

Document:-
A/CN.4/SR.1766

Summary record of the 1766th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
1983, vol. I

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connection, an attempt should be made to discover the underlying reasons for the limitations adopted by States either in their legislation or through agreements. To that end, greater consideration should be given to the preparatory work on legislative texts and conventions limiting State immunity. Fourthly, the nature of the act or activity should be taken into account. Immunity should remain intact, in other words absolute, in the case of acts relating to the public authority of the State. Fifthly, the exceptions to be recognized should always form residual rules, as article 13 suggested. States should always have an opportunity to stipulate otherwise if they preferred not to forgo their jurisdictional immunity. Sixthly, the exceptions should be formulated in the light of two factors, the first being the attitude of the States against which the restrictive tendency was currently applied, so as to discover in what matters they raised no objection and tacitly acquiesced, and in what other matters they did protest. In the case of the latter, it would be difficult to assert that there was a tendency to waive jurisdictional immunity and consequently recognize an exception. In that connection, he referred to *Venne v. Democratic Republic of the Congo* (1969),¹⁴ mentioned by the Special Rapporteur, *Dumont v. Colonie du Congo belge* and a case in which a Belgian professor in Zaire had instituted proceedings before the Belgian courts against the university at which he was teaching. The Government of Zaire had protested against the freezing of the university's accounts, which was decided on in the judgment. As for the second factor, it was necessary to see how States which had been denied jurisdictional immunity by foreign courts had carried out the judicial decisions in question. Had they executed them spontaneously, or had they been obliged to do so as a result of diplomatic or other pressure?

49. Sir Ian SINCLAIR, supported by Mr. FLITAN, suggested that, since the Commission was scheduled to complete its consideration of the topic of jurisdictional immunities of States by 27 May 1983, draft articles 14 and 15 should be discussed together.

It was so agreed.

50. Mr. ROMANOV (Secretary to the Commission) said that, following the statement by Mr. Al-Qaysi, he had requested the Chief of the Languages Service of the United Nations Office at Geneva to expedite the production of the summary records of the Commission's meetings. Those records formed part of the Commission's documentation and should be available on a daily basis and without delay. Moreover, he fully agreed with what Mr. Al-Qaysi had said, particularly since, for the 12 meetings held from the beginning of the session up to 19 May 1983, only 7 summary records had been distributed in French, 2 in Arabic, 3 in Chinese, 4 in English and Russian, and 3 in Spanish. The situation was thus alarming.

The meeting rose at 1 p.m.

¹⁴ Canada, *The Dominion Law Reports, Third Series* (Toronto), vol. 5 (1969), p.128.

1766th MEETING

Tuesday, 24 May 1983, at 3 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Al-Qaysi, 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. 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 RAPPORTEUR⁴ (continued)

ARTICLE 13 (Contracts of employment)⁵ (continued)

1. Mr. NI said that the topic of article 13, besides being relatively new, involved administrative and labour laws which varied from country to country or were altogether lacking in some legislations. It also involved the application of laws which were important to the economic well-being of people in the countries concerned. Few judicial decisions had been adopted thus far in a particularly controversial area, and little evidence of present-day State Practice in the matter was available. The Special Rapporteur was quite right to emphasize in his fifth report the need for care and prudence (A/CN.4/363 and Add. 1, para. 39). Indeed, the question might legitimately be asked whether there was any point in exploring a region already known for the paucity of material it offered for investigation.

2. There were three reasons justifying such exploration. First, the question of the administration of labour laws was highly important for the protection of the weaker

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.

party in an employment contract. The exercise of jurisdiction was a prerequisite for effective implementation of local labour laws, and the forum State might consider it a matter of public policy that labour relations should be regulated by its own laws when services were performed within its territory. Second, the forum State might consider it to be its duty to protect its nationals or residents. Third, exercise of jurisdiction by the forum State might encourage conformity with local labour laws and alleviate unemployment problems. It should nevertheless be made clear that, in the event of a dispute, the party to be sued was the office, agency or other establishment employing the plaintiff to perform services inside the forum State. The foreign State itself could not appear as the defendant in the action.

3. The phrase "Unless otherwise agreed" at the beginning of paragraph 1 of article 13 was necessary in order to make it optional for the parties concerned to agree on such matters as the mode of settlement of disputes, including the choice of jurisdiction or even the choice of applicable law. The phrase was also in conformity with the wording used in other draft articles on exceptions to immunity. Paragraph 2 (a) referred to proceedings relating to failure to employ an individual or dismissal of an employee, which appeared to be the main source of labour disputes of the type under consideration. Retention of that provision would leave little room for the exercise of local jurisdiction, but deletion of it might be interpreted as allowing for interference in the governmental actions of a foreign State. The question was thus a very complex one and required further consideration.

4. The crucial issue, however, was whether an exception to the rule of State immunity should be formulated at all in respect of contracts of employment. An exception from which a substantial number of cases were exempted could well become merely nominal. If there was no solid ground for formulating such an exception, it would surely be advisable to abstain from doing so, pending further developments. In that connection, he endorsed the remarks made by Mr. Evensen (1763rd meeting) and other members who, without questioning the value of the inductive approach as a means of seeking guidance from State practice, had pointed out the difficulty of drawing conclusions from what after all remained, in the present instance, a meagre amount of material. In particular, it was difficult to see how the inductive method could lead to the conclusion drawn by the Special Rapporteur in his fifth report (A/CN.4/363 and Add. 1, para. 53) that the restrictive practice in the particular case of "contracts of employment" was capable of gathering momentum. The affirmation that there appeared to be an emerging trend in favour of limitations on State immunity was even more difficult to accept in view of the scarcity of available evidence.

5. The course of denying State immunity could be embarked upon only if its advantages for the common good were crystal-clear. That did not seem to be so in the case under consideration. Retention of paragraph 2 (a) would place the majority of difficult cases outside the purview of the exception, and other easier problems relating to

employment could certainly be resolved without the need to go before the local courts. For the same reasons as those given at the previous meeting by Mr. Barboza, he doubted the necessity for draft article 13, for its provisions, if imprudently administered, would lead only to international friction and would not serve any real social purpose.

6. Mr. YANKOV said that the discussion on exceptions to State immunity had brought a new urgency to the consideration of the general problem of the nature, scope, field of application and legal implications of the principle of sovereign immunity as such. It was important that, as a result of the exceptions, the general principle should not be relegated to the status of a residual rule. In that regard, the substantive points made in Mr. Ushakov's memorandum (A/CN.4/371) deserved careful consideration. In his fourth report (A/CN.4/357, para. 10 (c)), the Special Rapporteur had listed nine possible exceptions to the general rule of State immunity, but the fifth report implied that further additions to that list might not unreasonably be anticipated. At the end of the exercise, the general principle might well be whittled down to such an extent that it would apply only to diplomatic immunities or the immunities of warships on the high seas and military forces stationed on foreign territory.

7. Concern over the possible consequences of such a development should not be regarded as a dogmatic or conservative reaction in defence of a sacrosanct principle. Rather, it reflected the wish to take account of certain important realities. There were many countries with socialist systems, as well as developing countries with a socialist orientation, in which various forms of public property, including State property, and the participation of the State in the management of the national economy played a crucial role. The national legislation and State practice of those countries could not be neglected or ignored in the preparation of a set of legal rules which was to be applied, not by homogeneous groups of States, but by the largest possible number of States with a broad spectrum of legal systems. It had to be recognized that the widely accepted rule was that of the immunity of the State, and exceptions to the rule could be made only on the basis of express consent.

8. As to draft article 13, he was appreciative of the Special Rapporteur's intention to afford effective legal protection for locally employed persons, especially those of relatively low rank. There again, however, the diversity of national legal systems had to be borne in mind; the basic conditions and legal requirements for employment, as well as the format, contents and legal implications of "contracts of employment", varied widely from country to country. In that connection, he drew attention to the practice followed in the socialist countries of Eastern Europe in general and in Bulgaria in particular.

9. Like Mr. Ni, he doubted whether, with the very limited background material available to date, the formulation of such an exception was justified. In his fifth report (A/CN.4/363 and Add. 1, paras. 29-31), the Special Rapporteur listed three essential elements pertaining to the scope of "contracts of employment" as an

exception to State immunity. There was, however, another fundamental element to be considered, namely the enforceability or practicability of the proposed provision. He agreed with Mr. Jagota (1764th meeting) that the prospects for its implementation were rather slight.

10. The expression "Unless otherwise agreed", in paragraph 1, was open to different interpretations. Either it was an expression of flexibility, in which case it was quite unexceptionable but perhaps superfluous, or it reduced still further the significance of the general principle of State immunity. His own interpretation would be that the principle of immunity should apply and that exceptions could be agreed upon by the States concerned; but the other interpretation could not be ruled out altogether. In either case, the paragraph required further clarification. With regard to paragraph 2 (a), he wondered whether an exception was warranted in a case of failure to employ an individual, in other words a situation in which there was no contract. As for paragraph 2 (d), Mr. Balanda (1765th meeting) had rightly observed that the proposed provision was somewhat unilateral.

11. For all those reasons, article 13 as a whole was not sufficiently justified. Exceptions to the general rule of the jurisdictional immunity of States could be admitted on the basis of general agreement, but they should be formulated, if at all, with great caution and prudence, so as not to end up by nullifying the principle itself. Like previous speakers, and in particular Mr. Al-Qaysi and Mr. Barboza (*ibid.*), he wished to advocate a more pragmatic approach.

12. Mr. USHAKOV said that cases in which the State acted as employer, within the meaning of article 13, were extremely rare and excluded not only cases in which local employees were recruited by an embassy, a consulate or by armed forces admitted to the territory of another State, but also instances in which such employees were recruited by a partially or totally State-controlled national corporation. A company of that kind was always a juridical person under private law, and it was the corporation, not the State, that acted as the employer. However, a State was an employer within the meaning of article 13 if its Ministry of Culture organized an exhibition on the territory of another State and, with the consent of the latter, recruited local employees who were nationals or residents of the State on the territory of which the exhibition was organized. There again, however, they were usually of the nationality of the employer State. A State also acted as an employer when it engaged employees through a government news agency such as Tass.

13. As he had pointed out in his previous statement (1764th meeting), no distinction could be made between the staff members of an embassy or a consulate in terms of whether they performed governmental functions. Nevertheless, each of them could act either in an official capacity or in a private capacity. For instance, a diplomat who bought himself a house on the territory of the receiving State was acting in a purely personal capacity. That was a distinction which the Commission had clearly made

in connection with "persons" and "organs" in part I of the draft articles on State responsibility.

14. The immunity of States in all cases, whether in connection with the employees recruited by an embassy or a consulate or a State organ, as in the examples he had cited earlier, was based on the sovereignty and sovereign equality of States. Such employees, however, did not have immunity in all instances. Embassy or consulate staff enjoyed the diplomatic immunity granted on behalf of the State, but that was not true of the employees of a State entity. The distinction would also be important in connection with draft article 14.

15. Lastly, if article 13 were kept in its present form, a State would feel obliged to employ its own nationals in other States, rather than nationals or residents of those States. Article 13 allowed for a practical solution to the issue but, from the standpoint of principle, it was none the less contrary to international law, and in fact undermined the principle of the absolute jurisdictional immunity of States. Indeed, the aim of article 13 could be achieved if the territorial State forbade other States to employ on its territory persons recruited from among its own nationals or permanent residents.

16. Mr. DÍAZ GONZÁLEZ, referring to the poetic similes used by the Special Rapporteur (A/CN.4/363 and Add. 1, paras. 17-18) and by Mr. Mahiou (1763rd meeting), pointed out that a morganatic "marriage" between the Mekong and the Thames rivers presented a number of dangers. As Mr. Ushakov had stressed in his memorandum (A/CN.4/371), the Commission should examine the present topic with great prudence and should not, for the sake of making rapid progress in preparing a set of draft articles, neglect to engage in careful consideration of all aspects of the subject-matter. In fact, it did not have sufficient basic documentation to elaborate provisions that were capable of securing the approval of the majority of States. The practice of States, which each and every State followed in keeping with its own national legislation, varied enormously.

17. The Special Rapporteur had distinguished two trends, one of which seemed to predominate, but Mr. Ushakov had demonstrated that such was not the case. Indeed, there were as many trends as there were independent States. Some States with similar laws and practices might well form a homogeneous group, but a closer look showed that sovereign States, whether old or new, were quite distinct from one another in terms of their juridical or judicial practice. Care must be taken not to single out a dominant practice and work out a legal doctrine that was well documented but completely inapplicable and unacceptable to most States. It was not a case of establishing distinctions according to the political, social or economic systems of States, but of recognizing the great diversity of State practice. It should be remembered that, in what was still nothing more than a draft convention, the Inter-American Juridical Committee was endeavouring to reconcile the extremely varied practice of its member States.

18. As Mr. Yankov had pointed out, attention should be paid to the consequences of elaborating draft articles

before the Commission first decided on the basic issues raised by Mr. Ushakov. An increasing number of countries recognized the concept of absolute sovereignty, as did Venezuela, which was not a socialist country. In the Americas, the rule was to safeguard the absolute sovereignty of the State. If the Commission did not begin by resolving that basic problem, it would be very difficult to make any headway, for the consideration of each article would necessarily mean reverting to the fundamental problem of the rule and the exceptions thereto.

19. In the circumstances, it was very difficult to express any opinion regarding draft article 13. Like other members, he considered that it was a provision of little value since, apart from the cases covered by the Vienna Conventions on Diplomatic Relations and on Consular Relations, it could be applied only in very rare instances.

20. The Spanish version of the Special Rapporteur's fifth report used the expression *contratos de empleo*, but all the laws and codes drafted in Spanish used the term *contratos de trabajo*, which had its equivalent in other Romance languages, including French, Italian and Portuguese.

21. Lastly, he emphasized that, rather than seek to bring into line two trends or determine which one predominated, the aim should be to harmonize legal systems and practices, more particularly in the light of the work that the ILO had been doing for many years in that regard.

22. Mr. KOROMA said that the Special Rapporteur was to be commended for the scientific approach he had adopted in his fifth report. The topic was assuming growing importance, owing to increasing international economic and diplomatic relations, and was therefore constantly before the law courts and legislatures of countries. It was equally stimulating for commentators and legal scholars. In the midst of such legal turbulence, the Special Rapporteur's task of progressively developing the law on the matter was, by any yardstick, a daunting one.

23. He fully realized that the Special Rapporteur's approach of drawing inferences from particular examples of case law, judicial decisions and State practice by means of the inductive method had been approved by the Commission, but there was a danger that such an approach might lead to codification and not to progressive development of the law. Again, since the vast majority of States had not taken any judicial position on the topic because it had never directly engaged their attention, the Commission might thus be legislating for one single homogeneous group of States. It should, however, be borne in mind that many States which had been taken to court in cases involving jurisdictional immunity had pleaded sovereign immunity even when judgments had been rendered against them. The attitude of those States thus reflected their national positions. Hence the rules to be formulated must be acceptable to the international community as a whole and the Commission must be guided by the principles of international law embodied in the Charter of the United Nations and attempt to

construct rules that would not derogate from those principles.

24. One rule with which everyone seemed to agree was that a State was immune from the jurisdiction of the courts of another State, a rule which had been described as a bastion of legal sanity that must be preserved in the interest of international comity. Contention had arisen, however, over the assertion that such immunity did not extend to the trading and commercial activities of States. In that connection, he paid tribute to Mr. Ni's excellent statement on that issue (1762nd meeting).

25. In his own view, developing countries engaged in international trade not for profit in the Ricardian sense but, rather, in the interests of their overall development. Such activities were nothing if not governmental. Governments imported or exported for profit simply because they alone were capable of engaging in such activities in view of the amounts of capital involved and the guarantees required. When a developing country used international trade as a means of diplomatic leverage, its intention was to achieve a national or State objective and it should not be deprived of its immunity. Any restrictions on State commercial activities would hamper the development of international trade and would be detrimental to the interests of developing countries. It would therefore be preferable for cases that arose to be handled through diplomatic channels, for, as stated by the judge in *The "Charkieh"* case (1873),

The object of international law, in this as in other matters, is not to work injustice, not to prevent the enforcement of a just demand, but to substitute negotiations between Governments, though they may be dilatory and the issue distant and uncertain, for the ordinary use of courts of justice . . .⁶

where such cases could lead to the impairment of international relations.

26. That remark also applied to draft article 13, whose purpose was to introduce a mild incentive to encourage conformity with local labour law and to improve social conditions, labour relations and employment opportunities. Nevertheless, in view of what was stated in the first sentence of paragraph 29 of the fifth report and of the provisions of article 31 of the 1961 Vienna Convention on Diplomatic Relations, it was difficult to see whose activities would be regulated by draft article 13. A partial response to that question had been given in paragraph 31 of the report, which stated that

. . . the gist of this specified area of exceptions to State immunities covers the actionability for obligations undertaken by, or binding on, a State, arising out of contracts of employment of individuals for the performance of services in another State.

Yet, if it was agreed that employment and dismissal constituted governmental acts, in other words *acta jure imperii*, and if account was taken of article 31 of the 1961 Vienna Convention, it was difficult to see where draft article 13 fitted into the topic, except, of course, as a further restriction on sovereign immunity. Application of

⁶ United Kingdom, *The Law Reports, High Court of Admiralty and Ecclesiastical Courts*, vol. IV (1875), p. 97.

the article might therefore lead to friction in international relations.

27. The main argument generally made in favour of the restrictive theory of sovereign immunity was that, if a foreign State decided to engage in commercial or trade relations, it must comply with the rules of international commerce. Similarly, article 13 appeared to attempt to deprive foreign States of the plea of sovereign immunity if they entered into the labour-market of host States. It was, however, often stated both in domestic and international law that labour disputes were best settled not in courts of law, but through arbitration or diplomatic channels.

28. Laudable though the intention was, cases of the type under consideration were few and far between and article 13 might not even be invoked by those for whom it was intended, particularly since the required lawyers' fees might be exorbitant and attorneys might use cases involving contracts of employment with foreign States as an opportunity to bring pressure to bear upon a government entity. Moreover, the article might give rise to conflict-of-law issues, such as those of dual nationality, habitual residence and the question of the applicable law, and raise more problems than it solved. In view of the paucity of judicial decisions and lack of evidence from State practice, the Commission would be well advised to omit article 13 from the draft for the time being.

29. Mr. OGISO said that although, according to the Special Rapporteur (A/CN.4/363 and Add. 1, para. 60), the emerging trend in national legislation, international opinion and some international conventions did appear to favour the application of local labour law, it was premature to affirm that the trend would encourage the exercise of territorial jurisdiction at the expense of the jurisdictional immunities of foreign States. There simply was not enough evidence from State practice and judicial decisions to point to a tendency to limit jurisdictional immunities in matters pertaining to contracts of employment. Furthermore, an exception to State immunity made on the basis of draft article 13 might hamper relations between the foreign State and its local employees.

30. For example, his own interpretation of paragraph 2 (a) was that the foreign State was not immune from the jurisdiction of the local courts in respect of the provisions of contracts of employment relating to such things as membership of trade unions, wages and working hours, but that it was immune from such jurisdiction in respect of the dismissal of a local employee. Article 13 could thus be construed to mean that, although local employees could bring less important disputes relating to clauses of their contracts before the local courts, they were unable to protect themselves against dismissal by their foreign State employer, even though, for the employees, dismissal was the most disadvantageous measure the employer could take against them. State practice appeared to indicate that cases of dismissal should not be subject to the jurisdiction of the local courts. On the other hand, if the most drastic measure that could be taken by a foreign State employer was immune from local jurisdiction, it would be logical for immunity to apply to the other terms of con-

tracts of employment. Thus State practice with regard to contracts of employment did not seem settled enough to warrant an exception for all aspects of such contracts and the Commission should be cautious before proposing such an exception.

31. He agreed with other members that the expression "Unless otherwise agreed" in paragraph 1 should be retained, since the lack of established practice made it necessary to allow States some flexibility in concluding specific agreements relating to contracts of employment. Any doubts about including that expression in paragraph 1 could be dispelled if it was made clear that it referred to an agreement concluded by the forum State and the foreign State. As to paragraph 2 (c), it would be preferable to replace the words "a resident of the State of the forum" by the words "habitually resident in the State of the forum", in line with section 4, paragraph 2 (b), of the United Kingdom's *State Immunity Act 1978*.⁷

32. Mr. SUCHARITKUL (Special Rapporteur), summing up the discussion of draft article 13, said that he had been given ample warning at the outset that the topic was difficult, sensitive, complex and one on which opinions and positions differed considerably. As a student of Buddha, however, he had to be moderate, patient and restrained in his approach. He in turn would warn the members of the Commission that they should not claim to represent the interests or opinions of their countries either as "givers" or as "takers" of immunity, for each country was simultaneously a claimant and a recipient of immunity.

33. The inductive method, which had been touched upon in the statements of nearly all members, was useful and essential. It involved research into all sources and, in particular, the judicial practice of States, which constituted the only direct evidence available. Other indirect evidence also requiring examination included the governmental, executive, legislative and treaty practice of States and the opinions of writers. When State practice was confusing, the Commission was not duty-bound to try to codify the rules. It could only determine what the trends were and seek to clarify them. In that connection, he agreed with various members that the Commission should adopt a flexible and balanced approach with a view to harmonizing all points of view on the present topic.

34. In the five reports he had submitted, he had made a point of avoiding any reference to absolute, functional or restricted immunity. He had also avoided any distinction between *acta jure imperii* and *acta jure gestionis* because, as Mr. Ushakov had pointed out, such a distinction was impossible. He was grateful for Mr. Ushakov's constructive memorandum (A/CN.4/371), which contained many valuable lessons from which everyone could benefit. In particular, Mr. Ushakov had noted that

... immunity from foreign jurisdiction by no means signifies that the State enjoying immunity may ignore the law of another State, within that other State's sphere of jurisdiction. On the contrary, it is under an obligation strictly to abide by the other State's internal law. In particular, it may engage, within the sphere of jurisdiction of another

⁷ See 1762nd meeting, footnote 11.

State, only in such activities as are permitted by the latter. Each State is also under an obligation not to interfere in another State's domestic affairs. (*Ibid.*, para. 7.)

Mr. Ushakov had gone on to state that

... generally speaking, since the 1930s the Soviet Union has not, in practice, concluded trade transactions with foreign natural or juridical persons. Such transactions are concluded by Soviet foreign trade associations and other juridical persons under national law, which as such enjoy no immunity from foreign jurisdiction. (*Ibid.*, para. 19.)

35. Thus no problem arose in respect of trade transactions concluded by trade associations and other juridical persons under Soviet national law. But that was simply one approach to the question of trading or commercial activities, and there were many others. As Mr. Riphagen had pointed out in citing Ian Brownlie's *Principles of Public International Law*, any country could adopt national legislation and no one could object to it (1763rd meeting, para. 18). That, however, gave the Commission broad scope for harmonizing differing points of view and conflicting interests in a balanced manner.

36. With regard to the point which had been raised by Mr. Ogiso, Sir Ian Sinclair (1763rd meeting) and Mr. Lacleta Muñoz (1764th meeting) in connection with draft article 4, and which had been dealt with in the second report,⁸ he fully agreed with Mr. Ushakov that there could be no interference with conventions already in force and that, if diplomats enjoyed immunities, States must also enjoy immunities (A/CN.4/371, para. 4). The principle in question was embodied in article 31 of the Vienna Convention on Diplomatic Relations. It should none the less be noted that, under section 2, paragraph 7, of the United Kingdom's *State Immunity Act 1978*, the head of a foreign diplomatic mission in the United Kingdom could waive or submit to jurisdiction on behalf of the foreign State.

37. The Commission therefore had to spend more time on draft article 4, looking more closely at matters on which nothing was said in the Vienna Conventions on Diplomatic Relations and on Consular Relations, in the Convention on Special Missions and in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. Draft article 6 would also have to be discussed again and redrafted in order better to reflect the views of members of the Commission. The question of enforcement raised by Mr. Jagota (1764th meeting) and Mr. Yankov would be dealt with later in part IV of the draft articles.

38. As to the wording of draft article 13, he had been instructed to indicate areas in which exceptions might possibly be made. The proviso "Unless otherwise agreed" had therefore been included at the beginning of draft articles 12 to 15 in order to allow for the requisite flexibility.

The meeting rose at 6 p.m.

⁸ *Yearbook* . . . 1980, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1.

1767th MEETING

Wednesday, 25 May 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Al-Qaysi, 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. Ushakov.

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 RAPPORTEUR⁴ (continued)

ARTICLE 13 (Contracts of employment)⁵ (concluded)

1. Mr. SUCHARITKUL (Special Rapporteur), continuing the summary of the discussion of article 13 which he had begun at the preceding meeting, said that the article did not cover the regular officers or civil servants of the Government of a foreign State who worked within the territory of the forum State and whose contracts of employment would, in most cases, be governed by the administrative law of the foreign State, as Mr. Ushakov had rightly pointed out (1764th meeting). Rather, it dealt with locally recruited staff who were employed by the foreign State in the territory of the forum State and whose contracts of employment would normally be governed by the labour law of the forum State.

2. As was made clear by draft article 4, draft article 13 did not relate to the immunities of diplomatic or consular agents or of members of special missions or permanent delegations. The scope of its application was not, however, as narrow as might be thought, as evidenced by the many examples of the activities of foreign States in the

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.