

Document:-
A/CN.4/SR.1841

Summary record of the 1841st meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
1984, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

1841st MEETING

Friday, 15 June 1984, at 10 a.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

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

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR⁴ (concluded)

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

1. Mr. REUTER said that he first wished to make two points regarding the discussion on draft articles 16, 17, 18 and 19. To begin with, some members of the Commission appeared to feel that the Commission was engaged in a difficult task. Yet the Commission was not only able

¹ Reproduced in *Yearbook ... 1983*, vol. II (Part One).

² *Idem.*

³ Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

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

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

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

⁵ For the texts, see 1838th meeting, para. 25.

to overcome any difficulties, but duty-bound to deal with the questions that were involved, partly because of the way in which the Special Rapporteur had raised the problem as a whole. Several members considered that jurisdictional immunity of the State should be established as the rule, while others held a somewhat different position. If account was to be taken of all viewpoints, the Commission would not be able to enunciate the principle of State immunity unless it looked into all the areas where exceptions might or did exist.

2. Secondly, logical well-founded arguments had been advanced that the State enjoyed general absolute immunity precisely because it was a State. In its international economic relations, it could use other legal entities which did not enjoy immunity. Accordingly, any problems facing the Commission were quite simply artificial. On principle, he could not agree, because the application of the rule of international law that was being formulated would thus be subordinated to unilateral, sovereign decisions that were taken by a State and related to its internal organization. Hence it would no longer be a rule, for it would not be binding on the State. But Mr. Ni had argued for another position (1835th meeting); first, that the State enjoyed immunity because it was a State, in other words an absolute entity, and secondly, that other subsidiary organs of the State existed which must also enjoy immunity. He himself could agree with that view, because he was inclined to believe in functional immunity, whether in the case of a State or of its organs.

3. The various attitudes towards draft article 19 were a matter of concern because, in terms of basic principles, such as whether a piece of floating territory was more important than a piece of land territory or whether the personality of the State was more important than territoriality, they were all equally defensible. Yet they would hold up the progress of the Commission's work. He therefore wished to revert to a point that had been touched upon only lightly, namely the requirements of shipping and maritime trade. When two States came into conflict and each one claimed jurisdiction, a settlement had to be reached and account had to be taken of those requirements. The fact was that, at the present time, maritime trade enjoyed great freedom. It might not be absolute and it might involve exceptions. It might not last for ever, but it did exist. Shipping accounted for at least three quarters of world trade. Such freedom was, admittedly, beneficial to the States able to take advantage of it, whereas others were unable to do so because of underdevelopment. The socialist countries now made ample use of it because they had large fleets and were shrewd traders, and many developing countries were becoming increasingly involved in such trade. If the international freight market did not exist, maritime trade would be carried on bilaterally, and obviously the problem of immunity would not arise. If all trade took place within a well-defined bilateral framework, immunity would not be needed because trade would be conducted on perfectly equal terms. Some countries might well see that as the solution if they found such a course to be in their interests.

4. The Commission must, none the less, base its deci-

sion on an overall view of the situation. As he saw it, the smooth functioning of international shipping and maritime trade depended on the maintenance of some measure of physical safety and legal security. That might afford a foundation for an exception to immunity—for the non-immunity of State-controlled ships—since immunity from jurisdiction could not be dissociated from immunity from execution. It might also be possible to confine State jurisdiction to two types of matters: all matters relating to the safety of shipping and all matters relating to maritime trade as a whole.

5. A new development had emerged so far as the safety of shipping was concerned: trading vessels had become extremely dangerous on account of the pollution they could cause and some of the cargoes they carried. In that connection, he referred to two disasters at sea which had involved vessels belonging indirectly to the Government of France but providing a public service. The disasters had given rise to proceedings, in one case in the United States of America. It would have been inconceivable for the Government of France to have claimed immunity from jurisdiction on the grounds that the vessels in question were State-owned. He was unable to agree with Mr. Ushakov (1839th meeting) that the problems caused by such cases could be settled simply by diplomatic negotiations. Experience showed that, although negotiations of that kind could be successful, they could also fail. In any event, they would not help to guarantee freedom of maritime trade. In that regard, moreover, the Norwegian legislation of 17 March 1939 referred to by the Special Rapporteur (A/CN.4/376 and Add.1 and 2, para. 191) provided some valuable guidelines. In the interests of safety, it was quite usual to give equal treatment to all ships within a State's territory, except for warships of course.

6. With regard to maritime trade, it should be possible to agree that State trading vessels did not benefit from immunity because they had chosen to engage in commercial activities. In what instances then would State vessels enjoy immunity? A State might, for example, have a liquid debt payable to a foreign entity and might, for valid reasons, not be able or not want to pay it. For the recovery of debts that had nothing to do with shipping or maritime trade, jurists had invented an operation whereby a ship of the State's fleet could be seized as surety while in a foreign port. Such cases had actually occurred, at least in the form of attempted seizure, and one had involved France. The Government of France had been opposed to that type of operation and he himself was absolutely against it. An operation of that kind would be prejudicial to the safety of maritime trade. Yet a State which possessed a fleet must be able to guarantee its fleet's safety. That was an avenue the Commission might explore in trying to find an acceptable formula.

7. Mr. BALANDA, drawing the Special Rapporteur's attention to what appeared to be two errors in the report (A/CN.4/376 and Add.1 and 2), said he assumed that the words "the unusual requisite of nationality" in paragraph 120 should be replaced by "the usual requisite of nationality". He also pointed out that the term "per-

sonalized responsibility" used in paragraph 157 did not exist in, for example, his own country's legal system.

8. The characteristics of ships described by the Special Rapporteur as justifying their special status were relevant and generally accepted: a ship had a nationality; it was regarded as an extension of national territory, with all the ensuing consequences; and it was a particular type of movable property in that it could be mortgaged, whereas mortgages usually applied to immovable property. The Special Rapporteur's historical analysis of judicial practice, in which absolute immunity for State ships employed in commercial service had given way to restricted immunity, was also very interesting, but unfortunately it covered only a particular group of States. It did not, moreover, always faithfully reflect the position of the State as such, as was shown more particularly in the analysis of *The "Pesaro"* case (1926), in which the State Department of the United States of America had adopted a different position from that taken by the courts (*ibid.*, paras. 157-159). The analysis also mentioned opinions such as Chief Justice Marshall's in *The Schooner "Exchange"* case (1812) (*ibid.*, para. 136) and Chief Justice Stone's in *Republic of Mexico et al. v. Hoffman* (1945) (*ibid.*, para. 160). The study was thus somewhat unbalanced, because in the early days only a small number of States had been well versed in shipping affairs.

9. Hence, as the Special Rapporteur himself pointed out, it could not be stated with any certainty that the principle of absolute immunity or lack of immunity existed in international law. Similarly, a position for or against jurisdictional immunity could not be inferred from the absence of judicial practice in other States or from the small number of legal decisions that had been handed down. The Commission must therefore proceed cautiously. He agreed with the statement made by the Special Rapporteur concerning the "marked absence of a consistent practice of States in support of immunities in respect of State-owned or State-operated vessels, regardless of the nature of their service or employment" (*ibid.*, para. 178); it could not be concluded on the basis of that finding that the principle of absolute jurisdictional immunity did exist.

10. Referring to the development of Anglo-American case-law, particularly since *The "I Congreso del Partido"* case (1981), he noted that, in cases where a State engaged in commercial activities, even to provide a public service, it was regarded as a private individual and therefore did not enjoy immunity. In that connection, Mr. Ni had made a point (1840th meeting) concerning commercial activities by developing countries. It should be emphasized that, in those countries, the State's role was entirely different from what it was in the developed countries: it was the driving force behind all activities and the entire life of the nation depended on it. It did not merely supply public services, for it was the great provider, responsible for promoting the political, economic and social development of the population. The State thus had to engage in commercial activities. Unlike private individuals, who conducted such activities for profit, the State engaged in them to provide public

services. The situation described by the Special Rapporteur as being that of the developed countries in the past (A/CN.4/376 and Add.1 and 2, para. 143) was now that of the developing countries. In that connection, the observations made by Mr. Justice Van Devanter, quoted in the report (*ibid.*, para. 158), spoke for themselves. The criterion of *publicis usibus destinata* that had emerged in *The "Pesaro"* case (1926) must therefore be taken into account.

11. Even in the practice of the developed countries, the reason for restricting immunity lay in the fear of the power of the State over the individual, who must be protected. Immunity from jurisdiction did not, of course, mean absence of responsibility, as Mr. Ushakov had pointed out (1839th meeting). The State could be held responsible for an act even though it enjoyed immunity from jurisdiction, and it could pay compensation when its responsibility was established. But a rule could not be established on the basis of an entirely exceptional situation. Again, arbitration might provide a solution even if the principle of jurisdictional immunity was applied to State trading vessels.

12. It would be entirely in keeping with the logic underlying article 12—in connection with which the Special Rapporteur had taken note of the virtually unanimous view of the members of the Commission that account had to be taken not only of the nature, but also the purpose of commercial activities—to reflect the particular situation of the developing countries. At the same time, it was possible to take, *a contrario*, the following view expressed by the Special Rapporteur in his report:

While there is no general agreement either in the practice of States or in international opinion as to the basis for vessels operated by States for commercial non-governmental purposes, there appears to have emerged a clear and unmistakable trend in support of the absence of immunity for vessels employed by States exclusively in commercial non-governmental service... (A/CN.4/376 and Add.1 and 2, para. 229).

There should be no difficulty in establishing an exception to jurisdictional immunity in the case of State ships engaging exclusively in non-governmental commercial activities, but immunity should none the less be accorded if the activities involved a public service, as was the case when developing countries engaged in commercial activities.

13. What argument was to be derived from the fact that a number of developing countries, including Zaire, had acceded to the 1926 Brussels Convention and its 1934 Additional Protocol, which equated commercial activities by States with those carried out by private individuals? It would be rash to conclude that, by rejecting the principle of jurisdictional immunity, those countries had necessarily adopted the restrictive tendency. For example, when Zaire had to market its natural resources in order to secure the advancement of the nation, it could not elude the constraints of the international economic situation. If it engaged in such activities of its own free will, it had to abide by the rules of the game. If it refused what was accepted by others, namely restricted jurisdictional immunity, it would be committing suicide. It faced a kind of state of necessity, one that the developing

countries had to yield to in order to survive. His own conclusions would therefore have been more nuanced than those reached by the Special Rapporteur in his report (*ibid.*, paras. 224-225).

14. The Special Rapporteur was right to say that immunity had to be invoked expressly, but it would be necessary to go even further, for behind the question of jurisdictional immunity stood that of the competence of courts. Under the legal system in Zaire, such competence was a matter of public policy, so that the judge in a case automatically had to raise the question of immunity without waiting for the State itself to be able to prove that it enjoyed immunity. Establishing the existence or absence of State immunity meant that the State was already being subjected to the jurisdiction of another State and that the principle *par in parem imperium non habet* was being ignored.

15. Like other members, he was of the opinion that the wording of draft article 19 had to be generally acceptable if the instrument now being prepared was to be effective in any way. It was important to use terminology found in most legal systems. For example, terms such as "action *in rem*" and "action *in personam*" should be deleted, particularly since an action *in rem* against a vessel did not exist in some legal systems, at least not in the system in force in Zaire. It would be quite astonishing to serve a summons on a ship, which was an inanimate object. Moreover, those terms were not very clear and the Special Rapporteur himself had shown (*ibid.*, para. 183) how an action *in rem* could lead to an action *in personam*. An action *in rem* also involved the problem of immunity from execution, which the Commission had not yet considered. The term "admiralty" should also be eliminated. In Zaire, competence, even in commercial matters, lay with the civil courts and tribunals. Again, he would be very reluctant to see the Commission establish the concept of "sister-ship jurisdiction", which was extremely dangerous and raised practical problems in international trade relations. Although the words "Unless otherwise agreed" in paragraphs 2 and 4 of alternative A of article 19 made for some flexibility, they did not pave the way for the application of the principle of reciprocity.

16. He would have great difficulty in endorsing article 19 in its present form. It contained too many elements and should be cut down to the bare essentials. If the Commission decided to retain the article, it should take account of the need for flexibility in applying it to the special situation of the developing countries.

17. Chief AKINJIDE said that four main factors had brought about a change in the situation with regard to the topic under consideration. In the first place, what was often referred to as international law in the matter had until recently actually been European law, in other words the law used by tsarist Russia and the European States which had once dominated most of the world to serve their own economic and imperialist aims. Care should be taken, therefore, not to import what was really European law into a modern concept. Secondly, as was clear from the various cases and the literature cited in the Special Rapporteur's report (A/CN.4/376

and Add.1 and 2), the only certain thing about the whole matter was its uncertainty. Nothing had ever been firmly settled even in the developed countries, and there was no way of knowing what attitude the courts of those countries might take in 20 years' time. Thirdly, after the Second World War, many countries had turned to the socialist system, a fact that could on no account be ignored. Fourthly, many developing countries had a mixed economy, many sectors of which were owned or controlled by the State. In his own country, for instance, there could be no question of shipping, railways and air transport being privately owned. It was felt that private individuals would have difficulty in competing with multinational corporations and obtaining the necessary capital, and also that it would be immoral to place in private hands the huge profits that were to be made in those sectors. Many other developing countries undoubtedly took the same view.

18. Given such a fundamental change of circumstances, it was simply not possible to adopt United States and European practice hook, line and sinker. As he saw it, the basic issue was how to marry all the competing interests within the context of the Commission's statute, and first and foremost article 1 (1), which provided for the promotion of the progressive development of international law. Under the terms of its statute, the Commission was also enjoined to take account of all the interests involved, since article 8 stipulated that representation of the principal legal systems of the world should be assured. Clearly the product of its work could not reflect but one legal system, a point which, he felt bound to note, was not apparent from the report.

19. Furthermore, if draft article 19 was adopted, there would be nothing to prevent a socialist or a developing country, for instance, from using one of its warships to carry wheat or crude oil and then claiming absolute immunity. Indeed, the Special Rapporteur seemed to support that contention, since he referred to the French case *Etienne v. Gouvernement des Pays-Bas* (1947), in which jurisdiction had been declined on the ground that the ship concerned had been employed by the Netherlands for political purposes (*ibid.*, para. 167). Also, as he later explained (*ibid.*, paras. 195-196), despite the clear terms of the *State Immunity Act 1978*, the United Kingdom had had to provide for a special exception in the case of the Soviet Union. It was thus apparent that judicial decisions and State practice did recognize the differences in economic systems.

20. The decisions taken by some countries were political, not judicial, as was evident from the Special Rapporteur's reference to the intervention of the United States State Department in connection with a question of immunity (*ibid.*, paras. 159-161). In the words of Chief Justice Stone in *Republic of Mexico et al. v. Hoffman* (1945), "it is therefore not for the courts to deny an immunity which our Government has seen fit to allow, or to allow an immunity on new grounds which the Government has not seen fit to recognize".

The "*I Congreso del Partido*" case (1981) (*ibid.*, para. 155) and the *Trendtex* (1977)⁶ and *Texas Trading* (1981)⁷ cases reflected the attitude not of the socialist or developing countries, but of the United Kingdom and the United States and that attitude, as had rightly been observed, should not be inflicted on countries having other legal systems. Obviously, draft article 19 did not meet the criteria he had outlined.

21. Mr. LACLETA MUÑOZ said that, unlike the section of the Special Rapporteur's report (A/CN.4/376 and Add.1 and 2) relating to articles 16 to 18, which had been difficult to understand primarily because of the translation into Spanish, the section on article 19 was readily grasped, despite some problems with the use of terms. The Special Rapporteur had placed too much emphasis on the practice of the common-law countries, as could be seen from article 19, but the article required re-drafting chiefly because it did not meet the Commission's needs. In that connection, he agreed with the comments made by Mr. Quentin-Baxter (1840th meeting).

22. With regard to the judicial practice of States, the Special Rapporteur had drawn attention to the oft-cited dictum of Sir Robert Phillimore, which contained an assertion of fundamental importance in the matter (A/CN.4/376 and Add.1 and 2, para. 147), and had gone on to trace the development of that practice. But the Commission should focus mainly on the Special Rapporteur's discussion of the 1926 Brussels Convention and its 1934 Additional Protocol, instruments that reflected a trend common to a large number of countries (*ibid.*, paras. 199-207). That trend had been confirmed in two of the conventions elaborated at the 1958 United Nations Conference on the Law of the Sea and also in the 1982 United Nations Convention on the Law of the Sea. It was not clear why the Special Rapporteur had mentioned only article 236 of the latter Convention (*ibid.*, para. 211), for many other relevant articles had also been adopted by consensus. They were based on provisions of the 1958 conventions and provided for State immunity only in the case of warships and State vessels employed in non-commercial governmental service. Hence they were the mark of a significant tendency within the international community.

23. He endorsed the Special Rapporteur's conclusions (*ibid.*, paras. 229-230), but did not think that either of the alternatives for draft article 19 was acceptable because each was based almost exclusively on the judicial practice of the common-law countries. As it now stood, paragraph 1 of alternative A could not be applied in Spanish law, in spite of the efforts at transposition made by the translators. There was no equivalent of the concept of "admiralty proceedings" in Spanish law. Maritime courts, however, were competent to deal with matters relating to navigation and shipping accidents, which were not fully covered by article 19. Moreover, the distinction between actions *in rem* and actions *in personam*, as well as any reference to "sister ships", should be avoided. Those elements had no place in the article be-

⁶ See 1834th meeting, footnote 8.

⁷ *Ibid.*, footnote 9.

cause, in the final analysis, they were governed by the internal law of the forum State. The Special Rapporteur should take account of all the comments in the Commission and redraft article 19 completely.

24. Two key ideas had emerged during the discussion. First, account would have to be taken of the particular situation of the developing countries, to which some members had drawn attention. To that end, the Commission might adopt the criterion of the purpose of the activity, as it had done in the case of article 12. Secondly, a distinction must be drawn between socialist and mixed-economy systems, although the difference between them might not be as great as it seemed. For example, in Spain, a market-economy country, there were some trading vessels which, despite appearances, did belong to the State: the vessels belonging to a particular national enterprise set up as a limited company under ordinary law belonged in fact to the Spanish State because the company was a subsidiary of the State-owned National Institute of Industry. Thus the socialist countries were not the only ones in which companies belonging exclusively to the State could own trading vessels.

25. Mr. McCAFFREY said that the basic principle embodied in article 19 was necessary on practical grounds and justified both by existing treaty law and by customary international law. He agreed, however, with a number of previous speakers (1840th meeting), especially Mr. Quentin-Baxter, Sir Ian Sinclair and Mr. Ogiso, that the provisions of the article should be redrafted so as to be made more generally applicable.

26. He had already mentioned in his previous statement (1839th meeting) the practical necessity of stating the principle contained in article 19 and had then referred to the inequality, as between private traders and State trading entities, that would result from granting jurisdictional immunity to the trading partner that happened to be owned or controlled by a State. In that connection, he recalled the reasoning of Judge Mack in *The "Pesaro"* case decided by the lower court in 1921 (A/CN.4/376 and Add.1 and 2, para. 157). Admittedly, the lower court decision had been reversed by the United States Supreme Court in 1926, but it was nevertheless true that Judge Mack's decision was better reasoned. It certainly represented more accurately current United States practice and, indeed, the practice of the State Department itself, as indicated by the letter addressed by the Department to Judge Mack denying jurisdictional immunity to "government-owned merchant vessels ... employed in commerce" and adding significantly: "The Department has not claimed immunity for American vessels of this character" (*ibid.*, para. 159). Judge Mack had concluded—very much as Sir Robert Phillimore had done in *The "Charkieh"* case (1873) (*ibid.*, para. 147)—that, since Governments were increasingly engaged in State trading and in various commercial ventures, immunity for States and State property involved in such ventures was not only unnecessary, but also undesirable, because it would deprive the private parties dealing with States of their judicial remedies. It would thus give States an unfair competitive advantage over private commercial enterprises.

27. He appreciated Mr. Balanda's point that developing countries often did not trade for profit. Nevertheless, when a State dealt with private individuals, it should do so with due regard for what Mr. Balanda himself had called "the rules of the game". As also pointed out by Mr. Balanda, jurisdictional immunity did not mean absence of liability or responsibility. Yet in practice, as far as the individual was concerned, immunity did unfortunately mean absence of responsibility.

28. Other members, notably Sir Ian Sinclair and Mr. Quentin-Baxter, as well as the Special Rapporteur in his report (*ibid.*, paras. 191-192 and 198-215), had amply demonstrated the firm basis in treaty law for the principle embodied in article 19. While the 1926 Brussels Convention constituted perhaps the most outstanding illustration of the broad acceptance of that principle, equally relevant were the important United Nations conventions on the law of the sea, namely the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, the 1958 Geneva Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea. In the case of the latter, it was significant that the relevant provisions had been adopted by consensus by the Third United Nations Conference on the Law of the Sea. The provisions of those Conventions, referred to by the Special Rapporteur (*ibid.*, paras. 208-211), confirmed the acceptance by a broadly representative group of States of the basic principle of the non-immunity of State trading vessels.

29. Incidentally, it should be stressed that, although the United States had not ratified the 1926 Brussels Convention, it had enacted legislation to the same effect, namely the *Public Vessels Act* of 1925 and also section 1605 (b) of the *Foreign Sovereign Immunities Act of 1976* (*ibid.*, para. 193). With regard to United States practice in the matter, he wished to draw attention to a passage in the *Restatement of the Foreign Relations Law*, which read:

Maritime liens. The special provision for maritime liens in subsection (4) (section 1605 (b) of the Act) reflects the desire of Congress not to curtail bases for jurisdiction of claims against foreign States existing prior to adoption of the Act.

Admiralty law has long been regarded as a kind of international law, in the sense that many of the disputes that it was designed to resolve arise on the high seas and not within the legislative jurisdiction of any State. Jurisdiction to adjudicate claims in admiralty (whether or not arising on the high seas) has been linked, therefore, not to activity within the State of the forum, but to the presence there of a vessel or cargo. Because the presence of a vessel or cargo might well be temporary, the law has long known "maritime liens", which constitute both the basis for jurisdiction over the claim and a security device for payment of a judgment that may be obtained. The *lien* results from a *libel* on the vessel or cargo, which must either remain in the port where the *lien* is asserted or be replaced by a bond.⁸

The purpose of the provisions of the *Foreign Sovereign Immunities Act* was to avoid arrests of State-owned vessels and they were based on pre-existing legislation relating to vessels owned by the United States. It should be noted that section 1605 (b) of the *Foreign Sovereign Im-*

⁸ American Law Institute, *Restatement of the Foreign Relations Law of the United States (Revised), Tentative Draft No. 2* (27 March 1981) (Philadelphia, Pa.), p. 197, Part IV: Jurisdiction and Judgments, chap. 2, sect. 455.

munities Act did not provide a remedy *in rem*, in other words against a ship, but a remedy *in personam* against the foreign State.

30. As to the terminology used in article 19, he agreed with other speakers about replacing such terms as *in personam*, *in rem* and “admiralty”, which had been taken from Anglo-American legal terminology, by more general expressions better suited to an international instrument. Actually, it was worth noting that the distinction between claims *in rem* and claims *in personam* had largely disappeared both in the United Kingdom and in the United States, where the Supreme Court had held in 1977, in *Shaffer et al. v. Heitner*,⁹ that there really was no difference for jurisdictional purposes between the two types of claim, since by proceeding against property, a claimant was really affecting the owner’s rights in that property.

31. Lastly, he expressed his regret that pressure of time should have obliged him to postpone to a later stage his comments on draft article 20 and on the Special Rapporteur’s valuable comments thereon.

32. After a brief procedural discussion in which Mr. MALEK, Mr. JAGOTA, Sir Ian SINCLAIR, Mr. THIAM and Mr. FRANCIS took part, the CHAIRMAN said that, since there was no time for further discussion of draft article 19, he would invite the Special Rapporteur to reply to the statements made so far. The debate on the article would probably be resumed at the following session.

33. Mr. SUCHARITKUL (Special Rapporteur) said his intention was not to sum up, but simply to give his impression of the enlightening comments that had been made so far.

34. He wished to apologize for having allowed himself to be unduly influenced by English legal terminology. He had drafted the articles in English, and had therefore been inevitably led to use concepts drawn from English law. He was grateful to, among others, Mr. Quentin-Baxter (1840th meeting), Sir Ian Sinclair (*ibid.*), Mr. McCaffrey and Mr. Lacleta Muñoz for drawing attention to that point. All the expressions which had been criticized, such as “action *in rem*”, “action *in personam*” and “admiralty proceedings” would be removed and replaced by more universally known expressions.

35. Mr. Ushakov’s opinion (1839th meeting), shared by a number of writers and Governments, was that, when a State-owned ship was operated by an independent entity, an action could be brought by a private claimant against that entity but not directly against the State. A new paragraph would therefore be inserted in the article to provide that proceedings in relation to the commercial operation of a State-owned ship by an independent entity could be permitted against that entity itself, thereby saving embarrassment to the State owning the vessel. At the same time, no inconvenience would result for any claimants with regard to the enforcement of a maritime lien or to any suit arising from a collision, salvage or carriage of goods by sea.

36. As to the position of the developing countries, the great complexity of the shipping problem should not be overlooked. From his experience in the Department of Economic Affairs in his own country, he was able to say that it was very difficult to intrude into the world of shipping, which was dominated not by Governments, but by private organizations. For example, the Japan-Thailand Liner Conference was dominated not by the Japanese or by their shipping firms, but by Scottish and Scandinavian shipping companies. That kind of phenomenon was the living reality of the shipping world.

37. The question of State-owned vessels used for commercial purposes was perhaps less straightforward than the 1926 Brussels Convention might suggest. The points made during the discussion, particularly by Mr. Ogiso (1840th meeting), Mr. Balanda and Chief Akinjide, had to be taken into consideration: non-commercial operations would have to be excluded from the rule laid down in article 19. He had in mind Government-to-Government transactions for the carriage by sea of relief supplies or a triangular operation such as the shipping to Africa of rice bought in Thailand by Japan. The rice in such a transaction, not being a commercial cargo, should be immune from attachment or seizure, since it was intended for use for a governmental purpose.

38. For all those reasons, he withdrew alternative A of article 19 and would revise alternative B in the manner suggested by Mr. Ogiso and by Sir Ian Sinclair. In addition to replacing specifically English legal terms, he also intended to omit the reference “and/or another ship”, in other words the so-called “sister-ship jurisdiction”.

39. With such changes, paragraph 1 of the new text of article 19 would be formulated along the following lines:

“1. If a State owns, possesses or otherwise employs or operates a vessel in commercial service and differences arising out of the commercial operations of the ship fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in proceedings relating to the operation of that ship or to the cargo and owner or operator if, at the time when the cause of action arose, the ship and cargo belonging to that State were in use or intended for use exclusively for commercial purposes, and accordingly, unless otherwise agreed, it cannot invoke immunity from jurisdiction in those proceedings.”

Paragraph 2 would be appropriately recast, and paragraph 3 might read:

“3. Proceedings relating to the commercial operation of State-owned vessels by an independent entity may be permitted if instituted against the independent entity operating the vessel.”

A reformulation of that kind should meet the concern expressed in the Commission. He would submit the revised text of article 19 for discussion at the present session, if time allowed, or else at the following session.

The meeting rose at 1.05 p.m.

⁹ United States Reports, vol. 433 (1979), p. 186.