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Summary record of the 2118th meeting

Topic:
Jurisdictional immunities of States and their property

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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.

5. He agreed with the provision laid down in article 1, on the scope of the articles, but it should be followed immediately by the general principle of State immunity in order to facilitate understanding of the topic. Indeed, as some Governments had suggested, it might be possible to combine the definition of terms and interpretative provisions in article 1, which could then be followed by articles 2 and 3 dealing, respectively, with the scope of the draft and with the rule of immunity itself.

6. It would be more logical to combine the provisions of article 2, on the use of terms, and of article 3, containing the interpretative provisions, under one rubric. It was illogical, however, to include in a definition itself the very word that was being defined, as was done in paragraph 1 (*b*) (i) of article 2 with respect to the expression "commercial contract". The provision was not clear and would require examination in the Drafting Committee.

7. Paragraph 2 of article 3 provided for a dual test in determining whether a contract for the sale or purchase of goods or the supply of services was commercial. It was a finely balanced provision and should be retained, as it reflected State practice and represented a compromise between those who advocated that the nature of the contract should be the sole criterion and those who considered that the purpose should also be taken into account.

8. The definition of the term "State" in paragraph 1 of article 3 was acceptable, but would it not suffice to confine the definition to the State *per se*, saying simply that a State was the body entitled to exercise sovereign authority? In his view, that would be preferable to breaking down the definition into categories of agencies and instrumentalities. To determine whether a particular ministry or department, for instance, was an instrument of the State, it would be necessary to inquire into the constitutional arrangements of that State.

9. He supported the proposal by the German Democratic Republic (A/CN.4/410 and Add.1-5) for the inclusion of a new paragraph 2 in article 3. The express exclusion from the scope of the draft articles of legal entities not entitled to perform acts in the exercise of sovereign authority was a decisive criterion in determining whether an act *jure imperii* or an act *jure gestionis* was involved.

10. He welcomed the proposal by the Federal Republic of Germany that a clause be inserted in article 4, paragraph 2, to make it clear that types of immunity other than the jurisdictional immunity of the State remained unaffected. Equally welcome was the proposal by Spain and by the United Kingdom that the privileges in question should apply not only to heads of State, but also to heads of Government, ministers for foreign affairs and persons of high rank. On the other hand, the view that the privileges and immunities of heads of State and foreign ministers were based on international comity was untenable, for reasons he would not enter into at present but which perhaps constituted the rationale behind the Australian suggestion to include the words "under international law" in paragraph 1.

11. Article 6, which was central to the whole draft, should affirm the principle that a foreign State enjoyed immunity from the jurisdiction of the courts of a forum State and then spell out the exceptions to that principle clearly so that anyone who referred to the future convention would immediately know what was and was not immune from jurisdiction. Such a provision would reaffirm the equality of all States, enable foreign Governments to perform certain functions in the interests of the State without the hindrance of having to defend themselves before foreign courts, and also accommodate the interests and legal rights of all those engaged in business with foreign Governments. To avoid any ambiguity, however, the words in square brackets, "and the relevant rules of general international law", should be deleted. Retaining them would make the efforts to elaborate a set of precise rules on State immunity nugatory by giving the impression that the draft was not comprehensive. It might also suggest that the theory of absolute immunity still applied and he doubted whether the Commission wished to adopt such a rigid position. The proposed new article 6 *bis* (A/CN.4/422 and Add.1, para. 17) would also perpetuate that ambiguity, since it would enable States to pick and choose so far as the rule of immunity was concerned. It was therefore important to set out the rule and the exceptions unequivocally, and not to leave the matter to States.

12. He was a little uneasy about the title of article 7, which did not correspond to its content, for paragraph 1 dealt with how effect was to be given to State immunity, while paragraphs 2 and 3 were concerned with the meaning of the expression "a proceeding before a court of a State". If the title were retained, he would suggest that the word "modalities" be replaced by "modes", which meant methods and procedures. Paragraphs 2 and 3 should perhaps be incorporated under the consolidated provisions of articles 2 and 3, but, if they were kept in article 7, he agreed with Australia's comments that they should be formulated in different terms.

13. He endorsed the proposal that a provision be introduced in article 8 whereby a State that had consented to the exercise of jurisdiction by a foreign court would be granted immunity in cases where a fundamental change in circumstances had occurred. Under domestic law, when ships were unable to deliver consignments because of *force majeure* or a fundamental change in circumstances, the contract was normally frustrated. The inclusion of such a proviso in the draft articles would not be to harm their terms, and would simply reflect reality.

14. The controversy which had surrounded the title of part III of the draft was regrettable and was apparently due to the dichotomy between the absolute and restrictive theories of immunity. It was normal to speak of an exception to a rule, however, and in the case of jurisdictional immunities the Commission was required by its mandate to elaborate a rule and spell out the exceptions to it. Accordingly, part III should set forth those exceptions, possibly with an explanation in the commentary that that did not imply the codification of one school of thought or the other.

15. With regard to article 11, it had been said that, where a dispute arose regarding a commercial contract, a State could not invoke immunity from jurisdiction in proceedings arising out of that contract. But in the disputes that had actually come before the courts—for example, *Trendtex Trading Corporation Ltd.* v. *Central Bank of Nigeria* (1977), *The "I Congreso del Partido"* (1981), *Verlinden B.V.* v. *Central Bank of Nigeria* (1981) and *Colonial Bank* v. *Compagnie générale maritime et financière* (1986)—the issues had been much more complex than a simple dichotomy between commercial and non-commercial contracts.

A contract that at first glance appeared to be commercial might not involve the profit motive which was normally associated with a commercial contract. States should be able to invoke immunity if a transaction was carried out in the exercise of sovereign authority.

16. Concerning paragraph 1 of article 11, even if jurisdiction was assumed, it should be made contingent on a territorial link between the commercial contract, the parties thereto and the State of jurisdiction, in order to prevent "forum shopping" or undue extension of domestic legislation. The decision by the United States District Court in the *Colonial Bank* case had been to that very effect, and similar provisions should be incorporated in article 11.

17. He agreed with other members that the Commission should take sufficient time to consider the articles thoroughly and not hasten to refer them all to the Drafting Committee. The areas covered by the articles following on from article 11, such as employment, patents and intellectual property, represented new frontiers requiring closer examination. The Commission should terminate its discussion with article 11, refer the first 11 articles to the Drafting Committee and take up the remaining articles at its next session.

18. Mr. DÍAZ GONZÁLEZ said that the Special Rapporteur's reports contained a wealth of information, an achievement that was not surprising from someone as intimately acquainted with the material as he was. The purpose was to analyse the comments received from what was, unfortunately, only a small number of States and, on the basis of those comments, propose amendments to or new versions of the articles for consideration on second reading. Most of the proposed changes related to wording alone and should be studied by the Drafting Committee. Some of the points raised, however, struck at the heart of the problem and deserved due consideration by the Commission.

19. In keeping with the Chairman's recommendation, he would limit his comments to articles 1 to 11. Mr. McCaffrey (2117th meeting) was right in saying that the Commission should not be precipitate and that it would be better to leave the consideration of the other articles until the next session. By that time, additional comments might have been received from States.

20. The set of articles was a compromise text arrived at after lengthy debate and should be viewed in that light as the second reading commenced. It could not be inferred that one approach had prevailed over another. Nearly half of the few States that had submitted comments were European countries, but even they were not unanimous in agreeing that the 1972 European Convention on State Immunity was relevant to the Commission's exercise. There was a wide divergence of opinion about the criteria that should be used for the principle of immunity. The opinions of most African, Asian and Latin-American countries were not available, and it was impossible to draw definitive conclusions from the comments made by States.

21. He could endorse the current formulation of article 1, but believed that the principle of immunity should be enunciated exactly as it was now set out in article 6. Articles 2 and 3, dealing with the use of terms and interpretative provisions, respectively, should indeed be combined into a single article on terms and definitions.

22. Similarly, he could endorse the amended text of paragraph 1 of article 4 proposed by the Special Rapporteur (A/CN.4/415, para. 50), but he would agree with Mr. Thiam (2117th meeting) that the article's implications should be considered in the light of, in particular, article 31 of the 1961 Vienna Convention on Diplomatic Relations. Mr. Reuter (2115th meeting), citing a text submitted by the previous Special Rapporteur, had made a number of very pertinent observations concerning the danger of giving more immunities to diplomats than to States. The cases that had been raised relating to the rights and interests of a State having territorial jurisdiction and to the immunities of third States, especially when offences such as assassination or espionage were committed by their diplomats, were all covered by rules governing the rights of diplomats, such as those laid down by the ICJ in its judgment in the case concerning *United States Diplomatic and Consular Staff in Tehran*.[5]

23. The Special Rapporteur had rightly pointed out that it might be premature to comment on article 5: the Commission would see whether or not it should be retained later, on completion of the second reading.

24. Article 6 was the keystone of the entire draft, and it represented a balanced compromise among a number of schools of thought. The bracketed phrase should be deleted: as Mr. Bennouna (2117th meeting) had remarked, it was illogical to take away with one hand what had been given with the other. The argument—based on the example of the 1972 European Convention—that State practice was still being developed did not hold water, as Mr. Mahiou (2116th meeting) had pointed out.

25. It was the opinion of many countries that State immunity was a basic principle of international law stemming from State sovereignty. The purpose of the draft articles was to consolidate present practice in an attempt to regulate the conditions in which State immunity was invoked. Exceptions had to be provided for, but a set of limitative exceptions that would end up by doing away with the principle of immunity should not be imposed. In a draft designed to unify existing norms and practice, the introduction of uncertainty that might give rise to more divergences than already existed and create more problems than solutions should be avoided.

26. He supported the proposals concerning articles 7, 8 and 9 made by the Special Rapporteur in his preliminary report (A/CN.4/415). As to the title of part III of the draft, the words "exceptions to" were preferable to "limitations on" and seemed to be the more accurate.

27. The texts proposed by Mr. Barsegov (2117th meeting, para. 1) and Mr. Shi (2115th meeting, para. 24) for the new article 11 *bis* both contained elements that merited consideration and might help to improve the wording. He reserved the right to make additional comments when those proposals became available in Spanish.

28. In conclusion, he wished once again to thank the Special Rapporteur for his excellent reports, his synthesis of the comments made by States and his efforts to arrive at compromise solutions.

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[5] Judgment of 24 May 1980, *I.C.J. Reports 1980*, p. 3.

29. Mr. SOLARI TUDELA said that he concurred with members who had commended the Special Rapporteur's reports, which were valuable for their doctrinal components and pragmatic in their approach to compromise. They employed a methodology which guided the reader among the various positions in the international community. As he had not been a member of the Commission during the consideration of the draft articles on first reading, he would make fairly general comments and would not linger over the debate on the absolute and restrictive theories of State immunity. His own view was that immunity must be absolute, in line with the principle of the sovereign equality of States set out in the Charter of the United Nations, but that did not mean that exceptions should not be made in very specific cases.

30. Everyone must be aware that draft articles setting the scope of immunity and circumscribing the exceptions thereto would make an important contribution to international trade and finance: such were the inevitable and fruitful consequences of the establishment of legal security.

31. He endorsed the wording of article 1 and saw no significant reason why articles 2 and 3 should not be combined in a single article. As to substance, the term "State" was defined as comprising "agencies or instrumentalities of the State": hence a close correlation should be maintained with article 11 and the proposed new article 11 *bis*, on commercial contracts and segregated State property, respectively. If a State-owned enterprise which, under the terms of the new combined article 2 (A/CN.4/415, para. 29), was considered a State did not have immunity from jurisdiction in its commercial activities, its property should not be held as security for actions taken against the State. The text of paragraph 3 proposed by the Special Rapporteur for determining the commercial character of a contract was the best solution. Such a determination should be based on the contract's nature and also take account of its purpose.

32. It was appropriate that article 4, paragraph 2, should mention the immunity of heads of State, but the reference should be extended to encompass heads of Government, ministers for foreign affairs and high-ranking officials. Of course, the draft articles dealt with State immunity, not personal immunity, but it was merely a question of setting out in a legal instrument the rights already recognized under customary law. The 1969 Convention on Special Missions did not suffice in that context, for it referred to immunities granted in very specific circumstances. The immunities should be acknowledged to apply to all situations—private visits, transit, unofficial meetings, etc.—and the draft afforded an excellent opportunity in that regard. The courts of the United Kingdom offered valuable and classic legal precedents, for in that country immunities were not simply an expression of courtesy, as the Special Rapporteur argued in his preliminary report (*ibid.*, para. 49), but were actually the manifestation of a right.

33. Article 6 would be acceptable if the bracketed phrase were deleted in order to give the entire set of draft articles a more precise scope, in terms both of the notion of immunity and of the permissible exceptions. The bracketed phrase, if retained, would introduce an element of ambiguity that would vitiate the entire article.

34. The new wording proposed by the Special Rapporteur for article 7 (*ibid.*, para. 79) in conformity with the suggestion made by the Government of Australia was more appropriate.

35. Again, the proposed new text of article 8 (*c*) (*ibid.*, para. 93) was a considerable improvement. He did not, however, agree with the comment made by the Government of Switzerland and endorsed by the Special Rapporteur that fundamental changes in circumstances should not be relevant to claims of immunity. If that approach were adopted, it would introduce a new limitation on invoking those grounds for termination of an international agreement, including agreements which provided that a State must submit to the jurisdiction of a foreign court in disputes arising from the application of a commercial contract. The cases in which such grounds could not be invoked were clearly set out in the 1969 Vienna Convention on the Law of Treaties, and it would not appear that agreements of the kind dealt with in article 8 of the draft were among them.

36. Lastly, he could agree to the amended texts of articles 9, 10 and 11 proposed by the Special Rapporteur in his preliminary report (A/CN.4/415) and considered that the texts proposed by Mr. Shi (2115th meeting, para. 24) and Mr. Barsegov (2117th meeting, para. 1) offered extremely valid contributions to the formulation of article 11 *bis*.

37. Mr. PAWLAK said that, as a relative newcomer to the Commission, he was somewhat reluctant to revert to issues which had already been discussed at length during the first reading of the draft articles. Nevertheless, he felt it his duty to comment on fundamental aspects of the topic and make suggestions about the way in which the Commission should conduct its work during the second reading.

38. First, he could not agree with the view expressed by the Special Rapporteur in his second report (A/CN.4/422 and Add.1, para. 10) that the theory of absolute State immunity in State practice was no longer a universally binding norm of customary international law. The Commission's discussion, as well as the comments received from Governments, proved the contrary. While it could not be denied that the number of States opposed to the absolute theory had continued to grow in recent years, especially among highly developed Western countries increasingly engaged in foreign trade, a very large number of States still relied on the absolute theory and applied it in practice. It was not the Commission's role to decide which of those conflicting views should prevail but, rather, to elaborate and submit to the General Assembly a draft which could serve as a useful legal instrument for the development of economic ties among all nations.

39. The draft articles adopted on first reading in 1986 did not adequately take into account the practice of the socialist States and of many developing countries. The balance proposed in the draft was far from satisfactory to them. If the Commission really wished to reach a compromise on the complex and highly sensitive issue under consideration, it should examine not only trends in Western practice, but also activities in other parts of the world. Without wishing to repeat the arguments advanced already by Mr. Shi, Mr. Barsegov, Mr. Koroma and Mr. Mahiou,

he would point out that, at a time when States were increasingly engaged in economic and financial activities, it was very difficult to draw a precise borderline between the public and commercial operations of State organs. The balance between the interests of foreign States and those of the State in whose territory the question of immunity arose should be based not on the anachronistic division between *acta jure imperii* and *acta jure gestionis* but on more modern criteria which more adequately reflected the needs and practices of the present day and did not run counter to the principle of the sovereign equality of States.

40. In Poland, as in many other socialist and developing States, enterprises owned by the State had legal personality and possessed assets which they had received from the State and which they could use without involving State liability and without being liable to the State. As evidenced by the *Czarnikow* v. *Rolimpex* case heard in the United Kingdom courts a few years earlier, Polish State enterprises conducted their commercial activities at their own risk and on their own account and did not claim immunity from jurisdiction in court actions brought against them. In practice, only credit agreements concluded by the Polish Ministry of Finance with foreign commercial banks could be considered "commercial contracts" within the meaning of article 2 of the draft. Actually, under Poland's revised economic laws the privileged status of State enterprises had now been replaced by a truly equal status for all economic entities, including private companies.

41. He would urge the Commission not to hurry in its work but to adopt a more patient approach, taking into consideration all aspects of the rapid changes in State practice and regulations. In that context, he welcomed the position adopted by the Special Rapporteur, which was more realistic and pragmatic than that of his predecessor. While remaining a firm advocate of the view that absolute immunity was a norm of general international law, he was also in favour of reconciling conflicting interests and was willing to determine on a case-by-case basis what types of activities should or should not enjoy sovereign immunity.

42. Turning to the draft articles themselves, he said that article 1 was acceptable and he agreed with the Special Rapporteur that the enunciation of the general principle should be left in article 6.

43. Articles 2 and 3 should be merged and rearranged in accordance with the proposals of a number of States and of the Special Rapporteur himself. Paragraph 1 (*b*) (iii) and (iv) of the new combined article 2 (A/CN.4/415, para. 29) should clearly define the State representatives and agencies mentioned; moreover, the expression "instrumentalities of the State" was too vague, and the explanation given in the commentary was not sufficient. The definition of the expression "commercial contract" should, as Mr. Reuter (2115th meeting) had pointed out, make it clear that transactions by States for public purposes were not included.

44. He supported the proposal made by the German Democratic Republic in connection with article 3 for the addition of a further paragraph on the meaning of the term "State". He also believed that, in determining the commercial character of a contract, the nature of the contract should be the basic criterion and its purpose an additional criterion.

45. As to article 4, he endorsed the Special Rapporteur's proposal, further to a suggestion by Australia, to add the words "under international law" in paragraph 1. As Mr. Tomuschat (2116th meeting) and other members had suggested, it would be appropriate to include a reference to heads of Government and ministers for foreign affairs in paragraph 2. It had been maintained that the article was superfluous, but he believed it important to clarify the position of diplomats and leading personalities *vis-à-vis* the State immunities envisaged in the draft.

46. Article 6 was and should remain a crucial provision of part II of the draft. The phrase appearing in square brackets should be deleted, otherwise it would destroy the purpose of the article. He could not accept the alternative wording proposed by Australia or the Special Rapporteur's suggestion that deletion of the bracketed phrase could be offset by the possible addition of article 28. Clearly, there was no need for the proposed new article 6 *bis* (A/CN.4/422 and Add.1, para. 17).

47. Article 7, as redrafted by the Special Rapporteur (A/CN.4/415, para. 79), posed no difficulty, especially with the adoption of Australia's drafting suggestion concerning the expressions "forum State" and "foreign State". However, he deprecated the use of terms such as "interests" and "control" and would prefer them to be deleted or replaced.

48. He saw no need to modify article 8 (*c*), as suggested by Australia. As for article 9, he shared Mr. Barsegov's view that the proposed new paragraph 3 unduly complicated the situation and should not be included.

49. With regard to the title of part III of the draft, the wording "Exceptions to State immunity" was the more appropriate, as suggested by many Governments. He supported the view expressed by some members of the Commission that exceptions should be kept to a very strictly defined minimum.

50. Article 11, with the changes in paragraph 1 proposed by the Special Rapporteur (*ibid.*, para. 121), reflected the character of commercial contracts more clearly than did the previous text. However, he shared the concern that the concept of State-owned enterprises with segregated property in socialist States should be reflected somewhere in the draft articles. The new article 11 *bis* proposed by the Special Rapporteur (*ibid.*, para. 122) was a very commendable effort, but it required further consideration as well as conceptual and drafting changes. The texts proposed by Mr. Shi (2115th meeting, para. 24) and Mr. Barsegov (2117th meeting, para. 1) were very helpful, yet they, too, required further study; for his part, he wished to compare those proposals with the new economic laws enacted in his country and to make further comments, time permitting, at a later stage.

51. Generally speaking, articles 12, 13 and 16 unnecessarily expanded the number of exceptions to State immunity. Such articles might have some justification in bilateral agreements but were out of place in a universal convention. They should therefore be deleted on second reading. Employment disputes (art. 12) were normally regulated by the domestic law of the foreign State. The cases covered by article 13 related in the main to traffic accidents and, as such, were covered by insurance. Art-

icle 16, on fiscal matters, was in its present wording contrary to the principle of the sovereign equality of States and therefore unacceptable.

52. He supported the Special Rapporteur's suggestion that subparagraphs (*b*) to (*e*) of paragraph 1 of article 14 could be deleted, and would add that some further changes might be made in the Drafting Committee. He did not, for the present, have a very clear position as regards retaining or deleting article 15: the arguments advanced by some developing countries were convincing, but the Special Rapporteur's reasoning in his second report (A/CN.4/422 and Add.1, para. 23) also had to be taken into account.

53. The term "non-governmental" appearing in square brackets in paragraphs 1 and 4 of article 18 should be deleted, but even then the article would raise difficulties for States with State enterprises. Likewise, article 19 was difficult to accept, even with the changes proposed by the Special Rapporteur. In that connection, he agreed with the suggestions made by Mr. Shi and also with the view expressed by the Government of Yugoslavia.

54. Lastly, for the reasons given by the German Democratic Republic, Mexico and the Soviet Union, he considered that article 20 was unnecessary and should be deleted.

55. Mr. ROUCOUNAS, referring to paragraph 2 of article 3, said that the guidance it gave to judges was certainly useful from the point of view of protecting the parties, which, after all, was the main purpose of the draft as a whole. However, judges should remain free to determine in each particular case whether the purpose, as well as the nature, of the contract should be taken into account. Further discussion on that point in the Commission would be welcome. Since the interpretative provision in paragraph 1 of the article spoke of political subdivisions of the State entitled to perform acts in the exercise of the State's sovereign authority, it was appropriate that reference should also be made to representatives of the State.

56. He agreed with Mr. Thiam (2117th meeting) that paragraph 1 of article 4 dealt with two different categories of immunity, but it was important to retain both subparagraph (*a*) and subparagraph (*b*). In that connection, the words "their members" would be better than "persons connected with them", in subparagraph (*b*). With regard to paragraph 2, reference should indeed be made not only to heads of State, but also to all persons mentioned in article 21 of the 1969 Convention on Special Missions. The special protection provided for heads of State in the past reflected the fact that virtually all duties pertaining to foreign affairs used to be vested in the head of State. In view of the developments which had taken place over the years, it was appropriate for the provision to be extended so as to cover heads of Government and ministers for foreign affairs.

57. In the matter of the bracketed phrase "and the relevant rules of general international law", in article 6, he would point out that legal opinion was still divided on the question whether customary international law was invariably superseded by codified law. In his view, the draft should not attempt to cover all possible cases: the point was to find a form of words acceptable to all, possibly along the lines suggested by Mr. Reuter (2115th meeting, para. 46).

58. With regard to article 7, Mr. Shi (2115th meeting) had mentioned the high cost of court proceedings, which in some cases could jeopardize the fairness of a trial. His own view was that article 7 was essential for that very reason, since it would incite Governments to find means of making the provisions of the draft as a whole known and accessible to all interested State bodies.

59. While generally agreeing with the thinking behind article 8, he felt that subparagraph (*c*) was still rather too limitative; as other members had suggested, a reference to agreement given through the diplomatic channel might also be included. Again, he saw no need for the inclusion of a new paragraph 4 in article 10, as proposed by the Special Rapporteur (A/CN.4/415, para. 107).

60. With regard to the title of part III of the draft, he would favour a less controversial form of words, possibly along the lines suggested by Mr. McCaffrey (2117th meeting, para. 91), but another possible solution would be to use a completely new title, such as "Exercise of jurisdiction by the forum State".

61. Lastly, he agreed with the Special Rapporteur that the phrase "is considered to have consented . . . " should be deleted from paragraph 1 of article 11. With regard to the proposed new article 11 *bis*, he took the view that the texts proposed by Mr. Shi (2115th meeting, para. 24) and Mr. Barsegov (2117th meeting, para. 1), as well as by the Special Rapporteur himself (A/CN.4/415, para. 122), could guide the Commission towards a generally acceptable solution.

62. Mr. FRANCIS expressed appreciation to the Special Rapporteur for his excellent reports and said that, as indicated in the second report (A/CN.4/422 and Add.1, para. 3), the aim in the course of the second reading of the draft articles should be to elaborate a new multilateral agreement which reconciled conflicting sovereign interests arising out of the application or non-application of State immunity, rather than to set out a mere confirmation of the more fundamental principle of sovereignty in that area.

63. The Commission had before it a set of draft articles which had been adopted on first reading and to which the Special Rapporteur had proposed certain changes in order to take into account the comments made by Governments and by members. The various articles, however, appeared in different documents, making the presentation somewhat unwieldy, as already pointed out by other members during the present discussion. He would urge the Special Rapporteur to present, at the Commission's next session, the whole body of draft articles as proposed by him in a single composite document, for the purposes of more convenient consideration.

64. Another point made during the discussion was that the Commission had not had sufficient time to consider carefully a set of draft articles that was much too important to be rushed through a second reading. As noted by Mr. McCaffrey (2117th meeting), it was necessary to bear in mind the changes taking place in the international community which affected the law itself, law that was in fact in a state of flux. For example, a more liberal approach to the whole subject of arbitration was becoming apparent in the United States of America. For those reasons, a more careful and deliberate approach was needed to the consideration of the draft articles, and in that regard he wholeheartedly supported the suggestion that the Commission should concentrate at the present session on articles 1 to 11.

65. Turning to the articles themselves and referring to the criteria for determining what constituted a "commercial contract" set out in paragraph 2 of article 3, he recalled that, during the first reading, he had cited the example of the intervention of the Government of Jamaica in the late 1970s in purchasing basic foodstuffs abroad. The element of the purpose of commercial contracts was certainly one that should be retained.

66. It was right for article 4 to say that the present articles were without prejudice to the privileges and immunities enjoyed by a State under existing diplomatic agreements, but the relevant international conventions should be listed in the article. A reference to "diplomatic immunity", however, would not be appropriate in that it concerned the agents of the State, rather than the State itself. In the present instance, the analogy was with the immunity enjoyed by a diplomatic mission under the 1961 Vienna Convention on Diplomatic Relations rather than with the immunity enjoyed by individual diplomatic agents.

67. The Special Rapporteur seemed to be in favour of the proposal made by Spain (A/CN.4/410 and Add.1-5) to delete the bracketed phrase "and the relevant rules of general international law", in article 6, and to transfer the idea to a paragraph in the preamble to the future convention. Actually, the Spanish proposal would not solve the problem. The best course would be simply to delete the phrase in question, which could well give rise to divergent interpretations and possibly create some confusion. Another reason was that the phrase was unnecessary in article 6 because of the provisions of article 28, whereby States could agree to extend to each other treatment different from that required under the present articles. The States concerned thus had considerable latitude regarding liberalization of the draft articles. The proposed new article 6 *bis* (A/CN.4/422 and Add.1, para. 17) was not acceptable, because it would weaken the content of the basic rule set out in article 6.

68. The interesting amendments proposed by Mr. Shi (2115th meeting, para. 24) and Mr. Barsegov (2117th meeting, para. 1) for the new draft article 11 *bis* contained elements which could enable the Commission to reach a compromise on a matter which had not yet been dealt with. It should be noted in that connection that the concept of segregated State property did not exist in many developing countries. In the case of an entity which had juridical status under municipal law and which contracted abroad, there was no excuse for the Government itself to be brought into litigation in the foreign country concerned. In the event of a judgment being given abroad against an arm of a sovereign State, it was for the Governments of the States concerned to settle the matter at the diplomatic level. A sovereign State itself could not be arraigned before a foreign court, a point that the Special Rapporteur should take into consideration.

69. Lastly, the term "exceptions" was preferable to "limitations" in the title of part III of the draft.

70. Mr. AL-BAHARNA congratulated the Special Rapporteur on his well-balanced preliminary report (A/CN.4/415), which was aimed primarily at bridging the gap between the so-called restrictive theory of State immunity and the already established doctrine of the absolute immunity of States. In view of recent practice, it could be said that absolute State immunity was no longer a norm of general international law. On the other hand, the restrictive theory could not be imposed unilaterally against States which believed in the doctrine of absolute immunity. Among the latter group of States, however, it was encouraging to note the recent practice of solving problems arising from "commercial contracts" by accepting the idea of a State enterprise, which was subject to the jurisdiction of foreign courts so far as segregated State property placed in its possession was concerned.

71. In considering the present topic, the Commission should as far as possible avoid discussion of theoretical questions and adopt the Special Rapporteur's pragmatic approach. For example, the Special Rapporteur wisely proposed that articles 2 and 3 should be combined in a single new article 2, on the use of terms. However, the expression "international instruments", in paragraph 2 of the combined article (*ibid.*, para. 29), should be replaced by "international agreements", which was not so wide in scope.

72. Members had been asked for their opinion as to whether the term "State" should also cover the constituents of a federal State. Indeed it should, for the definition contained in article 3 referred to the organs, political subdivisions, agencies and representatives of the State.

73. Another point concerned the definition of the expression "commercial contract". The question whether the test of a commercial contract should be its nature or its purpose was one which was debated in law and on which States naturally differed. The purpose test had been defended by the Special Rapporteur on the grounds that it could be helpful in determining the character of contracts for development aid and famine relief. The Special Rapporteur had proposed a new formulation in paragraph 3 of the new article 2: ". . . but 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, that purpose should be taken into account in determining the non-commercial character of the contract." That amendment had the drawback of complicating the text by introducing the notion of an "international agreement" and stipulating the need for a specific statement that the contract was for a governmental purpose. It would be better to retain the text adopted on first reading (para. 2 of article 3), modified along the following lines:

> "In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account in determining the non-commercial character of the contract."

That text would remove the qualifications imposed on the purpose test by the words "if, in the practice of that State, that purpose is relevant".

74. He supported the revised paragraph 1 of article 4 proposed by the Special Rapporteur pursuant to a comment by the Government of Australia and also endorsed his recommendation that, pending the final formulation of other draft articles, it was perhaps premature to contemplate any revision of article 5.

75. As to the much debated article 6, it was clear from the comments of Governments analysed in the preliminary report that it constituted the essential core of differences among States. For his part, he did not share the view that the retention of the bracketed phrase "and the relevant rules

of general international law" would necessarily lead foreign courts to seek exceptions to the immunity of States outside the framework of the draft articles. Nor, for that matter, would it encourage unilateral restrictions of the immunity of a State. Moreover, deletion of the phrase in question might interfere with the progressive development of norms of general international law. As a pragmatic compromise, therefore, he would be prepared to accept the suggestion by the Government of Spain, supported by the Special Rapporteur, to omit the phrase in question from the body of the text and transfer the underlying idea to the preamble to the future convention.

76. In introducing his second report (A/CN.4/422 and Add.1), however, the Special Rapporteur (2114th meeting) had invited members to comment on the choice between two alternatives, namely: (*a*) deleting the bracketed phrase and transferring it to the preamble, as suggested by Spain; and (*b*) deleting the phrase and introducing a new article 6 *bis* to provide an optional declaration with a view to maintaining an appropriate balance with the position of those States which favoured the restrictive theory of immunity. After careful examination of draft article 6 *bis*, he was not inclined to accept it. Introducing a new optional declaration into the draft convention did not seem an attractive idea and the article could well give rise to unnecessary procedural confusion.

77. He had no objection to the proposed new text of article 7 (A/CN.4/415, para. 79), which had been made clearer by the use of the expressions "forum State" and "foreign State", replacing the somewhat confusing expressions "a State" and "another State". The proposed reformulation of article 8 (*c*) was acceptable and he could support article 9 as it stood, but was not opposed to the addition to paragraph 1 and the insertion of the new paragraph 3 recommended by the Special Rapporteur (*ibid.*, para. 100). Article 10 was equally acceptable.

78. The question of the title of part III of the draft had given rise to some sharp differences of view in the Commission and in the Sixth Committee of the General Assembly. The Special Rapporteur had suggested that consideration of the title be deferred until concrete and individual issues had been settled. There was considerable merit in that approach, which demonstrated the Special Rapporteur's concern to go ahead with substantive questions without being bogged down by drafting issues.

79. He had no difficulty in accepting article 11, as slightly amended by the Special Rapporteur, and shared the view that the phrase "the State cannot invoke immunity . . ." was preferable to "the State is considered to have consented . . . ".

80. The proposed new article 11 *bis*, on segregated State property (*ibid.*, para. 122), seemed confusing. It was intended basically to accommodate a distinct legal régime on State immunities pertaining to so-called segregated State property of the socialist countries. Accordingly, he had mixed feelings as to whether the article should be included at all. Was it really necessary in a universal convention? Nevertheless, he had an open mind on the subject and would like the Commission to decide the matter.

81. In his oral introduction, the Special Rapporteur had suggested that article 11 *bis* would strike a balance between the restrictive theory and the absolute theory. Socialist countries, however, had "economic organizations" which were separated as juridical persons from the State and were individually responsible for their economic obligations solely within the limits and to the extent of the specific State property they possessed. Those economic organizations, therefore, within the limits assigned to them by the legislation of the socialist countries, would not enjoy immunity. On the other hand, under the law in the socialist countries, the State—which was distinct from the economic organizations in question—could still, in its sovereign capacity, enter into economic and trade relations and therefore claim immunity from the jurisdiction of foreign courts. That was precisely the question at issue, and not merely the issue of segregated State property. It was a problem that had to be dealt with separately and article 11 *bis* did not provide a solution.

The meeting rose at 1.05 p.m.

2119th MEETING

Thursday, 15 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, 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. AL-BAHARNA, continuing the statement he had begun at the previous meeting, said, in reference to the new article 11 *bis* proposed by the Special Rapporteur (A/CN.4/415, para. 122), that, although economic organizations in socialist countries did not enjoy jurisdictional immunity,

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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.