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Summary record of the 2117th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
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64. For the codification of the rules of international law on the immunity of the State, its organs and its property, it was the definition of what was understood by the State and State organs to which immunity should be granted which was of significance and that was of particular importance for socialist States where State-owned property was the predominant feature. In accordance with the fundamental principles of international law, the matter could be dealt with first on the basis of domestic legislation, in which case it was a matter for Soviet law which organization or instrumentality was to be considered as an organ of the Soviet State enjoying immunity. The trend towards decentralization of foreign economic activity in the Soviet Union, together with the restructuring of the whole system of economic management, had a direct bearing on that question, which could therefore not be considered outside the context of such profound changes. As part of that reform, foreign economic activity was being carried on directly by industrial enterprises and by scientific research and design organizations. Moreover, under the new arrangements, enterprises acquired legal personality when engaging in economic transactions and could therefore not be regarded as State organs enjoying immunity.

65. Furthermore, under the terms of the USSR's *State Enterprise (Association) Act*, which had entered into force on 1 January 1988, a State enterprise had a segregated part of the nationally owned property and its own independent balance sheet. Its property consisted of fixed and working capital, other tangible assets and financial resources, and it had the right to administer, use and dispose of its property. It was an independent legal entity. The State was not responsible for the obligations of the enterprise, and vice versa. The enterprise operated on principles of full accountability and self-financing. Under article 19 of the Act, the foreign economic activities of an enterprise were an important part of its entire operation. A major provision of the Act was that an enterprise which was a major supplier of goods or services for export might be granted the right to engage directly in export/import operations and also on markets in the capitalist and developing countries. Accordingly, a distinction had to be made between two types of State property: on the one hand, property which was directly administered by the State or its organs and which, regardless of the nature of the activity that was the subject of the claim against the State or its organs, enjoyed full immunity from foreign jurisdiction; and, on the other, segregated State property administered by State enterprises (associations), which were independent legal persons and did not enjoy immunity in the event of any claim against the enterprise before the courts of a foreign State.

66. Thus each State determined for itself the régime governing State property. The Soviet State, for its part, segregated part of that property, transferring it to State legal persons, including enterprises, or granting the latter certain property rights. Only in cases relating to the obligations of the enterprise did its property not enjoy immunity with respect to the preliminary submission of a claim or the enforcement of a decision. However, if a plaintiff applied for attachment of the property of a State enterprise in a claim brought not against the enterprise, but against some other legal person or the State itself, no proceedings could be taken against such property, for in such cases the Soviet State was entitled to plead that the State property enjoyed immunity.

The meeting rose at 1.10 p.m.

2117th MEETING

Tuesday, 13 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Prince Ajibola, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/410 and Add.1-5,[1] A/CN.4/415,[2] A/CN.4/422 and Add.1,[3] A/CN.4/L.431, sect. F)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CONSIDERATION OF THE DRAFT ARTICLES[4] ON SECOND READING (*continued*)

1. Mr. BARSEGOV, continuing the statement he had begun at the previous meeting, said that, in the case of the Soviet Union, State property administered by foreign trade organizations or industrial enterprises did not enjoy immunity in the event of an action brought against the organization or enterprise in connection with its statutory activity. That was, however, not the case in the opposite situation, where, if the property was attached as State property, it could no longer be segregated from socialist State property. Like any other State property, namely non-segregated property, such property enjoyed immunity. In that connection, he said that the proposed new article 11 *bis* (A/CN.4/415, para. 122) contained a legal inaccuracy; contrary to what it stipulated, a State enterprise did not enter into a contract "on behalf of a State". In the light of those considerations, he proposed the following alternative text for article 11 *bis*:

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[1] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[2] *Ibid.*

[3] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[4] For the texts, see 2114th meeting, para. 31.

"1. If a State enterprise enters into a commercial contract with a foreign juridicial or natural person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of the other State, the State enterprise (State juridical person) shall not enjoy immunity from jurisdiction in a proceeding arising out of that commercial contract.

"2. Paragraph 1 shall not apply when the action is brought not against the State juridical person which has entered into a commercial contract with a foreign natural or juridical person, but against some other enterprise of the same State or against that State itself. Furthermore, the provisions of this article shall not apply when the action is brought in connection with extra-contractual relations.

"3. Paragraph 1 shall not be applied by the State of the forum if, in corresponding cases, jurisdictional immunity is granted in that State to State juridical persons."

2. Such provisions did not appear to be in contradiction with those of national legislation in the matter. In support of that comment, he referred to section 1603 (*a*) of the United States *Foreign Sovereign Immunities Act of 1976*, which contained the following definition of a "foreign State":

A "foreign State" . . . includes a political subdivision of a foreign State or an agency or instrumentality of a foreign State . . .

That provision was explained by section 1603 (b), which read:

An "agency or instrumentality of a foreign State" means any entity

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign State or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign State or political subdivision thereof . . .

. . .

In jurisdictional practice, United States courts recognized the status of State agencies as State enterprises without any problem. There were also no particular problems with regard to the recognition as foreign States of enterprises of which the State was the sole owner.

3. He had taken note with great interest of the statements made by the members of the Commission who had already spoken on the question and, in particular, of that by Mr. Shi, who had also proposed a new article 11 *bis* (2115th meeting, para. 24). There was no doubt that his proposal, like the others made in that regard, would pave the way for broad agreement on the content of that article.

4. Mr. SEPÚLVEDA GUTIÉRREZ, noting that the Special Rapporteur's work was bringing the Commission closer to a consensus, said that he would refer only to the controversial aspects of articles 1 to 11.

5. Article 1 was acceptable and the Special Rapporteur had been right not to add anything to the text adopted on first reading, which had the merit of brevity.

6. It would be logical to merge articles 2 and 3 because they dealt with interrelated questions of terminology, and the title of article 3, "Interpretative provisions", would have given rise to some discussion. He therefore agreed with the way the Special Rapporteur had resolved the problem in his preliminary report. However, the proposed new text (A/CN.4/415, para. 29) called for some comments. For example, paragraph 1 (*b*) (ii) should be worded more precisely in order to avoid the doubts and confusion to which it could give rise. In Spanish, there might be a better way of saying *realizar actos en ejercicio de las prerrogativas del poder público*. Paragraph 3 should also be amended to indicate clearly that it referred to contracts concluded for a public purpose.

7. Although he agreed in principle with the proposed new text of paragraph 1 of article 4 (*ibid.*, para. 50), he believed the article did not really have a place in the draft and shared the doubts expressed in that regard by Mr. Mahiou at the previous meeting.

8. The safeguard clause at the beginning of article 5 was necessary, since there were cases in which retroactivity could have beneficial effects. In the absence of such a clause, a State party in whose territory proceedings were being conducted in connection with immunities which that State did not recognize would still have to abide by the régime established in the future convention.

9. With regard to article 6, which was the key provision in the system of immunities, he agreed with several previous speakers and with the Special Rapporteur that the words in square brackets should be deleted because of the problems to which they gave rise. The new article 6 *bis*, proposed by the Special Rapporteur as a possible compromise solution in his second report (A/CN.4/422 and Add.1, para. 17), created more problems than it would solve.

10. He supported the proposal by Australia to use the expressions "forum State" and "foreign State" in article 7 and was in favour of the new text proposed by the Special Rapporteur (A/CN.4/415, para. 79), which was shorter and clearer than the adopted text.

11. He endorsed the suggestion that, in article 8 *(c)*, the words "formal and written" or an equivalent expression should be added before the word "declaration". For the sake of greater clarity, moreover, the word "matter" in the introductory clause should be replaced by "dispute".

12. He also supported the new text of article 9 proposed by the Special Rapporteur (*ibid.*, para. 100), despite the words "at the earliest possible moment", at the end of paragraph 1, which were much too vague for a legal instrument. The Drafting Committee would no doubt find better wording.

13. The new paragraph 4 proposed for article 10 (*ibid.*, para. 107), was acceptable and made the article more precise.

14. Article 11 must clearly explain the concept of a "State enterprise" and should be kept in line with the other relevant provisions of the draft. The amended text proposed for paragraph 1 (*ibid.*, para. 121) was acceptable, but it stood in need of some improvement. He could not agree, however, to the proposed new article 11 *bis* (*ibid.*, para. 122), because the doctrine of segregated State property was not yet recognized in all countries. The Commission would have to consider it in depth if it was to protect the rights of certain countries, particularly those of the third world. He would have to look at Mr. Barsegov's proposal for article 11 *bis* (para. 1 above) more closely before he could take a decision on it.

15. Lastly, he proposed that articles 1 to 11 be referred to the Drafting Committee.

16. Mr. THIAM paid tribute to the Special Rapporteur and said that, at present, he did not wish to refer to questions of principle which had already been discussed at length. Instead, he would make a few comments on some of the draft articles.

17. He agreed with the wording of article 3, but, in order to take account of the systems of public law in force in certain countries, he would like it to list the various subdivisions of the State and, in particular, the administrative subdivisions—communes, departments, etc.—which were entitled to perform acts in the exercise of sovereign authority. As to the character of a contract, he noted that it was usually defined in terms of its nature, but he could agree to the concept of purpose being brought into play. The State would, however, have to say so expressly, because the principle was that the nature of the contract prevailed.

18. With regard to article 4, he said that there were major differences between immunity from jurisdiction and diplomatic immunity. The latter, which was linked to the diplomatic function and limited in time, differed in nature from jurisdictional immunity. It also had a different purpose, namely to guarantee the free exercise of the diplomatic function and to ensure the independence of the diplomat and the freedom without which he could not carry out his mission. Naturally, it involved immunity from jurisdiction as well, but such immunity was provisional and protected the diplomat only in the exercise of his functions. Immunity from jurisdiction was linked to the very sovereignty of the State: it was permanent and did not depend on changes of Government. Article 4 thus dealt unnecessarily with certain questions and might even create confusion. For example, why mention the privileges and immunities of heads of State, which were irrelevant to the issue? The wisest course would be to delete the article.

19. Referring to article 6, he said that he did not wish to reopen the theoretical—and virtually deadlocked—discussion of the question whether immunity was or was not a principle of international law; he preferred to confine himself to practical matters. In that connection, the Commission must not forget that States always tried to find the most convenient and most specific solutions to problems arising out of the organization of their relations and that they did so on the basis of reciprocity. The words in square brackets were ambiguous and could lead to disagreement. Their deletion would do no harm.

20. Article 7 was also unnecessary and its title difficult to understand. Moreover, a look at the elements composing the text showed that paragraph 3 referred to the "organs" of a State, whereas the term "State" had been defined in an earlier article.

21. He was not clear about the meaning of the new paragraph 4 proposed for article 10 (A/CN.4/415, para. 107). Why should the amount of the counter-claim be limited? It was logical to require the existence of a legal relationship between the two claims, but not to prevent one State from claiming more than the other State concerned. He referred to the case in which a wrongful act had caused different amounts of harm to States A and B and where State A would be prevented from claiming reparation for the harm which it had suffered—which was greater than that sustained by State B—by entering a counter-claim seeking relief exceeding in amount that sought by State B. A provision which would have such an effect must be deleted.

22. The proposed new article 11 *bis* (*ibid.*, para. 122) raised thorny matters of principle which he had not had enough time to consider, particularly since the suggested alternatives, especially the proposal by Mr. Shi (2115th meeting, para. 24), had not yet been translated into French. He therefore reserved his position on that point.

23. Mr. NJENGA said that the texts which the Special Rapporteur was proposing on the basis of the comments and observations of Governments to improve on the draft articles adopted on first reading would be of considerable assistance to the Commission in its work. He was particularly grateful to the Special Rapporteur for the theoretical analysis he gave of the evolution of the concept of jurisdictional immunity of States and their property and of the juridical basis for the theories of absolute immunity and restricted immunity. Although the second reading was not the appropriate time to enter into a "theological" debate on the basis of jurisdictional immunities, he wished to state that, in his view, the case-law, State practice and national legislation cited by the Special Rapporteur did not justify the conclusion he reached in his second report that

> the doctrine of absolute immunity has gradually given way to a doctrine of restricted immunity, and therefore it now appears that there is no existing rule of customary international law which automatically requires a State to grant jurisdictional immunity to other States in general terms. ... (A/CN.4/422 and Add.1, para. 4.)

24. The examples given by the Special Rapporteur (*ibid.*, paras. 7-8) were fairly recent, such as the "Tate letter" of the State Department of the United States of America (1952), *The "Philippine Admiral"* case (1975) and the *Danish State Railways in Germany* case (1953), but they were all taken from one part of the world, namely the Western industrialized countries. The domestic legislation cited was also recent: the United States *Foreign Sovereign Immunities Act* had been enacted in 1976, the United Kingdom *State Immunity Act* in 1978 and similar legislation in Singapore in 1979, in Pakistan in 1981, in South Africa in 1981, in Canada in 1982 and in Australia in 1985. If anything, all those texts could be regarded as a departure from the rule of absolute immunity, which continued to enjoy the support of the overwhelming majority of the international community, including the developing countries. He categorically refuted the view which G. M. Badr had expressed in 1984 in his book, *State Immunity: An Analytical and Prognostic View*, and which had been cited by Mr. Mahiou (2116th meeting), namely that the Asian-African Legal Consultative Committee subscribed to the theory of restricted immunity. The fact was that, at its 1985, 1986 and 1987 sessions, the Committee had held extensive discussions on what it considered to be the unjustified erosion of the jurisdictional immunity of States as a result of the recognition of extraterritorial jurisdiction by the United States *Foreign Sovereign Immunities Act of 1976*. Moreover, that Act had been the subject of a meeting in 1983 of the legal advisers of the member States of the Committee, who had reached the conclusion that, in view of differences in State practice and the growing trend towards the enactment of national legislation restricting immunity, it was desirable that the law on the subject should

be codified by the Commission in order to achieve a uniform approach to the application of the rule of sovereign immunity.

25. Commenting on part I of the draft (Introduction), he said that he endorsed the Special Rapporteur's proposal to merge article 2 (Use of terms) and article 3 (Interpretative provisions) in a single article 2 entitled "Use of terms". With regard to the definition of the word "court" in paragraph 1 (*a*) of article 2, he noted that, in some countries, judicial functions also covered functions carried out by organs of the State other than courts. The Special Rapporteur might wish to consider the definition of the term contained in Australia's *Foreign States Immunities Act 1985*, section 3 of which provided that a "court" included a tribunal or other body, by whatever name it was called, that had functions or exercised powers that were judicial functions or powers or were of a kind similar to judicial functions or powers.

26. The Special Rapporteur was to be commended for his efforts to ensure that the expression "commercial contract" did not extend to governmental transactions for public services which were essentially sovereign acts and must continue to enjoy immunity. Paragraph 3 of the new article 2 (A/CN.4/415, para. 29) was an improvement on the text adopted on first reading (para. 2 of former article 3) in that it provided for the application of two criteria: the nature of the contract and the purpose of the contract. As drafted, however, the purpose test would apply only "if an international agreement between the States concerned or a written contract between the parties stipulates that the contract is for the public governmental purpose". In his view, that was an unduly restrictive application of the purpose criterion, for, even without an explicit stipulation, it might be obvious that certain transactions, such as those entered into in the event of floods, emergency relief or immunization campaigns, were for public purposes.

27. Turning to part II of the draft (General principles), he said that the proponents of the absolute theory of jurisdictional immunity and the supporters of the restrictive theory agreed on the existence of customary norms in the matter, based on the sovereign equality of States. In a world characterized by different social, economic and political systems, States could not maintain harmonious relations if every State seized each opportunity to exercise its jurisdiction over the legitimate activity of other States within its territory. It was therefore essential for the Commission to state the basic and definitive principle of State immunity and to secure its universal application. That principle should not be subject to the so-called "relevant rules of general international law", which were undefined—if indeed they existed. He therefore welcomed the proposal to delete the bracketed phrase in article 6 (State immunity). The article as thus amended would provide for a régime that would not be rigid or immutable and that would be applied in a non-discriminatory manner in accordance with article 28, paragraph 1, and on the basis of reciprocity, in accordance with article 28, paragraph 2. Provision could also be made for particularly favourable régimes which could be applied within a region or subregion on the basis of specific agreements.

28. He would, however, caution against a multiplicity of régimes based on the principle of reciprocity and on a restrictive application of the articles, which was inherent in the new article 6 *bis* proposed by the Special Rapporteur (A/CN.4/422 and Add.1, para. 17). In his view, that article would be a significant obstacle to the formulation of an objective criterion for State immunity and he would therefore oppose it. Any exceptions to State immunity agreed on by the Commission should be spelled out in part III of the draft; and any exceptions which might become necessary in the future could be the subject of an additional protocol amending the future convention.

29. He could accept the minor changes which had been proposed by the Special Rapporteur in article 7 (Modalities for giving effect to State immunity) and which consisted of replacing the expressions "State" and "another State" by "forum State" and "foreign State", respectively, and of simplifying paragraph 3. He also supported the proposed new text of subparagraph (*c*) of article 8 (A/CN.4/415, para. 93), which underlined the voluntary nature of the submission of a dispute to local jurisdiction.

30. Again, he could accept the text proposed for article 9 (*ibid.*, para. 100), which was based on the theory of implied consent to the exercise of jurisdiction by virtue of prior participation in a proceeding. He considered, however, that the Special Rapporteur had been right to qualify that rule in cases where the State took a step relating to the merits before it had knowledge of facts on which a claim to immunity might be based. He thus agreed with the proposed addition to paragraph 1 (*b*), on the basis of article 3, paragraph 1, of the 1972 European Convention on State Immunity.

31. He would like some clarification concerning the proposed new paragraph 4 of article 10 (*ibid.*, para. 107), the wording of which should, in any event, be improved.

32. It was futile, in his view, to dwell at the present stage on the choice of a title for part III of the draft ([Limitations on] [Exceptions to] State immunity). Once a satisfactory compromise had been reached regarding the types and nature of the situations in which State immunity should not be invoked, it would be of little significance whether the word "limitations" or the word "exceptions" was used.

33. With regard to article 11 (Commercial contracts), he believed that, properly delineated, commercial activity was an area in which State immunity should not be invoked by a foreign State engaged in trade or commerce to oust the jurisdiction of the forum State. While he welcomed the new text proposed for paragraph 1 (*ibid.*, para. 121), there would be practical difficulties in applying the "applicable rules of private international law", owing to the differences that might arise as to whether the decisive factor was the *lex loci contractus*, the *lex domicilii* or the *lex situs*. As some Governments had suggested, it might be preferable to include in the article a rule pertaining to the jurisdictional link between the commercial contract and the forum State. Furthermore, paragraph 2 (*a*) should also cover financial and commercial agreements concluded between States and international organizations such as IMF, the World Bank and the African Development Bank.

34. Referring to the proposed new article 11 *bis*, on segregated State property (*ibid.*, para. 122), he said that, while the Special Rapporteur was to be commended on his willingness to accommodate different social and economic systems in a flexible and fair manner, it was the generally accepted view that State trading agencies enjoying separate

legal personality should neither seek nor receive immunities. Notwithstanding the explanations given by Mr. Shi (2115th meeting) and Mr. Barsegov concerning the operation of such State agencies in the socialist countries, the concept of "segregated State property" remained elusive to many and the word "segregated" itself was not felicitous. He would point out that, in most developing countries, there were similar agencies, with independent legal personality and financial autonomy, which would not be eligible to claim State immunity and in whose name the State should not be impleaded. The concept of "segregated State property" and the formulation of article 11 *bis* therefore required further clarification inasmuch as the question of immunity was perhaps being confused with the question of the party against which to take legal action. It should be made clear that, in the cases covered by the article, the courts of the forum State would have the right to bring a claim against a State enterprise, but not against the State itself. The wording suggested by Mr. Shi (*ibid.*, para. 24) was an improvement on the text proposed by the Special Rapporteur, but, for the sake of clarity, it would perhaps be advisable to replace the word "unless", in paragraph 1, by "if". He also found the wording proposed by Mr. Barsegov (para. 1 above) interesting, but he wondered whether paragraph 3 was really necessary.

35. He agreed with the Special Rapporteur that the words "and is covered by the social security provisions which may be in force in that other State", in paragraph 1 of article 12 (Contracts of employment), should be deleted. He was, however, not persuaded of the advisability of deleting subparagraphs (*a*) and (*b*) of paragraph 2, since they dealt with well-established situations of State immunity.

36. He doubted whether the exception provided for in article 13 (Personal injuries and damage to property) would be acceptable in principle. There was a paucity of judicial decisions in that regard and he was not persuaded by the argument that the dignity of the State would not be impugned, as insurance companies would, in most cases, meet the claim for personal injury. It was often said that it would be unfair to deny redress to a person who suffered personal injury or damage to his property at the hands of a foreign State; that was a weighty argument. The same could, however, be said of injury caused by a diplomatic agent, and it would be somewhat bizarre to justify diplomatic immunity for the agents of the State, but to deny that same immunity to the State itself. To say that was not to exclude responsibility, however. An act or omission resulting in personal injury or damage to property might constitute an internationally wrongful act for which the author State was liable under international law. It was in that connection that he supported the Special Rapporteur's proposal for the addition of a new paragraph 2 (A/CN.4/415, para. 143). Since the principle stated therein was of general application, however, the provision might be best reflected in the preamble.

37. Article 14 provided for an exception to immunity based on the well-established principle of the sovereign authority of the forum State in matters of ownership, possession and use of property. However, he endorsed the Soviet Government's view that paragraph 1 (*c*), (*d*) and (*e*) could open the door to foreign jurisdiction even in the absence of any link between the property and the forum State. He therefore supported the Special Rapporteur's proposal that those subparagraphs be deleted.

38. Article 15 (Patents, trade marks and intellectual or industrial property), which was an extension of articles 11 and 14, was generally acceptable and he supported the Special Rapporteur's proposal that it be explained in the commentary that the words "any other similar form of intellectual or industrial property" covered new categories of intellectual property, such as plant breeders' rights.

39. Article 16 (Fiscal matters) was also acceptable to him, subject to an explanation in the commentary that the article did not apply to State property used for diplomatic or consular purposes. He had no comment on article 17 (Participation in companies or other collective bodies), since a State which chose to enter into business with a company or commercial body in the forum State must be presumed to have accepted the jurisdiction of that State.

40. He broadly supported article 18 (State-owned or State-operated ships engaged in commercial service), but considered that the Special Rapporteur's proposal to delete from paragraphs 1 and 4 the term "non-governmental", which had been a source of controversy in the past, would represent a serious erosion of jurisdictional immunity and would frustrate the efforts of many developing countries which were trying to establish national shipping lines as a matter of national policy and not only for commercial purposes.

41. He would urge caution in drafting article 19 (Effect of an arbitration agreement), which provided for an exception to immunity in connection with the supervisory role exercised by the courts of the forum State in arbitration. Parties usually opted for arbitration in preference to judicial proceedings because it saved time and expense and they were free to choose not only the panel of arbitrators, but also the applicable law. All those advantages would be lost if a court were subsequently required to pass judgment on the validity of the arbitration agreement, the procedure and the award itself. Of course, resort to judicial organs could be expressly excluded under the arbitration agreement, but the legality of such a clause could also be the subject of judicial proceedings. The Commission should perhaps at least make more specific provision for such a possibility. In any event, he was not in favour of the Special Rapporteur's proposal to extend the scope of the article to differences relating to a "civil or commercial matter".

42. The Special Rapporteur had rightly noted, with regard to article 20 (Cases of nationalization), that the Commission had not been requested to express a legal opinion on the extraterritorial effects of measures of nationalization. For his own part, he saw no reason to retain the article, particularly since, as the Government of Thailand had observed, it had no connection with part III of the draft.

43. Turning to part IV of the draft (State immunity in respect of property from measures of constraint), he said it was a well-established principle of international law that waiver of immunity, express or implied, with regard to the adjudication of a dispute by a foreign court did not necessarily amount to waiver of immunity of State property from attachment, seizure or execution. That principle would apply even in the situations of exemption from immunity contemplated in the draft articles. It would not be conducive to harmonious State relations to subject State property to measures of constraint and, to the extent that article 21 stated that rule of immunity, it was acceptable. He was not, however, persuaded that there should be any exception

to that rule. Any measure of constraint was likely to strain inter-State relations and the best way of enforcing court decisions against States would, in his view, be through diplomatic channels. A State was of course free to give its consent to measures of constraint in writing, in a treaty or in a convention, but such consent had to be express. Subject to that condition, he supported article 22 (Consent to measures of constraint). He also supported article 23, which listed the categories of property that could on no account be the subject of measures of constraint. With regard to the term "non-governmental" in paragraph 1, however, he would refer members to his remarks on article 18.

44. Lastly, with regard to part V of the draft (Miscellaneous provisions), he generally supported articles 25 (Default judgment), 26 (Immunity from measures of coercion) and 27 (Procedural immunities), but reserved the right to revert to those matters in the light of the debate.

45. Mr. AL-QAYSI, commenting on articles 12 to 20, said that the formulation of those provisions gave the Commission an opportunity to work out the compromise solutions needed for the achievement of wider acceptance by States of the draft articles as a whole. He was convinced that the Commission would not fail in its efforts to achieve that goal.

46. He shared the Special Rapporteur's view that the reference to social security provisions in article 12, paragraph 1, was neither effective nor necessary. He had doubts, however, whether, if the article were retained, subparagraphs (*a*) and (*b*) of paragraph 2 should likewise be deleted. In the light of the Special Rapporteur's comments on the draft as a whole and on those subparagraphs in particular, the texts in question seemed to be well-founded and to leave no ambiguity. The fear that the expression "governmental authority" might lead to excessively broad interpretations could arise in connection with similar expressions in other articles as well, but clear and succinct commentaries would suffice to remove any ambiguity.

47. With regard to article 13, he said that a close analysis of the Special Rapporteur's exposé in his preliminary report (A/CN.4/415) and his second report (A/CN.4/422 and Add.1) revealed many loose ends. For example, although the scope of the article had been narrowed down in 1984 to cover traffic accidents, it was now proposed to delete the second territorial limitation—that of the presence of the author of the act or omission in the territory of the State of the forum at the time of the act or omission. Was that conceivable? Could a traffic accident be committed by remote control or by correspondence? Again, were there to be two standards of attribution of wrongful acts to States, as seemed to be envisaged—one as a general requirement of State responsibility and the other for the purposes of article 13? If so, what was the foundation for the distinction and what would its consequences be? The article also gave rise to other difficulties, in particular those referred to in the comments made by the Soviet Union and the German Democratic Republic. Moreover, the Special Rapporteur took the view that the Commission "should reconsider the scope of the article in the light of the fact that liability cases connected with criminal offences have thus far been very few in practice" (*ibid.*, para. 22). The choice seemed to be between giving the article a broad scope—a solution which, as the Special Rapporteur rightly noted, would not receive support from a significant number of States—or a scope explicitly limited to traffic accidents, for which, as the Special Rapporteur again rightly indicated, insurance coverage would be sought and in which case there would therefore be insufficient substance to warrant a separate article. In view of those uncertainties, he had strong doubts about the usefulness of such a provision in the form proposed by the Special Rapporteur.

48. Concerning article 14, he endorsed the Special Rapporteur's proposal to delete subparagraphs (*b*) to (*e*) of paragraph 1. As to article 15, the reasoning adopted by the Special Rapporteur in explaining its substance was well taken.

49. He had not yet reached any conclusion on article 16. On the one hand, he sympathized to some extent with Mr. Shi's reasoning (2115th meeting), but, on the other, he considered that the addition to the article—should its substance be acceptable—of a reference to international agreements in force between the two States concerned, as suggested by Spain, merited approval.

50. With regard to article 18 (State-owned or State-operated ships engaged in commercial service), he agreed that the term "non-governmental" in square brackets in paragraphs 1 and 4 should be deleted for the reasons advanced by the Special Rapporteur in his two reports. He also considered that the proposed new paragraph 1 *bis* (A/CN.4/422 and Add.1, para. 26) would, subject to drafting refinements along the lines of those to be agreed on for the proposed new article 11 *bis*, serve to bridge differences. A point on which clarification by the Special Rapporteur seemed to be necessary was the comment in his second report that paragraph 6 "should be redrafted because it could be misinterpreted to the effect that States may plead all measures of defence, prescription and limitation of liability only in proceedings relating to the operation of the relevant ships and cargoes" (*ibid.*, para. 25). The provisions of paragraphs 1 and 4 dealt precisely and exclusively with proceedings relating to ships and cargoes and it was difficult to see how there could be any misinterpretation. In the light of the Special Rapporteur's reasoning in his report (*ibid.*, paras. 28-31), he fully endorsed the conclusion that no special provision concerning aircraft should be added to article 18.

51. Like the Special Rapporteur, he preferred the expression "civil or commercial matter" in article 19 (Effect of an arbitration agreement), because it was more comprehensive than the expression "commercial contract" and should not give rise to problems since the subject-matter to be referred to arbitration was to be determined in an agreement. As referral to arbitration had to be made by agreement, there seemed to be no reason why the provisions of article 19 should be tied to the exception based on the commercial nature of contracts. With regard to the question whether, as the Special Rapporteur suggested, a new subparagraph (*d*) relating to the recognition of the award should be added, on the understanding that it should not be interpreted as implying waiver of immunity from execution, he accepted the suggestion, provided that the understanding was explicitly incorporated in the new text.

52. Despite the Special Rapporteur's reasoning in his second report (*ibid.*, para. 41), he was not convinced that article 20 should appear as an exception to State immunity in part III of the draft. Even in the hypothetical case

envisaged by the Special Rapporteur concerning the relationship between article 20 and article 15 (*b*), it was not clear whether the reissuing of the patent by the patent office of State Y for State X would not, on the basis of article 15 (*b*), make State X the owner of the protected right in the State of the forum. In any event, if it was considered that the substance of article 20 should be included, the appropriate place for it would be in part I of the draft.

53. In conclusion, he noted that the Commission seemed to be rushing through the second reading of the draft articles, despite their complexity and even though many members rightly considered that some of the articles required further in-depth consideration. It was to be hoped that, at future sessions, the Commission would allow time for thorough consideration of the most controversial articles before referring them to the Drafting Committee; it would then be able to provide the Committee with more specific guidelines.

54. Mr. BENNOUNA, after paying tribute to the Special Rapporteur for the way in which he had, in accordance with his country's philosophical traditions, avoided controversy, bridged opposing positions and displayed a pragmatic approach, said that he had no intention of reopening discussions of a theoretical or doctrinal nature that were hardly to the point in connection with the task of drafting a convention intended to be acceptable to the largest possible number of States. In the case of a topic which had taken shape in the practice and case-law of different national legal systems, it would not be possible in any event to find a doctrine or basic principles that were common to all those systems. What the Commission could do was to proceed pragmatically and propose some elements of compromise to meet the needs arising out of the growing interdependence of States in their economic and trade relations. It should also set aside the distinction between developed and developing countries and, instead, take account of the balance of power and the effect of different degrees of power on the rules it was formulating.

55. In accordance with the decision taken, he would confine his comments for the time being to articles 1 to 11, with regard to which he approved of most of the drafting improvements proposed by the Special Rapporteur.

56. The Special Rapporteur's proposal to combine articles 2 and 3 was acceptable. He nevertheless had some doubts about the wisdom of including representatives of the State in the definition of the State, as was done in paragraph 1 (*b*) (iv) of the new combined article 2 (A/CN.4/415, para. 29). The difference between "representative" and "represented" was a basic one and any confusion between the immunities of the State and those of its representatives, such as diplomatic and consular immunities, should be avoided.

57. With regard to paragraph 3 of the new article 2, relating to the definition of a commercial contract, he was in favour of maintaining the objective criterion of the nature of the contract and mentioning the purpose of the contract only as an additional factor of interpretation if the first criterion was insufficient or inapplicable. There was no point in referring to the hypothetical case of an international agreement between the States concerned, for, if such an agreement existed, the court would have to take it into consideration in any event. Moreover, a vague reference to a public purpose could be included in a contract without changing its purely commercial nature. However, if a State was acting in the exercise of its sovereign authority—such authority being outside the scope of ordinary law—it could agree with its contractual partner to have a provision to that effect included in the contract and thus become expressly entitled to jurisdictional immunity.

58. He agreed with several other members that the words in square brackets in article 6 should be deleted. The Commission could not take back with one hand what it was giving with the other; it could not state a legal rule of immunity and then empty that rule of its substance by referring to "the relevant rules of general international law", which were, in fact, no more than the rules defined by each State within its own legal system. The Special Rapporteur had rightly acknowledged that fact in his oral introduction and in his preliminary report (A/CN.4/415). The adoption of the proposal by Spain that the reference to general international law be included in the preamble would amount to letting in through the window what had been thrown out of the door. Compromises of that kind might be warranted in a resolution or a declaration of a political nature, but they had no place in a draft convention.

59. The new article 6 *bis* (A/CN.4/422 and Add.1, para. 17), which the Special Rapporteur was proposing by way of a compromise and which was based on the legal technique of reservations and objections to reservations, was designed to enable States to propose new provisions and exceptions even if they were not included in the convention and had not been negotiated. In his view, such a provision would upset the balance of the draft and change its overall structure and, instead of establishing a universal régime, might give rise to a large number of different types of bilateral practice. It also failed to take account of the balance of power he had already mentioned, in other words the pressures which the most powerful States could bring to bear in order to make other States accept their reservations for fear of being denied contracts they needed for their economic development. He was therefore unable to accept the Special Rapporteur's proposal, however well-intentioned it might be.

60. Referring to article 10, he regretted that, on the basis of a suggestion by Thailand, the Special Rapporteur was recommending the addition of a new paragraph 4 designed to limit immunity by a further condition relating to the amounts of the claim and the counter-claim. That was altogether unacceptable, since a State would have only to make a counter-claim in an amount exceeding that of the main claim in order to prevent the court from dealing with the matter. As Mr. Thiam had said, it should be enough that claims were of the same nature, were related to the same facts and were based on the same legal relationship.

61. With regard to the title of part III of the draft, he had no preference for either of the expressions in square brackets. He called on the Special Rapporteur to show imagination and pragmatism in order to find as neutral an expression as possible and said that he was prepared to help in that task.

62. Lastly, the proposed new article 11 *bis* (A/CN.4/415, para. 122) met the concerns of certain States and was to be welcomed for that reason. However, he considered the text unacceptable in its present form. The situation it envisaged was purely theoretical; an enterprise of the type

referred to would not be empowered to conclude a contract on behalf of the State. If the intention was to introduce a safeguard clause—and, on the face of it, article 3 would be the correct place for such a provision—it might be possible to adopt the proposal of the German Democratic Republic by specifying in the article on the use of terms that a State enterprise subject to the same rules and obligations of trade law as a private natural or juridical person should not, for the purpose of the present articles, be considered to be acting on behalf of the State. However, if States were not satisfied with such a solution, he would not object to the adoption of a new provision along the lines of those proposed by Mr. Shi (2115th meeting, para. 24) and Mr. Barsegov (para. 1 above).

63. Mr. Sreenivasa RAO said that the establishment of the proposed régime called for a less doctrinaire and more pragmatic approach based on a number of principles.

64. The first principle was the need to protect the sovereign immunity of States and their organs, including the constituents of federal States and their organs, in international relations.

65. Secondly, it had to be ensured that any differences and disputes arising from commercial transactions, namely transactions involving exchanges of goods and services for monetary consideration, were subject to the law and courts of the forum State where the obligation to perform the contract was at issue.

66. Thirdly, in determining what constituted a commercial transaction, due weight had to be given not only to the nature of the contract, but also to the purpose of the transaction, the nature of the contract being appreciated in the light of circumstances and context.

67. Fourthly, where the forum State and the foreign State had entered into an agreement recognizing the purpose of the contract to be one of public interest and not of commerce, even if goods and services were exchanged for monetary consideration, any differences and disputes that might arise from the contract had to be subject to negotiation and agreement between the two States, the rights and interests of private parties being underwritten by the forum State. The foreign State in such a case should have the obligation to settle the matter to the satisfaction of the forum State in return for the jurisdictional immunity it enjoyed.

68. Fifthly, the necessary compromise formulations had to be found so that the draft articles would be widely acceptable and the Commission could succeed in establishing a universally recognized legal régime which would lend stability and security to international relations and transactions. The law of sovereign immunities had recently been subject to an admittedly limited number of attacks that took the form of national laws and judicial decisions which it was being sought to portray as representing the current state of the law or, at any rate, as a basis for the progressive development of international law. That tendency towards the unilateral interpretation of a body of laws affecting all States had to be arrested by the adoption of an international régime which was clear, comprehensive and based on consensus.

69. In the proposed new text of article 2 (A/CN.4/415, para. 29), where the definition of the terms "court" and "State" seemed to give rise to some problems, it would be desirable to avoid formulations such as "political subdivisions" and "agencies or instrumentalities" of the State, which apparently created more problems than they solved. The definition of the expression "commercial contract", in paragraph 1 (*c*), was acceptable, provided that the need to give due weight to the purpose of the contract was appropriately emphasized in the commentary. He welcomed paragraph 3 for the same reasons he had given in his general comments, and because it would promote consensus.

70. The provisions of article 3 should indeed be incorporated in article 2, but paragraph 2 of article 3 was confusing and therefore open to criticism. The general rule in question was that if, in the practice and policy of the foreign State, an activity was considered to be commercial, that State should not seek immunity from the jurisdiction of the courts of the forum State for claims and counter-claims involving the same type of activity. That was a rule of fairness, of estoppel and even of reciprocity and it should either be stated forthrightly or, in order to promote consensus, paragraph 2 should be deleted. The text proposed by the Special Rapporteur for paragraph 3 of the new article 2 dealt with a different situation and could not serve as a substitute for paragraph 2 of article 3.

71. Article 4 also gave rise to some problems. In his opinion, there was no need to deal with the question of diplomatic immunities in draft articles on sovereign immunity: those were two entirely different fields. A general statement in the preamble referring to the immunities recognized in the relevant conventions codifying diplomatic and consular law would suffice. The immunities referred to in paragraph 2 of article 4 should be extended not only to heads of State, but also to heads of Government and ministers for foreign affairs. In that connection, he did not share the hesitation of the Special Rapporteur, who said in his preliminary report that those privileges were accorded "rather on the basis of international comity than of established international law" (*ibid.*, para. 49).

72. Article 5, on non-retroactivity, should be looked at again in terms both of drafting and of substance. The idea involved was a simple one: if, in certain places, the draft articles incorporated or reflected principles of customary international law on the topic under consideration, they would apply even in cases which had arisen prior to their adoption—otherwise, they would not be retroactively applicable. That must be stated. Moreover, no harm would be done if article 5 were deleted, since an agreement or convention would normally come into operation as between the parties only after it had entered into force, subject to the operation of the principles of customary international law that were incorporated therein, provided that they were not controverted.

73. In article 6, the words in square brackets, "and the relevant rules of general international law", should be deleted. It was not a healthy practice to refer to those "relevant rules" whenever the Commission had some doubt about the acceptability of a provision. That solution only underlined the lack of agreement among States and served to promote differences of interpretation, and that was contrary to the objective of establishing a universally acceptable régime. Moreover, as Mr. Mahiou (2116th meeting) had explained and the Government of Cameroon had

pointed out, in the present state of affairs international law supported the principle of the sovereign immunity of States and permitted only limited exceptions.

74. The proposed new article 6 *bis* (A/CN.4/422 and Add.1, para. 17) did not serve any useful purpose. It dealt with a special case reminiscent of the reciprocity situation referred to in paragraph 2 of article 28, on non-discrimination. The question was whether special régimes should be provided for and recognized in the draft articles.

75. He was also not sure whether article 7 was really necessary. It appeared to duplicate the provisions of articles 1 and 2 and to state only what was already obvious. In any case, as it now stood, it gave rise to problems of interpretation; it should be reconsidered and shortened, as suggested by the Australian Government.

76. Article 8 did not give rise to any major problems, and he was not sure that the revision of subparagraph (*c*) suggested by the Special Rapporteur (A/CN.4/415, para. 93) was necessary. The Special Rapporteur's reference to article 46 of the 1969 Vienna Convention on the Law of Treaties in response to the comment made by the Mexican Government was very appropriate.

77. He had no major difficulty with article 9, but the comment made by the Mexican Government with regard to paragraph 2 should be borne in mind. It was true that the mere appearance of a State before a jurisdictional organ in order to protect its nationals did not mean that it waived its immunity.

78. As to the proposed new paragraph 4 of article 10 (*ibid.*, para. 107), he said that, once a State had submitted to jurisdiction, it should not be able to rule out the option of judicial settlement on the grounds indicated in that provision.

79. With regard to the proposed new article 11 *bis*, Mr. Shi (2115th meeting, para. 24) and Mr. Barsegov (para. 1 above) had proposed texts that deserved full attention, for they seemed to spell out more clearly what segregated State property consisted of.

80. Mr. McCAFFREY said that, before dealing with the draft articles one by one, he would refer generally to the approach to be followed for the second reading and to the general comments made by the Special Rapporteur in his second report (A/CN.4/422 and Add.1, paras. 2-19).

81. The Commission was embarking on the second reading in the midst of what both the previous and present Special Rapporteurs and most commentators had recognized as a trend towards limiting the circumstances in which a State could invoke immunity from jurisdiction. As Mr. Barsegov had demonstrated, moreover, some countries were in the process of thoroughly restructuring and decentralizing their economies and of strengthening the ties with their partners in the world market. Some States that had traditionally adhered to the absolute theory of jursidictional immunities were in the process of reconsidering their positions. Thus, in the past several years, there had been a number of almost revolutionary developments which had the potential to transform radically the practice of States in respect of jurisdictional immunities, although that would not happen overnight.

82. For those reasons, the Commission's approach to the second reading of the draft articles should be guided by two considerations. The first was that it should approach its task more deliberately and patiently than it normally did on second reading: there was no reason to rush and the task was far from finished. The second consideration was that the law in the area under examination was in a state of flux and would probably continue to evolve even after work on the draft articles had been completed: the United States of America, for example, had just enacted amendments to its *Foreign Sovereign Immunities Act of 1976*. The draft must therefore leave some room for further development of the law on jurisdictional immunities. Those considerations had led him to conclude that the Commission should not be in too much of a hurry and should concentrate for the time being on articles 1 to 11 *bis*, leaving the balance of the draft for discussion at its next session.

83. Still with regard to the consideration of the draft articles on second reading, the Special Rapporteur was right to say that the Commission must endeavour to prepare a new multilateral agreement which would make it possible "to reconcile conflicting sovereign interests arising out of the application or non-application of State immunity" (*ibid.*, para. 3). That was, after all, the main reason why the General Assembly had asked the Commission to take up work on the topic. Differences in economic systems and the increase in State trading since the end of the Second World War had given rise to disputes with regard to the circumstances under which a State and the organs through which it acted were immune from the jurisdiction of the courts of another State. While those disputes frequently arose as between States with planned economies—usually the defendants—and those with free-market economies—whose citizens were usually the plaintiffs—they also affected the developing countries, since much of their trading was carried out through State organizations or enterprises. It was thus in no one's interest to adopt an extreme approach: either it would discourage private enterprises from dealing with State entities or States would become reluctant to expose themselves to litigation in other countries. Instead, it was necessary to try to achieve the reconciliation to which the Special Rapporteur had referred.

84. He did not wish to enter into the debate on the current status of international law in the matter: he would, rather, say only that it was incontestable that a growing number of States had, either through legislation or through decisional law, permitted suits in their courts against foreign States in certain circumstances. While, as Mr. Mahiou (2116th meeting) had pointed out, it was not correct to say that defendant States had not contested such assertions of judicial jurisdiction, it must also be acknowledged that the practice of States adhering to the restricted immunities approach had been constant and uniform for some time; it could therefore not be asserted that there was universal recognition or observance of a monolithic rule on State jurisdictional immunities. When those same States were among the world's principal suppliers of capital, goods and services, the significance of their practice, and the tremendous importance of the Commission's task, came even more sharply into focus.

85. Turning to the draft articles themselves, he said that the Special Rapporteur was right to propose combining articles 2 and 3, but the new combined article 2 (A/CN.4/415, para. 29) called for some comments. The expression "sovereign authority", while not entirely satisfactory, was

intended to convey the meaning of the French expression *puissance publique*. The idea expressed by the term "governmental", which could be useful in the context of State responsibility, was ambiguous in the context of jurisdictional immunities: it could be argued that even State commercial activities (*acta jure gestionis*) were "governmental" activities, to the extent that they were done by the Government, even though the same acts could be done by private persons. As to whether "agencies or instrumentalities" of the State should be included in the definition of the "State", it could be argued that, if they were not included, the exceptions that applied to the State would not apply to them: that question merited careful consideration by the Commission.

86. The definition of a "commercial contract" in paragraph 1 (*c*) of the new article 2 was too limitative: it did not accurately reflect State practice and might be misleading. It would be better to refer to "commercial activity". If the first expression was retained, however, it must be defined broadly, as in paragraph 1 (*c*) (iii).

87. With regard to the determination of the nature of a contract, he could agree with the Special Rapporteur that paragraph 2 of article 3 as adopted on first reading lacked objectivity and made the exception it was intended to provide for meaningless. The Special Rapporteur's proposed revision in paragraph 3 of the new article 2 was preferable, but there was still room for improvement. For the sake of consistency, the expression "commercial contract" should be used instead of "contract for the sale or purchase of goods or the supply of services". The word "should" was to be avoided in a legal instrument, especially if the provision incorporating it was to be included in an article on the definition of terms.

88. There was, however, another, more fundamental point: even if a treaty or a contract contained a provision stipulating that the contract in question was for public governmental purposes, that might not be explicit enough for a private party to the contract. In the United States, for example, the *Foreign Sovereign Immunities Act of 1976* did not make the purpose of a contract a relevant criterion: the court could look only to the nature of the activity. The same was true in the practice of a number of States. The best way of handling the problem would be to leave it to the parties to stipulate, under article 11, paragraph 2 (*b*), that any dispute arising out of the transaction would not be subject to judicial jurisdiction: that would leave no doubt whatsoever in the minds of the parties.

89. Article 4 raised the question of the relationship between the draft articles and the 1961 Vienna Convention on Diplomatic Relations. That was an interesting problem, but not something with which the Commission should concern itself unduly. It had been said that the draft articles would lead to an anomalous situation, since a diplomat would be immune under the 1961 Vienna Convention for the very same acts that would subject the State he represented to jurisdiction. The situation might, however, not be as anomalous as was claimed. It was understandable that a diplomat should be accorded greater protection than a State, for the simple reason that having to defend a lawsuit would seriously hamper him in the performance of his functions; there was also the possibility that he would be exposed to pressure through litigation. Finally, it should not be forgotten that article 31, paragraph 1, of the 1961 Vienna Convention came very close to codifying some of the exceptions contained in the draft articles under consideration. He could therefore endorse the amended text of article 4, paragraph 1, proposed by the Special Rapporteur (*ibid.*, para. 50).

90. The words in square brackets in article 6, "and the relevant rules of general international law", should be retained in order to leave room for the continuation of the current trend. It would be difficult to locate that phrase anywhere else in the draft. The Special Rapporteur was also proposing a new article 6 *bis* (A/CN.4/422 and Add.1, para. 17), which did not, unfortunately, seem likely to accomplish the intended purpose. If, for example, State A filed a declaration adding an exception to those listed in the draft, but its declaration was nullified by the fact that State B "raised objection within thirty days", the result would be that State A, knowing what the probable outcome would be, would simply not become a party to the future convention. Article 6 *bis* was therefore not a positive addition to the draft.

91. The title of part III of the draft ([Limitations on] [Exceptions to] State immunity) raised a difficult point, since those in favour of the restrictive theory wanted to leave room for the practice of some States which went beyond the exceptions provided for in the draft articles. He wondered whether the Commission might use wording such as: "Cases in which State immunity may not be invoked before a court of another State".

92. He had a strong preference for the proposed new text of article 11, paragraph 1 (A/CN.4/415, para. 121), especially the words "the State cannot invoke immunity from that jurisdiction". The theory of "implied consent" could circumvent the intention of the article, as had been pointed out by a number of Governments. As he had already indicated, it would be better to refer to "commercial activities" than to a "commercial contract".

93. The proposed new article 11 *bis*, (*ibid.*, para. 122), which related to the situation of State enterprises having their own property, could very easily leave a private party to a contract without a remedy. In the event of default, a private party could bring suit only against the State enterprise, not against the State itself; in effect, its recovery would therefore be limited by the amount of property owned by the enterprise. That would mean that private parties contemplating entering into a commercial transaction with a State enterprise must check to see whether it had sufficient assets to cover its obligations: that would often be difficult, if not impossible. It could also happen that a State created State enterprises to minimize losses to the State itself—just as a corporation might create a subsidiary—but did not endow them with sufficient assets to cover their operations or obligations. In such cases, a court could allow creditors of a subsidiary to bring suit against the parent corporation, but that remedy would not be possible against a State. That was a trap for private parties and one that the draft should avoid.

94. There were other problems with article 11 *bis*, especially with regard to the words "on behalf of a State". A State could conduct trade through its enterprises, but, legally speaking, did such enterprises enter into obligations "on behalf of the State"? If so, the State would remain responsible, whether or not the enterprises had segregated State property. In that connection, Mr. Barsegov had

proposed a text (para. 1 above) that would deserve careful consideration if the Commission decided that the draft should include a separate provision on segregated State property.

95. In conclusion, he drew attention to the amendments to the *Foreign Sovereign Immunities Act of 1976* enacted in the United States in November 1988. One set of amendments dealt with the attachment of foreign State vessels in commercial service; and another set, on arbitration, liberalized the provisions of the Act relating to the enforcement of arbitral awards.

The meeting rose at 1.05 p.m.

2118th MEETING

Wednesday, 14 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/410 and Add.1-5,[1] A/CN.4/415,[2] A/CN.4/422 and Add.1,[3] A/CN.4/L.431, sect. F)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CONSIDERATION OF THE DRAFT ARTICLES[4] ON SECOND READING (*continued*)

1. Mr. KOROMA, expressing appreciation to the Special Rapporteur for his lucid and comprehensive second report (A/CN.4/422 and Add.1), said that the practical significance of the topic of jurisdictional immunities of States and their property could not be overstated, since its effects were experienced almost every day. Over the years, the frontiers of the topic had expanded from the dichotomy between acts *jure imperii* and acts *jure gestionis* to encompass other spheres such as contracts of employment, personal injuries, damage to property, patents, trade marks, intellectual and industrial property, and fiscal matters. While such expansion was no bad thing, the danger was that it could increase the possibility of States being harassed by exposure to foreign jurisdiction. In that connection, he would draw members' attention to a case recently decided in the United States courts, *Colonial Bank* v. *Compagnie générale maritime et financière* (1986). Care must therefore be taken not to defeat the purpose of the basic rule that States must not be subject to foreign jurisdiction.

2. As pointed out by Governments in their comments and observations on the draft articles, the goal of the future convention was to reaffirm and strengthen the concept of jurisdictional immunities of States, while laying down clear exceptions. From that standpoint, to replace the principle of State immunity by functional, or restricted, immunity would not only weaken the effectiveness of the basic rule, but also lead to legal uncertainty and, in certain particulars, even hamper the efforts of some countries to achieve economic development. The Commission should therefore adopt the approach advocated by Brownlie as referred to by the Special Rapporteur in his report (*ibid.*, para. 13 *in fine*).

3. The tendency to divide the activities of Governments into acts *jure imperii* and acts *jure gestionis* was not always valid. For instance, although the purchase of pharmaceutical products could be regarded as a commercial transaction, for some countries having to make such a purchase it was not just an ordinary commercial transaction, since the health and well-being of their populations were involved. Nor would he support the theory of so-called "absolute" immunity. Indeed, he refrained from using the word "absolute", there being no such thing, in his view, as absolute immunity. The basic rule was simple, namely that one State was immune from the jurisdiction of another. If the Commission could confine itself to that simple rule, it would perhaps reduce the difficulties caused by having to choose between two schools of thought. On the other hand, there was no doubt that the topic had regrettably, but understandably, been subjected to various forms of pressure, for commercial reasons. It was the Commission's duty to relieve the topic of that pressure. One way of doing so was to formulate a rule on jurisdictional immunity on a consensual basis that would meet the interests of the international community. For that, an extensive analysis of the relevant legal material was required. In that connection, he noted that one learned author who was an advocate of the restricted immunity school had concluded that the absolute immunity theory certainly could not be said to have been discarded in favour of restricted sovereign immunity.

4. It was apparent that only a few States had submitted comments on the draft articles. The views of many more would therefore have to be canvassed if the interests and decisions not reflected in the report were to be taken into account. In view of the pressure he had mentioned, it was not possible to regard decided cases in national courts or even national legislation as sources for the topic. One means of taking the views of States into account, however, would be to make reference to their pleadings before a foreign court.

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[1] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[2] *Ibid.*

[3] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[4] For the texts, see 2114th meeting, para. 31.