Document:-

A/CN.4/L.457

Draft articles on jurisdictional immunities of States and their property. Titles and texts adopted by the Drafting Committee on second reading: articles 1 to 23 - reproduced in A/CN.4/SR.2218 to SR.2221

Topic:

Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-

1991, vol. I

condition *sine qua non* of the unity of the whole that constituted the system.

The meeting rose at 11.50 a.m.

2218th MEETING

Tuesday, 4 June 1991, at 10 a.m.

Chairman: Mr. John Alan BEESLEY

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/436,[1] A/CN.4/L.456, sect. D, A/CN.4/L.458 and Add.1, ILC (XLIII)/Conf.Room Doc.2)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

PART I OF THE DRAFT ARTICLES

ARTICLE [1] [2] (Use of terms)[2] (*concluded*)

1. Mr. McCAFFREY (Special Rapporteur), summing up the discussion of the seventh report, said that members seemed to have unanimously endorsed his proposal to reverse the order of articles 1 and 2, so that the article on scope would precede the one on the use of terms. Similarly, there was no objection to moving the definition of "watercourse State" from article 3 to the article on the use of terms.

2. Three main substantive issues had been addressed in the debate, namely, whether the term "watercourse" should be defined as a "system" of waters; whether groundwater should be included in the concept of an international watercourse or international watercourse system; and whether, for the purposes of the draft articles, a watercourse should be regarded as having a "relative international character".

3. On the first point, the great majority of members who had addressed the question favoured the "system" concept, some 13 members saying that it should be employed in the draft and two being in favour of using it under certain conditions. Several other members had not explicitly endorsed the concept, but had stated that they supported his proposals in that regard. Some of those who endorsed the use of the "system" concept had also suggested that the Helsinki Rules idea that the waters must flow into a common terminus should be included in order to keep the scope of the articles within reasonable bounds.

4. Two members were opposed to defining a watercourse as a "system of waters", and two others had reservations under certain conditions. Yet even one of the two members speaking in opposition to the "system" concept had not rejected it outright, and had said that an international watercourse could be treated as a system, although only in the limited sense of its uses causing appreciable harm or material injury to co-riparian States. Another of those members had said that States generally used the term "basin" rather than "system" and that the Commission should not expand the scope of the topic beyond that of watercourses, which was already broader than "rivers". As discussed in his report, the practice of States which employed the term "basin" actually supported use of the "system" concept. Furthermore, the question was not whether "watercourse" was a broad or narrow term as such, but what the term meant as far as the draft was concerned. The overwhelming support for use of the "system" concept provided a clear mandate to the Drafting Committee and the Commission to use that term in defining the expression "watercourse".

5. On the question of including groundwater in the concept of a watercourse, members were more divided, but there too, by his count, 12 were in favour, only five were against, and one member would exclude groundwater under certain conditions. The condition most often mentioned by those in favour was that the groundwater should be related to surface water; in particular, confined groundwater should not come within the scope of the draft. Several members had even suggested that confined groundwater should be the subject of a new topic on the Commission's agenda; if it was, in fact, decided not to include that form of groundwater, he would support that idea. Another proposal by several members was that, to be included, the groundwater must flow towards the same terminus as the surface water to which it was related. That was consistent with the similar proposal made with regard to the "system" concept.

6. Several arguments had been advanced against including groundwater. One or two members had said that, in discussing the draft articles over the past 5 or 10 years, they had always had rivers, and possibly lakes, in mind, but certainly not groundwater. Thus, they had not considered how some of the provisions adopted by the Commission might apply to groundwater. In that regard, he would point out that the provisional working hypothesis, first accepted in 1980,[3] expressly referred to groundwater as one of the components of an international

[1] Reproduced in *Yearbook ... 1991*, vol. II (Part One).

[2] For text, see 2213th meeting, para. 66.

[3] See 2213th meeting, footnote 12.

watercourse system. Perhaps he should have set out the hypothesis at the beginning of each of his reports to ensure that the Commission did not lose sight of it. At the present stage, however, rather than exclude such a vital component of the system, the sounder course would be to retain it and to review the question on second reading in light of the comments of Governments.

7. A second argument had been that, given the size or number of international watercourses flowing through some countries their entire territory would be subject to the draft articles if the concept covered groundwater. That, of course, had not been demonstrated to be the case and, for the time being, was only a hypothesis. But even if it were true of certain countries, whose number, in his estimation, would be small, it did not appear to be a technical or legal argument against the inclusion of groundwater. It was certainly not a line of reasoning based on State practice, the conclusions of meetings held under United Nations auspices or the work of international bodies, nor did it appear to be based on considerations of equity, since it would not seem to be unfair that a State which presumably derived substantial benefits from its international watercourses should also be responsible for any harm to other States resulting, for example, from pollution or excess depletion of groundwater supplies, especially where such supplies were fed by the international watercourses concerned. Thus, that argument seemed to be principally political and was precisely the kind of point that was suitable for comments by Governments at the first reading stage.

8. A third argument made for excluding groundwater from the draft articles was that it was difficult to determine where the groundwater was, in which direction it flowed, and so forth. Along similar lines, one member had noted that the commentary to article 3 stated that watercourse States could be determined in the vast majority of cases by simple observation, and had apparently taken that to imply observation of the surface of the land. That statement from the commentary would remain accurate if groundwater was included, particularly if the draft covered only groundwater related to surface water. The reason was that, far more often than not, a State whose groundwater contributed to an international watercourse system would also have surface water that formed part of the system. Thus, as stated in the commentary, in the vast majority of cases, watercourse States could, in fact, be determined by simple observation of the surface waters. In the relatively rare instances where a State contributed only groundwater to an international watercourse system, knowledge of hydrology had progressed to the point that in most cases it would not be difficult to make such a determination. The diagrams and charts in the annex to the seventh report, circulated informally, showed how advanced the mapping of groundwater reserves had become.

9. In short, the debate had strengthened his conviction that groundwater should be included in the scope of the articles, at least in so far as it was related to surface water. Such an approach was also supported by the heavy reliance on groundwater for such basic needs as drinking water, which would increase dramatically in the near future, as populations continued to grow. As illustrated in the diagram showing the elements of a hypothetical international river use system, pollution of surface waters could contaminate aquifers and vice versa, making those precious resources unusable for many human needs.

10. Further support for the inclusion of groundwater was provided by the opinion of specialists and United Nations conferences that groundwater should be managed together with surface water in an integrated manner. As early as 1966, the Helsinki Rules, adopted by ILA, had included groundwater, provided it was part of a system of waters consisting, *inter alia*, of surface waters. The Seoul Rules, adopted in 1986, had simply applied the principles of the Helsinki Rules to groundwater that was not related to surface water. He was confident that the Commission would adopt a position that would not only assist States in the comprehensive management of international watercourses but would also demonstrate that it was in tune with the times and had not ignored the hydrographic imperatives already recognized 25 years previously by ILA.

11. The third major point in the discussion had been whether, for the purposes of the draft, a watercourse should be regarded as having a relative international character. Once again, although opinion was not unanimous, a clear majority was in favour of defining an international watercourse or international watercourse system without reference to the idea of relative internationality. Of the members who had addressed the question, nine thought that the idea of relativity no longer served a useful purpose, while three thought that it did. Three others also seemed to be in favour of retaining the concept, while two appeared to support deleting it, although their positions were not as clear-cut. Those favouring retention of the idea generally thought it necessary to keep the scope of the articles within manageable bounds; those who believed that it was no longer needed felt that sufficient safeguards had already been incorporated into the draft articles and that consequently, the idea of relative internationality was, at best, superfluous.

12. While the origin of the concept was far from clear, in all likelihood it had been included in 1980 as a safeguard, since no articles containing substantive obligations had yet been adopted. At the time, the idea of relative internationality had provided some assurance that the articles would not be extended to cover situations where the actions of one watercourse State would have no effect upon other watercourse States. But as the Commission had adopted the bulk of the draft articles, the requirement of an actual or potential effect could be seen to have been built into the articles themselves.

13. The reasons, however, for abandoning that concept went beyond the fact that it was no longer necessary. As discussed in the report, the notion of relative internationality would seriously interfere with the functioning of the draft articles. For example, a State would not know whether it was a watercourse State unless and until it could be established that parts of the waters in its territory were affected by or affected uses of waters in another State. Thus, it would not know whether or not it had rights and obligations under the draft articles, beginning with article 4. If State A believed it would suffer harm from a measure planned in co-riparian State B, it

would have to wait until the harmful effect occurred in order to demonstrate that it was a watercourse State and entitled to the protection of the draft articles. Yet such a situation was exactly what part III of the draft articles was intended to prevent; the articles therein were designed to deal with potential conflicts among users before positions became entrenched, damage was caused, and the matter escalated into a serious dispute. That same basic problem would impair, if not wholly block, the functioning of the provisions in every part of the draft articles.

14. Specialists in the management and development of international watercourses had stressed that the idea of international relativity would make it extremely difficult for those at the working level to manage and develop the resources of an international watercourse system so as to obtain optimal benefit for all concerned. The Commission should not lose sight of that very important point: in the end, the real test of the draft articles would be whether they could be applied in practice by those whose responsibility it was to protect and manage international watercourse systems.

15. In short, there seemed to be ample support in the Commission for defining the term "watercourse" as a "system" of waters, for including at least certain kinds of groundwater in the components of a watercourse system and for not including the notion of the relative international character of a watercourse in the definition of the expression "international watercourse" or "international watercourse system". He therefore proposed that both versions of the article on the use of terms should be referred to the Drafting Committee for consideration in the light of the debate. As he had indicated in introducing the proposed article and as several members had noted during the debate, the definitions in the two alternatives were the same, but the term defined was slightly different. The discussion of the alternatives had shown a clear preference for alternative A.

16. In the Drafting Committee, consideration might be given to introducing certain changes in the proposed article in the interest of further enhancing its acceptability. The possible changes that had received the most support were, firstly, including groundwater only to the extent that it was related to, that is to say, interacted with, surface water. Hence, confined groundwater would not fall within the scope of the draft articles, nor would aquifers that were not connected with surface water, except possibly those that were intersected by a boundary. The second possible change a number of members had supported was the introduction of a requirement that the waters flow into a common terminus. The effect would be to limit the scope of the draft articles so that, for example, waters in two drainage basins that were connected by a canal would not be regarded as being part of a single international watercourse system. In addition to those possible changes, the commentary to the article on use of terms could carefully explain that the concept of internationality was no longer needed, because it had been incorporated into the articles themselves.

17. He appealed to the Commission not to adopt a definition of the scope of the draft articles that would make them outmoded before they were presented to the international community. He was not advocating the adoption of a solution that was ahead of its time, but rather one that was consistent with the present understanding of water problems and the imperatives of managing an increasingly scarce resource. The work on the topic of the law of the non-navigational uses of international watercourses would influence not only the behaviour of States, but that of important institutions, such as the multilateral development banks, which looked to the Commission for guidance. The Commission thus bore a heavy responsibility for the manner in which States developed their water resources and, indirectly, other important sectors of their economies, such as agriculture and energy production. Undue conservatism could very well result in increased human suffering and conflicts between States. He was confident that the Commission would make an enlightened choice.

18. Mr. BARSEGOV said that he did not object to referring the draft article to the Drafting Committee, but it was his impression that more than two members had expressed reservations about adopting the term "international watercourse system". To speak of a "system" would be to exceed the mandate given to the Commission by the General Assembly, which had clearly spoken of "watercourses". Many arguments had been advanced by members of the Commission against adopting "watercourse system". In his view, the word "system" should remain in square brackets. When the draft articles were referred to the Sixth Committee, the Commission should include an explanation of the opinion of those in favour of the term "international watercourse system" and of those in favour of "international watercourse", and Governments should then be asked for guidance.

19. The CHAIRMAN suggested that both versions of the article should be referred to the Drafting Committee on the understanding that, whether or not the Committee had time to consider the question and report back to the Commission, the Commission would in due course examine Mr. Barsegov's proposal to request the views of Governments on the issue. If he heard no objection, he would take it that the Commission agreed to that course.

It was so agreed.

Jurisdictional immunities of States and their property (A/CN.4/L.457, A/CN.4/L.462 and Add.1, Add.2 and Corr.1 and Add.3 and Corr.1, ILC/(XLIII)/Conf.Room Doc.1)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING[4]

20. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text of draft articles 1 to 23 as adopted by the Committee on second reading (A/CN.4/L.457).

[4] For texts of draft articles provisionally adopted by the Commission on first reading, see *Yearbook ... 1986*, vol. II (Part Two), pp. 7-12.

21. Mr. PAWLAK (Chairman of the Drafting Committee) said that articles 1 to 15 of the draft before the Commission had been adopted on second reading by the Drafting Committee at the previous session, but the Commission had decided to defer the adoption of those articles so as to have before it the complete set of articles on the topic. At the current session, the Drafting Committee had concluded the second reading of the entire draft, adopting the remaining articles, the titles of parts III, IV and V, paragraph 1 (*b*) (iv) of article 2, and paragraph 3 of article 10.

22. He suggested that any questions raised with respect to the articles adopted by the Drafting Committee at the forty-second session should be dealt with either by Mr. Mahiou, Chairman of the Drafting Committee at that session, or by Mr. Ogiso, Special Rapporteur for the topic. He, for his part, would confine himself to introducing the additions made by the Drafting Committee to articles 2 and 10.

ARTICLE 1 (Scope of the present articles)

23. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 1, which read:

Article 1. Scope of the present articles

The present articles apply to the immunity of a State and its property from the jurisdiction of the courts of another State.

He said that, if he heard no objection, he would take it that the Commission agreed to adopt article 1.

Article 1 was adopted.

ARTICLE 2 (Use of terms)

24. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 2, which read:

Article 2. Use of terms

1. For the purpose of the present articles:

(*a*) "court" means any organ of a State, however named, entitled to exercise judicial functions;

(*b*) "State" means:

(i) the State and its various organs of Government;

(ii) constituent units of a federal State;

(iii) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;

(iv) agencies or instrumentalities of the State and other entities, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;

(v) representatives of the State acting in that capacity;

(*c*) "commercial transaction" means:

(i) any commercial contract or transaction for the sale of goods or supply of services;

(ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;

(iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (*c*), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if, in the practice of the State which is a party to it, that purpose is relevant to determining the non-commercial character of the contract or transaction.

3. The provisions of paragraphs 1 and 2 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

25. Mr. PAWLAK (Chairman of the Drafting Committee) said that, on second reading, the Special Rapporteur had proposed an article, at the request of certain Governments, on State enterprises and had introduced the concept of segregated property. It had been the Special Rapporteur's intention to deal with those matters in article 11 *bis* and in the corresponding paragraph 1 (*b*) (iii) *bis* of article 2. The Drafting Committee, which had discussed the matter at length, had not found the concept of segregated property or the wording and position of the proposed provisions altogether satisfactory but had agreed in principle that a provision should be included in the draft concerning enterprises that were established by a State to perform commercial transactions yet had a separate legal personality from the State. It had further decided that it would be more appropriate to deal with the question in the context of article 10, and he would therefore explain the matter in more detail when the Commission came to that article.

26. Article 2, now before the Commission, was a combination of former articles 2 and 3. The definition of "State" considered by the Drafting Committee at the previous session had contained no reference to agencies and instrumentalities of the State. However, the Committee had now decided to retain the definition of agencies and instrumentalities of the State that it had adopted on first reading as paragraph 1 (*c*) of original article 3; that latter definition now appeared as paragraph 1 (*b*) (iv) of article 2. The Committee had also expanded the definition of State. In that connection, reference had been made in the Drafting Committee to a practice that had been fairly frequent after the Second World War and still occurred to some extent, when a State gave a private entity governmental authority to perform acts in the exercise of the sovereign authority of the State. For example, some commercial banks were authorized by a Government to deal with import and export licensing that fell exclusively within governmental powers. To the extent that private entities performed such governmental functions, they should be considered as the State for the purpose of the articles. The reference to "other entities" in paragraph 1 (*b*) (iv) was meant to cover non-governmental entities which were vested with governmental authority in exceptional cases. That subparagraph limited the definition of State to agencies or instrumentalities of a State and other entities only in so far as such bodies were entitled to perform acts in the exercise of the sovereign authority of the State.

27. Mr. Sreenivasa RAO said that he welcomed paragraph 1 (*b*) (iv), since the right to immunity for agencies, instrumentalities and other entities which performed State functions should be recognized. He would not object to the adoption of article 2 as a whole, despite the circular nature of the definition laid down in paragraph 1

(*c*) (i). There was, however, one point about that definition on which he would be grateful for clarification, and it concerned the notion of profit. A transaction entered into by a State or a private entity for the purpose of making a sale or a purchase with a view to earning a profit was clearly a commercial transaction. He wondered, however, what the position would be in the case of a purely financial transaction which was carried out for a public purpose and in which there was no profit motive; such a transaction might well involve the sale of, for instance, goods or services. Should such a purely financial transaction be assimilated to a commercial transaction or should it be treated somewhat differently, particularly since public purpose was one of the criteria recognized under paragraph 2 of article 2, for determining a commercial transaction?

28. Mr. McCAFFREY said that, while he would not oppose the adoption of the article, he had some doubts about the inclusion of the words "and other entities" in paragraph 1 (*b*) (iv). He was not convinced that the kind of situation contemplated occurred frequently enough to warrant the inclusion of those words in the article. In his view, if a separate entity, even a corporate one, was to be regarded as a State, and hence entitled to jurisdictional immunity from the courts of other States, the majority of the shares should at least be owned by the State. In the provision in question, there was no requirement of any legal connection other than that a public function should be assigned to a private entity.

29. He also had doubts about the need for paragraph 2, and particularly the last clause. The first clause would be acceptable, particularly if the word "primarily", which cast doubt on whether a nature or a purpose test was being used, was omitted. The next clause, however, starting with the words "but its purpose should also be taken into account if . . ." did not make it clear whether a nature or a purpose test was being used even though, in the practice of States, the nature test was predominant. He would therefore like to know how the clause would be applied in practice and whether the burden of proof would be on the defendant State. It was a very important point affecting, as it did, all of the articles in parts III and IV of the draft. He would look to the commentary to the article for a further explanation.

30. Mr. PELLET said that, unlike Mr. McCaffrey, he thought the words "and other entities" had a role to play. He did, however, agree with Mr. McCaffrey about paragraph 2 and had fairly strong reservations as to the wording and the substance. The paragraph would not, for instance, permit a court to determine whether there was a commercial transaction, while the words "in the practice of the State which is a party to it" could open the door to much abuse and to highly subjective interpretations. Furthermore, paragraph 3, in the French text, was not altogether satisfactory, the words *ne préjudicient pas à l'emploi* being particularly unfortunate.

31. Mr. TOMUSCHAT said that he was in favour of the words "and other entities" which would take account of the specific situation in which corporate bodies had an important role to play in cooperating in the discharge of public tasks. Even if such cases occurred infrequently, as Mr. McCaffrey suggested, they should not be left out of account altogether. Furthermore, since it was recognized that agencies, instrumentalities and public bodies could wield public power, it seemed clear that there was no substantive difference between sovereign authority, on the one hand, and other elements of governmental authority, as defined under articles 7 and 8 of the draft articles in part 1 of the topic of State responsibility, on the other. For the sake of clarity, it would be better to delete the word "commercial" from paragraph 1 (*c*) (i), which contained a circular definition that confounded the elementary laws of logic.

32. He agreed with Mr. McCaffrey that it would have been better to restrict paragraph 2 to the first clause, adopting the nature test, for the use of the purpose test could lead to difficulty. He took it from the text, however, that the two tests were not on the same level and that recourse would be had, in the first instance, to the nature test, and to the purpose test only on a supplementary basis where there was a serious doubt whether a given transaction was of a commercial or non-commercial nature.

33. Mr. ARANGIO-RUIZ said he agreed with Mr. Pellet that the words "and other entities" added a useful element to the article. He also agreed with Mr. Tomuschat regarding paragraph 1 (*c*) (i).

34. He was in favour of keeping the text of paragraph 2 as it stood, but an appropriate explanation should be included in the commentary. It was quite clear, of course, that the nature test was the primary test and that the purpose test was only secondary. None the less, he considered that that secondary test should be retained. The words "if, in the practice of the State which is a party to it, that purpose is relevant" did not just mean that the defendant State would simply have to adduce evidence of its practice: the matter was obviously one that the court would have to decide in the light of all the facts.

35. Mr. BARSEGOV said that he favoured article 2 in the form in which it was proposed. It dealt with a matter of considerable importance, both in theory and in practice. It should be remembered that, in many legal systems, the nature test and the purpose test were given equal importance. The text now being proposed represented a well-balanced compromise.

36. Mr. DÍAZ GONZÁLEZ said he agreed with Mr. Tomuschat about paragraph 1 (*c*) (i). The definition of "commercial transaction" was consistent with the definition contained in a great many national commercial codes.

37. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 2.

Article 2 was adopted.

ARTICLE 3 (Privileges and immunities not affected by the present articles)

38. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 3, which read:

Article 3. Privileges and immunities not affected by the present articles

1. The present articles are without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of:

(*a*) its diplomatic missions, consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences; and

(*b*) persons connected with them.

2. The present articles are likewise without prejudice to privileges and immunities accorded under international law to Heads of State *ratione personae*.

39. He said that, if he heard no objection, he would take it that the Commission agreed to adopt article 3.

Article 3 was adopted.

ARTICLE 4 (Non-retroactivity of the present articles)

40. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 4, which read:

Article 4. Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which jurisdictional immunities of States and their property are subject under international law independently of the present articles, the articles shall not apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the entry into force of the present articles for the States concerned.

41. Mr. Sreenivasa RAO said that he had no objection to article 4 in principle, but the drafting did not make for easy reading.

42. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 4.

Article 4 was adopted.

ARTICLE 5 (State immunity)

43. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 5, which read:

Article 5. State immunity

A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present article.

He said that, if he heard no objection, he would take it that the Commission agreed to adopt article 5.

Article 5 was adopted.

ARTICLE 6 (Modalities for giving effect to State immunity)

44. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 6, which read:

Article 6. Modalities for giving effect to State immunity

1. A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.

2. A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:

(*a*) is named as a party to that proceeding;

(*b*) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.

45. Mr. EIRIKSSON suggested that the word "or" should be inserted in paragraph 2 at the end of subparagraph (*a*) in order to link it with subparagraph (*b*). A similar change should be made in articles 10, 11, 17, 18 and 19 where the connecting word "or" or "and" should be introduced at the appropriate place.

46. The CHAIRMAN said that the suggestion could be treated as a drafting point and taken up by Mr. Eiriksson with the Special Rapporteur and the Chairman of the Drafting Committee.

47. Mr. McCAFFREY noted that a change had been introduced in paragraph 1 of the article with the words "and shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected". The commentary should make it clear that the passage was not to be construed as an encouragement to the State concerned not to appear before the court.

48. Mr. OGISO (Special Rapporteur) said that the commentary would duly mention that point.

49. Mr. Sreenivasa RAO said that he had no objection to article 6 and disagreed with Mr. McCaffrey. The matter was one of great importance for developing countries. It should not be necessary to appear before a foreign court where the immunity was obvious. The practice of forcing foreign States to appear before the courts involved heavy expense for the States concerned and raised very serious problems for the less developed countries. He therefore urged that the commentary should carefully reflect the point that States were free to appear before the court or not.

50. Mr. McCAFFREY said that he had not suggested that States should be told that they must appear. However, the Commission should not seem to be advising States not to appear. In most cases the jurisdiction of the court was obvious, although the foreign State concerned might not think so.

51. Mr. TOMUSCHAT noted that there did not appear to be any real disagreement between Mr. Sreenivasa Rao and Mr. McCaffrey.

52. Mr. ARANGIO-RUIZ said a State was free to appear before a foreign court or not. That was the position in all national courts and in ICJ. It was, however, in the interest of the State concerned—whether developing or developed—to appear before the court and claim immunity, in order to avoid a decision being handed down against it.

53. Mr. OGISO (Special Rapporteur) said that the commentary would carefully reflect Mr. McCaffrey's point that States should not be discouraged from appearing before the court. It would also mention the reservation by Mr. Sreenivasa Rao.

54. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt article 6, on the understanding that the commentary would cover the points mentioned by the Special Rapporteur.

Article 6 was adopted.

ARTICLE 7 (Express consent to exercise of jurisdiction)

55. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 7, which read:

Article 7. Express consent to exercise of jurisdiction

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:

(*a*) by international agreement;

(*b*) in a written contract; or

(*c*) by a declaration before the court or by a written communication in a specific proceeding.

2. Agreement by a State for the application of the law of another State shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State.

He said that, if he heard no objection, he would take it that the Commission agreed to adopt article 7.

Article 7 was adopted.

ARTICLE 8 (Effect of participation in a proceeding before a court)

56. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 8, which read:

Article 8. Effect of participation in a proceeding before a court

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:

(*a*) itself instituted the proceeding; or

(*b*) intervened in the proceeding or taken any other step relating to the merits. However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it took such a step, it can claim immunity based on those facts, provided it does so at the earliest possible moment.

2. A State shall not be considered to have consented to the exercise of jurisdiction by a court of another State if it intervenes in a proceeding or takes any other step for the sole purpose of:

(*a*) invoking immunity; or

(*b*) asserting a right or interest in property at issue in the proceeding.

3. The appearance of a representative of a State before a court of another State as a witness shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.

4. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.

He said that, if he heard no objection, he would take it that the Commission agreed to adopt article 8.

Article 8 was adopted.

ARTICLE 9 (Counter-claims)

57. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 9, which read:

Article 9. Counter-claims

1. A State instituting a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counter-claim arising out of the same legal relationship or facts as the principal claim.

2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counter-claim arising out of the same legal relationship or facts as the claim presented by the State.

3. A State making a counter-claim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of the principal claim.

He said that, if he heard no objection, he would take it that the Commission agreed to adopt article 9.

Article 9 was adopted.

ARTICLE 10 (Commercial transactions)

58. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 10, which read:

Article 10. Commercial transactions

1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

2. Paragraph 1 does not apply:

(*a*) in the case of a commercial transaction between States;

(*b*) if the parties to the commercial transaction have expressly agreed otherwise.

3. The immunity from jurisdiction enjoyed by a State shall not be affected with regard to a proceeding which relates to a commercial transaction engaged in by a State enterprise or other entity established by the State to perform exclusively commercial transactions which has an independent legal personality and is capable of:

(*a*) suing or being sued; and

(*b*) acquiring, owning or possessing and disposing of property including property which the State has authorized it to operate or manage.

59. Mr. PAWLAK (Chairman of the Drafting Committee) said that, in connection with article 2, he had explained the Special Rapporteur's proposal on State enterprises and entities engaged in commercial transactions. In the economic system of some States, certain transactions, which were characterized under the present articles as commercial, were conducted by enterprises and entities established by Governments and given by them

legal personality, independent from the State, to conduct those transactions. Therefore, in the event of a dispute, the independent legal personality of those entities should be recognized and State immunity from jurisdiction should remain intact. The claimant could only sue the enterprise or entity and collect from its assets.

60. Article 10 was an appropriate place for a provision on the commercial function of those entities, since the article dealt with "commercial transactions", and paragraph 3 had been added to in order to deal with the commercial transactions of such State enterprises or entities. Under paragraph 3, the State enterprises concerned were required to have certain qualifications. In the first place, they must have been established by a State exclusively to carry out commercial transactions. In the second place, the enterprise or entity must have an independent legal personality, personality that must include the capacity to (*a*) sue or be sued; and (*b*) acquire, own, possess and dispose of property, including property which the State had authorized the enterprise or entity to operate or manage.

61. It would be noted that the requirements of subparagraphs (*a*) and (*b*) were cumulative; the presence of both was necessary. In addition to the capacity to sue or be sued, the enterprise or entity must also satisfy certain financial requirements as stipulated in subparagraph (*b*). The Drafting Committee had considered that the entities concerned must not be permitted to conceal their property behind the State and thus avoid claims from creditors. Usually, the State put at the disposal of the entity some State property to be operated or managed by it. In addition, those entities could themselves acquire property through their commercial transactions. Under subparagraph (*b*), the enterprises or entities must be capable of acquiring, owning or possessing and/or disposing of their property, namely, the property that the State had authorized them to operate or manage as well as the property they themselves gained as a result of their operations. The term "disposing" was essential because it made the property of the entities potentially subject to attachment for satisfaction of creditors.

62. Mr. EIRIKSSON suggested that the word "or" should be used in paragraph 2 to connect subparagraphs (*a*) and (*b*). A comma should be introduced in subparagraph 3 (*b*), after "property" and before the words "including property which the State".

63. Mr. McCAFFREY said that he had serious reservations about the substance of paragraph 3, which had been introduced to meet the concerns of a limited number of States and the provisions of the paragraph were likely to thwart the whole object of the draft articles. The entire purpose of the draft was to ensure the enforcement of commercial transactions and the performance of contractual obligations. It must be remembered that State enterprises might be undercapitalized, the result being that creditors could not recover the amounts due to them.

64. Again, the first part of paragraph 3 was inadequately drafted. It said that the immunity from jurisdiction enjoyed by a State "shall not be affected with regard to a proceeding which relates . . .". The intention was perhaps to say that the immunity of the State "shall not be affected" by the fact that a proceeding relating to a commercial transaction of a State enterprise was initiated.

65. Mr. FRANCIS said that he was speaking also on behalf of two members who were absent, namely Mr. Njenga and Mr. Koroma. He strongly supported article 10 and expressed gratitude to the Drafting Committee for inserting paragraph 3.

66. Mr. Sreenivasa RAO said he disagreed with Mr. McCaffrey's remark that paragraph 3 concerned only a limited number of States. In any case, from a perusal of the draft it was not difficult to see that many of the articles were based on the legislation and practice of only a few States. It was worth recalling that some members had made suggestions on the subject-matter of paragraph 3 that went further than the text now before the Commission. Although that text was not fully satisfactory to them, those members were prepared to accept it in a spirit of compromise. He too would accept it in that same spirit, despite its limitations. For example, the use of the word "exclusively" to qualify commercial transactions was not satisfactory. It was not uncommon for a State enterprise or entity to perform governmental functions, apart from commercial transactions.

67. He failed to understand the argument about underfinancing. A State entity would have certain property allocated to it, and consequently, those who dealt with that entity would know where they stood and decide whether to carry out transactions with it.

68. Mr. PELLET said that, while he was prepared to accept paragraph 3 as a compromise solution, he was less than enthusiastic about it, for reasons closer to Mr. Sreenivasa Rao's than Mr. McCaffrey's. Introducing the criterion of the purpose for which a State established a State enterprise was dangerous, although possibly less so in the context of article 10 than elsewhere. Again, the last part of the paragraph, beginning with the words "which has an independent legal personality", was redundant and therefore infelicitous. He agreed with Mr. McCaffrey's criticism of the phrase "affected with regard to a proceeding", which, incidentally, was even less clear in French than in English, but did not share his fears about the possibility of a State enterprise having insufficient funds. The same risk existed in the case of purely private enterprises, and ordinary law was applicable in both cases. In short, the idea behind the text was satisfactory, but the drafting was not.

69. Mr. SHI said that he could not agree with the views on paragraph 3 expressed by Mr. McCaffrey. It was incorrect to think that the paragraph had been included to meet the concerns of a limited number of States. Today, the vast majority of States, not only developing but also developed, had State enterprises. Second, the allegation that State enterprises were often undercapitalized reflected a prejudiced or discriminatory way of thinking. He could not guarantee that all State enterprises in the world were not undercapitalized, just as no one could guarantee that all private enterprises were not undercapitalized; indeed, there were many cases of financially weak or unsound private enterprises, or even of fake enterprises which did not actually exist in law or in reality. It was, of course, true that private enterprises were independent of the State, but so were State enter-

prises in both law and practice. Why should the State be responsible for an independent State enterprise? If the State were to be held liable for liabilities which an independent State enterprise might not be able to meet, then the State of which a private enterprise was a national should also be held liable for liabilities which that private enterprise could not meet. If paragraph 3 could not stand for the reason that State enterprises were often undercapitalized, then a new article should be included in the draft to the effect that, if a private enterprise proved undercapitalized or financially weak or unsound, the State of which it was a national could be sued in a foreign court in a dispute between a private person and that private enterprise.

70. Mr. GRAEFRATH said that he was in favour of paragraph 3, which was the outcome of lengthy and serious consideration. The provision concerning State enterprises was, in his view, absolutely necessary under prevailing economic conditions. However, he doubted the usefulness of the word "exclusively" and would prefer to see it deleted.

71. Mr. MAHIOU, speaking as the former Chairman of the Drafting Committee, explained that paragraph 3 had not, in fact, been considered by the Committee under his chairmanship. Speaking as a member of the Commission, he was in favour of adopting the paragraph even if the drafting was not entirely satisfactory. He agreed with Mr. Graefrath, however, that the word "exclusively" was unnecessary. As to Mr. Pellet's remark about the second part of the paragraph, the definition was indeed somewhat redundant, but in the case in point an excess of clarity was hardly a fault. With those reservations, he endorsed the paragraph.

72. Mr. BARSEGOV said that the article under consideration, and particularly paragraph 3, was extremely important in that it reflected the profound economic changes currently taking place in a number of countries. As other members had rightly pointed out, the provision in paragraph 3 was also highly important to all developing countries and even to many developed countries traditionally associated with an economic system of private ownership. With regard to the possibility of undercapitalization mentioned by Mr. McCaffrey, he agreed with Mr. Shi that the same possibility existed in the case of private companies. To fail to adopt the provision on such grounds would be to encourage a discriminatory approach; if States were to be held liable for the financial transactions of State enterprises, they should also be liable for those of private companies which were their nationals. He agreed that the text under consideration was not entirely satifactory, and would personally have preferred paragraph 3 to form a separate article of the draft. However, the text did represent the result of lengthy discussion in the course of which full account had been taken of the law and experience of Western European and other developed countries. It was well-balanced and acceptable, and he hoped that it would help to promote international economic relations.

73. Mr. McCAFFREY said that his intention was not to prolong the debate but simply to explain his earlier remarks. In reply to Mr. Shi, he would point out that he had not said that State enterprises were "often" undercapitalized but only that they "might be". The difference between a private enterprise and a State enterprise, as he saw it, was that a private enterprise did not purport to have anything behind it, whereas a State enterprise carried the possibly dangerous implication of being backed by the full resources of the State. He had not accused States of deliberately undercapitalizing their enterprises and he fully agreed that private enterprises, too, were sometimes financially unsound.

74. Mr. HAYES said that paragraph 3 was not strictly necessary, for the meaning was conveyed by the relevant part of article 2, on the use of terms, already adopted by the Commission. The only difference between article 2 and article 10 was the reference to "exclusively" commercial transactions.

75. Article 10 as a whole expressed the distinction between *acta jure imperii* and *acta jure gestionis*, which had formed the subject of lengthy debate over the years. He personally believed in the distinction and in the attribution of immunity in cases which fell in the former category but not in the latter. That principle was clearly stated in paragraph 1 of article 10, and paragraph 3—which, as it were, proclaimed the obverse of the principle—was therefore unnecessary.

76. It was not unknown in national experience for enterprises, mostly private enterprises, to go bankrupt, and undercapitalization of State enterprises could undoubtedly have certain similarities with bankruptcy. Just as in the case of bankruptcy the shareholders were not made liable, so also in the case of undercapitalization liability should not go behind the State enterprise to the State itself. So to provide would also run contrary to the basis for determining whether immunity might be invoked, thus making a breach in the very fabric of the draft articles as a whole.

77. Mr. RAZAFINDRALAMBO said that, as a member of the Drafting Committee, he agreed with the substance of paragraph 3 as approved by the Committee on second reading. However, the drafting was not entirely satisfactory and he wondered whether it might not be improved by replacing the words "with regard to" at the beginning of the paragraph by the word "if" and deleting the word "which". He also agreed with members who thought it better to delete the word "exclusively". On the other hand, he disagreed with Mr. Pellet that the end part of the paragraph was redundant; subparagraph (*b*), in particular, introduced the important new concept of property which a State enterprise was authorized to operate or manage, and it should be retained.

78. Mr. Sreenivasa RAO thanked Mr. McCaffrey for explaining his earlier remarks. To imagine, even by implication, that a State enterprise necessarily had the resources of the State behind it was, of course, mistaken.

79. Mr. OGISO, speaking as a member of the Commission rather than as the Special Rapporteur, said he associated himself with those who had stressed that paragraph 3 represented a compromise solution reached after very lengthy discussion. For that reason, he was inclined to think that it would not be helpful to change the paragraph at the present late stage. Like many other members, he was not entirely satisfied with the text and, in

particular, with the word "exclusively", which, it would be recalled, had not appeared in the original proposal. In spite of those reservations, he was prepared to accept the compromise formulation as it stood.

The meeting rose at 12.55 p.m.

2219th MEETING

Wednesday, 5 June 1991, at 10.05 a.m.

Chairman: Mr. John Alan BEESLEY

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/L.457, A/CN.4/L.462 and Add.1, Add.2 and Corr.1 and Add.3 and Corr.1, ILC/(XLIII)/Conf.Room Doc.1)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING[1] (*continued*)

ARTICLE 10 (Commercial transactions) (*continued*)

1. The CHAIRMAN invited the Commission to resume its consideration of article 10.[2]

2. Mr. PAWLAK (Chairman of the Drafting Committee) said that he had no problem with the drafting changes that had been proposed at the previous meeting to the first part of the text of paragraph 3. Noting that the word "exclusively" did not enjoy the support of all members of the Commission, he suggested holding a brief discussion on that point with a view to finding a solution that would not upset the balance of the Drafting Committee's text.

3. Mr. MAHIOU said that he favoured the deletion of that word. In his view, the issue raised in article 10, paragraph 3, was governed by article 2, paragraph 1 (*b*) (iv), which extended the term "State" to agencies or instrumentalities of the State and other entities acting in the exercise of the sovereign authority of the State. The deletion would therefore not give rise to any particular problems and would not leave a gap in the draft articles.

4. Mr. McCAFFREY said that he was in favour of retaining the word "exclusively" precisely because, if it was deleted, there would be no tangible difference between the definition in article 2, paragraph 1 (*b*) (iv), and article 10, paragraph 3. In other words, the State would enjoy jurisdictional immunity in all cases where a State entity engaged in non-commercial activities had the capacities referred to in paragraph 3 (*a*) and (*b*). The word "exclusively" should therefore be kept in order to limit the scope of the jurisdictional immunities of States.

5. Mr. DÍAZ GONZÁLEZ said that he was in favour of the deletion of the word "exclusively" for the same reason as Mr. Mahiou. He also thought that paragraph 3, subparagraphs (*a*) and (*b*), were superfluous since it was already stated that the entities in question had "an independent legal personality".

6. Mr. TOMUSCHAT said that all that paragraph 3 meant was that a claim could not be brought against a State if a dispute arose between a commercial enterprise of the State and a third party. There was, however, nothing to prevent an action being brought against the State enterprise. The deletion of the word "exclusively" would thus have no effect on the basic problem, which was that of the responsibility of the State enterprise. Subparagraphs (*a*) and (*b*) should none the less be retained in order to make it perfectly clear that the entity existed as a legal personality and could therefore be sued.

7. Mr. THIAM said that he was in favour both of the deletion of the word "exclusively", for reasons already stated by other speakers, and of subparagraphs (*a*) and (*b*), which were redundant. There was no need to explain what having a legal personality meant: it always entailed the capacity to sue or be sued and to acquire or dispose of property. The two provisions added nothing to paragraph 3, but might perhaps be more appropriately placed in the commentary to article 10.

8. Mr. PELLET said that, in his view, subparagraphs (*a*) and (*b*) were not relevant: the purpose referred to by Mr. Tomuschat would be better served by providing not that the entity must be capable of acquiring, owning or disposing of property, but that it must actually be in possession of the property. He would, however, not object if those provisions were retained.

9. As to the word "exclusively", everything hinged on the intended meaning of paragraph 3. If the intention was to refer to State enterprises which performed commercial transactions, the word "exclusively" should be deleted, since the immunity of the State could not be challenged in that case. If, on the other hand, the provision was meant to refer to enterprises established by the State in order to perform commercial transactions, the word "exclusively" should be retained. He personally would prefer the text to refer to entities which performed commercial transactions; the deletion of the word "exclusively" would then follow.

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[1] For texts of draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 7-12.

[2] For text, see 2218th meeting, para. 58.

10. Mr. SHI said that he was in favour of the deletion of the word "exclusively". With regard to subparagraphs (*a*) and (*b*), he said he would join the majority view. He nevertheless thought that those subparagraphs were superfluous, since capacity to sue or be sued and to acquire, own or dispose of property was implicit in the concept of independent legal personality.

11. Mr. OGISO (Special Rapporteur) recalled that he had already spoken in favour of the deletion of the word "exclusively" (2218th meeting). With regard to subparagraphs (*a*) and (*b*), he explained that subparagraph (*b*) had been added to the text of paragraph 3 in order to replace the concept of "segregated State property". It had therefore been necessary to indicate explicitly that the State enterprise had to be capable of disposing of the property entrusted to it by the State.

12. Moreover, the Drafting Committee had considered that, in the interests of clarity, it was better to spell out the meaning of the term "independent legal personality", which could be interpreted differently from one country to another.

13. Mr. PAWLAK (Chairman of the Drafting Committee) said that although it seemed that the Commission was nearing agreement on article 10, he nevertheless proposed that the Commission should suspend its consideration of the article to enable him to hold further consultations with a view to arriving at a text which was satisfactory to all.

14. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to follow the suggestion of the Chairman of the Drafting Committee and to proceed to consider article 11 pending the results of the consultations on article 10.

It was so agreed.

ARTICLE 11 (Contracts of employment)

15. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 11, which read:

Article 11. Contracts of employment

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

2. Paragraph 1 does not apply if:

(*a*) the employee has been recruited to perform functions closely related to the exercise of governmental authority;

(*b*) the subject of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;

(*c*) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;

(*d*) the employee is a national of the employer State at the time when the proceeding is instituted;

(*e*) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

16. Mr. EIRIKSSON proposed that the word "or" should be added at the end of paragraph 2 (*d*).

It was so agreed.

17. Mr. McCAFFREY requested clarification of the meaning of the word "reinstatement" in paragraph 2 (*b*).

18. Mr. PELLET said that it would have been more logical first to establish the principle of immunity in the case of contracts of employment and then to list the exceptions. He would, however, not object to the adoption of the proposed text.

19. Mr. Sreenivasa RAO said that he would also like some explanations of the meaning and scope of paragraph 2 (*b*).

20. Mr. SHI said that, in a spirit of compromise, he was prepared to withdraw the reservations he had expressed at the preceding session concerning the inclusion of article 11 in the draft articles.[3]

21. Mr. OGISO (Special Rapporteur), replying to the questions raised with regard to paragraph 2 (*b*), said that the provision did not prevent an individual who had been wrongfully dismissed from bringing a claim for compensation. It simply meant that a court of another State would not be competent to rule on the recruitment, renewal of employment or reinstatement of the person concerned. He was prepared to provide more detailed explanations in the commentary to article 11.

22. Mr. MAHIOU, referring to the explanations just given by Mr. Ogiso, said that the scope of paragraph 2 (*b*) had been restricted by the words "the subject of the proceeding is" to indicate that a court could not compel a State to renew the contract of one of its employees. In the case of wrongful dismissal, however, the individual concerned could, as Mr. Ogiso had said, bring an action with a view to obtaining compensation.

23. Mr. TOMUSCHAT said that he had some reservations with regard to paragraph 2 (*c*). The provision, which seemed to mean that persons who were neither nationals nor habitual residents of the State of the forum would not enjoy any legal protection, was unfair. However, he did not intend to reopen the discussion on that point.

24. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 11 as amended by Mr. Eiriksson.

Article 11 was adopted.

ARTICLE 12 (Personal injuries and damage to property)

25. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 12, which read:

Article 12. Personal injuries and damage to property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of an-

[3] *Yearbook ... 1990*, vol. I, 2158th meeting, para. 35.

other State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

26. Mr. SHI said that article 12 gave rise to some problems. In the first place, the question of the attribution of an act or omission to a State came within the scope of the international responsibility of States and a court which held a foreign State responsible for an act would be violating the principle of State sovereignty. Secondly, under customary international law, the State in whose territory the wrongful act had been committed could not exercise its jurisdiction if the act in question was attributable to a foreign State. Lastly, the fact that a State could not invoke immunity from jurisdiction in a proceeding relating to compensation for damage to or loss of tangible property might create friction between States. In his view, the situations referred to in article 12 should preferably be settled through diplomatic channels. He therefore had reservations with regard to article 12 as a whole, but would not oppose its adoption.

27. Mr. GRAEFRATH said that, in his view, draft article 12 was incompatible with the principle of diplomatic immunity.

28. Mr. Sreenivasa RAO said that the matters covered by article 12 were normally settled through diplomatic channels. Every victim must, of course, be able to obtain redress and that principle was recognized in practice. It was not essential, however, to have recourse to the courts for that purpose. The last part of the article also seemed to make the exception to the rule of immunity subject to the presence of the author of the act or omission in the territory of the State where the act or omission had occurred. In other words, if the author of the act or omission was not present in the territory, the victim would, it seemed, have no other solution than to follow the normal procedure and seek reparation through diplomatic channels. In the circumstances, it would be best to delete the article or at least to reword it. He would not, however, oppose its adoption if that was the wish of the Commission.

29. Mr. BARSEGOV said that he agreed with the reservations expressed by Mr. Graefrath and Mr. Sreenivasa Rao.

30. The CHAIRMAN invited the Commission to adopt article 12, taking note of the reservations which some members had expressed.

Article 12 was adopted.

ARTICLE 13 (Ownership, possession and use of property)

31. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 13, which read:

Article 13. Ownership, possession and use of property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the determination of:

(*a*) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum;

(*b*) any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*; or

(*c*) any right or interest of the State in the administration of property, the estate of a bankrupt or the property of a company in the event of its winding-up.

32. Mr. Sreenivasa RAO said he would like to be assured that the article did not apply to property used for official purposes by diplomatic missions, consular posts, special missions and other organs of the State.

33. Mr. TOMUSCHAT said that, in his view, the article was too broadly framed. In particular, the notion of interest, which was borrowed from the common law system, would be difficult to apply under other legal systems.

34. Mr. MAHIOU assured Mr. Sreenivasa Rao that article 13 was to be interpreted in the light of article 3, which provided that the articles relating to jurisdictional immunities would not affect the privileges and immunities enjoyed by States under conventions on diplomatic relations, on consular relations, on special missions and on missions to international organizations. Property covered by those conventions was therefore not affected by article 13.

35. The Drafting Committee had decided after a lengthy discussion to retain the notion of interest, even though it realized that it might give rise to some problems under certain legal systems, because it felt that there were more advantages to retaining it than disadvantages.

36. Mr. McCAFFREY pointed out that article 9 of the European Convention on State Immunity also used the words "right or interest".

37. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 13.

Article 13 was adopted.

ARTICLE 14 (Intellectual and industrial property)

38. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 14, which read:

Article 14. Intellectual and industrial property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(*a*) the determination of any right of the State in a patent, industrial design, trade name or business name, trade mark, copyright or any other form of intellectual or industrial property which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(*b*) an alleged infringement by the State, in the territory of the State of the forum, of a right of the nature mentioned in subparagraph (*a*) which belongs to a third person and is protected in the State of the forum.

39. Mr. Sreenivasa RAO said that, in his view, the draft article, which dealt briefly with a very important matter regulated by many international conventions, should not be included in an instrument dealing with jurisdictional immunities. In a spirit of compromise, however, he would not call for its deletion.

40. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 14.

Article 14 was adopted.

ARTICLE 15 (Fiscal matters)

41. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 15, which read:

Article 15. Fiscal matters

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the fiscal obligations for which it may be liable under the law of that other State, such as duties, taxes or other similar charges.

42. Mr. SHI, supported by Mr. Sreenivasa RAO, said that he had strong reservations with regard to the article, since it would allow a State to institute proceedings against another State before the courts of the former State in violation of the principle of the sovereign equality of States.

43. Mr. TOMUSCHAT said that he too did not really see the need for the article.

44. Mr. MAHIOU said that there had not been a definite trend of opinion in the Drafting Committee in favour of the deletion of the article. If it gave rise to too many objections, however, a decision could be taken in plenary as to whether the article was necessary in the context of the draft as a whole.

45. Mr. BARSEGOV said that, despite reservations, he would not oppose the adoption of the article.

46. Mr. OGISO (Special Rapporteur) said that, although the provisions of the article were not of a universal character, they appeared in the legislation of several States, including that of the United Kingdom of Great Britain and Northern Ireland, Singapore, Pakistan and Australia. In the United States of America, the Government was empowered to impose tax on income accruing to foreign States from commercial operations conducted in United States territory.

47. Moreover, even though the article had admittedly given rise to reservations on the part of some members of the Commission, it had thus far never really been called into question.

48. The CHAIRMAN suggested that the Commission should have time for reflection and revert to article 15 later.

It was so agreed.

ARTICLE 16 (Participation in companies or other collective bodies)

49. Mr. PAWLAK (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 16, which read:

Article 16. Participation in companies or other collective bodies

1. A State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

(*a*) has participants other than States or international organizations;

(*b*) is incorporated or constituted under the law of the State of the forum or has its seat or principal place of business in that State.

2. A State can however invoke immunity from jurisdiction in such a proceeding if the States concerned have so agreed or if the parties to the dispute have so provided by an agreement in writing or if the instrument establishing or regulating the body in question contains provisions to that effect.

50. He said that the Drafting Committee had noted a few ambiguities in the article which it had decided to clarify.

51. In the version adopted on first reading, paragraph 1 had stated the general rule and had then set forth an exception, which read: "unless otherwise agreed between the States concerned"; that clause was repeated in all the articles in part III. However, in view of the special structure of article 16, which, unlike the other articles in part III of the draft, stated a general rule and then dealt with exceptions, the Drafting Committee had felt it would be preferable to move the clause to paragraph 2, to modify the wording slightly so as to adapt it to paragraph 2 and to replace the words "unless otherwise agreed between the States concerned" by the words "if the States concerned have so agreed". Paragraph 1 therefore dealt solely with the general rule and paragraph 2 with the exceptions.

52. In reviewing the English and French versions of paragraph 1 (*b*), the Drafting Committee had noted that there was no equivalent term in the French text for the word "control", which appeared in the English text. As the question of how a State could be in control of a corporate entity was very controversial, the Committee had decided, after further discussion, to replace the criterion of control by the criterion of the seat of the corporate entity, which was used in article 6 of the European Convention on State Immunity. Paragraph (*b*) as it stood therefore now provided that paragraph 1 would apply when one of the following three criteria was met: the corporate body was incorporated or established under the law of the State of the forum; the corporate body had its seat in that State; or the corporate body had its principal place of business in that State.

53. The Drafting Committee had also decided that it should be explained in the commentary that the words "the instrument establishing or regulating the body in question", in paragraph 2, applied only to the fundamental instruments of a corporate body and not to any type of regulation.

54. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 16.

Article 16 was adopted.

ARTICLE 17 (Ships owned or operated by a State)

55. Mr. PAWLAK (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 17, which read:

Article 17. Ships owned or operated by a State

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the operation of that ship if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

2. Paragraph 1 does not apply to warships and naval auxiliaries nor does it apply to other ships owned or operated by a State and used exclusively on government non-commercial service.

3. For the purpose of this article, "proceeding which relates to the operation of that ship" means, *inter alia*, any proceeding involving the determination of a claim in respect of:

(*a*) collision or other accidents of navigation;

(*b*) assistance, salvage and general average;

(*c*) repairs, supplies or other contracts relating to the ship;

(*d*) [loss or damage resulting from] pollution of the marine environment.

4. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the carriage of cargo on board a ship owned or operated by that State if, at the time the cause of the action arose, the ship was used for other than government non-commercial purposes.

5. Paragraph 4 does not apply to any cargo carried on board the ships referred to in paragraph 2 nor does it apply to any cargo owned by a State and used or intended for use exclusively for government non-commercial purposes.

6. States may plead all measures of defence, prescription and limitation of liability which are available to private ships and cargoes and their owners.

7. If in a proceeding there arises a question relating to the government and non-commercial character of a ship owned or operated by a State or cargo owned by a State, a certificate signed by a diplomatic representative or other competent authority of that State and communicated to the court shall serve as evidence of the character of that ship or cargo.

56. He said that the Drafting Committee had discussed the article at length. In the previous version of the article, the main problem had been the use of the word "non-governmental" in paragraphs 1 and 4. The Drafting Committee had noted that article 96 of the 1982 United Nations Convention on the Law of the Sea defined the conditions under which a State-owned or State-operated ship enjoyed immunity and that the difficulty with article 17 was that it approached the issue from the opposite angle by trying to define the circumstances in which a State-owned or State-operated ship did not enjoy immunity. The Drafting Committee had felt that the best way of overcoming the difficulty was to provide that a ship would not enjoy immunity whenever the criteria set forth in article 96 of the United Nations Convention on the Law of the Sea were not met. It had therefore replaced the concluding phrase of paragraph 1 by the words "if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes".

57. It would also be noted that, in the text as thus amended, the ship was no longer "designed to be used" for commercial purposes, but was "used" for commercial purposes. Paragraph 1 presupposed the existence of a cause of action relating to the operation of the ship and it was difficult to imagine that such a cause of action could arise if the ship was not actually in use. The Drafting Committee had therefore deemed it preferable to retain only the criterion of actual use, particularly since the criterion of intended use was very vague and likely to give rise to difficulties in practice. Some members of the Committee had, however, expressed reservations about the deletion of that criterion.

58. The Drafting Committee had deleted the words "engaged in commercial [non-governmental] service" from the first part of paragraph 1 because it had viewed them as unnecessary, since the criterion the ship had to meet in order for the rule of immunity not to apply was defined in the second part of that paragraph.

59. For the sake of clarity, the Drafting Committee had slightly amended the first phrase of paragraph 2, replacing the words "does not apply to warships and naval auxiliaries nor to other ships" by "does not apply to warships and naval auxiliaries nor does it apply to other ships". The words "or intended for use" had been deleted, as in paragraph 1. Also, the last part of the paragraph had been brought into line with the wording used in article 96 of the United Nations Convention on the Law of the Sea and now read ". . . used exclusively on government non-commercial service".

60. Some members of the Drafting Committee had objected to the retention of the second half of paragraph 2 on the ground that the reference to "other ships owned or operated by a State and used exclusively on government non-commercial service" was unnecessary and confusing. In their view, it was self-evident, given the terms of paragraph 1, that that category of ships enjoyed immunity and that there was therefore no need to state expressly that such ships were excluded from the scope of the paragraph. It had also been noted that the reference in question would enlarge the scope of the exception provided for under paragraph 5, relating to cargoes, which would be undesirable. The prevailing view among members of the Committee was, however, that it would be preferable to retain the reference in paragraph 2 to "other ships owned or operated by a State and used exclusively on government non-commercial service", so that paragraph 2 would also cover customs inspection boats, hospital vessels and police-patrol boats. Elaboration of that point would be included in the commentary.

61. In paragraph 3, the main change concerned the addition of a new subparagraph (*d*) pursuant to suggestions made in the Sixth Committee at the last session of the General Assembly. The Drafting Committee, while realizing that the listing in paragraph 3 was purely illustrative, had felt that, in view of the importance attached by the international community to environmental questions and the increase in the number of cases of pollution of the sea by ships, there was merit in making special mention of claims arising from the pollution of the marine

environment. Some members of the Committee had, however, taken the view that an unqualified reference to claims in respect of "pollution of the marine environment" might serve as an encouragement to frivolous claims or claims in the service of mankind not involving specific loss or damage. They had therefore insisted on the inclusion of the words "loss or damage resulting from" before the words "pollution of the marine environment". Some other members had considered that the inclusion of those words might lead to an undesirable *a contrario* interpretation with regard to the types of claims referred to in subparagraphs (*a*) to (*c*). They had further noted that the words in question were unnecessary, since no claim would be entertained by a court if the claimant had not established that he had actually suffered a loss or damage: the new subparagraph merely indicated that, in case a claim was presented in respect of pollution of the marine environment, State-owned or State-operated ships would be treated in the same way as other ships and that the question of the legitimacy or admissibility of the claim would not be determined on the basis of the draft under preparation.

62. The Drafting Committee had not been able to reconcile those divergent points of view and had therefore decided to place the words "loss or damage resulting from" in square brackets.

63. The other changes made in paragraph 3 were of a purely editorial nature. In the English text, the words "the expression" had been deleted and the words "shall mean" had been replaced by the word "means". The words "of a claim in respect of", which had appeared in each of the three subparagraphs, had been placed in the *chapeau* in order to avoid unnecessary repetition.

64. Paragraphs 4 and 5 enunciated rules relating to the carriage of cargo that were parallel to those laid down in paragraphs 1 and 2, as amended by the Drafting Committee. It would be noted, however, that, in paragraph 5, the words "intended for use" had been retained because the cargo was not normally used while it was on board the ship and it was therefore its planned use which would determine whether the State concerned was or was not entitled to invoke immunity. In paragraph 5, the Drafting Committee had also replaced the words "belonging to" by the words "owned by" for the sake of consistency.

65. As to paragraph 6, some members of the Drafting Committee had pointed out that the rule enunciated applied in all proceedings in which State property was involved and not only in proceedings relating to ships and cargoes, so that the rule should either be repeated in all the articles in part III or form the subject of a general provision. The Drafting Committee had, however, noted that article 17 was modelled on the first paragraph of article 4 of the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, which specified that States could, with respect to State-owned or State-operated ships, plead all measures of defence, prescription and limitation of liability which were available to private vessels and their owners, and had arrived at the conclusion that the elimination of paragraph 6 might give rise to problems of interpretation. It had therefore agreed to keep the paragraph, on the understanding that the commentary would make it clear that States could plead all available means of defence in any proceedings in which State property was involved.

66. Paragraph 7, which was based on article 3 of the Convention, had been somewhat modified in its wording so as to indicate at the outset that the ships dealt with in the paragraph were State-owned or State-operated ships and State-owned cargoes. Furthermore, the definite article "the" before the words "diplomatic representative" had been replaced by the indefinite article "a". In the English version, the words "shall serve as evidence" had been borrowed from article 5 of the Convention, the French text of which used the words *vaudra preuve*. Although the Drafting Committee was aware that the two expressions were not quite equivalent, it had thought it preferable not to call into question the French version of the Convention by adopting another formula, such as *constituera une preuve de*. The commentary would make it clear that the certificate referred to in paragraph 7 was rebuttable evidence.

67. Other editorial changes were that the words "any proceeding" in paragraphs 1 and 4 had been replaced by the words "a proceeding" and the title had been simplified and now read: "Ships owned or operated by a State".

68. Mr. BARSEGOV said that he had no objection to the text proposed by the Drafting Committee, but pointed out that legislation of the Soviet Union granted immunity from jurisdiction in proceedings relating to ships owned or operated by a State and that, in practice, a *modus vivendi* made it possible to settle disputes. He also noted that such immunity did not apply in the case of ships on commercial service.

69. Mr. EIRIKSSON said that he had taken note of the explanations given by the Chairman of the Drafting Committee concerning the last phrase of paragraph 2. He nevertheless considered that that phrase was unnecessary and found it strange to explain the expression "other ships owned or operated by a State and used exclusively on government non-commercial service" in the commentary, since ships used exclusively on government non-commercial service were already excluded from the scope of paragraph 1. He would therefore like that phrase to be deleted. He reserved the right to come back later to the other paragraphs of the article.

70. Mr. HAYES said that he shared Mr. Eiriksson's reservations, which he himself had put forward in the Drafting Committee, but without going so far as to oppose the retention of the last part of paragraph 2.

71. He also had a reservation about paragraphs 1 and 2 and, in particular, about the use of two different terms to reflect the same idea: in paragraph 1, the term "for other than government non-commercial purposes" and, in paragraph 2, the term "on government non-commercial service". He had proposed that the Drafting Committee should keep the term "for government non-commercial purposes" or at least use the same term in both paragraphs. Just because the two terms were used in the United Nations Convention on the Law of the Sea did

not mean that they also had to be used in the draft articles.

72. He reserved the right to come back later to other paragraphs of the article under consideration.

73. Mr. Sreenivasa RAO said that, in general, he supported article 17, but would have preferred the words in square brackets in paragraph 3 (*d*) to be retained and the square brackets eliminated in order to make the effect of the provision clearer. Other drafting amendments, on which he would not insist absolutely, would also make the text clearer. In the English version of paragraph 4, for example, the term "that State" was somewhat ambiguous, since two different States were being referred to: it would be better to specify that the reference was to the first State. Similarly, reference was made throughout the article to "government non-commercial service" and, in paragraph 7, to the "government and non-commercial character" of a ship. What was meant in both cases, at least as he saw it, was "public" or "government" and therefore "non-commercial". Moreover, the certificate issued by the State to serve as evidence of the government and non-commercial character of the ship was provided for in paragraph 7, but not referred to in any other article. The concept in question was, however, very important for the purpose of avoiding unnecessary complications before the courts and was enshrined in the practice of a number of States. It should appear more explicitly in the draft articles. Lastly, although the purpose of paragraph 2 was very clear, Mr. Eiriksson's proposal for the deletion of the second part of the paragraph also had some merit.

74. Mr. DÍAZ GONZÁLEZ said that the Spanish text of article 17 contained terms which did not exist in that language. He would discuss the matter with the other Spanish-speaking members of the Commission in order to decide on new wording, which would be communicated to the secretariat.

75. Mr. RAZAFINDRALAMBO said that the wording of the last part of paragraph 2, which Mr. Eiriksson had proposed should be deleted, was taken from article 96 of the United Nations Convention on the Law of the Sea, which dealt with the non-commercial use of ships, even warships and naval auxiliaries. The French text of that article also referred to *service public*, not to *service gouvernemental*. In paragraph 3 (*d*), he was in favour of the deletion of the words in square brackets because the concept of "loss or damage" applied to all of the subparagraphs of the article, and not only to pollution. If those words were deleted, it might be necessary to use the indefinite article and say: "a pollution of the marine environment".

76. Mr. MAHIOU said that he supported article 17, but had two comments to make. The first, which was more a doubt than an objection, related to the term "intended for use", which was now used only in paragraph 5 of the article, whereas it had also been used in paragraphs 1, 2 and 4 of the text adopted on first reading. The explanations given in that connection, both in the Drafting Committee and in plenary, were all the more unconvincing in that five of the seven States which had enacted legislation on the subject had used that term. The second comment related to paragraph 3 (*d*): he was in favour of the deletion of the square brackets because the phrase in question explained the meaning of the subparagraph without limiting its scope, for the simple reason that the beginning of the paragraph stated that "For the purposes of this article, 'proceeding which relates to the operation of that ship' means, *inter alia*, any proceeding . . .".

77. Mr. BARSEGOV said that he was also in favour of the deletion of the square brackets, since the phrase in question was necessary for greater precision. However, subparagraphs (*a*), (*b*) and (*c*) seemed very clear.

78. Mr. PELLET said that the explanation by the Chairman of the Drafting Committee was essential, namely, that the commentary would indicate that the words "shall serve as evidence" did not refer to irrebuttable evidence. As to the deletion of the words "intended for use" in several paragraphs of the article, international instruments were just as valuable a reference as national legislation. The United Nations Convention on the Law of the Sea carefully avoided any reference to the intended use of ships, since that concept was always a source of confusion. He was surprised that Mr. Eiriksson, who was one of the architects of the Convention, wanted to delete the end of paragraph 2, whereas that formulation was used in article 96 of the Convention and, especially, in article 236, which dealt with sovereign immunity. Lastly, he failed to see why so much importance was being attached to whether the square brackets in paragraph 3 (*d*) should be retained or deleted. That phrase merely gave an example of a proceeding in which the problem might arise and paragraph 3 could in no way constitute a basis for jurisdiction.

79. Mr. EIRIKSSON explained that he found paragraph 2 to be illogical and inconsistent with paragraph 1. No interpretation of the law of the sea could be taken to mean that a ship used exclusively on government non-commercial service (para. 2) could be used for other than government non-commercial purposes (para. 1). With regard to paragraph 3 (*d*), it was less the wording of the phrase in square brackets than its interpretation which posed a problem, in view of the wording of the *chapeau* of the paragraph. Some members were already attempting to build substantive law into paragraph 3 precisely on the basis of that phrase. The best solution would be to delete it and explain in the commentary that there had been absolutely no intention of establishing substantive law in paragraph 3. In fact, paragraph 3 as a whole was unnecessary.

80. Mr. HAYES said he agreed that, as Mr. Pellet had pointed out, the purpose of paragraph 3 was simply to give some examples of proceedings in which immunity could not be invoked. The question of retaining or deleting the phrase in square brackets was none the less important, since retention would pave the way for the *a contrario* argument by comparison with the other paragraphs that, in the case of pollution of the marine environment, the proceedings referred to in paragraph 1 would not be possible unless there had been loss or damage. Those in favour of retaining the phrase held that it would help avoid frivolous actions against States. However, immunity had nothing to do with the merits of the case and could not be a means of avoiding that type of

action. He was therefore strongly opposed to the retention of that phrase in subparagraph (*d*).

81. Mr. SHI said that he was just as strongly in favour of retaining that phrase and deleting the square brackets.

82. Mr. FRANCIS said that any wording to which objections had been raised in plenary, even by only one member of the Commission, should be placed in square brackets. He suggested that the Commission should abide by that practice, the only other solution being to proceed to a vote, which had happened only once in 15 years.

83. Mr. McCAFFREY said that he was in favour of the deletion of the words in square brackets. He also wondered why the words "intended for use" appeared only in paragraph 5 and nowhere else in the article.

84. Mr. TOMUSCHAT said he endorsed Mr. Eiriksson's suggestion that the end of paragraph 2, after the words "naval auxiliaries", should be deleted. In his view, that part of the paragraph was a mere repetition of paragraph 1.

85. The CHAIRMAN, speaking as a member of the Commission, noted that there was a convergence of views on the new text of the *chapeau* of paragraph 3, but he too feared that the phrase in square brackets in subparagraph (*d*) would pave the way for an *a contrario* argument and thus have the opposite effect of that being sought by those in favour of retaining it.

86. Speaking as Chairman, he suggested that the Commission should continue its consideration of article 17 at a later time, following consultations.

It was so agreed.

ARTICLE 10 (Commercial transactions) (*continued*)

87. Mr. PAWLAK (Chairman of the Drafting Committee) read out the new text he was proposing for paragraph 3 following his consultations, namely:

> "3. The immunity from jurisdiction enjoyed by a State shall not be affected with regard to a proceeding which relates to a commercial transaction engaged in by a State enterprise or other entity established by the State which performs commercial transactions and which has an independent legal personality and is capable of:
>
> "(*a*) suing or being sued; and
>
> "(*b*) acquiring, owning or possessing and disposing of property including property which the State has authorized it to operate or manage."

88. He said that the words "which performs", instead of the words "to perform", placed the emphasis on the activity of the enterprise rather than on the purpose for which it had been established. The main change in relation to the text proposed by the Drafting Committee was the deletion of the adverb "exclusively", which had qualified the words "commercial transactions".

89. Mr. HAYES said that the phrase "which performs commercial transactions" might simply be superfluous, since the first part of the text stated that the case in question was that of a proceeding which related to a "commercial transaction".

90. Mr. PAWLAK (Chairman of the Drafting Committee) said that, although Mr. Hayes' comment was logical, he believed that, for the sake of clarity, it would be best to retain the phrase.

91. Mr. TOMUSCHAT said that he preferred the Drafting Committee's original text, which covered the two basic elements: the fact that there was a commercial transaction engaged in by a State enterprise and the fact that the State enterprise had been established to perform commercial transactions.

92. Mr. Sreenivasa RAO said that he endorsed the text just read out by the Chairman of the Drafting Committee and was satisfied with his explanations.

93. Mr. EIRIKSSON said that he shared Mr. Tomuschat's view.

94. Mr. SHI said that he also endorsed the new text. In order to avoid redundancy, he would propose simply that the words "which performs commercial transactions" should be replaced by the words "in order to perform commercial transactions".

95. The CHAIRMAN asked whether the word "which" in the phrase "which performs commercial transactions" referred to the State or to the enterprise.

96. Mr. GRAEFRATH said that, like Mr. Tomuschat, he believed that the original text was more satisfactory because it was clearer.

97. Mr. PAWLAK (Chairman of the Drafting Committee) said that the text that he had just introduced had been designed solely to overcome some problems to which attention had been drawn. His own preference was also for the Drafting Committee's original text, although he would agree to the deletion of the word "exclusively", which was unnecessary and might be misleading. In any case, the reservations of the members of the Commission would be reflected in the summary records of the meetings and in the Commission's report.

98. Mr. FRANCIS said that he supported the revised text, in which the deletion of the word "exclusively" guaranteed the necessary flexibility. In such changing times, it could not be claimed that commercial transactions were an exclusive domain belonging only to enterprises established especially for that purpose.

99. Mr. PELLET said that, in his opinion, Mr. Shi's suggestion was simply a return to the text which had been adopted, after much hesitation, by the Drafting Committee. It involved a question of form rather than of substance. On the other hand, the revised text certainly differed in thrust from the original text. The problems of interpretation to which reference had been made seemed to relate only to the English version. In French at least, there was no doubt that it was the State enterprise that performed the commercial transactions, not the State.

100. He therefore preferred the new text, which had two advantages by comparison with the original text. First, the deletion of the word "exclusively" brought the objective into sharper focus. Secondly, and above all, the purpose for which an entity had been established would have no bearing in the case of a proceeding and had nothing to do with the problem of the immunity of the State in a given situation. The State might have wanted to establish a commercial entity which would, in fact, carry out activities other than commercial activities: in that case, immunity would apply. It might also have wanted to establish a primarily governmental entity which engaged in commercial transactions: in that case, immunity would not apply. Thus, it was not the purpose for which the State enterprise or other State entity had been established which counted, but its activity at the time when the problem of immunity arose.

101. He did not consider that provision to be essential, but he understood the concerns of some members of the Commission who had raised the question of the immunity of the State that had established an enterprise which did not enjoy immunity and did not want the provision to prejudice the answer. That answer would, however, depend on the draft as a whole.

102. Mr. TOMUSCHAT said that the discussion had taken a new turn, whereas a consensus had seemed to be emerging.

103. The Commission could stay with the original text proposed by the Drafting Committee by deleting the word "exclusively"—the main bone of contention—and replacing the words "with regard to" by the word "in" in the English version. Mr. Pellet's fears could be dispelled. The case of an entity established initially to perform government service and then transformed by the State to perform commercial transactions was covered by the words "to perform" contained in the Drafting Committee's original provision.

104. The CHAIRMAN invited the members of the Commission to continue their consultations on article 10, paragraph 3.

ARTICLE 15 (Fiscal matters) (*continued*)

105. Mr. McCAFFREY emphasized that article 15 was based on extensive legislative practice.

106. The CHAIRMAN suggested that consultations should continue and that the Commission should come back later to article 15.

It was so agreed.

The meeting rose at 1.05 p.m.

2220th MEETING

Thursday, 6 June 1991, at 10.10 a.m.

Chairman: Mr. John Alan BEESLEY

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/L.457, A/CN.4/L.462 and Add.1, Add.2 and Corr.1 and Add.3 and Corr.1, ILC/(XLIII)/Conf.Room Doc.1)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING[1] (*continued*)

ARTICLE 10 (Commercial transactions) (*concluded*)

1. The CHAIRMAN invited the Commission to resume consideration of article 10.[2]

2. Mr. PAWLAK (Chairman of the Drafting Committee) said that, at the previous meeting, he had proposed a revised draft of paragraph 3.[3] Following consultations and in view of the fact that the draft had not enlisted the support of the majority of members in plenary, he wished to withdraw it and, instead, to put forward another solution. It should be emphasized that the provision contained in paragraph 3 was most important. Its purpose was to indicate that a State enterprise or an establishment set up by the State could not be identified with the State. It had to have separate legal personality and had to be liable for its actions. His new proposal, which, he believed, preserved that central meaning yet met the concerns expressed by some members, was that the words "to perform exclusively commercial transactions", in the text proposed by the Drafting Committee,[4] should simply be deleted.

3. The CHAIRMAN thanked the Chairman of the Drafting Committee for his efforts to arrive at an acceptable solution. He said that, if he heard no objection, he would take it that the Commission agreed to adopt article 10, as amended.

Article 10, as amended, was adopted.

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[1] For texts of draft articles provisionally adopted by the Commission on first reading, see *Yearbook ... 1986*, vol. II (Part Two), pp. 7-12.

[2] For text, see 2218th meeting, para. 58.

[3] For text, see 2219th meeting, para. 87.

[4] See footnote 2 above.

4. Mr. McCAFFREY said that, while he had not wanted to obstruct the adoption of paragraph 3 as amended, he continued to have serious reservations as to whether the provision it contained was supported in State practice, was workable as a practical matter, or was generally acceptable to States.

ARTICLE 15 (Fiscal matters) (*concluded*)

5. Mr. MAHIOU, speaking as the former Chairman of the Drafting Committee, said that, in accordance with the Chairman's suggestion, he had held consultations with other members of the Commission and was now in a position to suggest the deletion of article 15[5] subject to certain explanations which he intended to present very briefly so as to avoid reopening the debate.

6. An article adopted by the Drafting Committee on second reading obviously could not simply disappear without trace; the reasons for deleting it had to be clear. The first was that the article concerned only relations between two States, the forum State and the foreign State; it therefore dealt with a bilateral international problem governed by existing rules of international law and, as such, covered by the provisions of article 3, already adopted by the Commission. The second reason was that the draft as a whole dealt with relations between a State and foreign natural or juridical persons, the purpose being either to protect the State against certain actions brought against it by such persons or, conversely, to enable those persons to protect themselves against the State. Hence, article 15, dealing as it did solely with inter-State relations, did not fall within the real scope of the draft articles: it merely gave rise to problems of interpretation *vis-à-vis* the diplomatic and consular conventions. In his opinion, therefore, it should be deleted.

7. Mr. OGISO (Special Rapporteur) said that he had been consulted by Mr. Mahiou about the proposal and would not oppose it if the majority endorsed it. However, since article 15 had been included in the draft articles from the first and since a number of domestic legislations referred to similar, though not identical, matters, it was advisable to retain the article in a somewhat amended form. It could read:

> "Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the fiscal obligations derived from the commercial transactions engaged in by the former State in the territory of the latter State."

8. Deletion of the article had been suggested first by a member from one of the European Community countries, which were now approaching harmonization of all their fiscal regimes. Quite understandably, the subject dealt with in the article was of no particular interest to those countries. It might, however, be of some interest to others, particularly countries which had legislation on the matter. Since no member from those countries was present in the Commission, he was hesitant about deleting the article at so late a stage. Secondly, it would be noted that he had narrowed the matter down to the fiscal obligations derived from the commercial transactions engaged in by States. Since, under the draft articles, a State had no immunity in respect of commercial transactions, the question of fiscal obligations might arise in future in countries which did not belong to the European Community, and some of them might consider it desirable to keep the subject in the draft. However, if most members thought the article should be removed he was ready to withdraw his proposal for the sake of achieving consensus.

9. Mr. McCAFFREY said that, as already stated at the previous meeting, he would normally feel rather uncomfortable about deleting an article which had been adopted on first reading, and was in the process of being considered on second reading. Although he still believed the article had some basis in international law, as Mr. Ogiso had demonstrated at the previous meeting, he was appreciative of Mr. Mahiou's explanations and the efforts to reach a mutually acceptable decision. Accordingly, he would not stand in the way of deletion of the article, provided it was made entirely clear, in the commentary or elsewhere, that the deletion did not in any way prejudge the question of State immunity in fiscal matters.

10. The CHAIRMAN thanked members for their conciliatory attitude.

11. Mr. TOMUSCHAT said that he agreed with the reasons given by Mr. Mahiou in support of deleting the article, which was on relations between two States and thus failed to fit into the framework of a draft in which the foreign State appeared in the role of a potential defendant. However, he also concurred with Mr. McCaffrey that the commentary should clearly indicate that the deletion of the article did not prejudge the question of State immunity in fiscal matters.

12. Mr. DÍAZ GONZÁLEZ said he, too, agreed with the proposal to delete the article, but endorsed the points made by Mr. McCaffrey and wondered whether the Commission should not pursue the search for a compromise solution.

13. Mr. PELLET said that, like Mr. McCaffrey, he had serious doubts about deleting article 15. At the same time, he had doubts about the principle of absolute non-immunity of States in fiscal matters set forth in the article and about the wording proposed by Mr. Ogiso, for he failed to see why fiscal obligations derived from commercial transactions should be singled out for special treatment. For those reasons, he was prepared, although with little enthusiasm, to accept the proposal to delete the article, but would wish to see it stated explicitly—if possible in the body of the draft rather than in the commentary—that the draft articles did not cover the question of relations between States.

14. Mr. MAHIOU, speaking as the former Chairman of the Drafting Committee, said that the Commission had to choose between deleting article 15, in which case the Special Rapporteur's views should be reflected in the commentary to article 10, paragraph 1, and maintaining

[5] For text, see 2219th meeting, para. 41.

the article but amending the wording, possibly on the basis of the Special Rapporteur's proposal.

15. Mr. OGISO (Special Rapporteur) said that none of the members who had spoken preferred his proposal. Consequently, he was prepared to withdraw it for the sake of consensus, on the understanding that the commentary to article 10 would state that the non-immunity of States in connection with commercial transactions also included non-immunity in fiscal matters arising from commercial transactions.

16. The CHAIRMAN thanked the Special Rapporteur for his spirit of cooperation. He said that, if he heard no objection, he would take it that members agreed to delete article 15.

Article 15 was deleted.

ARTICLE 17 (Ships owned or operated by a State) (*continued*)

17. The CHAIRMAN invited the Commission to resume consideration of article 17.[6] Although doubts had been expressed during the earlier discussion, particularly about the deletion of the criterion of intended use from paragraphs 1 and 2, he believed that only two points had given rise to actual divergences of views. One concerned the second half of paragraph 2, which some members considered unnecessary and illogical. Perhaps they would not object to adoption of the paragraph in its present form, on the understanding that their reservations would be duly recorded in the summary record. The second point concerned the bracketed phrase in paragraph 3 (*d*). He suggested that the Commission should examine it after considering paragraph 2.

18. Mr. EIRIKSSON said that, at least, the first part of paragraph 2 was not illogical. As for the second part, he still believed it was both illogical and unnecessary.

19. Mr. OGISO (Special Rapporteur) said he had reservations about the deletion of the words "intended for use" from paragraphs 1, 2 and 4, for reasons stated at the previous meeting by Mr. Mahiou. For his own part, he would add further reasons in support of the contention that the removal of the words "intended for use" left an undesirable gap in the draft articles.

20. For example, State A could order from a shipbuilding yard in State B a ship intended to be used for commercial purposes. After it was built, the ship sailed from a port in State B to a port in State A. During that first voyage the ship was not being actually used for commercial purposes, but was intended for future commercial use. With the deletion of the words "intended for use" that situation would not be covered by article 17.

21. Again, a training ship might sail from a port in State A to a port in State B. That type of ship was usually owned or operated by the Government and would enjoy immunity during the voyage in which the training took place. After the arrival of the ship in State B, however, the men who had been trained during the voyage might be assigned to another vessel. The training ship would then return to State A, without trainees, to pick up another group on arrival at State A. The situation was one in which the ship was not in actual use but was "intended for use" as a training ship. There again, the elimination of the words "intended for use" would mean that that situation would not come under the terms of article 17.

22. Mr. McCAFFREY associated himself with the Special Rapporteur's reservations regarding the deletion of "intended for use", particularly since those words were to be found in practically all relevant provisions of the legislation of States. The deletion would also have the undesirable effect of broadening the meaning of the term "use". For example, a ship which was undergoing repairs would have to be said to be "used" for a commercial purpose.

23. Mr. PAWLAK (Chairman of the Drafting Committee) said the point had been discussed at length in the Drafting Committee, which had considered the Special Rapporteur's views but had decided to remove the words in question. The important thing, it had been felt, was what the ship was doing at the time of transport of the goods. The operation of the ship "at the time the cause of action arose"—the wording of paragraph 4—indicated whether the ship was being used for a commercial purpose or not. It was the actual use that mattered, not the intention. The issue of intention was material with regard to the cargo but not to the ship.

24. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 2 on the understanding that members' reservations were placed on record.

It was so agreed.

25. The CHAIRMAN pointed out that the phrase "loss or damage resulting from", at the beginning of paragraph 3 (*d*), had been placed between square brackets so as to indicate clearly that the Drafting Committee had not been able to reconcile differing views; the same divergence was apparent in the Commission's debate. He believed it was unprecedented for the Commission to leave formulations in square brackets in drafts adopted on second reading. On the basis of established practice, he would therefore have no choice but to put the issue to the vote. An alternative course—one which he himself favoured—would be to depart from the Commission's practice and to leave the text as it stood, in other words, with the square brackets, so as to signal the problem to the Sixth Committee and elicit comments which would help in solving the problem when final action was taken on the Commission's draft. Again, it had been suggested that, as far as paragraph 3 (*d*) was concerned, the Commission was not in fact engaged in a second reading. The idea embodied in paragraph 3 (*d*) was a new one and had been put forward only recently.

26. Speaking as a member of the Commission, he urged the Commission to show flexibility. He was in favour of retaining the square brackets, a course that would place the issue clearly before Governments.

[6] For text, see 2219th meeting, para. 55.

27. Mr. BARSEGOV said he remained convinced that the words in square brackets were necessary in paragraph 3. As far as procedure was concerned, however, he would reiterate his view that the issue should be decided by consultation and not by a vote.

28. Mr. HAYES said that he continued to object to the phrase "loss or damage resulting from". The divergent views of members on the subject would be seen from the summary record.

29. Mr. FRANCIS said that sound arguments had been advanced on both sides with regard to the words in question. Personally, he was convinced that the issue should not be put to a vote. If it did not prove possible to arrive at a decision by consultations, the appropriate thing would be to retain the square brackets, even if, as had been suggested, such a course was being adopted for the first time.

30. Mr. McCAFFREY said he agreed with Mr. Barsegov and Mr. Hayes on the desirability of not putting the matter to a vote, even though it was undoubtedly important. It would not be appropriate to place the phrase between square brackets, thereby suggesting to the General Assembly that it was the one issue on which the Commission had been unable to decide, when it was obvious from the draft that decisions had been taken on a great many more important issues. He therefore suggested that the square brackets around the words "loss or damage resulting from" should be eliminated and paragraph 3 (*d*) should be adopted.

31. The CHAIRMAN said that he had specifically pointed out that the Commission's practice would require a vote. He did not favour one and it was not his intention to force one.

32. Mr. PAWLAK (Chairman of the Drafting Committee) suggested that the Commission should close its debate on article 17. The paragraph in question did not create any obligations. It simply gave examples and he agreed with Mr. McCaffrey that the subject should be placed in its proper perspective.

33. Mr. OGISO (Special Rapporteur) said that a lot of time had been spent on a problem that was not of great substance and did not create rights or obligations.

34. Mr. THIAM said that it was not correct to say that a vote had never been taken in the Commission on second reading; he remembered such a case, namely, on the topic on the succession of States in respect of State property, archives and debts, because he himself had been chairman at the time.[7] He was not against taking a vote. The Commission should not shy away from difficulties by sending the Sixth Committee a text containing square brackets. When all possibilities of reaching a compromise had been exhausted, which he did not consider to be the case at hand, the Commission must vote.

35. The CHAIRMAN said he agreed with Mr. Thiam that the Commission had in the past voted on second reading, but it would be preferable if that could be avoided.

36. Mr. AL-KHASAWNEH said he seemed to recall that a phrase had been left in square brackets in the text of the draft articles on the law of treaties between States and international organizations or between international organizations. If such a precedent had already been established, it would be useful.

37. The CHAIRMAN said that paragraph 3 (*d*) was not being considered on second reading. It was based on the desire to take account of environmental issues. The subject had arisen in 1991 and had not been discussed, voted on or accepted previously. Thus, the situation was sufficiently unusual for the Commission to decide what procedure it intended to adopt in the particular case.

38. Mr. PAWLAK (Chairman of the Drafting Committee) proposed that the phrase in the square brackets should be deleted and replaced by "consequences of".

39. Mr. BARSEGOV said he regretted that the word "injurious" was not used before "consequences". As it stood, the proposal left a large area in which State immunity could not be invoked and it went much further than had the Third United Nations Conference on the Law of the Sea.

40. The CHAIRMAN thanked Mr. Barsegov for not opposing the proposed change, despite his reservations.

41. Mr. Sreenivasa RAO said that the subparagraph was no clearer with the proposed amendment and it was to be hoped that that situation could be remedied in the commentary. He objected to deleting the words "loss or damage". Environmental protection was an emotional issue and that made it all the more inappropriate to leave such a broad formulation as "consequences of" in a text on the jurisdictional immunities of States. If his fears could be allayed in the commentary, however, he could withdraw his objection.

42. The CHAIRMAN suggested that reference might be made to the fact that paragraph 3 (*d*) was being adopted on first reading and that it was an important enough issue to be included in the draft. Perhaps the Special Rapporteur could be asked to produce an acceptable commentary.

43. Mr. BARSEGOV expressed strong reservations about the text. Such a broad provision might cause enormous loss to international shipping, especially that of developing countries. However, he would not stand in the way of the provision's adoption and would not ask for a vote.

44. Mr. SHI said that he could accept the compromise proposal of the Chairman of the Drafting Committee only if the commentary to the paragraph made the Commission's position clear. Otherwise, he was in favour of retaining the text in the square brackets and referring it to the Sixth Committee. As already pointed out, the provision was new and was therefore being considered on first reading. Hence, it would be appropriate to let Governments decide.

[7] See *Yearbook ... 1981*, vol. I, p. 270, 1692nd meeting, paras. 86 *et seq.*

45. Mr. PAWLAK (Chairman of the Drafting Committee) suggested that the Special Rapporteur should reflect the discussion in the commentary. For his part, he considered that the words "loss or damage" should be used in the commentary and that an explanation should be added on the position taken in the Commission.

46. Mr. BARSEGOV said that it was plain that the question had not yet been resolved. He suggested postponing a decision until conditions for reaching a compromise were ripe.

47. Mr. Sreenivasa RAO said that, if the commentary explained the scope and structure of the provision and made it clear that it was not too general, that would allay his fears and he could support the provision. He was not asking for a precise wording yet—simply one or two sentences that captured the general sense of what later would become the final formulation.

48. Mr. EIRIKSSON said that it would be preferable to take account in the commentary of the views of Mr. Barsegov and others. He would not object to seeing more of the commentary before the actual form of language was adopted. The proposal by the Chairman of the Drafting Committee was a compromise. The formulation of the subparagraph should not be viewed as having the dire consequences to which reference had been made. Clearly, that was not the intention.

49. Mr. HAYES said it would be better for paragraph 3 (*d*) to begin with the word "pollution", but he could agree to inserting the words "consequences of" in order to arrive at an agreement and avoid a vote.

50. In his view, paragraph 3 did not, and could not, create any exceptions to immunity. Paragraph 1 did so, and paragraph 3 gave examples of proceedings in which a court was otherwise competent, competence being a matter of national and not international legislation in those circumstances. Paragraph 3 must not have any other function than to give those examples. Specifically, he could not accept that it should have the effect of modifying the basic provision in paragraph 1 by saying that some kinds of actions in which a court might otherwise have competence would not be the kind of actions in which, in the circumstances in paragraph 1, immunity could not be invoked. In other words, paragraph 3 could not be a substantive article changing the meaning of paragraph 1. The law on the immunity of States was not concerned in any way with the merits of litigation. Thus, the argument about facilitating frivolous or vexatious litigation was invalid in the context of the provisions on the immunity of States now being prepared. For that reason, he had objected to the words "loss or damage resulting from", but he could agree to the formula "consequences of". In his opinion, the commentary should explain fully the two points of view, but it must not indicate that the effect of the revised formula was the same as that sought by including the words "loss or damage resulting from".

51. Mr. TOMUSCHAT said that, admittedly, the Commission was not drafting substantive rules, but the text of the article might have repercussions, or might be interpreted as having repercussions, on substantive law. Given the marked divergence of views in the Commission, he would prefer to retain the words "loss or damage resulting from" between square brackets. If those words were deleted, however, the two points of view in the Commission should be carefully reflected in the commentary. It might therefore be better to defer final adoption of article 17 until the Commission had before it a commentary which commanded the support of both sides.

52. Mr. BARSEGOV said it had been argued that paragraph 3 was merely illustrative and did not enlarge the sphere of immunity. The Commission's practice in cases where a list was not exhaustive—such as the list of crimes in the draft Code of Crimes against the Peace and Security of Mankind—was not to give illustrations. He therefore proposed, in line with that practice, that paragraph 3 as a whole should be omitted.

53. The CHAIRMAN, speaking as a member of the Commission, said that paragraph 3 was indeed meant to be illustrative and non-exhaustive. It was also a new provision, which allowed for a measure of flexibility so far as procedure was concerned. It was an *a contrario* argument to say that the inclusion of the words "loss or damage resulting from" would not have the effect of restricting immunity. He also agreed that subparagraph (*d*) was not the same as the other subparagraphs, but that it should be. To that end, the Commission might wish to consider adding the words "consequences of", or a similar formulation, to the opening clause of paragraph 3 or, alternatively, to each of subparagraphs (*a*), (*b*), (*c*) and (*d*). Again, it could add the words "loss or damage resulting from" to each of those subparagraphs. In that way, the Commission would underline the importance it attached to the issue without over-emphasizing it in such a way as to give rise to misinterpretation. In other words, there was perhaps room for constructive ambiguity.

54. In his view, although the members of the Commission did not differ greatly in their motivation, they had still not arrived at a fully satisfactory solution to the problem and should therefore explore further all the drafting possibilities.

55. Mr. FRANCIS said that he was concerned to note that both the Special Rapporteur and Mr. Thiam had indicated their readiness to accept a vote. True, a vote had once been taken in the Commission, but it was the only occasion he could remember in all his 15 years as a member. He particularly welcomed the attitude of Mr. Barsegov, who, in voicing the opinion that the Commission should not proceed to a vote, had carried on in the tradition of his eminent predecessor, Mr. Ushakov, who had always favoured decisions by consensus. A vote by the Commission on the issue at hand could only have serious repercussions for the future. Though it might be laborious, it would be better for the Commission to settle issues by consensus rather than by a show of hands.

56. Mr. Sreenivasa RAO said that, having re-read the article, he was reassured by the words "determination of a claim in respect of", which went to the heart of the matter. In a court of law, it was not so much a question of voicing opposition to pollution as of showing that damage had occurred. On that basis, he could go along with the wording of the article. He would suggest that the commentary should make it quite clear, first and

foremost, that all members were opposed to pollution of the seas. He would also like to be certain that the possibility of vexatious and frivolous claims was precluded.

57. Mr. PAWLAK (Chairman of the Drafting Committee) said that the wisest course would be to defer further discussion so as to draft a commentary that would reflect all views. At the same time, it should be remembered that a commentary merely reflected intentions, whereas the text of an article was binding.

58. The CHAIRMAN suggested that further discussion of article 17 should be postponed and that the Special Rapporteur should be asked to draft a commentary to the article for consideration by the Commission at the next meeting.

It was so agreed.

ARTICLE 18 (Effect of an arbitration agreement)

59. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 18, which read:

Article 18. Effect of an arbitration agreement

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(*a*) the validity or interpretation of the arbitration agreement;

(*b*) the arbitration procedure;

(*c*) the setting aside of the award,

unless the arbitration agreement otherwise provides.

60. Mr. PAWLAK (Chairman of the Drafting Committee) said that, in line with its decision on article 2, paragraph 1 (*c*), the Drafting Committee had opted for the term "commercial transaction". It would, of course, be interpreted by the courts in the light of their respective legal systems. The advantage of that term over "civil or commercial matter" was that it would not force an interpretation on States that might be inconsistent with those systems. After consideration, the Drafting Committee had decided not to include a subparagraph (*d*) on recognition of the award since it was a matter that pertained more to immunity from execution and, accordingly, had no place in article 18.

61. The Drafting Committee had deleted former article 20, on cases of nationalization.

62. Mr. EIRIKSSON proposed that the word "or" should be added at the end of subparagraph (*b*).

It was so agreed.

63. Mr. Sreenivasa RAO said that he had no objection to the article, but would like some clarification. Normally, where a State and a natural or legal person agreed on arbitration, the relevant procedural matters—for example, the venue and the applicable law—were laid down in the arbitration agreement. Thus, the court which was appointed pursuant to such an agreement would deal with the question of immunity rather than the court of any other State, and the arbitration procedure prescribed in the arbitration agreement would govern the three matters referred to in subparagraphs (*a*), (*b*) and (*c*) of article 18. He trusted that his understanding was correct and that no fundamental change in arbitration law was contemplated by the article.

64. Mr. OGISO (Special Rapporteur) said that Mr. Sreenivasa Rao's interpretation was correct. Normally, the arbitration agreement provided for the arbitration procedures. In cases where the arbitration agreement was not sufficiently clear in that respect, however, the matter could be dealt with by the supervisory jurisdiction of the court which was otherwise competent in the proceeding.

65. Mr. McCAFFREY said that he wished to enter a reservation with regard to the article, as it did not appear to provide for enforcement of the agreement to arbitrate. While it could be argued that that point was covered by subparagraph (*a*), it was not clear to him that that was the case.

Article 18, as amended, was adopted.

TITLE OF PART III (Proceedings in which State immunity cannot be invoked)

66. Mr. PAWLAK (Chairman of the Drafting Committee) reminded members that the Commission, having been unable to agree on first reading whether part III should be entitled "Limitations on State immunity" or "Exceptions to State immunity", had finally decided to place the words "Limitations on" and "Exceptions to" between square brackets and to consider the matter further on second reading. Although many members of the Committee had favoured the words "Exceptions to", the title "Proceedings in which State immunity cannot be invoked" had been adopted as a compromise in the belief that the title "Exceptions to State immunity" might give rise to objections in view of the strong views voiced earlier by a number of members. Should that belief prove unfounded, the Commission might wish to consider replacing the proposed title by "Exceptions to State immunity". He would none the less propose that the title should be retained.

It was so agreed.

The title of part III (Proceedings in which State immunity cannot be invoked) was adopted.

The meeting rose at 1.05 p.m.

2221st MEETING

Friday, 7 June 1991, at 10.10 a.m.

Chairman: Mr. John Alan BEESLEY

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Díaz González,

Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/L.457, A/CN.4/L.462 and Add.1, Add.2 and Corr.1 and Add.3 and Corr.1, ILC/(XLIII)/Conf.Room Doc.1)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING[1] (*continued*)

ARTICLE 17 (Ships owned or operated by a State) (*continued*)

1. The CHAIRMAN invited the Commission to resume its consideration of article 17.[2]

2. Mr. PAWLAK (Chairman of the Drafting Committee) said that, following consultations on paragraph 3, a commentary had been drafted for subparagraph (*d*) which reflected the difficulties encountered and the positions taken.

3. Mr. OGISO (Special Rapporteur) said that the commentary read:

Paragraph 3 (*d*) has been introduced on second reading in response to a suggestion put forward by a Government in the Sixth Committee at the forty-fifth session of the General Assembly. Although the provisions of paragraph 3 are merely illustrative, the Commission deemed it appropriate to include this additional example in view of the importance attached by the international community to environmental questions and of the unabated problem of ship-based marine pollution. In consideration of the fact that this subparagraph was not contained in the text of former article 18 adopted on first reading, both the Commission and the Drafting Committee discussed the question in some detail.

The words "consequences of" are intended to convey the concern of some members that unqualified reference to pollution of the marine environment from ships might encourage frivolous claims or claims without tangible damage or loss to the claimant. Some other members, on the other hand, felt that this concern was unjustified inasmuch as no claim would be entertained by a court if the claimant did not establish that he had suffered loss or damage. After extended discussion, the Commission agreed to insert the words "consequences of", on the understanding that the latter would include loss or damage resulting from pollution of the marine environment.

It should be noted that subparagraph (*d*) serves merely as an example of the claims to which the provision of paragraph 1 would apply, and, as such, does not affect the substance or scope of the exception to State immunity under paragraph 1. It should be noted also that subparagraph (*d*) does not create substantive law concerning the legitimacy or receivability of a claim. Whether or not a claim is to be deemed actionable is a matter to be decided by the competent court. One member considered, however, that a more qualified wording such as "injurious consequences" would have been acceptable to him. He therefore wished to reserve his position on this subparagraph.

4. He said that if the second paragraph of the commentary gave rise to any difficulty, there was no reason why it should not be deleted. He suggested that the adoption of the commentary should be deferred until members had had time to reflect upon it.

5. Mr. EIRIKSSON and Mr. McCAFFREY observed that they would have some suggestions to make on the commentary.

6. Mr. HAYES said that he too wished to propose certain changes to the commentary, which, in his view, was not altogether satisfactory. He would, however, have no objection to paragraph 3 (*d*) as it stood.

7. Mr. SHI recalled that his acceptance of the compromise formula for subparagraph 3 (*d*) was dependent on the commentary. Since the text of the commentary had been distributed only shortly before the meeting, he would request the Commission not to take a decision in haste on either the draft article or the commentary.

8. The CHAIRMAN, noting that consultations would have to be held on the commentary which the Special Rapporteur had read out, suggested that the Commission should take up article 19, article 18 having been adopted at the previous meeting, and that it should revert to article 17 after further consultations had taken place on the commentary to paragraph 3 (*d*).

It was so agreed.

ARTICLE 19 (State immunity from measures of constraint)

9. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 19, which read:

Article 19. State immunity from measures of constraint

1. No measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(*a*) The State has expressly consented to the taking of such measures as indicated:

(i) by international agreement;

(ii) by an arbitration agreement or in a written contract;

(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(*b*) The State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

(*c*) The property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum and has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed.

2. Consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint under paragraph 1, for which separate consent shall be necessary.

[1] For texts of draft articles provisionally adopted by the Commission on first reading, see *Yearbook ... 1986*, vol. II (Part Two), pp. 7-22.

[2] For text, see 2219th meeting, para. 55.

10. Mr. PAWLAK (Chairman of the Drafting Committee) recalled that the title of part IV adopted on first reading read: "State immunity in respect of property from measures of constraint". As part IV of the draft dealt only with measures of constraint which related to a proceeding before a court, some members of the Drafting Committee had felt that the title should be changed accordingly. Some other members of the Committee, who did not attach so much importance to the titles of the various parts of the draft and of the articles, had nevertheless agreed to the new title. The words "in respect of property" had been deleted, since it was obvious that a question of immunity of State property was concerned.

11. The Special Rapporteur had proposed that articles 21 and 22 adopted on first reading should be merged and that proposal had met with the support of the Commission since the ideas expressed in the two articles were closely related: article 21 dealt with State immunity from measures of constraint and article 22 with consent to such measures. The introductory phrase of article 19, paragraph 1, therefore embodied the general principle of State immunity from measures of constraint and the subparagraphs which followed stated the exceptions to that principle. The Drafting Committee had deleted from the introductory phrase the words "in the territory of a forum State", which appeared to introduce an unnecessary limitation that had not in fact existed in the original text of article 21. The Drafting Committee had, however, added to the new text the clause which appeared in the original text of article 21 and which stated that the article applied only to measures of constraint relating to State property "in connection with a proceeding before a court of another State". Also, the words "foreign State" and "forum State" had been replaced by the words "the State" and "another State" to conform to the terms used in the rest of the articles.

12. Subparagraph (*a*) corresponded to paragraph 1 of original article 22. The introductory phrase had been simplified without changing its meaning. The order of modalities by which a State could indicate its consent had been slightly changed as compared with the text adopted on first reading. Obviously, subparagraph (*a*) should be read together with the introductory phrase of paragraph 1; accordingly, a "declaration before the court" meant a declaration before the court of the State of the forum.

13. Subparagraph (*b*) corresponded to subparagraph (*b*) of article 21 adopted on first reading, apart from a minor drafting change because of the structure of the new introductory phrase.

14. Subparagraph (*c*) corresponded to subparagraph (*a*) of article 21 adopted on first reading, except that the expression "commercial [non-governmental] purposes" had been changed to "other than government non-commercial purposes", as in the earlier articles.

15. Paragraph 2 corresponded to paragraph 2 of article 22 adopted on first reading, with some minor drafting changes.

16. Lastly, the title of article 21 adopted on first reading had been maintained for article 19.

17. Mr. Sreenivasa RAO said he understood that subparagraph (*b*) had been adopted on first reading at the time when the concept of State enterprise had not been introduced into the draft. Even if a State had earmarked or allocated funds to a State enterprise, immunity should not operate in favour of that enterprise, since the property in such funds would have passed to it; accordingly, the enterprise should be held responsible for its activities. To infer from such situations that there was an exception to State immunity was neither necessary nor logical.

18. Mr. PAWLAK (Chairman of the Drafting Committee), noting that the draft should be considered as a whole, said he would interpret Mr. Sreenivasa Rao's comment as underlining the complexity of paragraph 1 (*b*) and not as a reservation.

19. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 19.

Article 19 was adopted.

ARTICLE 20 (Specific categories of property)

20. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 20, which read:

Article 20. Specific categories of property

1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under paragraph 1 (*c*) of article 19:

(*a*) property, including any bank account, which is used or intended for use for the purpose of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;

(*b*) property of a military character or used or intended for use for military purposes;

(*c*) property of the central bank or other monetary authority of the State;

(*d*) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;

(*e*) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

2. Paragraph 1 is without prejudice to paragraph 1 (*a*) and (*b*) of article 19.

21. Mr. PAWLAK (Chairman of the Drafting Committee) said that article 20 (originally article 23) was designed to protect certain specific categories of property by excluding them from any presumption of consent to measures of constraint.

22. Paragraph 1 sought to prevent any interpretation to the effect that property classified as belonging to one of the categories listed fell under the exception provided for

in article 19, paragraph 1 (*c*). The cross-reference to that particular provision had, of course, been adjusted in the light of the merger and renumbering of original articles 21 and 22. The Drafting Committee had made two changes in the introductory phrase of paragraph 1. The first concerned the words "for commercial [non-governmental] purposes", which, as in other provisions, had been replaced by the words "for other than government non-commercial purposes". The second consisted in the addition of the words "in particular" after the words "the following categories" to indicate that the enumeration in subparagraphs (*a*) to (*e*) was merely illustrative.

23. With regard to subparagraphs (*a*), (*c*), (*d*) and (*e*), the Drafting Committee had observed that, since the criteria listed in article 19, paragraph 1 (*c*) already included the requirement that the property should be "in the territory of the State of the forum", the phrase "which is in the territory of another State" was unnecessary. In subparagraph (*e*), the Drafting Committee had deemed it useful to add the word "cultural" after the word "scientific".

24. Some members of the Drafting Committee had wondered whether paragraph 2 was necessary, since the sovereign power of the State to dispose of its property as it saw fit was already safeguarded by article 19, paragraph 1 (*a*) and (*b*). The Committee had concluded that, in the light of those subparagraphs, article 20, paragraph 2, did not have to be as elaborate as it was in the draft adopted on first reading. It had, however, felt that a reference to article 19, paragraph 1 (*a*) and (*b*), would serve as a useful reminder in view of the categorical language used in paragraph 1.

25. The title of the article remained unchanged.

26. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 20.

Article 20 was adopted.

ARTICLE 21 (Service of process)

27. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 21, which read:

Article 21. Service of process

1. Service of process by writ or other document instituting a proceeding against a State shall be effected:

(*a*) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(*b*) in the absence of such a convention:

(i) by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or

(ii) by any other means accepted by the State concerned, if not precluded by the law of the State of the forum.

2. Service of process referred to in paragraph 1 (*b*) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

28. Mr. PAWLAK (Chairman of the Drafting Committee) said that article 21 largely corresponded to the text of article 24 adopted on first reading. Paragraph 1 as adopted on first reading had been much too detailed and had given preference to special arrangements between the claimant and the State over other means. The Committee had considered it unnecessary to go into too much detail on modes of service of process, which could be placed in three general categories: arrangements made in a binding international convention to which both States concerned were parties; diplomatic channels; and other means agreed between the claimant and the State concerned.

29. The Committee was of the view that there should be a preference for treaty provisions in force, where such provisions existed, and that it was only in the absence of a convention that service of process could be made either through diplomatic channels or by any other means. In that case, the parties should be free to agree on their own method of service of process, provided, however, that the method chosen was not precluded by the law of the State of the forum. The State concerned could also indicate by unilateral declaration that it would accept service of process through certain means. If those means were accepted by the claimant and were not precluded by the law of the State of the forum, they were valid under paragraph 1 (*b*) (ii).

30. Paragraphs 2, 3 and 4 were the same as those adopted on first reading and the title of the article remained unchanged.

31. Mr. Sreenivasa RAO said that he had no objection to the proposed article, but recalled that there were problems involved in going through diplomatic channels.

32. Mr. DÍAZ GONZÁLEZ, supported by Mr. BARBOZA, said that he could not endorse article 21 as it was drafted in Spanish.

33. Mr. AL-KHASAWNEH pointed out that, in the vast majority of cases, there was no international convention applicable in the matter. The exception appeared to have been taken as the starting point rather than the general situation, in which the solution was to go through diplomatic channels.

34. Mr. MAHIOU said that, in the French text of paragraph 1, the words *peut être effectuée* should be replaced by the words *est effectuée*.

35. Mr. PAWLAK (Chairman of the Drafting Committee) said it was understood that all the language versions would be harmonized and brought into line with the English text, which did not give rise to any problems.

36. Mr. THIAM proposed that the words *ou de toute autre pièce* should be used in the first line of the French text of paragraph 1.

37. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 21, taking into account the drafting comments made on it.

Article 21 was adopted.

ARTICLE 22 (Default judgement)

38. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 22, which read:

Article 22. Default judgement

1. A default judgement shall not be rendered against a State unless the court has ascertained that:

(*a*) the requirements laid down in paragraphs 1 and 3 of article 21 have been complied with;

(*b*) a period of not less than four months has expired from the date on which the service of the writ or other document instituting a proceeding has been effected or deemed to have been effected in accordance with paragraphs 1 and 2 of article 21; and

(*c*) the present articles do not preclude it from exercising jurisdiction.

2. A copy of any default judgement rendered against a State, accompanied if necessary by a translation into the official language, or one of the official languages of the State concerned, shall be transmitted to it through one of the means specified in paragraph 1 of article 21.

3. The time-limit for applying to have a default judgement set aside shall not be less than four months and shall begin to run from the date on which a copy of the judgement is received or is deemed to have been received by the State concerned.

39. Mr. PAWLAK (Chairman of the Drafting Committee), noting that article 22 had originally been numbered 25 when adopted on first reading, said that the Drafting Committee had felt that paragraph 1 would be clearer if the conditions required for a court to be able to render a default judgement were dealt with in three separate subparagraphs. The words "except on proof of" had been replaced by the words "unless the court has ascertained that" in the phrase introducing the three conditions in question so as to indicate clearly that it was incumbent on the court to ascertain that the required conditions were met and that it had to do so prior to rendering its judgement.

40. The text of subparagraph (*a*) was the same as that of the provision adopted on first reading, except for the renumbering of the cross-reference. That was also true of subparagraph (*b*), except that the time-limit had been increased from three to four months because it might take over a month for the document instituting the proceeding to reach the authorities of the State concerned and as much time for those authorities' reaction to reach the forum State. Subparagraph (*c*) had been introduced in response to a suggestion supported by several delegations in the Sixth Committee. The new subparagraph, nevertheless, had no bearing on the question of the competence of the court, which was a matter for each legal system to determine.

41. As to paragraph 2, the text adopted on first reading had dealt in one single sentence with two separate issues, namely, the transmittal of the text of the default judgement and the time-limit for requesting the setting aside of the judgement. The Drafting Committee had considered that it was preferable to devote separate paragraphs to each of those issues. Paragraph 2 reproduced without change the first part of the former paragraph 2. Paragraph 3 did not differ in substance from the latter part of paragraph 2 of the original text, except that, for the reasons explained in connection with paragraph 1, a four-month time-limit had been substituted for the six month time-limit envisaged in the original text.

42. Mr. McCAFFREY proposed that, in the introductory phrase of paragraph 1, the word "ascertained" should be replaced by the word "found".

43. Mr. THIAM said that he doubted whether the four-month period referred to in paragraph 1 (*b*) could be applied uniformly to all States without taking account of the distance between the State serving process and the addressee State. There might be some unfairness involved.

44. Mr. HAYES supported the proposal made by Mr. McCaffrey with regard to the introductory phrase of paragraph 1.

45. At the end of paragraph 2, he proposed that the words "and in conformity with the provisions of the said paragraph" should be added for the sake of clarity. The requirement was not simply to resort to one of the means specified in article 21, paragraph 1, but to do so in accordance with the order set out in the paragraph.

46. Mr. PAWLAK (Chairman of the Drafting Committee) said that he had no objection either to Mr. McCaffrey's proposal or to that of Mr. Hayes, which would be useful. With regard to Mr. Thiam's comment, he believed that, in the age of facsimile transmission, the problem of distance did not arise.

47. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 22, as amended by Mr. Hayes and Mr. McCaffrey.

Article 22, as amended, was adopted.

ARTICLE 23 (Privileges and immunities during court proceedings)

48. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 23, which read:

Article 23. Privileges and immunities during court proceedings

1. Any failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act or to produce any document or disclose any other information for the purposes of a proceeding shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State shall not be required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a party before a court of another State.

49. Mr. PAWLAK (Chairman of the Drafting Committee) said, for the purposes of convenience and drafting, that text combined what had originally been article 26 (Immunity from measures of coercion) with what had originally been article 27 (Procedural immunities), both of which had been designed to reduce the exercise of coercive measures on States to achieve compliance with court orders. Although the form of the two original texts had been changed, their content was the same.

50. Paragraph 1 was the result of the merger of article 26 adopted on first reading and paragraph 1 of article 27 adopted on first reading. Paragraph 2 corresponded to paragraph 2 of article 27 adopted on first reading, except that the words "a State is not required" had been replaced by the words "a State shall not be required" for drafting purposes only.

51. The new title reflected the Drafting Committee's belief that the article in fact dealt with certain privileges and immunities granted to States, for example, those relating to the provision of securities or deposits.

52. Mr. TOMUSCHAT said that he endorsed paragraph 1, but had a reservation with regard to paragraph 2. A foreign State, acting as defendant, should not be bound to provide security. However, acting as plaintiff, the foreign State should be required to provide security, since the defendant might find it difficult or even impossible to obtain reimbursement from that State for the costs of the proceedings. The rule enunciated in paragraph 2 was thus unfair and accorded an unwarranted privilege to States. None the less, he would not oppose the adoption of article 23.

53. Mr. EIRIKSSON, supported by Mr. McCAFFREY, Mr. HAYES and Mr. THIAM, said that he shared Mr. Tomuschat's view.

54. Mr. Sreenivasa RAO said that, while he understood those reservations, he believed that paragraph 2 met a practical need and was entirely logical when read in conjunction with paragraph 1, which enumerated the cases in which a State was or was not required to perform a particular act, provide a document or disclose any other information.

55. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 23.

Article 23 was adopted.

56. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Drafting Committee was recommending the deletion of article 28 (Non-discrimination), which had been approved on first reading, albeit with considerable reluctance on the part of some members. Several delegations in the Sixth Committee had indicated that they favoured the deletion of article 28. The same differences of opinion had resurfaced at the time of the second reading.

57. The arguments in favour of the retention of the article had been, first, that paragraph 1 embodied the universally accepted principle of non-discrimination and should thus not give rise to any difficulty, secondly, that paragraph 2 (*a*) was based on the concept of reciprocity, which was also a generally recognized concept, and, thirdly, that subparagraph (*b*) had the advantage of safeguarding the position of States that were parties to regional conventions providing for a treatment different from that required by the draft articles.

58. The prevailing view in the Drafting Committee had been that article 28 created more problems than it solved. It had been emphasized in particular that paragraph 2 contradicted paragraph 1 and allowed States so much leeway that it might be used to undermine the principle of immunity, which all States recognized as covering *acta jure imperii*. The Drafting Committee had concluded that, while none of the provisions of article 28 contradicted State practice, it might be better to rely on general international law and, in particular, on the law of treaties.

TITLES OF PART I (Introduction), PART II (General principles), PART IV (State immunity from measures of constraint in connection with proceedings before a court) *and*

PART V (Miscellaneous provisions)

59. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the titles of parts I, II, IV and V of the draft articles.

The titles of parts I, II, IV and V were adopted.

60. The CHAIRMAN suggested that the Commission should consider agenda item 6 while awaiting the results of the consultations on the commentary relating to article 17, paragraph 3 (*d*).

It was so agreed.

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/437,[3] A/CN.4/L.456, sect. G, A/CN.4/L.465)

[Agenda item 6]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR[4]

61. The CHAIRMAN invited Mr. Barboza, the Special Rapporteur, to introduce his seventh report on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/437).

62. Mr. BARBOZA (Special Rapporteur) said that he had tried to comply with the suggestion of one delegation in the Sixth Committee of the General Assembly that the Commission should prepare an overall review of the current status of the topic and indicate the direction it intended to take in the future, instead of continuing with an article-by-article analysis.[5] The texts of the articles

[3] Reproduced in *Yearbook ... 1991*, vol. II (Part One).

[4] For outline and texts of articles 1-33 proposed by the Special Rapporteur, see *Yearbook ... 1990*, vol. II (Part Two), chap. VII.

[5] *Official Records of the General Assembly, Forty-fifth Session, Sixth Committee*, 30th meeting, para. 69.

submitted thus far had therefore been referred to in his report simply to facilitate the work of the Commission and he suggested that members should focus not on those texts, but rather on the basic issues.

63. The debate in the General Assembly had proved that, while agreement had not been reached on certain aspects of the topic, consensus had definitely been emerging with regard to some important points. In his opinion, the General Assembly had answered very clearly the questions put to it by the Commission. The majority of the delegations had been opposed to establishing a list of dangerous substances and in favour of providing for the liability of the State of origin in the case of transboundary harm caused by an activity carried out by a private enterprise under its jurisdiction. In the light of those trends and since the task at hand was the development of the law rather than its codification, he believed that negotiations were inevitable and that, instead of continuing the debate on issues on which consensus had not yet been reached, the Commission should consider the possibility, at least for certain articles, of submitting several alternatives to the General Assembly. To that end, it must identify first the main issues and then the various currents of opinion on those issues. It could then suggest the legal formulas which would give expression to those opinions. He was thus not proposing that the general debate should be reopened. The seventh report was an attempt to sum up and assess the situation; it was for the Commission to decide whether that assessment was accurate or not.

64. Another preliminary question was that of the Commission's contribution to UNCED, to be held in Brazil in 1992, and to the United Nations Decade of International Law. Since the Drafting Committee would apparently be unable to consider the articles submitted to it, particularly those relating to principles, in time for them to be presented to the Conference, it might be appropriate to establish a working group to study those principles in particular, so that the Commission could discuss them at its current session, with a view to the 1992 Conference.

65. Opinions were divided on the nature of the instrument that the Commission was drafting. Some members were of the opinion that if the Commission did not concern itself with drafting rules for a convention which required acceptance by States, it could more easily accept certain hypotheses and draft articles, but there was a strong current of opinion in favour of some type of framework convention. In the end, it was the General Assembly that would make the final decision on that issue, and the Commission should postpone its recommendation as to the nature of the instrument.

66. As a preliminary solution to the problem of the English title of the topic, which seemed to be more restrictive in terms of the Commission's mandate than it was in the other language versions, he thought that the current title could be replaced by "Responsibility and liability regarding the injurious consequences of activities not prohibited by international law", although he did not think that the Commission should consider that issue at the current session.

67. With regard to the scope of the draft articles, the main question was to determine whether article 1 should include both activities involving risk and activities with harmful effects or whether those two types of activities should be covered by two separate instruments. The majority of members and of delegations to the Sixth Committee seemed to be in favour of the first solution. Even if the scope in that case might seem somewhat broad, it should be remembered that the obligations arising from the provisions of article 1 were not too burdensome.

68. As to the principles contained in draft articles 6 to 10, a broad consensus seemed to exist on the basic principle (art. 6), the wording of which was inspired by Principle 21 of the Stockholm Declaration.[6] The same was true of the principle of international cooperation (art. 7). The principle of prevention assumed preventive action in order to avert transboundary harm or to reduce the risk of such harm to a minimum or, if harm had already been caused, in order to minimize the harmful effect. Two types of obligations derived from that principle: procedural obligations, which consisted mainly in assessing the transboundary effects of the intended activities, notifying the State presumed affected and holding consultations; and unilateral obligations, namely, the adoption by States of the necessary legislative, regulatory and administrative measures to ensure that operators took all steps to prevent harm, minimize the risk of harm or limit the harmful effects that had been unleashed in the territory of the State of origin. The principle of reparation (art. 9) should reflect the majority opinion in the Sixth Committee, namely that compensation was the responsibility of the operator, under the mechanism of civil liability, with the State assuming residual liability; that was in conformity with many conventions governing specific activities. The principle set forth in draft article 9 therefore needed to be reformulated. The Commission might also consider extending the liability of the State to cases where the victim was unable to obtain compensation because the operator could not provide restitution in full or to cases where the responsible party could not be identified. As indicated in the report, the question should be settled on the basis of negotiations between the State of origin and the State presumed affected. The principle of non-discrimination (art. 10) had given rise to very few objections because it was essential to the proper functioning of the system of civil liability.

69. Referring to article 2, which dealt *inter alia* with dangerous activities, he recalled that most delegations in the Sixth Committee had favoured a general definition of activities involving risk and had felt that a list of substances would be unhelpful and inappropriate. In his opinion, it would be preferable to include in an annex an illustrative list of substances which could help determine the activities which, by virtue of using one of the substances listed, presented a significant risk of transboundary harm. However, that was a matter for the Commission to decide.

[6] *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

70. The issue of prevention was dealt with in greater detail separately in the report. The procedural obligations gave rise to a problem in that it would be difficult to burden States with obligations of that kind within the framework of a legal regime as general as that envisaged in the draft articles. However, such obligations were fairly well established in international law and States usually required previous authorization for activities of the type described in article 1, in order to protect their own population. The procedure should therefore be simplified, possibly by allowing the State presumed affected some degree of participation in the authorization procedures for the activity in question. In addition, the procedure should not be made a condition for the granting of the authorization, it being understood that the State of origin would be liable in the event of actual harm. Furthermore, no State could be compelled to tolerate significant harm or a significant risk of harm. That brought in the idea of the prohibition of an activity and the need to establish a threshold for prohibition, which was in turn related to the idea of a threshold for harm or risk, bearing in mind the balance of interests and the factors referred to in draft article 17. It remained to determine how to settle possible disputes: the Commission would have to decide whether there should be a mandatory system or whether the methods of general international law should be applied. As had been indicated, prevention included procedural obligations and unilateral measures. While the former might or might not be mandatory, depending on the case, some were of the opinion that the latter certainly should be, and that meant that failure to give effect to them would entail the consequences provided for by general international law.

71. The last chapter of the report dealt with State liability and with civil liability. There seemed to be a majority in favour of residual State liability. The question was whether there should be an "original" State liability in cases where the author of the damage could not be identified and whether the State should have an obligation to notify, inform and consult with the States presumed affected. The report considered three possible approaches to civil liability. The first would be not to deal with civil liability at all in the draft. However, the Sixth Committee had already rejected that approach. The second would be to regulate only the interrelationship between State liability and civil liability, in which case claimants would have to deal with the national law of the State of origin. The third would be to include in the draft articles provisions designed to ensure the application of the principle of non-discrimination and certain other international standards. The report also considered the question of the channelling of liability, to which there was no simple answer in the context of a general instrument. There seemed to be three possible solutions, first, not to deal with the question in the articles, leaving the court to decide who was liable according to the criteria of existing national law, the solution adopted in the sixth report;[7] secondly, to establish criteria whereby liability would be attributed to the person exercising control of the activity at the time when the incident had taken place, the solution adopted in the European draft;[8] and thirdly, to impose the obligation on States to establish the criteria for channelling liability in their domestic legal systems, in the light of the activity in question.

72. With regard to liability for damage to the environment in areas not under national jurisdiction (the "global commons"), he did not think that the Commission was in a position to consider the question immediately, since it did not yet have all the information it needed to reach a decision.

73. In conclusion, he emphasized that he had no wish to reopen a general debate on the draft articles. His report merely attempted to evaluate the present situation and to consider certain methods of work.

74. The CHAIRMAN thanked the Special Rapporteur for his introduction of the seventh report.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/L.457, A/CN.4/L.462 and Add.1, Add.2 and Corr.1 and Add.3 and Corr.1, ILC/(XLIII)/Conf. Room Doc.1)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING[9] (*continued*)

ARTICLE 17 (Ships owned or operated by a State) (*concluded*)

75. The CHAIRMAN invited the Commission to resume its discussion of article 17, paragraph 3 (*d*).

76. Mr. OGISO (Special Rapporteur) read out the revised text of the commentary on article 17, paragraph 3 (*d*):

Paragraph 3 (*d*) has been introduced on second reading in response to a suggestion put forward by a Government in the Sixth Committee at the forty-fifth session of the General Assembly. Although the provisions of paragraph 3 are merely illustrative, the Commission deemed it appropriate to include this additional example in view of the importance attached by the international community to environmental questions and of the problem of ship-based marine pollution. In consideration of the fact that this subparagraph was not contained in the text of former article 18 adopted on first reading, both the Commission and the Drafting Committee discussed the question in some detail.

Since subparagraph (*d*), like subparagraphs (*a*) to (*c*), serves merely as an example of the claims to which the provisions of paragraph 1 would apply, it does not affect the substance or scope of the exception to State immunity under paragraph 1. Nor does the subparagraph establish substantive law concerning the legitimacy or receivability of a claim. Whether or not a claim is to be deemed actionable is a matter to be decided by the competent court.

The words "consequences of" are intended to convey the concern of some members that unqualified reference to pollution of the marine environment from ships might encourage frivolous claims or claims without tangible loss or damage to the claimant. One member, indeed, considered that a more qualified wording such as "injurious conse-

[7] *Yearbook ... 1990*, vol. II (Part One), document A/CN.4/428 and Add.1.

[8] Council of Europe, document CDCJ (89) 60, Strasbourg, 8 September 1989.

[9] For texts of draft articles provisionally adopted by the Commission on first reading, see *Yearbook ... 1986*, vol. II (Part Two), pp. 7-12.

quences" would have been necessary and he therefore reserved his position on the subparagraph. Some other members, on the other hand, felt that this concern was unjustified since no frivolous or vexatious claims would be entertained by a court and that furthermore it was not the function of rules of State immunity to prevent claims on the basis of their merits.

77. Mr. TOMUSCHAT, speaking also on behalf of Mr. SEPÚLVEDA GUTIÉRREZ, Mr. Sreenivasa RAO and Mr. SHI, said that he endorsed the commentary, since the word "tangible" had been added in the third paragraph before the words "loss or damage". That word introduced a shade of meaning which he felt was necessary. It should also be pointed out that the article did not establish any substantive rule relating to the legitimacy or receivability, as such, of a claim and it made no difference to the law already applicable.

78. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the text of the commentary read out by the Special Rapporteur.

It was so agreed.

79. Mr. SOLARI TUDELA said that he could accept article 17, paragraph 3 (*d*), with or without square brackets, even though he thought that the words in brackets were redundant, since pollution of the marine environment was itself a consequence and where pollution occurred, there was necessarily loss or damage.

80. Mr. HAYES said that he associated himself with the reservations expressed in connection with the second part of paragraph 2 of article 17.

81. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 17 as a whole.

Article 17 was adopted.

82. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Drafting Committee had also considered the question of the immunity of State-owned or State-operated aircraft engaged in commercial service. The Committee had noted that the Special Rapporteur had tackled the issue in an addendum to his second report[10] and had reviewed the existing treaties on international civil aviation law, pointing out that aircraft used for military, customs and police service were deemed to have immunity. The Special Rapporteur had also stated that, apart from that rule, there did not seem to be any clear rule conferring immunity on planes and that the practice of States was not entirely clear. He had therefore come to the conclusion that it was preferable to deal with the matter in a commentary instead of including a special provision concerning aircraft in the draft.

83. The Drafting Committee had also considered the possibility of including in the draft articles certain rules on immunity applicable to aircraft and objects launched into outer space. It had observed that the matter was a complex one and that a definition of specific categories of aircraft, such as presidential planes, civil aircraft chartered by Government authorities for relief operations and planes used by diplomatic missions, would require a thorough analysis of existing conventions, domestic legislation and case law. Because of the lack of time and documentation, however, it had been able only to examine briefly a draft article prepared at its request by the Special Rapporteur. The Drafting Committee nevertheless recognized that the question was a topical one and was aware that the absence of provisions on aircraft in the draft might be viewed as a lacuna, particularly in the light of the general principle embodied in article 5. It therefore wished to draw the Commission's attention to the question of the status, from the point of view of immunity, of aircraft and objects launched into outer space. The Commission might in turn wish to draw the attention of the General Assembly to the matter.

84. He explained that Mr. Pellet had stated that he was in favour of the inclusion in the draft articles of provisions on the immunity of aircraft and objects launched into outer space.

ADOPTION OF THE DRAFT ARTICLES ON SECOND READING

85. The CHAIRMAN invited the Commission to take a decision on the draft articles as a whole, as amended.

The draft articles on jurisdictional immunities of States and their property as a whole, as amended, were adopted on second reading.

TRIBUTE TO THE SPECIAL RAPPORTEUR

86. The CHAIRMAN thanked the Chairmen of the Drafting Committee at the forty-second and forty-third sessions of the Commission, Mr. Mahiou and Mr. Pawlak respectively, and the Special Rapporteur, Mr. Ogiso, for the work they had done to enable the Commission to complete its consideration of the topic. The Commission still had to formulate its recommendations to the General Assembly on the action to be taken on the draft articles, but meanwhile he was sure that the Commission would wish to express its gratitude to the Special Rapporteur. He therefore proposed that it should adopt a draft resolution, which read:

"*The International Law Commission,*

"*Having adopted* the draft articles on the jurisdictional immunities of States and their property,

"*Expresses* to the Special Rapporteur, Mr. Motoo Ogiso, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft by his tireless efforts and devoted work and for the results achieved in the elaboration of draft articles on jurisdictional immunities of States and their property."

[10] See *Yearbook ... 1989*, vol. II (Part One), document A/CN.4/422/Add.1.

87. Mr. JACOVIDES said that he supported the draft resolution and that all members of the Commission could not but recognize the excellent work done by Mr. Ogiso.

The draft resolution was adopted.

The meeting rose at 1.05 p.m.

2222nd MEETING

Tuesday, 11 June 1991, at 10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Khasawneh, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/437,[1] A/CN.4/L.456, sect. G, A/CN.4/L.465)

[Agenda item 6]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR[2] (*continued*)

1. Mr. JACOVIDES, congratulating the Special Rapporteur on the progress achieved in a difficult and challenging area of the law, said that there was sufficient agreement on the underlying principles to enable the Commission to finalize its work on the topic. The final form the draft should take, whether a convention, a code of conduct or some other form of legal guidelines should none the less be decided later, in the light of the views of Governments expressed at the General Assembly or in their written comments. It would also be useful if the results of the Commission's endeavours, and in particular the draft articles prepared by the Special Rapporteur and referred to the Drafting Committee, could be presented to UNCED, to be held in Brazil in 1992. In that way, the Commission would make a contribution to the global efforts to protect the environment, something which deserved high priority in the United Nations Decade of International Law. In voicing that opinion, he was in no way underestimating the continuing difficulties that would have to be faced. The questions of methodology would, for instance, have to be tackled and an overall assessment made of the status of the item, of the direction it should take, and of the pace at which work should proceed. The approach might not be orthodox, but, then again, neither was the topic, for it was concerned more with progressive development than with codification of the law and should be examined accordingly.

2. One positive element was the response by the Sixth Committee to the two policy questions raised in the Commission's report on the work of its forty-second session.[3] The Commission might wish on the basis of that precedent to put to the General Assembly further policy questions: the resulting interaction between the two bodies would be particularly appropriate in such a new area of the law. That did not, of course, mean that the Commission could simply pass on its responsibility to the General Assembly. There was much legal material and State practice, and also many treaties, particularly regional treaties, which were of relevance to the topic and should be studied first.

3. The Special Rapporteur had rightly urged the Commission to concentrate not on the draft articles he had submitted earlier but on certain important issues. The first of them, a decision on the nature of the instrument could, as the Special Rapporteur had stated at a previous session, wait until coherent, reasonable, practical and politically acceptable draft articles had been developed,[4] after which the Commission could consider whether to recommend that the articles should be incorporated in a draft convention or in some other legal instrument.

4. With regard to the title of the topic, he saw merit in using in the English version the words "responsibility and liability" and in replacing "acts" by "activities"; that would more closely reflect the broadening of the scope to encompass activities involving risk and activities with harmful effects. The fundamental principle underlying the topic was acceptable, though the drafting of certain articles should be re-examined.

5. As to the procedural obligations regarding prevention, the obligation of due diligence should be "hard". Also, in the absence of some form of dispute settlement under Article 33 of the Charter of the United Nations, a compulsory system for the settlement of disputes should be introduced. As he had long advocated, a comprehensive system of third-party dispute settlement must form an integral part of any treaty if the rule of law among nations was to acquire real meaning.

6. The aim with regard to responsibility and liability should be to provide for State responsibility for breach of due diligence and for original State liability where it

[1] Reproduced in *Yearbook... 1991*, vol. II (Part One).

[2] For outline and texts of articles 1-33 proposed by the Special Rapporteur, see *Yearbook... 1990*, vol. II (Part Two), chap. VII.

[3] *Yearbook... 1990*, vol. II (Part Two), para. 531.

[4] *Yearbook... 1987*, vol. II (Part Two), p. 49, para. 192.