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Summary record of the 2119th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
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of general international law" would necessarily lead foreign courts to seek exceptions to the immunity of States outside the framework of the draft articles. Nor, for that matter, would it encourage unilateral restrictions of the immunity of a State. Moreover, deletion of the phrase in question might interfere with the progressive development of norms of general international law. As a pragmatic compromise, therefore, he would be prepared to accept the suggestion by the Government of Spain, supported by the Special Rapporteur, to omit the phrase in question from the body of the text and transfer the underlying idea to the preamble to the future convention.

76. In introducing his second report (A/CN.4/422 and Add.1), however, the Special Rapporteur (2114th meeting) had invited members to comment on the choice between two alternatives, namely: (*a*) deleting the bracketed phrase and transferring it to the preamble, as suggested by Spain; and (*b*) deleting the phrase and introducing a new article 6 *bis* to provide an optional declaration with a view to maintaining an appropriate balance with the position of those States which favoured the restrictive theory of immunity. After careful examination of draft article 6 *bis*, he was not inclined to accept it. Introducing a new optional declaration into the draft convention did not seem an attractive idea and the article could well give rise to unnecessary procedural confusion.

77. He had no objection to the proposed new text of article 7 (A/CN.4/415, para. 79), which had been made clearer by the use of the expressions "forum State" and "foreign State", replacing the somewhat confusing expressions "a State" and "another State". The proposed reformulation of article 8 (*c*) was acceptable and he could support article 9 as it stood, but was not opposed to the addition to paragraph 1 and the insertion of the new paragraph 3 recommended by the Special Rapporteur (*ibid.*, para. 100). Article 10 was equally acceptable.

78. The question of the title of part III of the draft had given rise to some sharp differences of view in the Commission and in the Sixth Committee of the General Assembly. The Special Rapporteur had suggested that consideration of the title be deferred until concrete and individual issues had been settled. There was considerable merit in that approach, which demonstrated the Special Rapporteur's concern to go ahead with substantive questions without being bogged down by drafting issues.

79. He had no difficulty in accepting article 11, as slightly amended by the Special Rapporteur, and shared the view that the phrase "the State cannot invoke immunity . . ." was preferable to "the State is considered to have consented . . . ".

80. The proposed new article 11 *bis*, on segregated State property (*ibid.*, para. 122), seemed confusing. It was intended basically to accommodate a distinct legal régime on State immunities pertaining to so-called segregated State property of the socialist countries. Accordingly, he had mixed feelings as to whether the article should be included at all. Was it really necessary in a universal convention? Nevertheless, he had an open mind on the subject and would like the Commission to decide the matter.

81. In his oral introduction, the Special Rapporteur had suggested that article 11 *bis* would strike a balance between the restrictive theory and the absolute theory. Socialist countries, however, had "economic organizations" which were separated as juridical persons from the State and were individually responsible for their economic obligations solely within the limits and to the extent of the specific State property they possessed. Those economic organizations, therefore, within the limits assigned to them by the legislation of the socialist countries, would not enjoy immunity. On the other hand, under the law in the socialist countries, the State—which was distinct from the economic organizations in question—could still, in its sovereign capacity, enter into economic and trade relations and therefore claim immunity from the jurisdiction of foreign courts. That was precisely the question at issue, and not merely the issue of segregated State property. It was a problem that had to be dealt with separately and article 11 *bis* did not provide a solution.

The meeting rose at 1.05 p.m.

2119th MEETING

Thursday, 15 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/410 and Add.1-5,[1] A/CN.4/415,[2] A/CN.4/422 and Add.1,[3] A/CN.4/L.431, sect. F)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CONSIDERATION OF THE DRAFT ARTICLES[4] ON SECOND READING (*continued*)

1. Mr. AL-BAHARNA, continuing the statement he had begun at the previous meeting, said, in reference to the new article 11 *bis* proposed by the Special Rapporteur (A/CN.4/415, para. 122), that, although economic organizations in socialist countries did not enjoy jurisdictional immunity,

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[1] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[2] *Ibid.*

[3] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[4] For the texts, see 2114th meeting, para. 31.

the State itself could, in its sovereign capacity, enter into economic and trade relations and therefore claim immunity from the jurisdiction of foreign courts. Accordingly, the question was one not of segregated State property, but of the operations of State enterprises having legal personality, and the title of article 11 *bis* should be "State enterprises". In any event, that article did not provide a comprehensive solution.

2. Article 12 (Contracts of employment) was acceptable subject to the amendments suggested by the Special Rapporteur in his preliminary report (*ibid.*, para. 133).

3. Article 13 (Personal injuries and damage to property) was also acceptable, but again subject to the amendments suggested by the Special Rapporteur (*ibid.*, para. 143), which consisted of the deletion of the last phrase of the article and the addition of a new paragraph 2 excluding the rules concerning State responsibility under international law.

4. The Special Rapporteur pointed out, with regard to article 14 (*ibid.*, paras. 152-154), that paragraph 1 (*c*), (*d*) and (*e*) mainly concerned the legal practice in common-law countries and suggested that they either be deleted together with subparagraph (*b*) or be amended better to reflect practice. The first solution was preferable. A codification convention should, in so far as possible, be based on the general practice of States rather than on a particular legal system. Thus amended, the article would be acceptable.

5. Articles 15, 16 and 17 raised no problems and were acceptable.

6. The term "non-governmental" in paragraphs 1 and 4 of article 18 (State-owned or State-operated ships engaged in commercial service) should be deleted, in accordance with the Special Rapporteur's suggestion, since, as a number of Governments had pointed out, it was ambiguous and could give rise to controversy. The Special Rapporteur also recommended the addition of a paragraph 1 *bis* (A/CN.4/422 and Add.1, para. 26) whereby State enterprises and segregated State property could be dealt with separately. He reserved his position on that point, for the reasons he had stated in connection with article 11 *bis*.

7. He would have no difficulty with article 19 (Effect of an arbitration agreement) if it incorporated the amendments suggested by the Special Rapporteur, which consisted, first, of using the expression "commercial contract" rather than "civil or commercial matter" and, secondly, of adding a new subparagraph (*d*) on recognition of the award.

8. He also wished to reserve his position on article 20 (Cases of nationalization), whose meaning and scope required further clarification.

9. With regard to article 21 (State immunity from measures of constraint), the Special Rapporteur had rightly suggested the deletion of the words in square brackets and of the phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed" in subparagraph (*a*). He could not agree to the alternative to the deletion of the latter phrase suggested by the Special Rapporteur, namely the addition of the words "Unless otherwise agreed between the States concerned" at the beginning of the article.

10. The words in square brackets in article 22 (Consent to measures of constraint) should be deleted in accordance with the Special Rapporteur's recommendation, and as had been proposed in the case of article 21.

11. The Special Rapporteur proposed that article 23 (Specific categories of property) be amended slightly by deleting the term "non-governmental" in square brackets in paragraph 1 and adding the words "and serves monetary purposes" in paragraph 1 (*c*). He could support the article as thus amended.

12. Lastly, he appealed to the Commission to avoid the temptation of making radical changes to the texts adopted on first reading in 1986. The Commission should abide by its decision to adopt the draft articles on second reading before the end of the current session.

13. Mr. CALERO RODRIGUES said that he would confine his remarks on articles 12 *et seq.* to the amendments it was proposed to make to the texts adopted on first reading.

14. Article 12 stipulated, in paragraph 1, that a State could not invoke immunity before a court of another State with respect to contracts of employment if the employee had been recruited in that other State and, also, if he was covered by the social security provisions in force there. The Special Rapporteur proposed to delete the latter condition. It had been included, however, because the fact of being covered by the social security system of a State was further evidence that the contract came under the legal system of that State. The argument in favour of the amendment, namely that the condition would lead to discrimination as between countries which had social security systems and those which did not, was not very convincing.

15. Paragraph 2 of the article listed a number of exceptions, the first two of which, in subparagraphs (*a*) and (*b*), the Special Rapporteur proposed to delete. For his own part, he would have difficulty in accepting the deletion of subparagraph (*a*) ("if . . . the employee has been recruited to perform services associated with the exercise of governmental authority"), since it covered precisely the type of case in which the employee should not come under the jurisdiction of another State. In that connection, he noted that, in the English version of the draft, the French expression *puissance publique* was translated in various ways. He was also unable to agree to the deletion of subparagraph (*b*) ("if . . . the proceeding relates to the recruitment, renewal of employment or reinstatement of an individual"), since it was difficult to see how a State could be forced by the court of another State to keep a particular person in its employment.

16. He had difficulty in accepting the Special Rapporteur's suggestion that the words "and if the author of the act or omission was present in that territory at the time of the act or omission", at the end of article 13 (Personal injuries and damage to property), should be deleted. That would enlarge the scope of the exception laid down by the article, which might be too wide already. It should also not be forgotten that transboundary harm would come under the article. Moreover, on the basis of a suggestion by the Government of Spain (A/CN.4/410 and Add.1-5), the Special Rapporteur proposed the addition of a paragraph 2

concerning the rules of State responsibility. He doubted, however, whether the solution to the question of personal injuries and damage to property should be left to those rules, and the Special Rapporteur himself did not seem to be persuaded that it should.

17. While he welcomed paragraph 1 (*a*) of article 14 (Ownership, possession and use of property), since immovable property situated in the territory of a State fell, naturally as it were, under its jurisdiction, subparagraphs (*b*) to (*e*), which dealt with both movable and immovable property, complicated the situation. As subparagraphs (*c*), (*d*) and (*e*) used language taken from the common law which might not be very familiar to other systems of law, the Special Rapporteur recommended that they be replaced by a new subparagraph (*c*) (A/CN.4/415, para. 156). If that meant incorporating the various elements on a more universal basis, he could accept the new subparagraph. If, however, it were to remove the difference between movable and immovable property, that was a different matter, since the situation with regard to movable property was not nearly so clear. In short, the article was not very satisfactory and, if it came to the worst, he would prefer all the subparagraphs in paragraph 1 to be deleted.

18. Paragraph 2 of article 14 was not couched in very clear terms and the Special Rapporteur suggested that, as recommended by the Government of Belgium, it be deleted, since it gave the impression that there was a conflict with article 7, paragraph 3. That was true and the paragraph could be dropped without difficulty.

19. The Special Rapporteur made two proposals concerning article 18. With regard to the first, which consisted of deleting the term "non-governmental" in paragraphs 1 and 4, he would recall that the difficulty of defining "State-owned or State-operated ships engaged in commercial service" had been noted during first reading. The purpose of the term "non-governmental" was therefore to add an element of precision, although it admittedly represented discrimination against some States. In the absence of a proper formula, he would agree with some reluctance to the deletion of the term. As to the second proposal, which was to add a new paragraph 1 *bis* concerning ships that were segregated State property, the suggested wording (A/CN.4/422 and Add.1, para. 26) was not very good, but Mr. Barsegov (2117th meeting, para. 1) and Mr. Shi (2115th meeting, para. 24) had made extremely interesting proposals in connection with the new draft article 11 *bis* which might help in arriving at a solution.

20. Article 19 (Effect of an arbitration agreement) was fully justified, for it merely recognized the supervisory power of national courts regarding an arbitration agreement. As for the choice between providing for arbitration relating to a "commercial contract" or arbitration relating to a "civil or commercial matter", the Special Rapporteur preferred the latter solution. The effect of that expression would, however, be to enlarge the scope of the exception recognized under the article, whereas the aim should be to narrow it.

21. There was no suggested change in article 20, but its position in the draft raised a problem, as had been noted by the Governments of Australia and Thailand. His own view was that the article should be placed elsewhere in the draft.

22. He had no objection to the addition at the beginning of article 21 of the traditional clause "Unless otherwise agreed between the States concerned". He also agreed to the deletion of the words in square brackets, "or property in which it has a legally protected interest", whose meaning was uncertain. The problem of the concept of "rights and interests", which had caused some difficulty on first reading, arose once again, but in a more serious form. Indeed, what was a right but "a legally protected interest"? As to the exceptions provided for in subparagraphs (*a*) and (*b*), he was strongly opposed to the deletion of the condition in subparagraph (*a*) reading: "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed". The Special Rapporteur considered that that condition was not necessary in view of the preceding phrase, but to delete it would, once again, extend the exceptions and, consequently, narrow the concept of immunity.

23. The need for article 23 was not self-evident, for the property referred to would in any event never be regarded as commercial property. The Special Rapporteur proposed the addition at the end of paragraph 1 (*c*) of the words "and serves monetary purposes". But what purposes could the "property of the central bank" serve other than monetary purposes? To make that precision would further erode State immunity and he was therefore not in favour of amending the subparagraph. The new wording proposed for paragraph 2 (A/CN.4/415, para. 240) was not an improvement. His own view was that the text as adopted should be maintained for reasons of balance, but with such improvements as the Drafting Committee might wish to introduce.

24. Turning to part V of the draft (Miscellaneous provisions), he said that article 24 as adopted on first reading was extremely comprehensive, providing as it did for service of process by means agreed upon by the States concerned, through diplomatic channels or by other means, including transmission by registered mail. The Special Rapporteur had simplified the provision in the proposed new text (*ibid.*, para. 248). However, in his view, service of process by mail was not the generally accepted practice. On the basis of the comments of several Governments, the Special Rapporteur proposed that the reference to a "special arrangement" in paragraph 1 (*a*) be deleted and that reference be made instead to any "applicable international convention binding" on the States concerned. However, the fact that such arrangements were not accepted by all legal systems was not a very convincing argument in favour of that deletion. Subparagraph (*a*) could perhaps be replaced by the words "in accordance with any international agreement or arrangement binding on the forum State and the State concerned", in order to cover all possibilities.

25. The Special Rapporteur did not propose any change to articles 25, 26 and 28. He did, however, propose a relatively important change to article 27, paragraph 2, in that the privilege accorded to a State party to proceedings before a court of another State would henceforth be confined to the defendant State. That was not a good idea, in his view, since States, by their very nature, should not be treated as ordinary parties to proceedings. It was not appropriate to seek guarantees from them, whether they were claimants or defendants.

26. Mr. MAHIOU said that his comments on articles 12 *et seq.* would coincide on certain points with those made

by the previous speaker. He noted that the Special Rapporteur recommended the deletion, in article 12, paragraph 1, of the condition relating to social security. Although he did not insist on its retention, he considered that that condition was sufficiently clear and would enable a link to be established between the contract of employment and the forum State. The Special Rapporteur also proposed the deletion of paragraph 2 (*a*) and (*b*), although the Commission had included those provisions on first reading to take account of a number of special situations. He would therefore be hesitant about following the Special Rapporteur on that point.

27. He would have no difficulty in accepting the suggestion by the Government of Spain for a new paragraph 2 of article 13 (A/CN.4/410 and Add.1-5), but wondered whether it was useful.

28. Many Governments had stressed the complexity and singularity of article 14, whose text was based on common-law concepts. In that connection, he agreed with the comments made by the Special Rapporteur, who thought it necessary to simplify the text and to eliminate several subparagraphs in order to avoid creating problems for countries which were not familiar with such concepts.

29. In article 18, the Special Rapporteur recommended the deletion of the term "non-governmental" in square brackets in paragraphs 1 and 4. That raised a substantive problem that had already been encountered in connection with articles 2 and 3. Just as it was sometimes difficult to define a commercial contract, it could also be difficult to define the commercial or non-commercial use of a ship. The Special Rapporteur's analysis of that problem in his second report (A/CN.4/422 and Add.1, paras 24-25) did not accurately reflect the position of the developing countries, especially when he stated that he had doubts "whether granting immunity to ships owned or operated by the developing countries is advantageous to them in the long run". The developing countries did not wish to create such a situation, which would be both unfair and unacceptable: what they wanted was to be able to invoke immunity from jurisdiction in certain circumstances where the public interest was involved. As in the case of a commercial contract, in which the public-interest purpose served as a subsidiary criterion in determining the nature of the contract, public interest could serve as a secondary criterion in determining the nature of the use of a ship. The position of the developing countries must not be presented as being excessive. In the case under consideration, the same reasoning should be adopted as for articles 2 and 3 and an attempt should be made to find a compromise that would take account of certain special circumstances when ships were used for governmental purposes in the public interest.

30. In support of his contention that the term "non-governmental" was inappropriate, the Special Rapporteur referred to such instruments as the 1926 Brussels Convention on the immunity of State-owned vessels, the 1958 Convention on the Territorial Sea and the Contiguous Zone and the 1982 United Nations Convention on the Law of the Sea (*ibid.*). His own interpretation of those instruments was somewhat different. The 1926 Brussels Convention and the 1958 Convention referred to ships which were used only on government non-commercial service: it could therefore be deduced *a contrario* that government commercial service existed. The terms used varied from one convention to another, but a distinction was always made between those two types of service. That distinction was also to be found in articles 96 and 236 of the 1982 Convention. The distinction between commercial and non-commercial government activity entailed a number of consequences from the jurisdictional point of view. The solution to that problem had to be patterned on the one proposed in the provisions of the new article 2 relating to commercial contracts (A/CN.4/415, para. 29). It had to be an equitable solution based on a criterion which was relatively clear, but which would also take account of certain particular situations.

31. Of the two expressions in square brackets in article 19, the Special Rapporteur preferred the second, which would have the effect of broadening the scope of the exception. He personally would be reluctant to adopt that view, for fear that that might create an opening that would enable courts unfairly to deny the jurisdictional immunity of a State. It was all too easy, outside the contractual field, to reach the point of disputing decisions which should be regarded as relating to acts performed in the exercise of the sovereign authority of the State. In order to illustrate the risks involved in the misinterpretation of certain terms, he referred to the *Pyramids* case. A contract for a tourism development project concluded in 1974 by an Egyptian Government agency with a foreign enterprise had provoked a general outcry both in Egypt and abroad, since public opinion had considered that the project might damage one of the seven wonders of the world. The contract had thus been impugned and the foreign enterprise had invoked the arbitration agreement to claim compensation for the work it had already done. The arbitral tribunal had ruled that it had jurisdiction not only with regard to the Government agency which had signed the contract with the foreign enterprise, but also with regard to the Egyptian State itself, which had, as the supervising State, approved the contract: in the view of the tribunal, mere approval—a unilateral act of the State—had made Egypt a party to the contract and hence to the arbitration agreement. Egypt had, of course, appealed the award, which had been rescinded.

32. That example showed that the jurisdiction of the forum State had to be extended, since arbitral tribunals, to which the parties usually entrusted their disputes, were sometimes tempted to go beyond their jurisdiction, whereas the judge of the forum was more likely to defend the prerogatives of the State. The example also showed that there was a tendency, whenever the State set its seal of approval on a commercial contract, to consider it as a party to the arbitration agreement and to dispute the validity of its actions, even when they were performed in the exercise of its sovereign authority. As matters now stood, he would therefore be in favour of retaining the first expression in square brackets in article 19, namely "commercial contract". Insidious jurisdiction was a danger to be avoided.

33. Still with regard to article 19, the Special Rapporteur had asked whether a position should not be taken on the problem of the enforcement of arbitral awards. Had a State which had accepted an arbitration agreement not also accepted the jurisdiction of the courts that were competent to enforce the award? He would not deal again with that question, to which he had referred in his earlier statement (2116th meeting), but he noted that caution was called for in that regard, since such an extension of the jurisdiction of the courts of the forum could lead to some questionable

results. He also recalled that acceptance of an arbitration agreement should not be confused with acceptance of enforcement proceedings.

34. Article 20, which was a kind of reservation clause on the settlement of the problem of nationalizations, was one of the elements of a global compromise and had been designed to make article 15 acceptable and safeguard the measures of expropriation and nationalization which could be taken by States. He was one of the members of the Commission who had proposed the article, but he was not satisfied either with its wording or with its position in the draft. In view of the ambiguous interpretations to which its provisions gave rise, he even had doubts whether it should be retained.

35. The Special Rapporteur made three recommendations on article 21 in his preliminary report (A/CN.4/415, paras. 217-219) and a fourth one in his second report (A/CN.4/422 and Add.1, para. 46). As in article 18, he recommended the deletion of the term "non-governmental", which he personally was in favour of retaining for the reasons he had already indicated; perhaps a solution to that problem could be found in the Drafting Committee. The concept of a "legally protected interest" might well be peculiar to certain legal systems. The concept of "interest" was, however, broader than that of "right" and, since the Commission was working in an area in which measures of execution had to be limited as much as possible, it would be wiser to retain that expression for the time being, both in article 21 and in article 22.

36. The Special Rapporteur also considered that there was no need to require a connection between the property in question and the object of the claim or the agency or instrumentality against which the proceeding was directed, or to make it a prerequisite for measures of constraint, and had explained his position on that point in his oral introduction (2115th meeting), referring to the *Letelier* case. It should, however, be pointed out that the problem called for solutions that varied according to the countries involved. Even in countries where there was a restrictive trend with regard to immunity, that link or connection was required. He believed the United Kingdom was the only country which had eliminated that requirement; in the United States of America, proposals along those lines had not been adopted. Besides, solutions adopted at the national level were not necessarily applicable for the purposes of an instrument that was universal in scope.

37. The new text of article 23, paragraph 2, proposed by the Special Rapporteur in his preliminary report (A/CN.4/415, para. 240) was an improvement on the adopted text. There was, however, still the problem of bank accounts, as referred to in both the preliminary report and the second report (A/CN.4/422 and Add.1, para. 44). The Special Rapporteur's position on that problem was not very clear and stood in need of explanation. He appeared to be proposing to revert to the original recommendation made in his preliminary report to add the words "and serves monetary purposes" to paragraph 1 (*c*) in order to protect the property of the central bank or any other monetary authority implementing the monetary policy of the State. He had some doubts about that suggestion, for the reason given by Mr. Calero Rodrigues, since a central bank could, in his view, not have anything but monetary activities. The expression "and serves monetary purposes" was therefore not clear. It would certainly give rise to problems if it were to have the effect of restricting the immunity of the State in that field. In the circumstances, he therefore preferred the earlier text.

38. He had no comments on articles 24 to 26 and shared the concerns of the Special Rapporteur, whose recommendations he supported. It would be for the Drafting Committee to decide whether those recommendations improved the texts and should therefore be adopted. Account should, however, be taken of the comments made by the Federal Republic of Germany and the German Democratic Republic on article 25, which were intended to prevent a default judgment from being rendered against a State by virtue of service of process.

39. Paragraph 2 of article 27 as adopted on first reading was preferable to the new text proposed by the Special Rapporteur (A/CN.4/415, para. 266) because the claimant State should enjoy the same rights as the defendant State, first for the reason given by Mr. Calero Rodrigues and, secondly, because of the need not to discourage States from entering claims. In some countries, the financial aspects of the proceeding were an important consideration. If a State acting as claimant were required to provide security, it might decide not to bring suit, thus calling its immunity from jurisdiction into question. That factor had to be borne in mind in view of the cost of some proceedings.

40. Mr. AL-KHASAWNEH paid tribute to the Special Rapporteur and to the States that had commented on the draft articles adopted on first reading. There were, however, still many points that called for in-depth consideration, which the Commission would not be able to complete at the current session if it took up all the draft articles. He would therefore comment only on articles 1 to 11 *bis*.

41. Article 1 (Scope of the present articles) was acceptable in terms both of its content and its place in the draft as a whole. The merger of articles 2 (Use of terms) and 3 (Interpretative provisions) in a single new article 2 was entirely warranted. However, the definition of the expression "commercial contract" was tautological, although that could be avoided by deleting the adjective "commercial" in paragraph 1 (*c*) (i) of the new text (A/CN.4/415, para. 29) and replacing it by "business" in paragraph 1 (*c*) (iii). In paragraph 3, the word "primarily" was redundant, since it made sense only if the nature test was applied primarily and an additional test was applied in the case referred to in paragraph 2 of article 3 as adopted. More importantly, the words "but if an international agreement . . . in determining the non-commercial character of the contract" were also redundant, bearing in mind article 11, paragraph 2. In fact, as it stood, paragraph 3 as a whole was merely recommendatory and served only to dilute the rule that a State which had concluded a commercial contract with a foreign non-State entity enjoyed immunity from jurisdiction under article 11, paragraph 2 (*b*). The text proposed by the Special Rapporteur for paragraph 3 was no doubt intended to reconcile differences of opinion on the weight to be given to the nature of the contract and to its purpose, but he could still not accept it. That left the question of determining what weight should be given to the non-commercial purpose of a contract whose nature and outward form were commercial. The comments made by Governments were not of much

help in that regard, since they were divided. However, any suggestion to give equal weight to the nature of the contract and to its purpose should be rejected. If such a suggestion were accepted, the judges called upon to interpret the future convention would face a very difficult task. And that task would not be any easier if they had to take account "primarily" of the nature of the contract, so that the purpose of the contract would then be only marginally and additionally relevant. In the first place, the purpose test was, by definition, subjective. Secondly, it was not inconceivable—it was even normal—that, in concluding a commercial contract, a State would be motivated both by commercial considerations and by considerations of public welfare. Thirdly, since the practice of States claiming immunity varied from one country to another, different solutions would be adopted depending on the claimant State in question—and that would be the opposite of unification.

42. In its comments, the United Kingdom Government had stressed that a mechanism already existed in article 11, paragraph 2 (*b*), under which a State could reserve its immunity at the time of the conclusion of the contract. Since the protection of private rights was the main reason for restricting immunity, however, when the non-State entity in question agreed to the invoking of immunity by the other party to the contract, namely the State, there was no reason why the State of the forum should question the consent of the non-State entity, except as a matter of public policy. It followed that, in certain cases, that consent would apply to contracts whose nature and purpose were both commercial, thereby cutting across the distinction between acts *jure imperii* and acts *jure gestionis* on which the restrictive theory of immunity was predicated. It was possible, for example, that a firm might, out of ignorance of the subtleties of that distinction or simply out of a wish to make quick profits, accept a clause whereby a State would reserve its immunity in respect of a contract whose nature and purpose were both commercial. Conversely, a State might, in order to guarantee the welfare of its citizens, conclude a contract with a foreign firm and agree to waive its immunity, even if the purpose of the contract was clearly a public one. In both cases, the mechanism provided for in article 11, paragraph 2 (*b*), would leave a great deal of room for market forces and could therefore hardly be described as appropriate. Surely the task of the law was to moderate the exercise of power, whether economic or political, and not to consolidate it. He had thus come to the conclusion that the purpose of the contract had to be taken as a criterion, but its subjectivity had to be reduced as much as possible in the interests of legal certainty and in order to establish a uniform régime. That could be done by listing a number of categories of commercial contracts for which the purpose test would be applied—for example, contracts for military purposes or contracts concluded for emergency assistance. An alternative solution would be to add a new paragraph 2 (*c*) to article 11, reading: "if the court is satisfied that the purpose of the contract is a public one".

43. In article 4 (Privileges and immunities not affected by the present articles), the scope of paragraph 2 should be broadened to include certain persons connected with the head of State, such as members of his family forming part of his household and servants attached to his personal service, and perhaps also prime ministers and ministers for foreign affairs.

44. Article 5 (Non-retroactivity of the present articles) was satisfactory, although there was considerable relevance in the comment made by the Australian Government on the value of imposing any restrictions on the application of the future convention. It was significant in that regard that, when the *Foreign Sovereign Immunities Act* had been adopted in the United States of America in 1976, claimants had begun to introduce lawsuits for cases going back to the 1940s, as Mr. Shi (2115th meeting) had pointed out.

45. Turning to article 6 (State immunity), he supported the proposed deletion of the words in square brackets. However, since the article had given rise to much controversy in the past both in the Commission and among publicists, he wished to comment on it in some detail. First, a tendency to opt for easy solutions in the matter of the codification and progressive development of international law had been discernible in the Commission and in the Sixth Committee of the General Assembly in recent years. For some topics, a framework approach was advocated in order to take account of diversity: such was the case with the law of the non-navigational uses of international watercourses and with international liability for injurious consequences arising out of acts not prohibited by international law. In the case of the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the Commission had almost succumbed to the temptation of an optional régime which would have had the effect of decodifying the law of diplomatic and consular relations. In the case of the topic under consideration, the same reluctance to accept a single unified régime had led to the introduction of the words in square brackets in article 6 and also to the adoption on first reading of article 28 (Non-discrimination). Were those developments a sign of greater creativity or an admission that legislating for a heterogeneous world was wellnigh impossible? The latter was probably the right explanation. The Commission did legislate, of course, but the instruments it produced could not serve as a yardstick against which the activities of States could be measured with certainty. In other words, it engaged in codification, which led to the freezing of developments through customary law without the certainty it was supposed to offer in order to offset the loss of pragmatism and creativity that were part of customary law.

46. Secondly, the trading activities of States were nothing new. In the topic under consideration, the extreme richness of court decisions, administrative practices and municipal legislation contrasted with the total absence of decisions by international courts and a relative scarcity of diplomatic practice. There was no reason why that trend should suddenly be reversed. It was extremely unlikely that there would be many international court decisions or arbitrations, but it was very likely that national courts and legislators would produce more cases and laws pointing in two opposite directions—a restrictive approach in some countries and an absolute one in others. The raison d'être of codification was precisely to arrest processes that could lead to legal uncertainty. If the draft were expressly to relegate itself to a place of secondary importance, such uncertainty might ensue.

47. Thirdly, it had been argued that, since it was difficult to draw a distinction between *acta jure imperii* and *acta jure gestionis* in such a way as to arrive at a clear dichotomy, and also difficult to achieve world-wide agreement

among States concerning the exact dividing line between immunity and non-immunity, a grey area should be expressly recognized and left for subsequent regulation.

48. Problems of that kind were common to all drafts and any set of rules carried within it the seeds of its own destruction, but only an unwise draft would deliberately plant the seeds of its own ineffectiveness.

49. On the basis of those considerations, he was not in favour of retaining the words in square brackets in article 6. The furthest he would go in that regard was to agree to the suggestion by the Government of Spain for the inclusion in the preamble to the future convention of a paragraph reading:

> "*Affirming* that the rules of general international law continue to govern questions not expressly regulated in this Convention" (A/CN.4/410 and Add.1-5).

In a commendable effort at compromise, the Special Rapporteur had suggested the deletion of the words in square brackets and the inclusion in the draft of a new article 6 *bis* (A/CN.4/422 and Add.1, para. 17), and had invited members of the Commission to indicate their preference as between the Spanish suggestion and the new article. He personally preferred the Spanish suggestion because he doubted that article 6 *bis* stood much chance of approval by those in favour of the restrictive approach and he agreed with Mr. Reuter (2115th meeting) that, since a State favourable to the theory of absolute immunity would always raise objections, the new article was only a "temporary gift".

50. He agreed with Mr. Tomuschat (2116th meeting) on the need to study the relationship between article 7 (Modalities for giving effect to State immunity) and article 2 and also endorsed the drafting suggestions made by Mr. Al-Qaysi (*ibid.*, para. 43). As to article 8 (Express consent to the exercise of jurisdiction), he agreed with the amendment proposed by the Special Rapporteur in subparagraph (*c*) (A/CN.4/415, para. 93). With regard to article 9 (Effect of participation in a proceeding before a court), he had the same question as Mr. Al-Qaysi, namely whether a mistaken waiver could be corrected when the State invoking jurisdiction had itself instituted the proceedings. Such a situation, while most unlikely, was not inconceivable. In article 10 (Counter-claims), he welcomed the incorporation of the amendment suggested by the Government of Thailand as a new paragraph 4 (*ibid.*, para. 107).

51. As to part III of the draft ([Limitations on] [Exceptions to] State immunity), he agreed that the importance attached to the issue of the title, which had proved so controversial, had been disproportionate.

52. In article 11 (Commercial contracts), which he had already touched on in connection with articles 2 and 3, the use of the words "by virtue of the applicable rules of private international law", in paragraph 1, seemed to be based on the assumption that the choice of applicable law and the choice of jurisdiction were the same. Since that was not necessarily so, he would be grateful for further explanations by the Special Rapporteur. He also noted that, in the proposed new article 2, paragraph 3, the Special Rapporteur used the term "agreement" rather than "contract" when both parties to the instrument in question were States. That seemed to be the correct interpretation; but it would then follow that article 11, paragraph 2 (*a*), could be deleted, since a commercial contract (or agreement) between States on a Government-to-Government basis would in any event enjoy immunity from jurisdiction. He welcomed the Special Rapporteur's comment that the rules of private international law "often require some form of territorial connection" (*ibid.*, para. 116).

53. The proposed new article 11 *bis*, on segregated State property (*ibid.*, para. 122), had obvious merits, since it limited the abuse of domestic judicial proceedings against foreign States by distinguishing between the State itself and a State enterprise with segregated property. The examples cited by Mr. Shi were a reminder that the issue could not be overlooked. A question of principle that might arise was whether the draft should expressly make provision for an institution found only in one group of States. Ideally, that should not be done, but in an instrument intended for world-wide use it was important to arrive at a fair and equitable solution and he had no doubt that such would be the case if article 11 *bis* were adopted. The exact wording of the article should be left to the Drafting Committee.

54. Mr. AL-QAYSI said that he wished to conclude his observations on the topic by commenting on articles 21 to 28.

55. With regard to article 21 (State immunity from measures of constraint), he agreed with the Special Rapporteur's recommendation that the words "or property in which it has a legally protected interest" in square brackets be deleted, not only—as had already been stated—because their meaning was unclear, but also for the reasons set out in paragraph (4) of the commentary to the article, which stated:

> . . . the interest of the State may be so marginal as to be unaffected by any measure of constraint; or the interest of the State, whether an equity of redemption or reversionary interest, may by nature remain intact irrespective of the measure of constraint placed upon the use of the property.[5]

He also agreed with the Special Rapporteur that the term "non-governmental" in square brackets should be deleted. For the reasons advanced by the Government of Qatar, he agreed with the suggestion that the words "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed", in subparagraph (*a*), should be deleted.

56. As for article 22 (Consent to measures of constraint), he agreed with the Special Rapporteur that the words "or property in which it has a legally protected interest", in square brackets in paragraph 1, should be deleted for the reasons stated in connection with article 21.

57. In article 23 (Specific categories of property), he was in favour of deleting the term "non-governmental" in square brackets in paragraph 1, but he was not sure exactly what wording the Special Rapporteur was recommending for paragraph 1 (*c*). In his preliminary report (A/CN.4/415, paras. 239-240), the Special Rapporteur proposed the addition of the words "and serves monetary purposes" to that subparagraph and the reformulation of paragraph 2; in his second report (A/CN.4/422 and Add.1, para. 45), he proposed that paragraph 1 (*c*) be reformulated and that paragraph 2 be deleted, going on to suggest (*ibid.*, para. 46) that article 21 be modified accordingly, but then again

[5] *Yearbook . . . 1986*, vol. II (Part Two), p. 18.

proposing (*ibid.*) the addition of the words "and serves monetary purposes" to the end of paragraph 1 (*c*).

58. How exactly did matters stand? He was in favour of the addition to paragraph 1 (*c*) proposed by the Special Rapporteur, but was not sure whether paragraph 2, as redrafted in the preliminary report, was to be retained or deleted. If it were retained, as presumably was the Special Rapporteur's intention, then the proposals made in paragraph 45 of the second report would have to be modified. But there was another puzzle that needed resolving. The Special Rapporteur had clearly indicated that he was proposing a redraft of paragraph 2 in response to the comments made by the German Democratic Republic. In that connection, it should be noted that the German Democratic Republic gave as the reason for its proposal the fact that paragraph 2 as adopted on first reading would annul the special precautionary measure in question. He failed to see the logic of that reasoning in view of the commentary to article 23, which stated that the specific categories of property listed in paragraph 1 (*a*) to (*e*) were to be protected unless the State had allocated or earmarked the property or had specifically consented to the taking of measures of constraint.[6] In both cases, the consent of the State in question—implied in the former case, express in the latter—formed the basis for lifting the special protection. Why should such consent be considered a negation of protection? Even more surprising was the text of paragraph 2 as reformulated by the Special Rapporteur in response to the comments of the German Democratic Republic. The proposal was that, "notwithstanding the provisions of article 22"—in other words, notwithstanding the express consent of the State—the special protection of the categories of property listed in paragraph 1 could be lifted only when such property had been allocated or earmarked by the State in question for the satisfaction of the claim which was the object of the proceeding. Did that mean that express consent would not matter unless it was coupled with implied consent through allocation or earmarking? If so, he was unable to agree with such reasoning and preferred the wording of paragraph 2 as adopted on first reading. The only changes that needed to be made in article 23 were to delete the term "non-governmental" in paragraph 1 and to add the words "and serves monetary purposes" to paragraph 1 (*c*).

59. With regard to article 24 (Service of process) and article 25 (Default judgment), he shared Mr. Shi's view (2115th meeting) that the words "if necessary" in paragraphs 3 and 2 of those articles, respectively, should be deleted. He also agreed with the recommendation made by the Special Rapporteur in response to the comments of the United Kingdom and the Federal Republic of Germany that paragraph 2 of article 27 (Procedural immunities) be amended so as to apply only to a defendant State. In view of the doubts he had already expressed (2116th meeting) about the workability of the new draft article 6 *bis*, he considered that article 28 (Non-discrimination) had a place in the draft.

60. Lastly, noting that the Special Rapporteur had referred to the possibility of including a part VI of the draft on the settlement of disputes, he agreed with Mr. Shi that now was not the time to do so. If the draft articles were to take the form of an international convention, it would be the task of the diplomatic conference to look into that matter.

61. Mr. OGISO (Special Rapporteur), referring to article 23, said that the only amendment he was proposing related to paragraph 1 (*c*) and was to add the words "and serves monetary purposes"; paragraph 2 would remain unchanged.

62. Mr. AL-QAYSI thanked the Special Rapporteur for that explanation, which did not, however, entirely meet the point he had raised in connection with paragraph 2. He would look forward with interest to the Special Rapporteur's summing-up of the debate.

63. Mr. TOMUSCHAT said that, unlike several of the speakers who had preceded him, he was not in favour of the deletion of article 12, which he thought was useful and fully justified. Evidence for that position could be found in a judgment of the Swiss Federal Tribunal of 22 May 1984. The embassy of an Asian country in Bern had hired an Italian national in 1958 to serve as a radio and telex operator. That person had subsequently been entrusted with different functions, had finally been downgraded and had been dismissed in 1979—arbitrarily, according to him. In order to vindicate his rights, he had sued his employer. According to article 37, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations, since the person belonged to the service staff of the mission, he did not enjoy diplomatic immunity and did not have the status either of a diplomat or of a civil servant of the country concerned: his relationship with that country had been based on a simple work contract. It might be asked what else he could have done, other than bringing suit against the country in question, in order to assert his rights. Should he have travelled to a far-away country to institute judicial proceedings? Clearly, to deny access to local courts in such instances would amount to a denial of justice. He was convinced that the guarantee embodied in the second sentence of paragraph 1 of article 14 of the International Covenant on Civil and Political Rights would not be respected if access to a competent tribunal for the determination of "rights and obligations in a suit at law" were made excessively difficult. In the instances covered by article 12 of the draft, the local forum was the only convenient forum.

64. He could not accept the contention that the person concerned could turn to his Government to request it to bring a claim against the employer State. That option was no remedy, since, in the context of diplomatic protection, the individual's fate depended entirely on a discretionary decision of his Government. Many Governments would be reluctant to espouse the modest claim of one of their nationals against a foreign State, for fear of jeopardizing their relations with that State. If the Commission wished to remain faithful to the basic idea that an individual who considered that his rights had been violated should have an effective remedy, it must acknowledge the jurisdiction of local courts.

65. As to the exceptions provided for in paragraph 2 of article 12, they deserved close scrutiny. In paragraph 2 (*c*), for example, the decisive date should not be that of the contract of employment: in the example he had just given, the employee had been hired 21 years before the dismissal decision had been taken!

[6] *Ibid.*, p. 20, para. (7) of the commentary.

66. He also preferred the adopted text of article 13, for, as he had just said in connection with article 12, enabling a person who believed that he had suffered damage as a result of the actions of a foreign State to appeal for a judicial remedy was the simplest and most effective way of settling the matter. Why should a foreign State, because it enjoyed immunity, be able to evade responsibility for the acts of its agents in another country? Those agents were required to respect local laws and regulations: if they did not, why should the affected individual be put in a situation which amounted to a denial of justice? There again, giving such an individual the option of bringing a suit before the courts of another State was not a real solution.

67. He did not think, however, that the requirement that the author of the act must have been present in the territory of the forum State should be deleted. It was not enough to stipulate that the damage must have occurred in the territory of the forum State—or, as the Special Rapporteur was proposing, that the act or omission must have occurred in the forum State: that would be to enlarge the scope of article 13 unduly. Under the doctrine of extraterritorial jurisdiction, acts and their effects were seen as an inseparable whole. There was a basic difference between the situation where a foreign State acted within its borders, exercising the full range of its sovereign power, and one where agents of a foreign State acted in the territory of the forum State. No State was sovereign in the territory of another State and its agents were bound always to respect local laws: territorial sovereignty always prevailed, except as otherwise agreed. If it were enough that the damage had occurred in the forum State, the entire problem of transboundary air pollution could be settled in a unilateral fashion by the domestic courts of one of the States involved. That was not a viable dispute-settlement model, however, and that was why transboundary harm gave rise to international disputes that had to be settled in the traditional ways listed in Article 33 of the Charter of the United Nations. On that point, he shared the views expressed by Mr. Calero Rodrigues.

68. He agreed with the Special Rapporteur that the text of article 14 should be radically simplified. Paragraph 1 (*a*) was unnecessarily complicated for the expression of a very simple idea, namely that actions concerning immovable property should be able to be heard by the courts of the country where such property was located. The Commission might adopt the wording of article 31, paragraph 1 (*a*), of the 1961 Vienna Convention on Diplomatic Relations, which referred to an action "relating" to immovable property situated in the territory of the receiving State. In many legal systems, the reference to an "interest" in immovable property might be confusing. As a matter of principle, a universal treaty should never bear the hallmark of a single legal system. Paragraph 2 of article 14 should be deleted: immunity should never be invoked in a case against a private individual.

69. Referring to article 18, he said that, before hearing Mr. Mahiou's statement, he had thought that all members of the Commission supported the deletion of the term "non-governmental" throughout that provision. The term brought the number of different categories of ships to four and made the provision too complicated to be easily applied.

70. Article 19 was a difficult text, but its provisions were extremely important. The underlying idea was that, if a State and a foreign natural or juridical person had agreed to settle their differences by way of arbitration, neither of the parties must be allowed to obstruct the arbitral proceedings at a later stage in order to prevent the award from being recognized or enforced. If at that stage the foreign State could invoke its immunity, the entire arbitral process might be rendered nugatory. That was the idea that must be clearly expressed in the text by referring specifically, as the Government of Qatar had proposed, to the recognition and enforcement of the award.

71. With regard to article 20, some members of the Commission held that no claim relating to measures of nationalization should be entertained. It was true that, when a State nationalized private property, it was making use of its sovereign powers. But article 20 did not establish a rule: it was only a disclaimer. He did not see what useful purpose it could serve and, like Mr. Mahiou, was not entirely convinced by the arguments put forward by the Special Rapporteur in his second report (A/CN.4/422 and Add.1, para. 41).

72. Article 21 protected private property to an extent that was wholly unjustified. He took by way of an example the building in New York where his country's mission to the United Nations rented a floor. Should that entire building be immune from any measures of constraint because the Federal Republic of Germany had a legally protected interest in it in the form of a rental contract? Article 21 as it now stood could give that impression. There was, however, no justification for creating such obstacles to normal business relations. Measures of constraint should be excluded only if the enjoyment of its rights by a foreign State was affected, and that was certainly not the case in the example he had given. He therefore agreed with the Special Rapporteur's proposal to delete the words in square brackets in the introductory clause. The same comment held true for the reference to possession or control: measures of constraint should be excluded only if they might affect possession or control. The scope of the article should therefore be reduced and measures of constraint be excluded only if they might affect the foreign State's exercise of its rights.

73. Mr. REUTER said he agreed that articles 1 to 11 should be referred to the Drafting Committee, together with the proposed new article 11 *bis* (A/CN.4/415, para. 122) and some of the subsequent articles.

74. With regard to article 12, he was on the whole in favour of the proposals by the Special Rapporteur (*ibid.*, para. 133), even though the article was still not entirely satisfactory.

75. He was somewhat perplexed by article 13, including the proposed new paragraph 2 (*ibid.*, para. 143). While it went without saying that personal injury or damage to property would give rise to claims for compensation, it was difficult to determine the rules of law whose violation might be advanced as the reason for such claims. Mr. Tomuschat was convinced that it was the rules of national law, and the case of automobile accidents was often mentioned in that regard. If that was the interpretation to be given to the article, however, then the new paragraph 2 was unnecessary. Perhaps the provision should be interpreted more broadly as applying to acts or omissions that constituted a violation of the rules of international law: in that case, a reference to those rules would be justified. In positive international law, however, the only remedy available to the victim of a

violation of international law committed by a foreign State was to request the State of which he was a national to take action in the context of diplomatic protection—something that that State might well refuse to do, as Mr. Tomuschat had just pointed out. It was therefore necessary to know whether the intention in the article was to give individuals who had suffered damage or injury the right to act directly against the foreign State to which the damage or injury could be attributed. That was, of course, a laudable approach, but it had every chance of remaining entirely theoretical. Nevertheless, if such was the purpose of the provision, paragraph 2 should be amended and, in that connection, the proposal by Spain would either go too far or not go far enough. To be perfectly clear, it should be expressly stated that, if an individual did not enjoy adequate protection and had not obtained satisfactory results through the normal channels of public international law, he could take direct action. That solution was defensible from the theoretical standpoint, for it was possible to argue, in line with the decision in the *Société européenne d'études* case, that when a State submitted a claim to secure the diplomatic protection of its nationals, it did so in order to obtain compensation for damage it had suffered itself. In any case, the Commission should review article 13, decide on the approach it wished to adopt therein and amend the text accordingly.

76. In article 14, the link between the property in question and the territory of the State of the forum should be specified in paragraph 1 (*b*) and the word "interest" should be deleted for the reasons given by Mr. Tomuschat; failing that, the word should be replaced by an expression which did not come from the vocabulary of the common law.

77. It should be made clear whether the subject of article 16 was duties, taxes and other similar charges in general or exclusively those relating to an activity or property that did not enjoy immunity. As to article 17, it would be better not to use terms from the sphere of private international law in paragraph 1 (*b*). A more general formulation stressing the links between the company and the territory of the State of the forum might be preferable.

78. A great deal of time and effort had gone into the formulation of article 18 and it was difficult to express an opinion on it without a detailed knowledge of maritime law. As to the proposed deletion of the term "non-governmental", he could see why reference might be made to the concept of purpose or object to describe certain operations, situations or entities, but believed that precision was necessary. While it was perfectly understandable, as Mr. Mahiou had suggested, that, in certain exceptional circumstances, ships should enjoy a broader form of immunity, those circumstances should be spelled out. In any case, the Commission was obliged to reconsider the article in the light of the comments made by the Federal Republic of Germany and the United Kingdom, among others.

79. Article 23, paragraph 1 (*c*), should be made more specific, for it could not be said that all the property which a State placed in banks in the territory of another State was used for commercial purposes. The property in question was the type of deposits that played a particular role as monetary guarantees in the context of the international banking system. A special definition for such deposits was probably common in banking circles.

80. In conclusion, he said that the draft articles called for a number of general comments, which applied to the new draft article 11 *bis* as well. The texts proposed by Mr. Shi (2115th meeting, para. 24) and Mr. Barsegov (2117th meeting, para. 1) for that article were not without merit, but he had some reservations about them. It had already been stated that the entire set of articles should enunciate rules of international law that did not yet exist, as demonstrated by the fact that the various opinions expressed primarily reflected national interests. Of course, he understood why States might want immunities that were as strict as possible, but, on hearing the advocates of the theory of absolute immunity, he wondered whether they were not primarily concerned about the problems raised by intervention. As soon as civil or commercial—in others words, contractual—matters came into play, there was a struggle to gain the power bestowed by the law: if a State were granted immunity, that would mean that only the courts of that State had jurisdiction and that only its legal system, including its basic legislation, would be applicable. Small States wanted to protect themselves, and that was perfectly understandable, but the issue was primarily one of intervention. As Mr. Bennouna (2117th meeting) had pointed out, the balance of power had to be borne in mind, even if many contracts concluded in respect of raw materials showed that countries which were weak, or which believed they were, were capable of suddenly becoming strong.

81. It was interesting to note that, so far, no one had stated that the rules to be formulated must be peremptory and absolute: he would have done so if he had had time to make comments on article 28. In any event, however, it was always the more powerful of the two parties involved that would decide whether immunity should be granted or not, whether its own courts had jurisdiction and, consequently, whether its own law was applicable. That was why he feared that the text that would finally be adopted, through sheer weight of numbers or political influence, both in the Commission and in the Sixth Committee of the General Assembly, would be highly unsatisfactory. The real rules of international law were common rules, such as those worked out in CMEA or EEC. Whatever reservations there might be with regard to international arbitration and the problems to which it could give rise, it did point to the course to be followed, for the future lay in genuine joint international legislation. The Commission should reconsider the topic in that light as soon as possible.

The meeting rose at 1 p.m.

2120th MEETING

Friday, 16 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey,