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Summary record of the 1764th meeting

Topic:
Jurisdictional immunities of States and their property

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foreigners. Indeed, those foreigners themselves might not wish to pay social security contributions in a country in which they were to reside only temporarily and in which they were unlikely to qualify for any benefits. Nevertheless, no clear practice had yet emerged in the matter.

57. Sir Ian SINCLAIR said that, in the light of the Special Rapporteur's explanations regarding paragraph 2 (*a*), the problem of the reference to "dismissal" might well prove to be one that could be settled by suitable drafting.

58. He agreed that appointments of members of a diplomatic mission within the meaning of the 1961 Vienna Convention on Diplomatic Relations, or of members of a consular post within the meaning of the 1963 Vienna Convention on Consular Relations, came under a rule of immunity. It followed that the rule in paragraph 1, relating to non-immunity, did not apply in those instances, something that should be made clear in article 13 or elsewhere in the draft.

59. He agreed with the Special Rapporteur regarding the need to deal with the problem of locally recruited employees not covered by the provisions of existing international conventions on diplomatic privileges and immunities.

The meeting rose at 12.55 p.m.

1764th MEETING

Thursday, 19 May 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Al-Qaysi, Mr. Balanda. Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/357,[1] A/CN.4/363 and Add.1,[2] A/CN.4/371,[3] A/CN.4/L.352, sect. D, ILC(XXXV)/Conf. Room Doc. 1 and 4)

[Agenda item 2]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[4] (*continued*)

ARTICLE 13 (Contracts of employment)[5] (*continued*)

1. Mr. THIAM stressed the practical aspect of the topic, which was to find solutions to problems that arose every day. Hence, he would refrain from engaging in doctrinal questions which came up for discussion at each session of the Commission. From the outset, some members had wondered whether a principle of jurisdictional immunity of the State did actually exist, a question that was difficult to answer without making a choice between the need to respect the sovereignty of the forum State and the need to respect that of the sending State. In the circumstances, the best course would be to aim for balanced solutions conducive to the development of international law.

2. Contracts of employment, the subject-matter of draft article 13, fell within the sensitive sphere of social legislation, which was marked by major social advances that compelled recognition by both the forum State and the sending State and were in some sense matters of public policy. For example, a State could not waive regulations concerning wages, work by children or women, night work, or weekly working hours. The forum State did not enjoy complete freedom in its relations with its workers, for it was subject to the control of its own courts; what was more, at the international level there were conventions on the subject and organizations which ensured their observance. Certain principles might even be considered to form part of *jus cogens*. Consequently, the sending State could not invoke the principle of jurisdictional immunity for the purpose of inserting in contracts of employment provisions that were contrary to the public policy of the forum State. That was the crux of the problem, which the Special Rapporteur had stressed when he had questioned the extent to which the sending State should conform to the labour laws and regulations of the territorial State. The principle of immunity could not be considered as going so far as to allow the sending State entire freedom with regard to contracts of employment. Moreover, in most countries, the entry into force of a contract of employment with a foreign State was subject to a registration procedure which afforded some means of control.

[1] Reproduced in *Yearbook . . . 1982*, vol. II (Part One).

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

[3] *Idem*.

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

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

Part II of the draft: (*d*) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook . . . 1980*, vol. II (Part Two), p. 142; (*e*) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook . . . 1982*, vol. II (Part Two), pp. 100 *et seq.*; (*f*) art. 10, revised: *ibid.*, p. 95, footnote 218.

Part III of the draft: (*g*) arts. 11 and 12; *ibid.*, p. 95, footnotes 220 and 221; revised texts: *ibid.*, p. 99, footnote 237.

[5] For the text, see 1762nd meeting, para. 1.

3. Admittedly, disputes were not very common, but they could well become more frequent. In actual fact, establishment agreements generally required the sending State to recruit local employees as far as possible, a practice which was ultimately as much in its own interest—since such employees were paid less—as it was in the interest of the forum State, which was often a developing country seeking to overcome underemployment. The increasing number of such agreements would necessarily give rise to disputes. Consequently, he could not fail to endorse article 13, inasmuch as it considered that contracts of employment should in principle form an exception to jurisdictional immunity for the sending State.

4. Generally speaking, the wording of article 13 was acceptable, but paragraph 2 (*a*) could give rise to difficulties, since all proceedings relating to the dismissal of an employee would be governed by the principle of immunity. Yet dismissal was precisely the greatest penalty, as Mr. Mahiou had observed (1763rd meeting), and it was difficult to see why a sending State should fail to respect the local labour code with regard to dismissal. In principle, any dismissal must be justified, so that the courts had an opportunity to exercise control by examining the reasons. In its present form, paragraph 2 (*a*) precluded such an opportunity.

5. Lastly, all the problems posed by article 13 were of particular importance to the developing countries, since they were nearly always the ones that found themselves in the situation of forum State. Hence it was essential to protect them, since jurisdictional immunity could, in borderline cases, be mistaken for impunity.

6. Mr. LACLETA MUÑOZ said that he would refrain from speaking on questions of principle, such as the value of the inductive method, which had led the Special Rapporteur to the conclusion that there was a general trend to restrict State immunity. In the light of his own experience, he was of the view that such a trend did exist. Indeed, that was quite logical, for in today's world States constantly found themselves acting within the legal order of another State, a legal order which was sometimes very different from their own but none the less had to be respected. That in itself was a considerable restriction on their sovereignty. Rather than engage in a discussion on such theoretical questions, the Commission should endeavour to agree on certain points so as to draft acceptable provisions. In that regard, the Special Rapporteur had in fact sought to introduce an element of progressive development of international law into the work of codification of the topic under consideration.

7. It was evident from draft article 13 that State immunity should be widely recognized but that it had its limits. Generally speaking, the provisions of the article successfully harmonized the respective interests of the two States concerned. As Mr. Thiam had observed, labour legislation could be viewed as comprising an element of public policy and as something that was strictly territorial in application. Again, the interests of the foreign State could not be ignored and it could not be compelled to keep a person in its employ.

8. The question of the requisite elements for determining whether or not the territorial State had jurisdiction had been discusssd at length. Some members thought that, since the employer State exercised governmental functions, all the contracts of employment it concluded with the persons required to perform such functions were exempt from territorial jurisdiction. Others considered that there could be no exemption unless the employee himself performed those functions. Another element, included in paragraph 2, was the nationality of the employee. In addition, a few members of the Commission had stressed that draft article 13 did not take into consideration the issue of social security, one that was indeed important but should none the less be left on one side, for the application of the social security regulations of the forum State was a question not of jurisdiction but of the applicable law.

9. The wording of article 13 as a whole was acceptable. However, the expression "Unless otherwise agreed" at the beginning of paragraph 1 did not seem necessary. Not only did it fail to clarify anything, but it did not specify between which parties an agreement could be concluded. Moreover, it was difficult to see the link between the case of a contract of employment of a national of another State when the work was to be performed on the territory of that other State, as covered by paragraph 1, and the cases covered by paragraph 2 (*b*) and (*c*). It was in fact the same problem viewed from different angles, although the cases did not quite overlap. Paragraph 2 (*b*) and (*c*) concerned, respectively, the time the proceedings were brought and the time of employment, something that was not specified in paragraph 1. In view of those provisions of paragraph 2, paragraph 1 could be made less cumbersome.

10. Lastly, the situation regarding diplomatic missions was sufficiently specific to warrant separate treatment. The jurisdictional immunity of a diplomatic mission went beyond that of the State. It would be remembered that, in the course of the work of elaborating and adopting the 1961 Vienna Convention on Diplomatic Relations, the jurisdictional immunity of diplomatic missions had been considered as one aspect of the immunity of the State. As Sir Ian Sinclair had pointed out (1763rd meeting), it would perhaps be advisable to insert a special provision on the jurisdictional immunity of diplomatic missions in labour matters.

11. Mr. MALEK said he wondered whether it was technically possible to consider draft articles 13, 14 and 15 independently of the introductory part of the fifth report. In his oral presentation (1762nd meeting), the Special Rapporteur had laid more emphasis on general principles than on the articles themselves. In addition, the introductory part presented for the first time the specific areas in which limitations on or exceptions to the rule of State immunity could be recognized and applied.

12. It had been rightly noted that the topic was one of practical importance and extreme complexity. Its importance was tied in more particularly with the development of international trade. Unquestionably, the concept of the State had undergone and was still experiencing profound changes and the notions of

sovereignty and sovereign equality, on which the principle of jurisdictional immunity of States was based, were no longer viewed in the same way. Denial of immunity was becoming more and more common, and the rule of absolute immunity was merely undermining court jurisdiction in increasingly numerous and broader areas of the international legal order. It was apparent that the Sixth Committee of the General Assembly, like the Commission, had recognized, on the basis of the judicial practice of a small number of States in the nineteenth century, that a general principle of State immunity did exist, despite divergent views regarding its scope.

13. The Special Rapporteur had affirmed that the present practice of all States had been taken into consideration, practice that was prevalent throughout the world and unopposed by other States that had remained silent. The conclusion was that a principle of immunity existed and had never been considered either as an absolute rule or as *jus cogens*. Differences of opinion seemed to exist only with regard to the areas in which the principle was subject to exceptions or limitations. The Special Rapporteur had stated with equal conviction that the evolution of the law did not require the active participation of all States, a view that he himself shared, but he none the less wondered whether the silence of certain States could be interpreted as a mark of approval or disapproval. Their attitude could rather be interpreted as a lack of interest in the rule of immunity, which perhaps had never seemed necessary to them in practice. Yet the problem of granting or denying immunity would arise more and more in the future.

14. The enumeration of the spheres in which restrictions on or exceptions to the principle of State immunity could be recognized and applied seemed limitative in the opinion of the Special Rapporteur. In any event, the drafting of part III, on the exceptions to the rule, was proving ever more complex, and State practice in that regard was not encouraging. At the previous meeting, one member had suggested that it might be better to discontinue the elaboration of the draft in view of the difficulties it raised. A similar sentiment had been expressed with regard to another topic on the Commission's agenda. If the Commission was to maintain its distinguished scientific reputation, it could not on any account recommend a halt in its work on any topic, particularly when it had itself recommended inclusion of the item on its agenda.

15. The difficulties of applying the rule of immunity could not be surmounted unless national laws were brought into line with each other. In an article published under the auspices of the American Bar Association,[6] George Kahale III had shown, with a large number of examples taken from the law of certain countries, to what extent national laws could contradict the rule of immunity or the admitted exceptions to the rule. The internal law and even the constitutions of many countries contained provisions which, for example, both prohibited any possibility of including clauses waiving jurisdictional immunity in contracts in the public interest concluded with foreigners and also provided that the national courts were alone competent to settle any proceedings resulting from the application of such contracts.

16. Draft article 13 would seem to come under those rules which found little or no support in State practice and were the result of a relatively recent trend. It drew on the relevant provisions of the 1972 European Convention on State Immunity,[7] which had also been the basis for laws adopted recently in various countries. The Special Rapporteur had noted that the Convention had come into force between Austria, Belgium and Cyprus on 11 June 1976 and that they, like the United Kingdom, would probably be adopting a restrictive practice. That information was disappointing, since the Convention did not seem to have aroused any particular interest in the States directly concerned.

17. If the actual principle of article 13 was admitted, the useful comments, suggestions and proposals made could all be sent to the Drafting Committee. The term "national" (*ressortissant*) was used several times, and he wondered whether the Special Rapporteur had used it deliberately in view of the broader sense attached to it in the United Kingdom's *State Immunity Act 1978*.[8] The expression used in the French text of the European Convention was *qui a la nationalité*.

18. As to the expression "contract of employment", unlike several members of the Commission who thought that it should be defined as accurately as possible in order to avoid differing interpretations in internal law, he doubted whether such a definition was necessary or even timely. It would perhaps be sufficient to give some indication of the meaning in the commentary to article 13. The opening words "Unless otherwise agreed" were perhaps not superfluous. Their presence merely signified that the exception was optional.

19. In conclusion, he endorsed Mr. Flitan's comments (1763rd meeting) that the Commission should increase its efforts to find suitable formulations as soon as possible for reconciling the two different concepts, namely absolute immunity and restricted immunity.

20. Mr. RAZAFINDRALAMBO said that, from the outset of his work, the Special Rapporteur had stressed the importance he attached to the inductive method; but he must now recognize that that method had brought disappointment. The majority of States had not provided material that would have enabled him to establish a fairer, more complete and more balanced view of the world's different systems regarding jurisdictional immunity of States and their property. Furthermore, the Special Rapporteur had found contradictions and divergencies in the practice of the few States which had supplied information. International efforts had not arrived at any more conclusive results, since the 1972 European

[6] G. S. Kahale III, "State loan transactions: foreign law restrictions on waivers of immunity and submissions to jurisdiction", *The Business Lawyer* (Chicago, Ill.), vol. 37, No. 4 (July 1982), p. 1549.

[7] See 1762nd meeting, footnote 7.

[8] *Ibid.*, footnote 11.

Convention on State Immunity was in force between only five countries and the inter-American convention was as yet simply a draft.

21. In the circumstances, one could only question the affirmation that a trend seemed to be emerging in favour of the application of internal labour law in the case of persons recruited in a given country, a conclusion that was all the more surprising in that the judicial practice cited by the Special Rapporteur tended to depict unfailing application of immunity in the field of labour relations (A/CN.4/363 and Add. 1, para. 49). For all that, the predominant place of labour and labour relations in contemporary society could not be ignored, nor could the primacy of social justice and promotion and the ideas of collaboration and human equality be denied. That was why, like many other members of the Commission, he called for prudence and an attempt to find a solution which did not favour any one theory of immunity over another and would enlist the widest possible support from the international community.

22. The Commission should first and foremost formulate draft article 6 in such a way as to recognize unequivocally that the principle of State immunity was a universally recognized rule. With that point of departure and for the sake of the higher interests of mankind, the principle could be restricted to some extent under conditions that it was for States themselves to establish. With those reservations, he could accept the exception embodied in article 13.

23. The expression "Unless otherwise agreed" in paragraph 1 could be maintained, since the proposed exceptions could be justified only if provision was made for the possibility of a contrary agreement restoring the normal operation of the rule of immunity. Furthermore, he endorsed the principle contained in paragraph 2 (*d*), which recognized the right of States to adopt legislation granting exclusive jurisdiction by reason of the subject-matter.

24. The criteria in paragraph 1 regarding application of the exception seemed acceptable despite the doubts expressed with regard to the exact meaning of the expression "contract of employment". Labour law, as distinct from administrative law, did in fact exist and, depending on the country, reflected more or less faithfully international labour standards, particularly those concerning the equality of the employer. Admittedly, the essential feature of governmental functions lay in the exercise of the sovereign authority of the State, but in order to remove any uncertainty, the Commission could define "contract of employment" in the commentary to article 13.

25. In respect of paragraph 2 (*a*), several members had observed that failure to employ presupposed the absence of a contract and did not seem to warrant a special reference. The Special Rapporteur had replied (1763rd meeting) that failure to employ was an act performed in the exercise of governmental functions and did not, therefore, fall within the jurisdiction of the territorial courts. The same argument had been adduced in the case of dismissal of an employee, but it did not seem adequate. In the logic of the proposed system, neither failure to employ nor dismissal should *a priori* constitute cases of non-application of paragraph 1. The relevant international standards, which most States had incorporated in their national legislation by ratifying the pertinent international labour conventions, were binding and included such principles as non-discrimination and compensation for wrongful dismissal. The European Social Charter of 1961[9] laid down an obligation to give prior notice in the event of dismissal. Non-observance of those principles could well justify proceedings before the courts of the forum State. Dismissals unquestionably lay at the root of most labour conflicts between employees and employers and, if they were removed from the sphere of application of paragraph 1, the Commission might be running counter to the principles of social justice. Hence, paragraph 2 (*a*) was of doubtful value.

26. As the Special Rapporteur had stressed earlier (*ibid.*), it would be advisable to make a separate provision for immunity covered by the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Convention on Special Missions.

27. Mr. USHAKOV said that the Commission was not a legislative body and, in its work of codification, and sometimes of progressive development of international law, members could not let themselves be guided by personal feelings. Their work must be founded on existing international law. When a general trend did exist, they could propose progressive provisions in the context of the development of the law. However, no trend of that sort existed with regard to the subject-matter of article 13. Some States had admittedly begun to place restrictions on the principle of State immunity in the sphere of contracts of employment, but that could not be interpreted as a trend generally accepted by all States. It was merely a trend in the internal legislation of a few countries. Others which had recently adopted legislation on labour relations were in no sense following the same course. In some instances, recent legislative provisions were entirely contradictory. It was not possible, as the Special Rapporteur had done, to rely on only some legislation and infer that there was a recognized trend in international law. Moreover, States were not free to adopt just any kind of legal text that affected international relations. A legislative trend that prejudiced the rules of international law could not be taken into account. In his opinion, the well-established trend was to ensure strict guarantees of State sovereignty by applying the theory of the absolute jurisdictional immunity of States.

28. It would be dangerous to believe that the question of contracts of employment in which a State acted as employer related in practice to the recruitment of embassy staff; the Commission should not now become involved in problems of diplomatic law. In any event, the matter did not concern consulates, permanent missions to international organizations, special missions and, still less, foreign armed forces.

[9] Council of Europe, European Treaty Series, No. 35 (Strasbourg, 1967).

29. No distinctions could be made within a single State body between the persons who performed governmental functions. For example, a typist working in an embassy enjoyed immunity nearly as absolute as that of diplomats because of the documents she typed. It was not, however, she but the embassy that performed governmental functions. Among the staff members, the distribution of tasks allowed no distinctions to be made from the standpoint of immunity. The doubtful cases were those in which the State employed nationals of the receiving State. If it concluded a contract of employment, a State observed the terms of the contract. Indeed, legal proceedings were extremely rare and were generally settled by diplomatic means, hence the lack of available State practice in the matter.

30. When a State recruited the staff members of its embassies, consulates and diplomatic missions and they were its own nationals or aliens not permanently resident in the forum State, the applicable legislation was that of the employer State. Why should matters differ if the persons engaged were nationals of the State on whose territory the work was performed? Under private international law, unless the parties agreed otherwise, a State's own legislation applied when it concluded a sales or purchase contract. There was no reason why a contract of employment should be subject to different legislation. On the question of the applicable law, the Special Rapporteur did not, in fact, state which law was involved (A/CN.4/363 and Add. 1, paras. 34–36). Furthermore, the law of the sending State was not necessarily less favourable than that of the State on whose territory the work was performed.

31. Yet another question was whether the courts of the receiving State were authorized to settle proceedings in all cases, when in actual fact many were settled by administrative law. Article 13 referred merely to court jurisdiction and not to administrative jurisdiction. When a State recruited a national of the forum State, was it required to know all the labour law of that State? In practical terms, that was an impossible undertaking. Furthermore, before certain States had adopted legislation restricting the jurisdictional immunity of States, the situation had not been one of anarchy. The very few number of disputes that had arisen had been settled either through diplomatic channels or out of court by the foreign State and the employee. He therefore wondered why it was necessary to introduce rules which had so little practical use.

32. Strictly speaking, under the terms of draft article 13 the sending State was not exempt from the jurisdiction of the forum State. Would ambassadors be affected by them on the pretext that a contract of employment had been concluded? In actual fact, the situation of the staff of embassies, consulates, diplomatic missions and permanent missions to international organizations was governed by the relevant diplomatic conventions. As for nationals of the State in which the work was performed, they were protected by the legislation of the foreign State, which was not necessarily a law-breaker. There was no point in subjecting foreign State employers to the judicial authority of another State for the genuinely minor disputes that might occur.

33. In conclusion, he did not find in the practice or the position of States any grounds for article 13. It was thought that a tendency could be seen to restrict State immunity. If a few national laws existed in that sense, they were contrary to international law. The national legislations that took the opposite view were far more numerous. The article had no practical or legal foundation and its general terms made no exception for diplomatic staff.

34. Mr. JAGOTA commended the Special Rapporteur on his comprehensive and instructive report (A/CN.4/363 and Add.1) and on the moderate conclusions it contained. The draft articles dealt with a sensitive question and took into account a trend which had been emerging mainly in the practice of industrialized, developed States over the past 30 years and which was being crystallized in the form of the legislation and judicial decisions adopted by those States in the past decade or so. The socialist and developing countries had, in a sense, been disturbed by that trend and, in response, had adopted a cautious attitude towards the granting of reciprocity.

35. When the Commission had begun its discussion of State immunity, it had decided that the Special Rapporteur should first indicate the rule and then indicate the exceptions to the rule. Many members had stressed that the exceptions should be defined in such a way that they would not adversely affect the rule and that they should be restrictive and restrictively interpreted and applied.

36. Draft article 13 differed from draft article 12 in that the latter was based on more abundant State practice regarding immunity and exceptions in the case of State trading or commercial activity. As far as contracts of employment were concerned, the Special Rapporteur had admitted that the inductive method had not proved very helpful and that he had been unable to find judicial decisions relating to the exception provided for in draft article 13. All the decisions cited by the Special Rapporteur upheld the principle of State immunity and, as he had noted, little evidence had been encountered of uniform State practice with regard to contracts of employment (*ibid.*, paras. 39–40).

37. The Special Rapporteur had none the less concluded (*ibid.*, paras. 59–60) that the emerging trend was to consider such contracts as an area of possible exceptions to State immunity. He had based that conclusion on national legislation, international conventions and the opinions of publicists and expert bodies, such as the International Law Association, and had noted that that trend was a positive and useful one in that it would protect the interests of local employees of foreign States who did not perform official functions and whose employment would be governed not by the administrative law or personnel policies of the foreign State, but by that of the forum State in which the work was performed and in which the contract of employment had been concluded. The local

courts would thus have jurisdiction to examine the merits of cases and rule whether or not exceptions to immunity applied.

38. The Special Rapporteur had thus dealt with the questions of the applicable law and non-immunity from jurisdiction, but had not yet discussed the third question, namely the enforceability of the decisions of local courts against foreign States. Clearly, the Commission had to determine whether there were any trends with regard to those three questions and, if so, whether they would promote or hamper friendly relations among States. It must also bear those three questions in mind in drafting the exceptions to the rule of State immunity.

39. The Special Rapporteur had said that he was concerned not with private activities or the activities of corporations but with activities carried out by a State in the territory of another State, either directly or through agencies or enterprises under its control. Hence, it had to be decided what was meant by "agencies of the State" and whether such agencies were governed by local law or by international law. The reason was that diplomatic missions, consular posts and special missions were not government agencies for the purposes of State immunity; they were encompassed by the rules of diplomatic and consular immunity. Local employees might, however, be employed by diplomatic missions, consular posts and special missions, in which case the question arose of whether they would be covered by draft article 13. As it stood, paragraph 2 (*d*) seemed to indicate that local law would decide the issue.

40. That matter, which should be given careful consideration before the Commission concluded its study of the topic, had arisen in a case involving one of India's embassies in a foreign State. The embassy, which employed local people as gardeners, drivers or ushers, for example, entered into contracts of employment with local employees, whose conditions of work and rights were determined by local law and custom. A local employee had claimed that he had not received due and proper notice of the termination of his employment and had initiated proceedings against the embassy. The case had been brought before a local court which had exercised jurisdiction, asserting that the person in question had been employed not by the embassy, which was an agency of a foreign State, but by the Government of that foreign State, and that the applicable law was not diplomatic immunity but State immunity, which was not recognized by the forum State. Ultimately, in the interests of maintaining friendly relations with the forum State, the embassy had decided to pay compensation to the person in question but had also addressed a note to the Ministry of Foreign Affairs of the forum State, requesting it to intervene. The Ministry had replied that it could not intervene because the local courts were autonomous and competent to apply local law as they saw fit. The final remedy had been for India to apply the same law in Indian territory. India had thus learned that, if its embassies in foreign countries could be subjected to foreign jurisdiction, it would be compelled to subject foreign embassies in its territory to the same treatment.

41. It was an example that revealed the need for a precise definition of the scope of State immunity. If diplomatic immunity was excluded from the draft, the Commission must say so clearly and not leave it to local law to decide under the terms of paragraph 2 (*d*). That point was particularly important because States were becoming increasingly involved in activities in other States in a variety of fields. Such activities obviously involved the employment of local staff, whose interests had to be protected as against those of the foreign State employers. Yet, at the same time, friendly relations between the States concerned must not be adversely affected. That element formed the real motivation for article 13 and it was in that connection that the emerging trend mentioned by the Special Rapporteur became relevant.

42. With regard to paragraph 1, the purpose of the expression "Unless otherwise agreed" was surely to make the exception embodied in the article a residual rule, one which could be modified by detailed agreement between the parties to the future convention to which the set of draft articles would presumably lead. Unfortunately, the wording did not make it clear that the article related only to the local employees of the foreign State. There were thus two possibilities: either the persons whose interests were being protected should be clearly identified, or the term "contract of employment" should be defined in order to indicate what types of employees were covered. The latter course would, in fact, more clearly indicate the real intention of paragraph 2 (*a*) by obviating the mistaken impression that the foreign State could engage and dismiss persons at will, and it would also restrict the phrase "unless . . . by reason of the subject-matter" in paragraph 2 (*d*), which should not give primacy to local law. Furthermore, it would be preferable to replace the word "dismissal" in paragraph 2 (*a*) by the words "termination of the contract". Article 13 would be acceptable, subject to those changes.

The meeting rose at 1 p.m.

1765th MEETING

Friday, 20 May 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.
