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Summary record of the 1840th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
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commercial government service. A problem arose when State-owned vessels were used in commercial service; that was another aspect of commercial activity which the Commission had discussed in connection with an earlier article. Since the arrest of a vessel was involved, the case was on the borderline between exceptions to State immunity in the adjudicative field and the concept of immunity from attachment. Accordingly, any provision on the matter had to take both aspects into consideration and also make clear the fact that it related exclusively to commercial service and did not apply to naval ships or to State-owned ships used for non-commercial service.

19. In his review of legal writings (*ibid.*, paras. 216-228), the Special Rapporteur had mentioned a number of writers who upheld the doctrine of absolute immunity, but he would also doubtless agree that the list of authors who endorsed the restrictive concept of immunity could have been much longer.

20. Lastly, the Special Rapporteur had commented on sister-ship jurisdiction in connection with the House of Lords decision in *The "I Congreso del Partido"* case in 1981 (*ibid.*, para. 41) and had stated that "the basis for the assumption and exercise of sister-ship jurisdiction is not completely free from controversy" (*ibid.*, para. 155). Sister-ship jurisdiction as applied in the English courts derived directly from the International Convention relating to the Arrest of Seagoing Ships, signed at Brussels in 1952.⁶ To date, there were 31 States parties to the Convention, by no means all of them European countries, for they included Fiji, Guyana, Mauritius, the Syrian Arab Republic and Togo. The purpose of sister-ship jurisdiction was to deal with the problem of the impossibility of arresting the specific vessel in commercial service which had caused the incident giving rise to a maritime claim. In cases of that type, it had been agreed at the 1952 Brussels Conference that, subject to certain conditions, the claimant could arrest a sister ship of the vessel whose service had given rise to the claim.

21. It was important to remember that, in United Kingdom judicial practice, sister-ship jurisdiction was subject to very strict conditions. For example, *The "Sennar"* (No. 2) case, a very recent one reported so far only in the *Financial Times* of 8 June 1984, had not involved a problem of State immunity, but sister-ship jurisdiction had been invoked, first in the courts of the Netherlands and subsequently in the English courts. The purpose had been to avoid a jurisdictional clause included in the contract in the interests of the Sudanese party to the transaction. The contract had related to the export of groundnuts shipped from Sudan to the Netherlands, with a stipulation that it was governed by Sudanese law and that the courts of Khartoum or Port Sudan had exclusive jurisdiction over any dispute arising out of the contract. The Court of Appeal in London had refused to allow sister-ship jurisdiction for the benefit of the claimants and had taken the same view as the Netherlands court earlier, namely that the case fell within Sudanese jurisdiction.

The meeting rose at 12.40 p.m.

⁶ See 1837th meeting, footnote 17.

1840th MEETING

Thursday, 14 June 1984, at 10.05 a.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Koroma, Mr. Laclela 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.

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 RAPPORTEUR⁴
(*continued*)

ARTICLE 19 (Ships employed in commercial service) and
ARTICLE 20 (Arbitration)⁵ (*continued*)

1. Mr. QUENTIN-BAXTER said that he had been unable to participate actively in the discussion of draft articles 16 to 18, which contained provisions that were perhaps necessary and interesting but were of somewhat limited application. Draft article 19, however, dealt with the very important matter of ships, a special case that had to be considered in its own right. Yet some of the ele-

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 1838th meeting, para. 25.

ments included in alternatives A and B might well go beyond what was immediately necessary for the purposes of the article.

2. He was struck by the fact that the form of article 19 differed greatly from that of the other articles on exceptions to immunity. For example, both article 15, paragraph 1, and article 16, paragraph 1, began with the words: "The immunity of a State cannot be invoked...", while article 17, paragraph 1, stated: "Unless otherwise agreed, a State cannot invoke immunity...". If article 19 were cast in the same form, the question involved would still be sizeable but it would be more manageable.

3. As the Special Rapporteur had pointed out in his sixth report, shipping was a subject on which treaty law afforded ample guidance (A/CN.4/376 and Add.1 and 2, paras. 198-214). The International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, adopted at Brussels in 1926, specified in article 1:

Seagoing vessels owned or operated by States, cargoes owned by them, and cargoes and passengers carried on government vessels, and the States owning or operating such vessels, or owning such cargoes, are subject in respect of claims relating to the operation of such vessels or the carriage of such cargoes, to the same rules of liability and to the same obligations as those applicable to private vessels, cargoes and equipments.

4. Admittedly, the 1926 Brussels Convention was binding on only a minority of States—including, however, such maritime nations as the United Kingdom—but it provided a clear indication of a trend in the law. An even clearer indication, and one of a more general character, was to be found in the 1958 Geneva Conventions on the law of the sea, which had stemmed from the work of the Commission and constituted one of its most remarkable achievements. Both the Convention on the High Seas and the Convention on the Territorial Sea and the Contiguous Zone drew a very clear distinction between warships and government ships operated for non-commercial purposes on the one hand, and ships operated for commercial purposes, on the other. That distinction had stood the test of time, for it had been carried into the 1982 United Nations Convention on the Law of the Sea, together with most of the provisions of the 1958 conventions on the high seas and the territorial sea.

5. Despite the different views held on the subject of State immunity, in that respect the law with regard to ships was quite plain. Accordingly, if article 19 was simply formulated to read: "A State cannot invoke immunity from the jurisdiction of a court of another State in proceedings relating to ships engaged in commercial service", it would be enough to deal with an important but not very controversial issue. Unfortunately, the Special Rapporteur had included a vast amount of material in his report and both the commentary to and the texts of alternatives A and B dealt not only with immunity itself, but also with the problem of when immunity could be claimed. The attempt to deal with the very difficult question of the circumstances in which a Government's interest in a ship was sufficient to attract immunity involved an enormous range of problems. Indeed, the differences on the subject were so wide that it would be difficult to

devise a common rule even for the United States and United Kingdom systems.

6. In his report, the Special Rapporteur treated the nationality of ships as an issue different from that of ownership. In the 1958 Geneva Conventions on the law of the sea, however, attention had been focused on a ship's nationality, which was that of its flag. Under the law of the sea, nationality and ownership went together for the purpose of identifying a government ship employed for non-commercial purposes. On the other hand, in court proceedings many other factors were involved. In that regard, the report contained the inevitable reference to a ship being "sometimes considered as a piece of floating territory of the flag-State" (*ibid.*, para. 120). Yet that conception was known to be full of problems and it had been the subject of strong judicial criticism. In *The "Lotus"* case⁶ before the PCIJ, Judge Lord Finlay had condemned the formula as exaggerated use of metaphor in relation to ships. In *The "Cristina"* (1938),⁷ Lord Atkin had similarly disapproved of Oppenheim's words regarding the character of ships. The Special Rapporteur had concluded that the distinctions in question, important as they were for certain other purposes, did not greatly affect the character of ships in the context of the topic under consideration. Therefore the Special Rapporteur had added that:

... ships, though *prima facie* governed by rules different from those to which common law submits other movables, are in the final analysis subject to such rules, and the courts "will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control" (*ibid.*, para. 123),

quoting an extract from the decision by Lord Atkin in *The "Cristina"*,⁸ which had not been altogether satisfactory in terms of results.

7. For his own part, he preferred the view expressed by Justice Frankfurter of the Supreme Court of the United States in *Republic of Mexico et al. v. Hoffman* (1945):

... "possession" is too tenuous a distinction on the basis of which to differentiate between foreign government-owned vessels engaged merely in trade that are immune from suit and those that are not. Possession, actual or constructive, is a legal concept full of pitfalls.⁹

Those conclusions were supported by the judicial practice followed in the United Kingdom and in a number of Commonwealth countries since 1945. Many cases could be cited which demonstrated the impracticality of basing the distinction between two types of ships on possession or control.

8. One of the most significant steps forward would be to break through the jungle of concepts and adopt the very simple concept of a ship engaged in trade or of a ship employed for commercial purposes. A formula of that kind would not involve any of the difficulties of the old distinction between *acta jure imperii* and *acta jure*

⁶ Judgment No. 9 of 7 September 1927, *P.C.I.J.*, Series A, No. 10.

⁷ United Kingdom, *The Law Reports, House of Lords, Judicial Committee of the Privy Council, 1938*, p. 485.

⁸ *Ibid.*, p. 490.

⁹ *United States Reports*, vol. 324 (1946), pp. 39-40.

gestionis, which had given rise to different rules in different countries and had led to different results on the same sets of facts. Again, the Special Rapporteur had perhaps paid undue attention to common-law precedents over the past 100 years. Personally, he would hesitate to saddle the jurists of the world with those precedents.

9. It might be necessary at a later stage to deal with the circumstances in which a Government could be held to have a sufficient connection with a ship in order to claim immunity. The immediate point, however, was to state the exception to State immunity so far as ships were concerned. A provision confined exclusively to such a statement would give rise to none of the extremely difficult issues to which he had referred. Article 19 would thus simply provide that a claim of immunity could not be made with respect to ships operated for commercial purposes.

10. Lastly, in framing article 19 it was desirable to avoid the use of terms such as “action *in rem*” and “action *in personam*”, which might not be readily understandable to lawyers from every legal system. The draft articles had to be brief and had to provide guidance to the whole world on certain important questions. To that end, terms peculiar to one particular system of law should be avoided.

11. Mr. NI observed that most of the material discussed in the section of the report on draft article 19 (A/CN.4/376 and Add.1 and 2, paras. 119-230) derived from the practice followed under the common-law system, and that the terms employed and the conclusions reached drew largely on that system. It was explained that, since there was little judicial practice in support of the doctrine of “absolute” immunity, the Special Rapporteur had taken as his starting-point the so-called Anglo-American practice (*ibid.*, para. 144). The absence or scantiness of judicial decisions, however, should not be interpreted as lack of support for the rule of unrestricted immunity, for other expressions of opinion and attitudes existed and were no less authoritative than were judicial decisions.

12. The Special Rapporteur had given a highly interesting account of two divergent theories to explain the immunity of government trading ships, one based on State ownership, and the other on State possession. Then a third theory was advanced (*ibid.*, para. 221), according to which complete immunity was founded on the principle of the sovereign equality of States. It was apparent that the first two theories merely stated the different criteria for immunity already asserted in respect of public trading ships; only the third provided the ground—namely the sovereign equality of States—for granting immunity to so-called State trading ships.

13. Six arguments were forcefully made in support of the non-immunity of public trading ships (*ibid.*, paras. 223-228) and they merited careful examination. The first suggested that immunity on a broad basis was outmoded. The second explained the reasons for assimilating the legal position of public trading ships to that of private ships. The third and sixth emphasized the lack of equity in placing the individual and the State on a different

footing. The fourth concerned the dignity, equality and independence of States owning or operating the vessels. The fifth argument was based on the interests of safe navigation and was a valid one, although perhaps somewhat over-emphasized. For countries, including his own, which carried on foreign trade or transport through State enterprises having an independent legal personality of their own, the absence of immunity for ships owned or operated by them was unlikely to present any difficulty.

14. Nevertheless, alternative A for draft article 19 seemed much too lengthy and cumbersome. Paragraph 1, relating to the scope of application, did not appear to be necessary, since not all States had a separate admiralty or maritime jurisdiction, nor did all procedural systems draw a distinction between actions *in rem* and actions *in personam*. Paragraph 2 dealt with the non-immunity of ships used or intended for use for commercial purposes, while paragraph 3 set forth the conditions for the exercise of “sister-ship jurisdiction”, a broadening of the scope of application of the article that would probably give rise to difficulties in connection with arrest or execution in maritime proceedings. It was doubtful whether the concept of such jurisdiction would be generally acceptable. Again, paragraph 5 included a number of notions, such as “control” as distinguished from “possession” or “interest” in the ship or cargo, that were not very clear and would need further clarification and study.

15. Alternative B was very much shorter, but certain terms called for elucidation. What was the exact meaning of “commercial service” and what was encompassed by the expression “commercial operations”? Furthermore, paragraph 2 of alternative B was probably unnecessary, for the reasons he had already given in connection with paragraph 1 of alternative A.

16. The object of draft article 20 was to deny immunity in the case of an agreement to submit to arbitration, but the article none the less gave rise to a difficult problem. The parties to a dispute sometimes preferred arbitration to judicial proceedings because it saved time and costs, apart from enabling the parties to choose freely the panel of arbitrators, the arbitration procedure and the law to be applied. In that connection, it was interesting to cite the Convention on the Settlement of Investment Disputes between States and Nationals of other States, signed at Washington in 1965,¹⁰ which was adhered to by a majority of States. Article 26 specified that:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy...

Naturally, the provisions of the Washington Convention did not prevail over the national laws of States not parties to the Convention, but article 26 at least indicated the effect of an agreement to arbitrate *vis-à-vis* litigation in national courts.

17. There were some States in which the judiciary exercised a measure of control or supervision over arbitration and in which a matter might be submitted to a court

¹⁰ United Nations, *Treaty Series*, vol. 575, p. 159.

for a decision on a particular point of law. Nevertheless, arbitration and adjudication by courts were two distinct procedures and, in most States, an agreement to arbitrate normally precluded the bringing of suit to a court on the same grounds, except for the purpose of invalidating the agreement. An agreement to arbitrate could on no account be taken as a presumption of waiver of immunity; otherwise, the parties would be deterred from entering into such an agreement.

18. There was little national legislation on the subject and judicial practice in support of article 20 was scanty, although the Special Rapporteur mentioned the interesting case *Maritime International Nominees Establishment v. Republic of Guinea* (*ibid.*, para. 248). The 1923 Geneva Protocol on Arbitration Clauses and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, mentioned by the Special Rapporteur (*ibid.*, paras. 252-253), seemed to confirm the validity of an agreement to submit to arbitration as being relevant to the exercise of jurisdiction by the court in that particular case. Under article II of the 1958 Convention, where an arbitration agreement existed, the court seized of a case had, at the request of any one party, to order the case to be submitted to arbitration, unless such agreement was considered void or not enforceable. Thus the agreement to submit to arbitration could only be interpreted as an impediment to the exercise of jurisdiction by the court, unless the agreement was invalid. In the circumstances, it would be extremely difficult to accept the situation as an "irresistible implication" or an "almost irrebuttable presumption" (*ibid.*, para. 255) that the State in question had waived its immunity from jurisdiction. Article 20 should not therefore find a place in the draft.

19. The Commission was reaching the end of its discussion of the articles relating to exceptions to immunity, and hence some concluding comments were in order. Immunity, founded on the sovereign equality of States, was the rule and he was fully aware of the significance of the sovereignty of the territorial State. Indeed, in a country like China, which had once been subjected to such régimes as consular jurisdiction or capitulations, territorial sovereignty and political independence were treasured above all else. When representatives of one State entered the territory of another, they must naturally abide by the laws and regulations of the host State. It was, however, equally true that, by virtue of the principle of the sovereign equality of States, one State could not sit in judgment over another State without its consent. That was especially true in States where immunity had to be claimed before the courts. An appearance before a court in another State, even if only to contest jurisdiction, was in itself tantamount to submission to the authority of the court of the other State. It was for that reason that certain States claimed immunity on the strength of the legal maxim *par in parem imperium non habet*, which was totally different from a claim of extraterritoriality or unaccountability to the local law.

20. Since immunities could be waived either expressly or by implication, disputes often arose with regard to implied waiver. In that regard, a number of presumptions had been suggested as implying consent. Presump-

tions, however, should not be far-fetched or arbitrary. For example, in theory article 16 afforded protection to both the developing and the developed countries. In practice, however, more protection was provided for developed States. The test of fairness could not be applied in a vacuum and the actual circumstances had to be taken into account. In the preparation of draft articles on a subject in which the interests of States did not always work in harmony, consideration should be given to mutual understanding and mutual accommodation. In view of the crucial character of part III of the draft, he urged members of the Commission to work patiently together in order to produce a draft that would be acceptable to all States, regardless of their legal system, from all regions of the world.

21. Mr. OGISO, noting that little judicial practice could be cited from countries other than the United Kingdom and the United States of America, said that to the best of his knowledge the only Japanese case involving a government ship had occurred in 1954, when a Captain Kurikov, the commander of a Russian patrol boat which had entered Japanese territorial waters, had been prosecuted by a Japanese court for aiding and abetting illegal entry into Japan and had received a suspended sentence. The court had held that the status of warships was clearly established in international law, but not the status of other government ships, and hence that it was able to exercise jurisdiction. No other cases involving government ships had arisen since 1954 and Japan had subsequently become a party to the 1958 Geneva Conventions on the territorial sea and the contiguous zone and on the high seas, thereby accepting the provision regarding the status of public ships other than warships, which the Special Rapporteur discussed in his sixth report (A/CN.4/376 and Add.1 and 2, paras. 208-209). In the circumstances, he did not think that the Japanese Government would have any fundamental objection to the basic proposition that the State could not claim immunity from jurisdiction in the case of a government-owned ship operated for commercial purposes.

22. He had been heartened by Mr. Quentin-Baxter's objections to some of the terms used in draft article 19, which was based largely on United Kingdom legislation. Concepts such as actions *in rem* and actions *in personam* were unknown in Japanese law, under which any action involving the operation of a ship was brought against the owner or operator of the ship. Such concepts would inevitably raise the question of the extent to which the provisions of the article could be brought into line with or incorporated into the Japanese legal system. He experienced similar difficulty with the term "admiralty proceedings", which had no equivalent in the Japanese legal system. All claims concerning the operation of a ship or damage caused by a ship were brought in the civil courts in accordance with the same procedure as that applicable to all other civil cases. Moreover, so far as he knew, those terms were not used in the 1926 Brussels Convention. In an international convention, it was necessary to use neutral wording and seek to express the basic principle clearly, without entering into too much detail or leaning unduly towards any one particular legal system.

23. The common-law system had made a great contribution to the development of international law and, so far as ships were concerned, much benefit was to be derived from the judicial decisions of the United Kingdom and the United States; but an international convention had to be drafted in such a way that the principles could be applied under the relevant national legislation without difficulty and without giving rise to any unnecessary discrepancies with other national legal systems. He had not discussed the matter with the Japanese judiciary, but he suspected that their initial reaction might be to ask why they should accept a copy of foreign legislation which, historically, was entirely different from their own. Given the basic agreement on the purpose of the article, such a negative response from competent national authorities would be rather disappointing.

24. Furthermore, the phrase "intended for use" appeared in both of the alternative versions of draft article 19 but was not found in the 1926 Brussels Convention; it would introduce a subjective element and tend to cloud the issue of jurisdiction unnecessarily. United Kingdom legislation had its own background and, in the absence of that background, the expression in question could cause problems and ambiguity. Consequently, unless there was a definite reason for retaining it, it should be deleted.

25. He would also be grateful to have the Special Rapporteur's view on whether the word "use" or "operation" was preferable. He believed that the word employed in the 1958 Convention on the High Seas and also in the 1926 Brussels Convention was "operated". Again, United Kingdom legislation might have some special background which justified the word "use", but he would prefer "operated".

26. In his comments on the formulation of draft article 19, the Special Rapporteur employed the word "exclusively" (*ibid.*, para. 231 (b)). That comment could therefore be interpreted to mean that, if a ship caused damage when in use for commercial service, an exception to immunity would apply; on the other hand, if that same ship was used for governmental service, either before or after commercial service, an exception to immunity might not apply. Personally, he considered that the notion of exclusiveness in regard to non-governmental and commercial service should be related to the point in time at which the cause of action arose, so as to make quite clear the circumstances under which an exception to immunity might apply. If that was not done, the exception to immunity might become far narrower than the Special Rapporteur had explained.

27. On the basis of his comments, he wished to suggest the following wording for article 19, with a view to assisting the Special Rapporteur:

"Unless otherwise agreed, a State cannot invoke immunity from jurisdiction in respect of claims relating to the operation of vessels owned or operated by that State for commercial purposes at the time when the cause of such claims arose."

He had avoided any detailed reference to ownership and possession in the belief that the adoption of termin-

ology along the lines of that used in the 1926 Brussels Convention would help to simplify the draft.

28. Sir Ian SINCLAIR said that State-owned or controlled ships, whether employed in commercial or in non-commercial service, had special characteristics: they had the quality of mobility; they were a type of floating property; by their very nature, they frequently came within the territorial sea or waters of other States; they visited foreign ports; and they provided a major point of contact with the territorial State for the State that owned, controlled or operated them. Therefore it was not surprising that much of the development of the law on sovereign immunity had turned on the question whether and to what extent immunity could be invoked to bar claims arising out of the operation of seagoing vessels owned, controlled or operated by a foreign State.

29. The extensive jurisprudence of the United Kingdom in that connection was reviewed by the Special Rapporteur in his report (A/CN.4/376 and Add.1 and 2, paras. 145-156) and the line of development from *The "Prins Frederik"* case (1820) through *The "Charkieh"* (1873) to *The "Parlement belge"* (1880) was well known. The Court of Appeal had granted immunity in *The "Parlement belge"* case on the ground that the ship was essentially a mail-boat and hence a public vessel employed mainly in non-commercial service. Although *The "Parlement belge"* case had been misinterpreted in later cases in United Kingdom courts, and notably in *The "Porto Alexandre"* case (1920), the Special Rapporteur was clearly right to conclude (*ibid.*, para. 150) that the principle laid down in *The "Parlement belge"* did not appear to be incompatible with the restrictive approach to immunity: that, indeed, had been the view taken by the House of Lords in 1981 in *The "I Congreso del Partido"* case.

30. Thus United Kingdom case-law had finally come down decisively in favour of the view that there was no principle of international law that required immunity to be granted to a State-owned ship employed in commercial service. Section 10 of the *State Immunity Act 1978* incorporated that qualification of the general principle of immunity, albeit in a somewhat idiosyncratic way, since it had been tailored to deal with the special peculiarities of admiralty proceedings in the United Kingdom. Clearly, however, neither he nor any other United Kingdom lawyer would wish to saddle the rest of the world with all the complexities that arose from the concept of admiralty proceedings and actions *in rem* and *in personam* that had developed over the years.

31. Thus there seemed to be a broad consensus of informed opinion in support of that particular view of the matter. He had been studying the publication entitled *Materials on Jurisdictional Immunities of States and their Property*¹¹ in order to try to form an assessment of the situation. From the replies to the Secretariat's ques-

¹¹ United Nations publication, Sales No. E/F.81.V.10.

tionnaire furnished by States, he had deduced that a very large number of States had accepted the broad proposition that State-owned vessels engaged in commercial service did not enjoy immunity from the jurisdiction of local courts.

32. In his report (*ibid.*, paras. 217-228), the Special Rapporteur had examined the opinions of jurists on whether immunity should be accorded to State-owned trading vessels. The Special Rapporteur could no doubt cite many other authorities in favour of a restrictive view of immunity with regard to the operation of such vessels; but, for his own part, he wished to draw attention to the report by Ian Brownlie to the Institute of International Law in 1983 entitled *Les aspects récents de l'immunité de juridiction des Etats*, in which Mr. Brownlie had surveyed the whole field of jurisdictional immunities and had endeavoured to pin-point what were termed critical elements. First, if the implementation of State policies necessarily involved the making of transactions within the context of a system of local law, including reference to commercial arbitration, the State took the risk of accountability within that system of local law. Secondly, such accountability was compatible with the principle of consent, since the foreign State could always choose to avoid such transactions: it became a "visitor" to the jurisdiction at its own choice and could always stipulate for treaty performance of servicing operations. Thirdly, such accountability within the system of local law was justified by certain general principles of law and, in particular, by the principles of good faith, reliance and unjust enrichment. Fourthly, given the private-law character of the transactions, municipal courts provided the appropriate forum.

33. Mr. Brownlie had also given examples of how those elements should operate in specific situations. For instance, if the owners of a ship chartered it to a foreign State to transport wheat purchased under a commodity agreement with another State, with the charter agreement containing an arbitration clause, and if the ship was damaged in discharging cargo and the owners sought to compel arbitration in the pertinent municipal courts, the charter and its arbitration clause were transactions based in private law and in ordinary commercial forms. They were incidental to the implementation of an international agreement, but the means chosen involved ordinary private transactions. The State charterer would presumably have chosen the most effective and convenient method of achieving the particular purpose, a method that involved the risk of arbitration. Such risks were themselves an emanation of the *puissance publique* and, on the basis of the principles of good faith and reliance, could not be avoided if they matured.

34. As to draft article 19, Mr. Quentin-Baxter's comments had already covered much of what he had wished to say. Obviously, it would not be appropriate to endeavour to translate the complexities of United Kingdom procedural law into an international convention. An attempt should therefore be made to seek a more general form of wording that would have

meaning for everyone and would achieve the desired aim. He did not altogether agree with Mr. Ogiso regarding the phrase "intended for use", since there had been instances, as in *The "I Congreso del Partido"*, when a claim had been brought against a vessel that had been intended for use for commercial service but had not actually been used for such service at the time in question.

35. On the other hand, he agreed that it was unnecessary to make special provision for sister-ship jurisdiction, even though certain States operated such jurisdiction, or to include a reference in the article to admiralty proceedings or *in rem* or *in personam* jurisdiction. Yet the article should cover not only claims against State-owned ships for trading purposes, but also claims against cargo, something which Mr. Ogiso's proposed text would not do. With that in mind, he had drafted the following text for possible consideration by the Drafting Committee:

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

"(a) The determination of a claim against or in connection with a seagoing vessel in commercial service owned, possessed or operated by the State; or

"(b) The determination of a claim against or in connection with a cargo owned by the State

if, at the time when the cause of action arose, the vessel or, as the case may be, the cargo of the vessel carrying it, was in use or intended for use for commercial purposes.

"2. Paragraph 1 shall not apply to any warships, naval, auxiliary or other ships owned or operated by a State and used for the time being only in government non-commercial service."

36. Mr. USHAKOV said it would be interesting to know how State-owned trading ships employed in commercial service were defined in the laws and regulations in force in the United Kingdom. In addition, he would like to know why an action *in rem* against a trading ship owned by a State would be brought against that State in its capacity as the owner in cases where the vessel in question was not being used by the State but was in the possession of, or being used by, a legal person—whether foreign or not—that was neither a State nor a State organ and did not enjoy immunity.

37. Mr. OGISO said he would have no objection to article 19 covering claims against cargo. He would none the less appreciate it if the Special Rapporteur could clarify, first, the extent to which article 12 would cover the question of cargo and, secondly, whether cargo which represented some form of economic assistance, for instance provision of rice through governmental aid programmes under the Kennedy Round, would come under the heading of commercial activities.

The meeting rose at 1.05 p.m.