity (*ibid.*, para. 73). The reference to rights belonging to a third person and to a right "otherwise protected in another State" would obviously create serious complications. Mr. Jagota's criticism of the article (1836th meeting) was also highly pertinent. The courts of another State should not have jurisdiction to examine the validity of the nationalization, acquisition, requisition or other expropriation legislation of the State concerned. Similarly, the Commission should benefit from the experience and expertise of UNCTAD and other relevant bodies.

20. Draft article 17 likewise called for reconsideration. Paragraph 1 (a) appeared to be based on section 11 of the United Kingdom Act, which was applicable only to commercial activity. Accordingly, an express reference to commercial activity should be introduced into subparagraph (a), as was already done in subparagraphs (c) and (d). Paragraph 1 (b) could be dispensed with, as could paragraph 2, for the reference to certain specific measures of execution could lead to difficulties of interpretation; it might be wrongly inferred that other measures or remedies not specified therein were available for execution against diplomatic or consular premises.

21. Draft article 18 was acceptable in substance. The basis for the article would be apparent from the cases from Indian judicial practice prior to independence, when the subcontinent had had a number of "native States" ruled by maharajahs and nawabs. Under the provisions of the statutory law at that time, those States and their rulers were entitled to sovereign immunity. In the *Gaekwar of Baroda State Railways* case,¹⁴ the Privy Council had upheld the plea of immunity, since the railway had been owned by the Maharajah of Baroda. On the other hand, in the winding up of a limited company in which the majority of the shares had been owned by the ruler of the State, immunity had been denied by the High Court because the company had a personality dis-

¹³ See 1833rd meeting, footnote 5.

¹⁴ *Gaekwar of Baroda State Railways v. Hafiz Habib-ul-Haq and others* (1938) (*Annual Digest and Reports of Public International Law Cases, 1938-1940* (London), vol. 9 (1942), case No. 78, p. 233).

inct from that of its members. Article 18 applied *prima facie* to bodies established for commercial activities. In order to remove all doubts, it should be pointed out that the article would not apply to cultural bodies or to bodies which, under the company law of India or Pakistan, for example, were called “associations not for profit”. That would perhaps allay any apprehensions concerning bodies like the Asian-African Legal Consultative Committee. It was plain that articles 16 to 18 required revision in the light of the discussion.

22. Mr. LACLETA MUÑOZ, referring to the section of the report (A/CN.4/376 and Add.1 and 2, paras. 2-18) on the status of the draft articles already submitted, said that he was among those who had expressed reservations regarding article 6, paragraph 2, and consequently the interrelated article, namely article 7, texts which had been provisionally adopted by the Commission.

23. The question of the differences in ideology regarding the personality, capacity and functions of the State was crucial and the solution proposed by the Special Rapporteur (*ibid.*, para. 22), which was possibly the only one, deserved consideration. On the one hand, there were those who believed in the single legal personality, or rather capacity, of the State, vested in international law with all the attributes that were those of a sovereign and which it could renounce only of its free will. On the other hand, there were those, including himself, who believed in the dual legal capacity of the State. In his opinion, when a State acted as a subject of law in an internal legal system—the one in force within its own territory or within the territory of other States—it was not protected by jurisdictional immunity, at least not in every instance.

24. Indeed, 50 years had passed since the problem of such duality had been resolved. States that had embarked on activities which, in other systems, were carried on by private entities that were subjects of private law had done no more than assign those activities—at least in their external relations—to other entities which were controlled, owned or administered by them, but had separate personality and were therefore subject to the jurisdiction of the courts of another State. From such a standpoint it was possible to affirm the absolute immunity of the State, because the State as such was no longer engaging in activities that could be classed as *acta jure imperii*, in other words acts of sovereign authority, since the *acta jure gestionis* were being carried out by other entities. Such an approach, however, was not followed by all States and rules acceptable to all had to be adopted. Admittedly, the task was not an easy one. In that regard, it was essential to remember that the distinction between *acta jure imperii* and *acta jure gestionis* lay essentially in the need to facilitate relations between foreign States and private persons who were the nationals of other States.

25. The questions discussed in the report in connection with differences in practice and procedure (*ibid.*, paras. 23-26) were different, but no less important. He could agree with the Special Rapporteur if the latter's view was that the problem of jurisdictional immunities arose only when the courts were competent and had jurisdiction under the rules governing those matters. Like the Special Rapporteur, however, he wondered whether the exi-

stence of jurisdictional immunity in an individual case could be determined only by the competent court. That was doubtful, for if the determination of jurisdictional immunity fell only to a court that was competent, complete immunity would not be possible and the foreign State would always be subject to the jurisdiction of that competent court, at least so far as the decision on immunity from jurisdiction was concerned.

26. The Special Rapporteur's reflections on the growing acceptance of the necessity for international control of State immunity (*ibid.*, paras. 27-28) reopened the question of differences in ideology but were of great interest and illustrated his commendable efforts to make every use of the inductive method, a course which sometimes posed some difficulties. For his own part, he endorsed the statement that care should be taken lest lack of practice in a given State be misconstrued as favouring absolute immunity when, in actual fact, there had been no decision upholding any State immunity anywhere (*ibid.*, para. 28). Spain afforded an illustration of that point, since it revealed no practice in the matter. There was no legislative provision, no decision of the Supreme Court—merely the decisions of some courts of first instance. Even those decisions were disconcerting, because in some instances they reflected the distinction between *acta jure imperii* and *acta jure gestionis*, but not in others. He would hesitate to affirm that decisions by Spanish courts granting a foreign State immunity from jurisdiction without drawing that distinction actually went so far as to confirm absolute immunity. More than likely, a judge in a particular case had considered whether the circumstances warranted the granting of immunity and, after deciding that they did, had ruled on the issue as if immunity were unrestricted. In fact, that was not so. Decisions of that kind could not be regarded as being any different from rulings in which a judge had decided not to recognize immunity on the grounds of the distinction between *acta jure imperii* and *acta jure gestionis*.

27. The application of the principle of reciprocity, discussed in the report (*ibid.*, para. 29), was not without interest, for reciprocity covered the notions of equity, justice, equality and also retaliation and reprisals. It was nevertheless a necessary evil that could solve some of the problems involved. The trend towards further limitations on immunity of States was warranted and could be explained by the increasing realization that a State's immunity when it engaged in trading activities must not conflict with protection of the interests of other entities or private persons, and should not violate human rights.

28. Draft article 16 was acceptable. Chief Akinjide's comments (1834th meeting) regarding the situation of the developing countries were not properly relevant, since they were concerned more with legislative policy and the system of protecting intellectual property. No rule of public international law compelled States to protect all, or even some of the aspects of intellectual property. States were perfectly free not to become parties to the international conventions on the matter and to refrain from adopting internal legislation. Article 16 dealt not with that question but with the situation of a State when it submitted itself to the system for the protection of in-

lectual property enforced in the forum State in order to defend its intellectual property rights, and the situation of a State when it infringed or was accused of infringing the rights of others in the territory of the forum State.

29. The two situations were covered in paragraphs 1 and 2, respectively, of article 16 and were the two sides of the same coin. Invoking reasons of justice or equity in order to lay down the principle of immunity in paragraph 2 would in effect be the same as saying that a State could, in the name of its sovereignty, meddle in the territorial sovereignty of another State by infringing the rights of third parties, who would then be deprived of any remedy. Mr. Jagota considered (1836th meeting) that failure to enunciate State immunity in paragraph 2 meant that the courts of the forum State could strip the acts and decisions of another State of their legal effects, something which would be incompatible with the sovereignty of that other State. Personally, he did not fully share that view, since judges in the forum State must then, in the name of the very same principle of sovereignty, apply the rules in force in the territory of that State for the protection of intellectual property rights. Perhaps it would be enough for them to recognize the extraterritorial effects of the decisions and acts of other States, for example by invoking reasons of public policy, something which would not be incompatible with respect for the sovereignty of States. Once again, the difficulty lay in the need to go into detail, but it was also extremely difficult to set forth principles that took account of each and every possible case.

30. Furthermore, if the interests of the developing countries were to be borne in mind, particularly with regard to the acquisition of technology and technical know-how, it was necessary to draw on other solutions that had already been proposed, more especially the adoption of systems for protecting intellectual property that included certain requirements established in the national interests of those countries. That could not be achieved merely by protection, through State immunity, of types of conduct that could well be wrongful under the law of the forum State.

31. The section of the report on draft article 17 (A/CN.4/376 and Add.1 and 2, paras. 81-103) was rather obscure, at least in the Spanish version, but the rule appeared to be acceptable inasmuch as it covered cases in which the State did not enjoy tax exemptions and did not benefit from immunity from the jurisdiction of the courts of the other State in any proceeding relating to fiscal liabilities. The wording of the article could none the less be simplified, since it gave the impression that the State was subject to the jurisdiction of the courts of another State only in proceedings relating to liabilities under the four categories of taxes and duties enumerated. Paragraph 2 should be brought into line with article 4 of the draft. If it was retained, attention would have to be paid to the wording, since State immunity in connection with seizure did not seem to be a satisfactory notion. It would be better to speak of the inviolability, rather than the immunity, of the State.

32. Draft article 18, on shareholdings and membership

of bodies corporate, was absolutely essential. Membership of a State in a body corporate must not create a situation of inequality through application of the principle of immunity, something that would be disastrous for the other members. The article elicited comment only in connection with the condition whereby the body corporate in which the State participated must be "controlled from ... that State". That notion was merely territorial and had nothing to do with the theory of control, which was concerned with the nationality of those who effectively exercised control over the body corporate. The wording should be improved accordingly.

33. Mr. MAHIU said that, although the Special Rapporteur had, in his sixth report (A/CN.4/376 and Add.1 and 2, para. 20), pointed to the irrelevance of continuing differences in ideology and had urged the Commission not to become bogged down in dispute, the discussion showed that the same basic issues continued to arise. For example, the three articles under consideration necessarily called into question yet again the fundamental principle of State immunity, which was viewed in various ways depending on the place assigned to the State in international relations. The problem would be easy to resolve if a distinction could be made in every instance between sovereign activities, which benefited from immunity, and activities which did not so benefit. But sometimes the distinction was particularly difficult to make. Indeed, the Commission could well engage in endless discussion on that point. If it was true, as Mr. McCaffrey had pointed out, that absolute jurisdictional immunity was not possible, then absolute territorial sovereignty was not possible. In short, the sovereignty of the forum State and the immunity of the foreign State—such immunity simply being an extension of the foreign State's own sovereignty—were the two sides of the same coin. Again, it was not quite true, as Mr. McCaffrey had affirmed, that absolute immunity from jurisdiction would lead to impunity for one State in another State. Under international law, other sanctions were available to a State that regarded another State's activities as reprehensible: it could declare an agent of the other State *persona non grata* or decide to sever diplomatic relations.

34. It was apparent from the report that the legislative practice, and still more the judicial practice, of States had not laid down the principle of absolute immunity. However, the virtual absence of judicial practice could be explained quite simply by the fact that the problem had never arisen in some States. Indeed, in some States the courts had never had occasion to adjudicate because it had not been deemed advisable to bring before them cases that would have jeopardized the principle of immunity. Hence it was possible to infer that some States had a very broad and perhaps absolute view of immunity.

35. One might well ask, as the Special Rapporteur did (*ibid.*, paras. 88-89), whether draft article 17, concerning exemption from fiscal liabilities and customs duties, was really warranted. Regional conventions glossed over that problem. The argument had been advanced that the Commission would thus be contributing to the progressive development of international law, but he was hesitant in that regard because some practice did exist in the

matter and seemed not to have raised any special problems.

36. Despite lengthy discussion, most members appeared to be in favour of the protection afforded in draft article 16. Its scope should therefore be clarified, together with the effects on States brought before the courts. In connection with paragraph 1, Mr. Jagota (1836th meeting) had wondered whether a State depositing or applying for a patent or trade mark in another State thereby consented to the latter's jurisdiction or whether it should then request protection for the patent or trade mark. From the standpoint of jurisdiction, the effects would not be the same in each case. Deposit or application by one State in another State implied acceptance by the former of the latter's legislation, legislation which normally provided for protection which was assured by the courts of the forum State. The Special Rapporteur would have to take account of that matter, particularly in the light of the fact that the issue involved a State and not a person.

37. The enumeration of intellectual property rights in paragraph 1 (a) of article 16 could be condensed. Why, for example, mention a plant breeders' right and not the right to a breed of animal or even the human species for the purposes of genetic engineering? Moreover, it was doubtful whether the same effects could be attached to a patent which had been "registered", "deposited" or "applied for". The consequences of a mere application should not be the same as for registration or deposit.

38. Paragraph 2 of article 16 should be brought into line with paragraph 2 of article 15 of the draft, in connection with which he had expressed reservations.¹⁵ Indeed, paragraph 2 of article 16 confirmed his fears: a State might well be brought before the courts of another State in connection with patent proceedings against a third party. It was essential to limit the cases in which a State could be summoned to appear. Mr. Jagota's concern regarding the assessment of nationalization measures was perfectly justified. In view of the phenomenon of "creeping jurisdiction", a State sued in connection with nothing more than copyright might find itself being taken too far. Moreover, in regard to intellectual property, case-law varied not only from one country to another, but even inside one and the same country. Consequently, under paragraph 2 of article 16 in its present formulation, some States could be dragged into proceedings well beyond any expectation.

39. Draft article 17 called for comment merely in connection with its wording. An enumeration of taxes and duties should be avoided so as to obviate giving the impression that taxes and duties which were not listed were in fact exempt from jurisdiction. At the same time, no mention should be made of value added tax or *ad valorem* stamp-duty, which did not exist in all countries. An interesting solution had been proposed by Mr. Jagota, namely to approach the problem from the standpoint of the activities of the State rather than the standpoint of taxes, and to identify the activities for which a State would be exempt from the jurisdiction of the courts of another State.

40. The principle underlying draft article 18 was jus-

tified. As he had observed in connection with other articles, it was natural for a State engaging in commercial activities in another State to be subject to the jurisdiction of the courts of that other State. Nevertheless, it would be advisable to clarify the scope of the article, particularly the requirement that the body corporate should have members other than States. The point had already been raised in the course of the discussion that members other than States might include international organizations. It was also possible to have a company in which the sole shareholder was the State, or companies consisting of States and organizations, like some banks that took part in regional or world-wide commercial operations.

41. Paragraph 1 (b) of article 18 set forth the criteria for identifying a company, namely the law governing incorporation, the matter of control, and the principal place of business. The first of those criteria was sound, but the other two should be re-examined in order to avoid difficulties of interpretation.

42. Lastly, the question arose whether the Commission could define a company within the meaning of article 18, something that in turn posed the problem of the definitions contained in article 2 of the draft. Article 18 spoke of bodies corporate or partnerships, but they were characterized differently from one legal system to another. Some bodies could not be clearly marked as bodies under public law, bodies under private law or bodies engaging in acts of sovereignty or in commercial acts. Hence the problem was not simply one of drafting.

43. Sir Ian SINCLAIR said that, unfortunately, he had forgotten to comment in his earlier statement (1834th meeting) on the passage in the Special Rapporteur's report relating to the recent "*I Congreso del Partido*" case (1981), in which jurisdiction had been upheld upon the physical presence of a sister ship (A/CN.4/376 and Add.1 and 2, para. 41). The passage in question might give the impression that, in the case in point, the United Kingdom courts were exercising excessive jurisdiction. The real position was, in fact, that the so-called "sister-ship jurisdiction" stemmed from the United Kingdom *Administration of Justice Act, 1956*¹⁶ which was itself based on the International Convention relating to the Arrest of Seagoing Ships¹⁷—a Convention which had been drawn up at the Ninth Diplomatic Conference on Maritime Law held at Brussels in 1952 and to which more than 30 States, including the United Kingdom, were parties.

44. The sister-ship jurisdiction referred to in the report was therefore nothing new. It had been the subject of lengthy discussions between experts on maritime law at the Brussels Conference. It existed mainly in order to ensure that certain types of maritime claims or maritime liens against a ship could be pursued against a sister ship. That was very necessary in shipping, since vessels tended to move from place to place very rapidly.

The meeting rose at 1.05 p.m.

¹⁵ *Yearbook ... 1983*, vol. I, p. 300, 1806th meeting, para. 80.

¹⁶ United Kingdom, *The Public General Acts, 1956*, p. 245, chap. 46.

¹⁷ United Nations, *Treaty Series*, vol. 439, p. 193.