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**Summary record of the 1834th meeting**

Topic:  
**Jurisdictional immunities of States and their property**

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Special Rapporteur had prudently excluded from article 18 the case of a private company whose only shareholder was a foreign State, which would raise the problem of capacity. He had also excluded the case of a private company which had only foreign States as shareholders, which would make it an international enterprise, if not an international organization such as the World Bank group. The Special Rapporteur required that at least two members should not be States. In accepting that situation, the State placed itself under private law and accepted jurisdiction. Perhaps it should be specified that the members which were not States must be private persons; it would then be understood that the Commission considered that the State had had recourse to a form of private law and that it accepted jurisdiction. It could not be said that that was a form of commercial law, for the question depended on internal law. Under the law of some countries, the adoption of a particular form of company, such as the limited liability company, meant that all its activities, whatever the company's object, were commercial activities. But there were cases in which the activities were not commercial, and in the absence of a special text covering them, the Commission would be left with the provision on commercial activities and those cases would not be covered. However, that situation did not seem to present any great danger.

40. Lastly, he believed that a State could be the owner of copyrights. The same applied to international organizations, though, for reasons of caution, few of them were recognized as having that faculty. Those organizations should be protected not only against other organizations or private persons, but also against States.

*The meeting rose at 6 p.m.*

## 1834th MEETING

*Tuesday, 5 June 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Laclela Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

**Jurisdictional immunities of States and their property**  
(*continued*) (A/CN.4/363 and Add.1,<sup>1</sup> A/CN.4/371,<sup>2</sup> A/CN.4/376 and Add.1 and 2,<sup>3</sup> A/CN.4/L.369, sect. C, ILC (XXXVI)/Conf. Room Doc.1 and Add.1)

[Agenda item 3]

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> *Idem.*

<sup>3</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

## DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR<sup>4</sup> (*continued*)

ARTICLE 16 (Patents, trade marks and other intellectual properties)

ARTICLE 17 (Fiscal liabilities and customs duties) *and*

ARTICLE 18 (Shareholdings and membership of bodies corporate)<sup>5</sup> (*continued*)

1. Mr. OGISO said that draft articles 16 to 18 were mainly a follow-up to the contents of articles 12 and 15, which the Commission had provisionally adopted. Accordingly, he had no major difficulty with regard to the substance of those articles and his comments would be confined largely to drafting matters.

2. Draft article 16 was unduly detailed and his own preference would be for a text stating as succinctly as possible the general principle of the limitation of State immunity with regard to patents, trade marks and the like. In paragraph 1 (*a*), it seemed hardly necessary to refer to "a patent, industrial design, trade mark, service mark, plant breeders' right or any other similar right or copyright", a form of language taken from the United Kingdom's *State Immunity Act 1978*, where it was of course quite appropriate. A detailed list of that kind, however, was not suitable for an international convention, since some Governments would have to enact national legislation to implement the principles of the convention in their domestic law. Hence the best course was to make the provisions as general as possible, in order to allow the necessary flexibility for implementation in the different national legal systems. The list in paragraph 1 (*a*) could be replaced with advantage by a formula such as "a patent, trade mark or other intellectual property" and paragraph 1 (*b*) could then be deleted altogether, for the expression "other intellectual property" would cover trade names and business names.

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

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

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

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

<sup>5</sup> For the texts, see 1833rd meeting, para. 1.

3. Again, the difference between subparagraphs (a) and (b) of paragraph 2 appeared to be that the latter covered trade names and business names. If paragraph 1 (b) was deleted, paragraph 2 (b) could also be eliminated. Indeed, it should be possible to merge paragraphs 1 and 2 into a single formulation along the following lines:

“A State cannot claim immunity from the jurisdiction of another State if the proceedings relate to:

“(a) A patent, trade mark or another intellectual property which, in the State of the forum, has been applied for, registered or deposited or is otherwise protected in another State, and in respect of which the State is the owner or applicant; or

“(b) An alleged infringement by a State in the territory of that other State of a patent, trade mark or other intellectual property belonging to a third person and protected in that other State.”

4. It would be noted that he was also suggesting the formula “an alleged infringement by a State”, so as to remove the controversial expression “attributable to”. He was not making a firm proposal, but merely putting forward a possible rewording for draft article 16 that the Drafting Committee might take into consideration.

5. As to draft article 17, the words “any agricultural levy” in paragraph 1 (a) should be replaced by some more general formula. In the European Economic Community, “agricultural levy” meant a tax levied on agricultural imports from outside the Community area and, in preparing draft article 17, the Special Rapporteur had drawn upon the language of the United Kingdom *State Immunity Act 1978*, in which the reference to “agricultural levy” was entirely relevant since the United Kingdom was a member of the Community. In the present context, a more general term was obviously desirable.

6. With regard to draft article 18, he had a comment of substance to make arising from the remarks by Mr. Reuter (1833rd meeting) concerning certain corporations, notably of a financial nature, established by international agreement. He had in mind an organization such as INTELSAT, which had been established by an international agreement and whose members included not only States, but also the telecommunications authorities of member countries. In his opinion, organizations of that kind should remain outside the scope of paragraph 1 (a) and he would be grateful to hear the views of the Special Rapporteur and of other members on that point.

7. He had considerable misgivings about paragraph 2 of article 18. The first clause of the paragraph would have the effect of setting aside the provisions of paragraph 1 whenever such a course was so agreed by the parties in dispute. However, the State of the forum might well not be a party to the dispute. It therefore seemed essential to make it clear that, in order to set aside the provisions of paragraph 1, the consent of the State of the forum had to be obtained. If such consent was not forthcoming, then paragraph 1 should apply. The position was the same with regard to the remaining part of paragraph 2, under which the application of paragraph 1

could be set aside by means of a clause contained in the constituent instrument of the body or partnership in question. There again, the State of the forum might not have had an opportunity to give even its tacit consent to the constituent instrument. Indeed, in the case of a private partnership, the State of the forum would play no part whatsoever in the formulation of the constituent instrument. For those reasons, he would welcome clarification from the Special Rapporteur on both of the provisions contained in paragraph 2 of article 18.

8. Chief AKINJIDE said he experienced no difficulty with regard to draft articles 17 and 18. The argument advanced by Mr. Ushakov (1833rd meeting) appeared to be based mainly on differences in the economic systems of States. Personally, he found Mr. Reuter's remarks (*ibid.*) entirely persuasive and he also agreed with the comments made by the Special Rapporteur (*ibid.*) in his oral presentation. Subject, therefore, to any drafting improvements such as those just suggested by Mr. Ogiso, the Commission could adopt draft articles 17 and 18.

9. On the other hand, he had very serious misgivings about draft article 16, which would have grave economic implications for developing countries. The draft must attract not only the General Assembly's approval, possibly by consensus, but also, and much more important, ratification by Member States. As it stood, article 16 would draw an economic iron curtain between the developed countries and the developing countries and would sentence the latter to indefinite economic imprisonment.

10. In his sixth report (A/CN.4/376 and Add.1 and 2, para. 51), the Special Rapporteur had divided intellectual and industrial property into three categories: first, patents, including industrial designs and inventions; secondly, trade marks and the like; and thirdly, other industrial or intellectual property such as copyright, translation rights, and so on. In his oral presentation, the Special Rapporteur had also added computer software and computer discs to the third category. Those three categories of intellectual property constituted the life-blood of the economic well-being of the world, especially that of the developing countries. Yet, as the Special Rapporteur had pointed out:

... The system for deposit, examination, investigation and eventual registration is administered in each State in accordance with its prevailing legislation and customs. It is not unusual that, in industrially or economically developed countries, the protection provided is more effective and infringement is discouraged or severely punished, while in less developed or developing countries, such a system may either be non-existent or be at a very embryonic stage, since expert knowledge is required before registration of any invention, patent or industrial design. ... (*Ibid.*, para. 52.)

11. The picture thus drawn by the Special Rapporteur showed that, in connection with intellectual property, the developing countries and the developed countries were engaged in an unequal contest, in which the developing countries could never win and in which the developed countries were always bound to win. It was no exaggeration to compare that contest to a race between a camel and a jet aircraft. He failed to see how it was possible to frame treaty provisions on the subject that would be common to the two groups of countries. The developing

countries had no prospect whatsoever of catching up with the developed countries in the foreseeable future.

12. Article 16, if accepted in its present form, would not only provide total protection for existing inventions, but also inhibit any possible advancement by developing countries. Inevitably, the truth must be faced that industrial espionage was the rule, even among the developed countries themselves. Cases of such espionage attracted attention only when they failed; successful ones remained unknown. When he had been a small boy, a certain country had produced goods generally regarded as cheap and inferior, whereas today its products were synonymous with high quality. That extraordinary result had been achieved by breaking the industrial secrets of others. If, when he had been a child, a provision along the lines of article 16 had been international law, it would have been quite impossible for that country to become the great industrial power it was today. He did not believe for one moment that the developed countries would willingly pass on their industrial secrets to the developing countries. A provision such as article 16 had no place in the draft under consideration, for the developing countries had no intention of resigning themselves to the role of perpetual suppliers of raw materials and consumers of the industrial products of others.

13. In its report, *North-South: A Programme for Survival*, the Brandt Commission stated:

The crisis through which international relations and the world economy are now passing presents great dangers, and they appear to be growing more serious. We believe that the gap which separates rich and poor countries—a gap so wide that at the extremes people seem to live in different worlds—has not been sufficiently recognized as a major factor in this crisis. It is a great contradiction of our age that these disparities exist—and are in some respects widening—just when human society is beginning to have a clearer perception of how it is interrelated and of how North and South depend on each other in a single world economy.<sup>6</sup>

It also went on to affirm:

The transnational corporations, or as they are also called, multinational corporations, are closely involved in many of the areas which are dealt with in this Report: with minerals, commodities, industrialization, food and energy. Many of them have played a large role in bringing technology and capital to developing countries. Oil and food companies have been operating globally since the early years of the century. But in the post-war years the scale and sophistication of their operations have greatly increased, and they have become politically much more visible and have frequently been the centre of controversy. They are now major actors in the world's political economy. They control between a quarter and a third of all world production and are particularly active in processing and marketing. The total sales of their foreign affiliates in 1976 were estimated at \$830 billion, which is about the same as the then gross national product of all developing countries excluding oil-exporting developing countries.<sup>7</sup>

14. The expression "third world" was commonly used to describe the developing countries, but he would be tempted to speak of three categories: (a) a sort of second world, comprising certain countries of Asia and Latin America which had achieved some measure of industrial

progress; (b) the main body of third world countries, whose plight was far worse; (c) the "fourth world" of the least developed countries.

15. In the light of those considerations, his own solution would be to delete article 16, which dealt with matters that should be left to national legislation and to bilateral agreements. It was significant that section 7 of the United Kingdom *State Immunity Act 1978*, quoted by the Special Rapporteur (*ibid.*, para. 70), used the words "in the United Kingdom" in four places. Just like the United Kingdom, many developing countries wanted to be free to adopt national legislative provisions of their own on the subject.

16. He could cite a few examples, taken from his own experience when he had been Attorney-General of his country, to illustrate how the developing countries were placed at a disadvantage with regard to intellectual property. In 1977, a decision unfavourable to his country had been rendered in the United Kingdom by Lord Denning,<sup>8</sup> who had said in effect what had later been embodied in section 7 of the United Kingdom *State Immunity Act 1978*. His own difficult task had been to decide whether to appeal to the House of Lords, and he had been obliged to abandon the idea, partly because of a feeling that the House of Lords was unlikely to overrule Lord Denning and partly because of the enormous cost of litigation in the House of Lords. Again, in a case<sup>9</sup> heard in the United States courts and involving the application of the *Foreign Sovereign Immunities Act of 1976*, he had been compelled to advise against an appeal to the Supreme Court because of the staggering legal costs which such recourse would have involved.

17. A glance at the judicial practice in the matter showed that most cases relating to intellectual property were between a developing country and a developed country and that they were fought at enormous cost. He was therefore strongly opposed to draft article 16 in all its ramifications. It was acceptable only for countries that were on equal terms and could, of course, be applied between developed countries; but it was totally unacceptable from the point of view of developing countries.

18. Sir Ian SINCLAIR said he agreed with the Special Rapporteur (A/CN.4/376 and Add.1 and 2, paras. 20-22) as to the irrelevance of differences in ideology, especially differences stemming from a particular view of the capacities and functions of the State. The notion of the "dual personality" of the State (in other words, the State acting as a sovereign entity and the State acting in the same manner as a private person) had occasionally been put forward as a justification for the restrictive theory of immunity. That had been particularly true in the case of Italy, where as early as 1886 the Court of Cassation of Florence had drawn a distinction between the Govern-

<sup>8</sup> *Trendtex Trading Corporation Ltd. v. The Central Bank of Nigeria* (The All England Law Reports, 1977, vol. 1, p. 881).

<sup>9</sup> *Texas Trading and Milling Corp. v. Federal Republic of Nigeria and Central Bank of Nigeria* (1981) (United States of America, *Federal Reporter, 2nd Series*, vol. 647 (1981), p. 300; see also United Nations, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), p. 527).

<sup>6</sup> *North-South: A Programme for Survival. Report of the Independent Commission on International Development Issues* (under the chairmanship of Willy Brandt) (London, Pan Books, 1980), p. 30.

<sup>7</sup> *Ibid.*, p. 187.

ment as a body politic (*Governo ente politico*) and as a civil entity (*Governo ente civile*).<sup>10</sup> In France, however, the Court of Appeal of Paris, in a leading case in 1912, had rejected the distinction between *État puissance publique* and *État personne privée*.<sup>11</sup>

19. Doctrinally, the theory that the State could have dual personality was rather suspect. What was significant in the context of State immunity was not the capacity in which the State might have acted but the nature of the act in question. In any event, he agreed wholeheartedly with the Special Rapporteur that it would serve no useful purpose to endeavour to resolve those differences and it was noteworthy that the draft articles did not depend upon acceptance of the theory of the “dual personality” of the State.

20. The distinction between *acta jure gestionis* and *acta jure imperii* lay behind much of the extensive judicial practice of those States which favoured the theory of restrictive immunity. It had some utility, since it helped to confirm that, even under the restrictive theory, immunity still had to be accorded in respect of acts performed by a foreign State in the exercise of its sovereign activity. But the distinction was less helpful when the precise content of what constituted *acta jure gestionis* had to be determined. There were inconsistencies in the judicial practice of different countries, particularly in relation to proceedings arising out of contracts for the purchase of military supplies or out of loan agreements.

21. The distinction would certainly have to be borne in mind as work on the topic proceeded, but perhaps more as a general guideline than as a clearly defined formula for determining when immunity could properly be invoked and when it could not. He therefore agreed with the Special Rapporteur's disclaimer that the distinction did not apply to the draft articles already provisionally adopted by the Commission. Nevertheless, attention would still have to be paid to the difference between *acta jure gestionis* and *acta jure imperii* as a rough guide.

22. With regard to the “subtle differences in practice and procedure” to which the Special Rapporteur rightly drew attention (*ibid.*, paras. 23-26), he had some mild reservations about the analysis in paragraph 23 of the report, the penultimate sentence of which appeared to confuse jurisdictional immunity with a whole series of other grounds on which a court might refrain from exercising jurisdiction. For example, if the subject-matter of the particular dispute did not fall within the jurisdictional rules applied by the court of the forum State, the question of jurisdictional immunity simply did not arise, since the writ would, at least in the common-law system, be set aside for lack of subject-matter jurisdiction. Equally, lack of capacity to sue or be sued on the part of either the plaintiff or the defendant would be an independent ground for setting aside a writ.

23. Similarly, a clear distinction had to be drawn between jurisdictional immunity and the “act of State”

doctrine. The rule of immunity in respect of *acta jure imperii* precluded the courts of the forum State from assuming jurisdiction in a case where a foreign State was directly or indirectly impleaded and where the validity of acts which it had performed in the exercise of its foreign sovereign authority might be at issue. In other words, it operated as a bar *in limine* to the continuation of the proceedings. The “act of State” doctrine, on the other hand, as applied by courts in the United States of America, was not in any sense a bar to the assumption of jurisdiction and could be pleaded even in cases where the foreign State was neither directly nor indirectly impleaded. It operated as a defence to proceedings in which the validity of foreign executive or legislative acts might be at issue.

24. An analogous but distinct example was provided by the notion of judicial self-restraint developed in the leading English case of *Buttes Gas and Oil Co. v. Hammer* (1982),<sup>12</sup> in which there had been uncertainty as to the jurisdiction of the English courts to rule upon an alleged libel by the defendant. The difficulty was that, in order to determine the issues raised in the litigation, the courts would have had to rule on the validity of certain governmental acts asserting sovereignty over areas of the seabed in the Arabian Gulf. The House of Lords had refused to countenance such a pronouncement, relying on the concept of judicial self-restraint to avoid having to rule on the underlying issue.

25. It was essential for the Commission, in its work on the present topic, to confine itself strictly to the jurisdictional immunities of States and their property. Any attempt to cover a wider field would inevitably give rise to great difficulties. There were all kinds of reasons why a court, properly seized of a dispute over which it was entitled to exercise jurisdiction, might refrain from exercising it. Apart from the cases he had already mentioned, the court, acting in accordance with its own rules of private international law, or pursuant to an international treaty by which the forum State was bound, might apply the principle of *forum non conveniens*. It might equally refrain from exercising jurisdiction because proceedings between the same parties were pending before the courts of another State. All those considerations, which the Special Rapporteur referred to in his report (*ibid.*, para. 33), had little or nothing to do with jurisdictional immunity in the strict sense. Admittedly, it was true that, in the courts of certain countries, there had been some occasional confusion between *incompétence* and *immunité de juridiction*, but the fact remained that jurisdictional immunity denoted immunity from a jurisdiction which would otherwise be exercisable by a court. If the court did not initially possess jurisdiction under its own rules to determine the merits of the dispute, the question of immunity did not arise. He accordingly agreed with the Special Rapporteur's conclusion on that aspect of the matter.

26. With regard to the notion of reciprocity, although it was operative in many spheres of international law, it

<sup>10</sup> *Guttieres v. Elmilik (Il Foro Italiano)* (Rome), vol. XI, part 1 (1886), p. 913).

<sup>11</sup> *Gamen-Humbert v. État russe* (Dalloz, *Recueil périodique et critique de jurisprudence*, 1913 (Paris), part 2, p. 201).

<sup>12</sup> United Kingdom, *The Law Reports, House of Lords*, 1982, p. 888.

had to be borne in mind that the interests involved were not simply those of the States concerned, but also of private litigants. Since jurisdictional immunity barred the remedy of any potential private litigant, the fact that a foreign State against which he wished to proceed would grant immunity to other States in a similar case did not seem relevant. That did not mean it would be contrary to international law for a State to apply a condition of reciprocity, but the application of such a principle seemed largely to ignore the interests of potential private litigants.

27. The Special Rapporteur had also mentioned *Alcom Ltd. v. Republic of Colombia* (1984)<sup>13</sup> in the context of costs, in which connection his concern was understandable since the costs incurred by a foreign State in establishing its immunity from jurisdiction could be considerable. In the *Alcom* case, each party had had to bear its own costs for the garnishee proceedings, both before the House of Lords and in lower courts. In making his order, Lord Diplock had rightly pointed out that the question of law that was involved was of outstanding international importance. Counsel for the Attorney-General, who had appeared as *amicus curiae* in the proceedings before the House of Lords, and counsel for the appellant had submitted that neither international law nor the terms of the *State Immunity Act 1978* permitted the making of a garnishee order against the current account of a diplomatic mission in London that was used to meet that mission's day to day running costs. That line of argument had prevailed.

28. The question of costs was a tricky one and it should be remembered that the developing countries were not the only countries to suffer in that regard. The United Kingdom Government had on occasion incurred substantial costs in defending proceedings brought against it in foreign States or in intervening in such proceedings to protect a particular Government interest. At all times, however, it was important not to forget the third party—the private litigant wishing to pursue what he regarded as a valid claim against a foreign State; the fact that he also had to weigh in the balance his liability for costs if he was unsuccessful before the courts acted as a powerful deterrent against the pursuit of unmeritorious claims.

29. As to the three new draft articles submitted by the Special Rapporteur, article 16 raised not only technical problems but, in the context of Chief Akinjide's statement, also more substantive issues. He had been somewhat puzzled by that statement, although he fully understood Chief Akinjide's concern at the disparities between the developed and the developing countries so far as lack of expertise in patent matters was concerned. Nevertheless, he genuinely wondered what that had to do with the acceptability or otherwise of draft article 16. Would it be in the interests of Nigeria, and of developing countries in general, if a foreign State were to infringe a patent that had been applied for in Nigeria and then claim immunity in the context of proceedings brought by the owner of or applicant for the patent? Would it be in the interests of Nigeria, and of developing countries in general, if for-

eign States that applied for a patent in Nigeria then claimed immunity in proceedings brought by a Nigerian national who claimed prior rights in the subject of the patent? Personally he did not know the answer, but he suspected that it would not be in the interest of Nigeria, or of developing countries generally, for a rule of immunity to continue to apply. Furthermore, if a rule of immunity was applicable in such matters, it would apply when a foreign State infringed a patent, irrespective of how many relevant national laws there were.

30. Little objection had been raised to the need for a provision of the type contained in paragraph 1 of article 16, whether it was justified on the basis of close connection with articles 12 and 15 or of implied consent to the exercise of jurisdiction. He wished to assure Mr. Ushakov, who had expressed doubt (1833rd meeting) as to whether a State could rely on copyright, that so far as the United Kingdom was concerned it was certainly possible to do so.

31. Mr. Ushakov had been even more concerned about paragraph 2 of article 16. But if a State was subject to the jurisdiction of the courts of the forum State in regard to property rights of which it was the owner or for which it had applied, why should it not be equally amenable to the jurisdiction of those courts if it had allegedly infringed in the intellectual property rights of third parties in the forum State? As indicated in the report (A/CN.4/376 and Add.1 and 2, para. 78), an alleged infringement inevitably put at issue the question of whether the private party or the forum State was entitled to the protection of the intellectual property right concerned. Even if the courts of the forum State were called upon to interpret and apply the relevant international conventions, that fact caused him no misgivings. Intellectual property rights were essentially rights under private law and national courts regularly interpreted and applied such international conventions on the unification of private law as the 1929 Warsaw Convention in the case of aircraft, and the Hague (1924) and Hamburg (1978) Rules in the case of ships. Indeed, that was how jurisprudence was developed. He therefore had no problems in principle with paragraph 2, although he agreed that the Drafting Committee should consider carefully the implications of the notion that an alleged infringement might be attributable to a State.

32. Similarly, draft article 17 posed no problems, although he noted that Mr. Ushakov considered it unnecessary. Yet for the economy of the draft as a whole some such provision would have to be included, for otherwise the implication would be that the rule of immunity would apply. The Special Rapporteur had rightly stated that it was a twilight zone (*ibid.*, para. 103), since there was very little judicial practice and the basis for a provision of that kind was not very clear, even though something very similar had been included in the United Kingdom's *State Immunity Act 1978*. The 1972 European Convention on State Immunity, for its part, omitted all reference to the matter, leaving it to States to deal with it under their own legislation; the same approach would perhaps provide an alternative solution.

33. Lastly, he considered that there was a clear need for draft article 18; otherwise the implication would be that

<sup>13</sup> See 1833rd meeting, footnote 5.

there was a rule of immunity which could interfere with the way in which companies ran their businesses.

34. Mr. SUCHARITKUL (Special Rapporteur), replying to points raised, said he agreed entirely that the Commission should not rely unduly on the distinctions that were drawn by States. Nevertheless, it had to be recognized that they loomed large in the case-law of many countries and could not be dismissed out of hand. His purpose therefore had simply been to point out the irrelevance of such distinctions in certain respects, without dwelling further on their philosophical or conceptual implications. He likewise agreed that it was first necessary to establish that a court did have jurisdiction; otherwise there could be no question of jurisdictional immunity. That assertion, however, was not always accepted by legal writers. In that connection he recalled that, on one occasion, a former member of the Commission had said that, if he had to defend a foreign Government before a United Kingdom or a United States court, he was not sure whether, in addition to jurisdictional immunity, he would not also raise the question of some other defence. Normally, of course, the court was not bound to decide the question of jurisdictional immunity before other questions.

35. The expression "owner or applicant", in paragraph 1 (a) of draft article 16, raised questions of both substance and translation. In the matter of substance, "applicant" had been included to denote the fact that, in the period before a patent was actually registered, the applicant for registration had a kind of inchoate title to property. So far as questions of translation were concerned, *déposant ou titulaire* ("owner or applicant"), in the French text, appeared in article 8 of the 1972 European Convention on State Immunity, but the Drafting Committee might wish to make some improvement. He agreed, however, that the expression *non-respect présumé* ("alleged infringement"), in paragraph 2, was inelegant. It might be best to adopt the same expression as the one used in the 1972 European Convention.

36. With regard to paragraph 2 of draft article 16, he would not go into the question of the interests of the developing countries, since it was already dealt with, *inter alia*, in declarations adopted by WIPO and in UNCTAD resolutions on the transfer of technology. He would merely say that, in regard to cultural rights, which could be considered as a species of intellectual property, the developing countries were surely as advanced as the developed.

37. A point had been raised in connection with the term "agricultural levy" in paragraph 1 (a) of draft article 17. It had been translated into French as *toute redevance agricole*, but the expression used by the Common Market was *prélèvement*, which meant the sum over and above the import duties payable.

38. The expression "an agreement in writing between the parties to the dispute", in paragraph 2 of draft articles 18, had been included because the choice of law was open to the parties to a dispute. Again, the term "constitution or other instrument" in the same paragraph referred to any instrument regulating the body

in question, such as the Charter of the United Nations. Lastly, although there was little judicial practice, actual practice was constantly on the increase as States invested in companies within or outside their own territory. In such cases they would, of course, be amenable to the local jurisdiction of the State of incorporation.

39. Mr. USHAKOV said he wished to reaffirm that, in his opinion, paragraph 1 of draft article 16, which was concerned more particularly with cases in which the State was the plaintiff, was superfluous. A State could always apply to a court of the forum State for protection of its intellectual property rights. As to paragraph 2, he unreservedly endorsed the argument by Chief Akinjide, for the paragraph was not only entirely contrary to, but also seriously jeopardized, the interests of the developing countries.

40. With regard to draft article 17, he agreed with Mr. Reuter (1833rd meeting) that a State, like any other taxpayer, could institute proceedings relating to, for example, calculation of the amount of taxes or duties, if the court was competent in the matter. But there was really no need for such a provision.

41. Lastly, concerning draft article 18, he too considered that cases in which the State held shares in a company raised formidable problems. He still believed that the formulation of general rules on the basis of concrete, special or highly delicate cases would run into difficult, if not insurmountable, problems.

*The meeting rose at 12.55 p.m.*

## 1835th MEETING

*Wednesday, 6 June 1984, at 10.05 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balandá, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

**Jurisdictional immunities of States and their property (continued)** (A/CN.4/363 and Add.1,<sup>1</sup> A/CN.4/371,<sup>2</sup> A/CN.4/376 and Add.1 and 2,<sup>3</sup> A/CN.4/L.369, sect. C, ILC (XXXVI)/Conf. Room Doc.1 and Add.1)

[Agenda item 3]

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> *Idem*.

<sup>3</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).