Document:-
A/CN.4/SR.1838

Summary record of the 1838th meeting

Topic:
Jurisdictional immunities of States and their property

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

1838th MEETING

Tuesday, 12 June 1984, at 3 p.m.

Chairman: Mr. Alexander YANKOV

Present: Mr. Balanda, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Koroma, 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]

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] (*concluded*)

1. Mr. USHAKOV said he wished to point out that article 61 of the Fundamentals of Civil Procedure of the USSR and the Union Republics could not be interpreted, as the Special Rapporteur had done in his sixth report (A/CN.4/376 and Add.1 and 2, para. 72), to mean that jurisdictional immunity was granted to foreign States subject to reciprocity. The article first laid down the rule of absolute immunity, under which a suit could be brought against a foreign State only with its express consent, and then went on to specify that where a foreign State did not accord to the Soviet State, its representatives or its property the same judicial immunity which, in accordance with the article, was accorded to foreign States, their representatives or their property in the USSR, the Council of Ministers of the USSR on another authorized organ might impose retaliatory measures in respect of that State, its representatives or its property. Accordingly, such measures could be taken against a foreign State which had infringed the law of the USSR, but they were not based on any reciprocity. Further to an infringement of that kind, any State could take retaliatory measures on the grounds of responsibility. Soviet legislation should be construed in that sense, as should, in all likelihood, the legislation of some other States.

2. Mr. DÍAZ GONZÁLEZ said it was deplorable that, in the Spanish version, the Special Rapporteur's sixth report (A/CN.4/376 and Add.1 and 2) was very difficult to read. It was not the first time that, as a member working in Spanish, he was compelled to protest that the Commission's documents, which were for the most part drafted in English or French, were incorrectly translated into Spanish, even though they were extremely well written in the original language. Legal terminology was as precise in Spanish as it was in other languages and it was regrettable that the Commission's Spanish-speaking members should be obliged to use documents containing expressions that were not accurate having regard to their legal training and background.

3. Generally speaking, draft articles 16 to 18 were acceptable. The Special Rapporteur had endeavoured to reconcile the trends which had emerged not only in the Commission, but also in the international legal world. It did not seem advisable to revert now to matters of principle such as the absolute character of jurisdictional immunity or of sovereignty. Perhaps the three articles would have to be recast and condensed. For example, the detailed enumeration in article 17, if retained, might well cause more difficulties than it would solve. Moreover, the Commission should not try indefinitely to determine, for instance, which taxes or patents were exempt from jurisdiction; it should simply use terms broadly defined in the relevant international conventions and in the fiscal legislation of States. In any event, the three articles in question would doubtless be referred to the Drafting Committee, which would consider both the substance and the form. He reserved the right to make further comments on them when they came back from the Drafting Committee.

4. Mr. SUCHARITKUL (Special Rapporteur), summing up the discussion on draft articles 16 to 18, said that the debate had proved helpful. In particular, he wished to thank Mr. Ushakov for his explanation regarding the interpretation of Soviet legislation. Clearly, under Soviet law immunity was not based on reciprocity, although the executive could, where appropriate, take retaliatory

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

[2] *Idem.*

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

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

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

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

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

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

measures that might have the effect of restricting the scope of immunity. Thus the position under Soviet law was not quite the same as in Indian practice and was the opposite of Italian practice, in which immunity was granted to a foreign State only in so far as it was established that the Italian State enjoyed immunity under that foreign State's law. He was grateful to Sir Ian Sinclair (1837th meeting) for clarifying the position with regard to "sister-ship jurisdiction", thereby dispelling any misunderstanding regarding the passage of his sixth report on that subject (A/CN.4/376 and Add.1 and 2, para. 41).

5. Similarly, Mr. Pirzada (1837th meeting) had helpfully drawn the Commission's attention to the role of the executive in the recognition of State immunity, as illustrated by the legislation in Pakistan. Of course, State practice on the matter of the immunity of foreign States consisted primarily of judicial practice, but he agreed that due regard should be paid to legislative practice and also to the practice of the executive, although the latter was admittedly more difficult to investigate and analyse than was judicial practice.

6. During the discussion of the topic at the Commission's thirty-fourth session, it had been noted that the judicial practice related to only a handful of States, mostly from western Europe. That important point had been made by, among others, Mr. Malek [6] and Mr. Thiam. [7] In his reply, [8] he had said in particular that the first leading case on the subject, *The Schooner "Exchange"* v. *McFaddon and others* (1812), had been tried not in a European State, but in the United States of America, which at the time had been a comparatively new State and certainly a developing country. It was true that most of the cases pertaining to State immunity were from Europe and the United States, as well as Egypt, but one should remember that, throughout the nineteenth century, China, Japan and most Asian countries had still been subject to the so-called "capitulations" régime of extraterritorial jurisdiction, under which all foreigners, and not just foreign States or State entities, had been excluded from the jurisdiction of the territorial State. Hence it was understandable that no cases could be cited from the Asian region in the nineteenth century.

7. Again, the doctrine of State immunity, as interpreted by United States judges, and especially Chief Justice Marshall, was not a doctrine of absolute immunity at all. As to the practice in other States, the distinction between the public acts and the private acts of the State, in other words the concept of the dual personality of the State, had emerged clearly in Italy as early as 1886. [9] In Belgium, in a case dating back to 1857, [10] immunity had been withheld on the grounds that the cause of action had arisen from a commercial contract. In the more recent United Kingdom and United States practice with regard to so-called "unqualified immunity", it was significant that immunity was subject to many qualifications which represented significant limitations.

8. With regard to the approach adopted towards the exceptions to immunity, Mr. Jagota (1836th meeting) had wondered whether articles 16 to 18 did not reflect the position that State immunity represented an exception to the basic rule of territorial jurisdiction. In fact, it had not been his intention to depart in any way from the view that the fundamental principle was that of immunity, based on the sovereign equality of States. As Mr. Thiam had said at the thirty-fourth session, one State could not exercise *imperium* over another. [11]

9. The rules of international law on State immunity and waiver thereof were based essentially on a series of presumptions of consent. Thus a State which consented to receive an ambassador thereby agreed to extend the appropriate immunities to that ambassador and to the State he represented. As Chief Justice Marshall had pointed out, if a State invited the troops of a foreign State to pass through its territory, it could be assumed to have waived jurisdiction over the troops in question. However, when a State agreed to another State conducting commercial activities on its soil, its consent could be made conditional on non-immunity for the other State or State entity concerned. With reference to exceptions to immunity, Mr. Jagota had rightly drawn attention to the need to establish a sufficient territorial connection, something which had been apparent in connection with the provisions of article 12, on commercial contracts. Paragraph 1 of article 12 specifically referred to "the applicable rules of private international law", rules which implied a strong territorial connection. That important point could perhaps be brought out in redrafting article 12. The same was true of article 13, on contracts of employment, and article 14, on personal injuries and damage to property. In the case of article 15, the principle of immunity was bound up with the fundamental norm of territorial sovereignty.

10. In connection with draft article 16, the Drafting Committee would consider the suggestion to dispense in paragraph 1 (*a*) with the enumeration "a patent, industrial design, trade mark ..." and would carefully check the French and Spanish versions of the article. However, despite the suggestion that paragraph 1 could be deleted on the grounds that it was already covered by articles 9 and 15, he none the less considered that the paragraph was a useful one, more particularly because of the specialized nature of the subject of patents, copyright, and so on.

11. Attention had been drawn to the desirability of taking into account the work of UNCTAD regarding the problem of patents and the developing countries. He had therefore consulted UNCTAD studies on the role of the patent system in the transfer of technology to developing countries and had learnt that it was not perhaps advisable for many of the developing countries to introduce patent legislation at the present time, since such legislation would not be of assistance to them in their development

[6] *Yearbook ... 1982*, vol. I, p. 64, 1709th meeting, para. 3.

[7] *Ibid.*, p. 69, 1710th meeting, para. 5.

[8] *Ibid.*, p. 87, 1713th meeting, para. 5.

[9] See 1834th meeting, footnote 1.

[10] *État du Pérou* v. *Kreglinger* (*La Belgique judiciaire* (Brussels), vol. XVII, p. 33).

[11] *Yearbook ... 1982*, vol. I, p. 69, 1710th meeting, para. 2.

efforts. That might be true for some, but by no means all developing countries. His own country, Thailand, was at present exporting watches and television sets to countries in western Europe and was only able to do so because it had adopted a patent system.

12. In connection with paragraph 2, he accepted the suggestion to delete the words "or attributable to" in subparagraph (*a*). His conclusion was that, subject to appropriate redrafting, article 16 as a whole had a place in the draft.

13. Draft article 17 seemed equally useful, although the question arose as to the form in which it should be included in the draft. First, the Drafting Committee would consider the suggestion to remove the detailed enumeration of taxes. Secondly, paragraph 2 in its present form might be dispensed with and its substance transferred to a general provision that would find a place either at the end of article 15 or in part IV of the draft.

14. No objection of principle had been put forward with regard to draft article 18, but the discussion had revealed the need to clarify the article, which was of limited application and related purely to matters of company law. A query had been raised about the meaning of "an unincorporated body", as opposed to "a body corporate". The intention was of course to cover, by means of a comprehensive formula, bodies with or without legal personality (*dotées ou non de la personnalité juridique*).

15. In conclusion, he proposed that draft articles 16 to 18 should be referred to the Drafting Committee. He would himself submit revised drafts in the light of the discussion.

16. Mr. JAGOTA said he hoped that the Drafting Committee would take due account of the points he had mentioned in his statement at the 1836th meeting, particularly with regard to the position of developing countries in the matter of patents and intellectual property. Article 16, viewed from the standpoint of UNCTAD, might well have no relevance for a developing country, for if a developing country had no patent law, as recommended by UNCTAD, there would be nothing for the country's courts to protect. The converse, however, was true for a developing country that experienced a trade problem with another country in which trade was controlled or regulated by the State and which had a patent law and allowed no immunity to foreign States in respect of patents. The Drafting Committee should look into that aspect of the matter. Again, it should consider whether it was appropriate to accept the presumption that a foreign State which applied for registration in order to protect its products or patents was thereby deemed to have waived its immunity altogether. In his view, such registration could not be considered as sufficient to imply waiver; a more express act should be required for that purpose. A system which regarded mere registration of a patent as justifying the setting aside of immunity for all consequent proceedings would constitute a serious barrier to the advancement of the developing countries. Of course, it was always possible to conclude an intergovernmental agreement between a developed and a developing country whereby access to the developed country's market was made subject to a waiver of immunity in respect of proceedings for the commercial activities in question.

17. Lastly, he wished to reiterate the importance of drawing a careful distinction between international trade proceedings and the matter of patents. The exercise of jurisdiction by foreign courts in commercial activities conducted by a State or by State entities was acceptable. In relation to patents, however, matters of public law must not be called into question before a foreign court. In particular, a foreign court could not be allowed to sit in judgment on the validity of acts of State regarding nationalization.

18. Sir Ian SINCLAIR pointed out that article 16 dealt only with a right or rights protected in another State. Some right capable of being protected in another State had to exist. If a State had no patent law, there would be no right that required protection. The whole object of article 16 was to ensure that State immunity would not interfere with the determination of any issue relating to protection of the right.

19. Mr. Jagota's point regarding nationalization measures would not necessarily arise in the context of article 16 alone. It could also apply to any matter connected with the extraterritorial recognition of nationalization legislation. The case-law on that subject varied considerably from one country to another. The problem was a very general one and could emerge under any of the articles of the draft.

20. The Drafting Committee should also consider the possible need to broaden the terms of paragraph 1 (*a*) of article 18 by replacing the formula "other than States" by "other than States or international organizations". Some bodies consisted solely of States and international organizations and perhaps the intention was not to bring them within the framework of article 18.

21. Mr. SUCHARITKUL (Special Rapporteur) said that the point mentioned by Sir Ian Sinclair in connection with article 18 would be dealt with by the Drafting Committee. With regard to Mr. Jagota's point concerning the effects of registration, his own view was that a foreign State which applied for the registration of a patent or other intellectual property thereby showed a clear intention of seeking the protection of the laws and courts of the State of registration. It would therefore have to accept that the whole procedure should take its course.

22. As to the question of the "act of State" doctrine in the United States, the most recent case-law in that country clearly indicated that, when a party pleaded immunity from jurisdiction and the plea was rejected, the defence of "act of State" could not be raised again for the same set of facts. The same rule applied to a foreign State which brought suit itself, thereby submitting to the jurisdiction; it could not subsequently invoke the defence of "act of State". [12] Any different rule would mean allowing the foreign State concerned to bring in immunity through the back door—i.e. by pleading "act of State"

[12] See *Alfred Dunhill of London, Inc.* v. *Republic of Cuba et al.* (1976) (*United States Reports*, vol. 425 (1978), p. 682).

—after having submitted to the jurisdiction or having had its plea of immunity rejected. Another difference between the plea of immunity and the defence of "act of State" was that that defence could not be waived. Also, if the defence of act of State was upheld, there was a total lack of jurisdiction and the court could not sit in judgment at all. The problem was totally different from that of immunity from jurisdiction.

23. Mr. McCAFFREY said that the act of State doctrine was in effect a doctrine of judicial abstention whereby the judiciary might deem it appropriate not to enter into the kind of inquiry involved. Accordingly, Mr. Jagota's concern might be allayed by some kind of general saving clause specifying that nothing in the articles related to the question of whether one State could sit in judgment on the propriety of nationalization by another State.

24. The CHAIRMAN said he took it that the Commission agreed to refer draft articles 16, 17 and 18 to the Drafting Committee.

It was so agreed. [13]

ARTICLES 19 AND 20

25. The CHAIRMAN invited the Special Rapporteur to introduce draft articles 19 and 20, which read:

Article 19. Ships employed in commercial service

ALTERNATIVE A

1. This article applies to:

(*a*) admiralty proceedings; and

(*b*) proceedings on any claim which could be made the subject of admiralty proceedings.

2. Unless otherwise agreed, a State cannot invoke immunity from the jurisdiction of a court of another State in:

(*a*) an action *in rem* against a ship belonging to that State; or

(*b*) an action *in personam* for enforcing a claim in connection with such a ship if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes.

3. When an action *in rem* is brought against a ship belonging to a State for enforcing a claim in connection with another ship belonging to that State, paragraph 2 (*a*) above does not apply in regard to the first-mentioned ship unless, at the time when the cause of action arose, both ships were in use for commercial purposes.

4. Unless otherwise agreed, a State cannot invoke immunity from the jurisdiction of a court of another State in:

(*a*) an action *in rem* against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or

(*b*) an action *in personam* for enforcing a claim in connection with such a cargo if the ship carrying it was then in use or intended for use as aforesaid.

5. In the foregoing provisions, references to a ship or cargo belonging to a State include a ship or cargo in its possession or control or in which it claims an interest; and, subject to paragraph 4 above, paragraph 2 above applies to property other than a ship as it applies to a ship.

ALTERNATIVE B

1. If a State owns, possesses or otherwise employs or operates a vessel in commercial service and differences arising out of the commercial operations of the ship fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in admiralty proceedings *in rem* or *in personam* against that ship, cargo and owner or operator if, at the time when the cause of action arose, the ship and/or another ship and cargo belonging to that State were in use or intended for use for commercial purposes, and accordingly, unless otherwise agreed, it cannot invoke immunity from jurisdiction in those proceedings.

2. Paragraph 1 applies only to:

(*a*) admiralty proceedings; and

(*b*) proceedings on any claim which could be made the subject of admiralty proceedings.

Article 20. Arbitration

1. If a State agrees in writing with a foreign natural or juridical person to submit to arbitration a dispute which has arisen, or may arise, out of a civil or commercial matter, that State is considered to have consented to the exercise of jurisdiction by a court of another State on the territory or according to the law of which the arbitration has taken or will take place, and accordingly it cannot invoke immunity from jurisdiction in any proceedings before that court in relation to:

(*a*) the validity or interpretation of the arbitration agreement;

(*b*) the arbitration procedure;

(*c*) the setting aside of the awards.

2. Paragraph 1 has effect subject to any contrary provision in the arbitration agreement, and shall not apply to an arbitration agreement between States.

26. Mr. SUCHARITKUL (Special Rapporteur) said that draft articles 19 and 20 established two further exceptions to jurisdictional immunity. The first, provided for under draft article 19, concerned ships employed in commercial service. It was a matter that was more familiar to common-law jurists than to civil-law jurists because the procedures involved were British admiralty procedures and also because special status was attached to ships. So far as the procedures were concerned, maritime law had developed largely in the context of the systems used by the larger maritime powers, in which connection British admiralty practice had been predominant. Ships were, in a sense, floating territory, which meant that there could be an overlapping of jurisdictions, for example when the ship of one State entered the harbour of another State. Another special feature of ships, however, was their nationality, or rather their flag, which entitled them to the protection of the flag-State and its law. It was because of those two factors—procedure and the special status of ships—that he had looked first at the practice of the United Kingdom and the United States of America, before examining that of other jurisdictions (A/CN.4/376 and Add.1 and 2, paras. 145-163).

27. The British cases dated back to *The "Swift"* (1813) and the dictum of Lord Stowell in that case was cited in the report (*ibid.*, para. 184). Probably the first case to involve a public ship of war, however, was *The "Prins Frederik"* (1820) (*ibid.*, para. 146), although the dispute had ultimately been settled by arbitration. The next important case in the United Kingdom had been *The "Charkieh"* (1873) (*ibid.*, para. 147), involving a ship which had been engaged in trading ventures and had not

[13] For consideration of draft article 16 as proposed by the Drafting Committee, see 1868th meeting, paras. 38 *et seq.*, and 1869th meeting, paras. 1-4; for consideration of draft articles 17 and 18, see 1869th meeting, paras. 5-35.

been accorded immunity. A lesser ground for rejecting immunity had been that the ship had been owned by the Khedive of Egypt in his private capacity and had been chartered to a British subject at the time of the commencement of proceedings. Sir Robert Phillimore's dictum in that case was well known (*ibid.*) and had laid down the rule of restrictive immunity which he had confirmed in *The "Cybele"* (1877) and in *the "Constitution"* (1879), in which he had drawn a distinction between an American vessel of war, which had been held to be entitled to immunity, and a public ship employed for commercial purposes, which had not been accorded immunity (*ibid.*, para. 148). Sir Robert Phillimore had gone a step further in *The "Parlement belge"* case (1879), concerning a ship used only partly for commercial purposes, although the decision had been overruled by the Court of Appeal on the grounds that the ship had "been mainly used for the purpose of carrying the mails" (*ibid.*, para. 149). Moreover, under the bilateral treaty then in force between Belgium and the United Kingdom, packet-boats, regardless of subsidiary employment, had to be treated as men-of-war for the purposes of jurisdictional immunities. In that connection, he drew attention to the pronouncement by Lord Justice Brett (*ibid.*). The rule as applied in the United Kingdom had none the less tilted in favour of the doctrine of unqualified immunity with the decision in *The "Porto Alexandre"* case (1920), in which the decision in *The "Parlement belge"* had been followed, perhaps incorrectly.

28. The decision in *The "Cristina"* (1938) had marked the beginning of a period of uncertainty and a number of judicial observations had thrown further doubt on the decision in *The "Porto Alexandre"* (*ibid.*, para. 153). Nevertheless, the matter had finally been settled with the House of Lords decision in 1981 in *The "I Congreso del Partido"* case, an extract from which was cited in the report (*ibid.*, para. 155). As stated (*ibid.*, para. 156), the House of Lords had applied the common-law principles as they had existed prior to the entry into force of the *State Immunity Act 1978* and the ratification by the United Kingdom of the 1926 Brussels International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels and its 1934 Additional Protocol. *The "Philippine Admiral"* case and *Trendtex Trading Corporation Ltd.* v. *The Central Bank of Nigeria* in 1977 had put an end once and for all to any lingering doubts about the judicial practice of the United Kingdom (*ibid.*).

29. As to judicial practice in the United States, a leading case had been that of *Berizzi Brothers Co.* v. *S.S. "Pesaro"* (1926). Judge Julian Mack, at first instance (1921), had favoured restricted immunity, but the Supreme Court had disclaimed jurisdiction on the grounds that the vessel in question, though described as a general ship engaged in the common carriage of merchandise for hire, had been owned and in the actual possession of the Italian Government. A dictum by Mr. Justice Van Devanter in that case was cited in the report (*ibid.*, para. 158). Yet after a fairly short time, the executive branch of the Government had intervened, as was apparent from the decision in *Republic of Mexico et al.* v. *Hoffman* (1945), in which Chief Justice Stone had stated: "It is ... not for the courts to deny an immunity which our Government has seen fit to allow". United States judges had been predisposed to regard the interpretation of a foreign State's use of its vessels as a matter of diplomatic rather than judicial determination, and judicial primacy in the matter had thus been superseded.

30. The Tate Letter of 1952 (*ibid.*, para. 161) had brought a return to a restrictive doctrine based on the distinction between *acta jure imperii* and *acta jure gestionis*, culminating in the adoption of the *Foreign Sovereign Immunities Act of 1976*. Thus any significant trace of absolute State immunity as reflected in *The "Pesaro"* and *The "Porto Alexandre"* cases had, in effect, been eliminated.

31. The practice of other countries examined in his sixth report (*ibid.*, paras 164-177) revealed some initial fluctuations but ultimately an abandonment of any adherence to the doctrine of absolute or unqualified immunity and a growing trend, with the adoption of the 1926 Brussels Convention, to favour a more restrictive doctrine of immunity in regard to government-owned and operated vessels employed in commercial and non-governmental services. For example, in Belgium, the requisitioning of a vessel by a foreign State had once been regarded as an *actum imperii* over which Belgian courts had no jurisdiction. But with the entry into force of the 1926 Brussels Convention and its Protocol, the Court of Appeal of Brussels had permitted the arrest of a vessel in *Sáez Murua* v. *Pinillos et García* (1938) (*ibid.*, para. 172).

32. The trends in State practice, though tentative, were clear. In *The "Visurgis" and the "Siena"* case (1938), a German court had observed that continental, British and American practice could be summarized in the following terms: "A vessel chartered by a State but not commanded by a captain in the service of the State does not enjoy immunity if proceedings *in rem* are brought against it; still less can the owner of the vessel claim such immunity in an action for damages" (*ibid.*, para. 179). The rules of State immunity as applied to vessels owned or operated by States had been clearly expounded by Lord Wilberforce in *The "I Congreso del Partido"* (*ibid.*, para. 183). Chief Justice Marshall had also observed in *Bank of the United States* v. *Planters' Bank of Georgia* (1824) that it was "a sound principle that, when a Government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen" (*ibid.*, para. 185).

33. With regard to governmental practice, an examination of national legislation revealed a trend in favour of a distinction between vessels of war and vessels used for government purposes, on the one hand, and vessels employed in non-governmental and commercial services, on the other. In that connection, he had cited Norwegian legislation of 17 March 1939 (*ibid.*, para. 191), the United States *Public Vessels Act* of 1925 and *Foreign Sovereign Immunities Act of 1976* (*ibid.*, para. 193), and the United Kingdom *State Immunity Act 1978* (ibid., para. 194).

34. He had also examined international and regional conventions, particularly the 1926 Brussels Convention

and its 1934 Additional Protocol (*ibid.*, paras. 199-207). The Convention should not be dismissed as an instrument of purely regional character, since it had many States parties from a number of continents and with differing economic and social systems. He had likewise referred to the codification conventions prepared by the 1958 Conference on the Law of the Sea (*ibid.*, paras. 208-210), to article 236 of the 1982 United Nations Convention on the Law of the Sea (*ibid.*, paras 211-212), regarding protection of the marine environment, to the 1940 Treaty on International Commercial Navigation Law (*ibid.*, para. 213) and to the 1969 International Convention on Civil Liability for Oil Pollution Damage (*ibid.*, para. 214). In the context of treaty practice, he had pointed out (*ibid.*, para. 215) that the use of a "waiver clause" reaffirmed the trend towards the exercise of jurisdiction by competent courts in proceedings against vessels, cargoes and owners, provided the cause of action arose out of commercial shipping forming part of the business activities of the State. A typical example was article XVIII of the Treaty of Friendship, Commerce and Navigation between the United States and the Federal Republic of Germany (*ibid.*).

35. Lastly, his examination of the opinions of writers (*ibid.*, paras. 216-230) revealed that those in favour of absolute immunity and those in favour of restricted immunity were initially more or less equally divided. Nevertheless, there was undoubtedly a clear trend towards restricted immunity, one that had inevitably gathered momentum. It was on the basis of those considerations that he had prepared the alternative versions of draft article 19.

36. Draft article 20 related to arbitration, which in one sense was difficult to dissociate from judicial settlement. Arbitration could take many forms and the main types were discussed in the report (*ibid.*, paras. 237-245). State practice in the matter was not very revealing, since an agreement to submit to arbitration could operate to delay the exercise of the original jurisdiction by a court. In that connection, it would be noted that in the arbitration case *Maritime International Nominees Establishment* v. *Republic of Guinea* (1982), it had been held that the agreement to submit to arbitration did not create new jurisdiction where none existed (*ibid.*, para. 248).

37. With regard to governmental practice, section 9 of the United Kingdom *State Immunity Act 1978* provided that, where a State had agreed in writing to submit a dispute to arbitration, the State was not immune as respects proceedings in the courts of the United Kingdom which related to the arbitration, although a proviso was included to the effect that that provision was subject to any contrary provision in the arbitration agreement and did not apply to any arbitration agreement between States. A similar provision was to be found in Pakistan's *State Immunity Ordinance, 1981* and Singapore's *State Immunity Act, 1979*. He had also referred to the 1972 European Convention on State Immunity, the Geneva Protocol on Arbitration Clauses, of 24 September 1923, and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*ibid.*, paras. 251-253). Consequently, it was clear that, if there was an agreement to submit to arbitration and if there was also a link between the procedure for arbitration and the internal legal system, it was difficult not to infer implied consent to the exercise of jurisdiction. It was on that basis that he had formulated draft article 20 for consideration by the Commission.

The meeting rose at 6 p.m.

1839th MEETING

Wednesday, 13 June 1984, at 11.10 a.m.

Chairman: Mr. Alexander YANKOV

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

Organization of work of the session (*concluded*)* (ILC (XXXVI)/Conf. Room Doc.2)

[Agenda item 1]

1. The CHAIRMAN said that the Enlarged Bureau had held a meeting that morning to consider the timetable for the remainder of the session. It recommended:

(*a*) That the Commission should continue its consideration of the following two topics:

Jurisdictional immunities of States and their property (agenda item 3), until 15 June;

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (agenda item 4), from 18 to 22 June;

(*b*) That the Commission should then consider the following topics:

International liability for injurious consequences arising out of acts not prohibited by international law (agenda item 7), from 25 to 29 June;

The law of the non-navigational uses of international watercourses (agenda item 6), from 2 to 9 July;

State responsibility (agenda item 2), from 10 to 20 July;

(*c*) That the Commission should consider its draft report and related matters from 23 to 27 July.

2. The Enlarged Bureau planned to hold a further meeting before the end of the session in order to review the progress of work. If there were no objections, he would take it that the Commission agreed to those recommendations.

It was so agreed.

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* Resumed from the 1815th meeting.