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Summary record of the 2160th meeting

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"3. These documents shall be accompanied by a translation into the official language, or one of the official languages, of the State concerned, or at least by a translation into one of the official languages of the United Nations in use in that State."

That formulation might go some way towards meeting the concerns expressed by Mr. Tomuschat at the previous meeting.

47. The proposed addition at the end of paragraph 1 of article 25 of the phrase "and if the court has jurisdiction in accordance with the present articles" was commendable. It was judicious to make it a general provision that, when a State chose not to appear, courts should investigate their competence under the present articles before rendering a default judgment.

48. With regard to article 27, he preferred the text adopted on first reading to the new text suggested by the Special Rapporteur. He did not see why exemption from the requirement to provide any security, bond or deposit should be restricted to the defendant State. In his view, the plaintiff State should also enjoy that exemption.

49. He had no objection to article 28, which definitely had a place in the draft articles.

50. In conclusion, he said he hoped that the Drafting Committee would be given adequate time to consider the draft articles it had before it and that the Commission would be able to complete the second reading of the draft articles during the term of office of its current members.

51. Mr. GRAEFRATH, reviewing the proposals concerning articles 12 to 28 made by the Special Rapporteur in his third report (A/CN.4/431), said that the second alternative for paragraph 2 (*a*) of article 12 was more acceptable than the text adopted on first reading. As for paragraph 2 (*b*), he was convinced of its importance and of the need to retain the word "recruitment". It was not acceptable for the forum State to be able to compel a foreign State to recruit a particular person.

52. He again suggested that article 13 should either be deleted or that its scope should be limited to compensation arising from traffic accidents, as the Special Rapporteur himself had suggested in his second report. The text of the article was in complete contradiction with article 31 of the 1961 Vienna Convention on Diplomatic Relations, because mostly persons enjoying diplomatic immunities would be involved.

53. Concerning article 14, he supported the Special Rapporteur's suggestion to delete subparagraphs (*c*), (*d*) and (*e*) of paragraph 1.

54. With regard to article 18, he noted that the problems raised could not be solved by a mere referral to draft article 11 *bis*. An article that covered both State-owned and State-operated ships engaged in commercial service, as did article 18, failed to take account of legal systems in which State-owned ships could be operated for commercial purposes by independent legal entities. Since the article referred only to commercial activities, only State-operated ships should be taken into account. An examination of the relevant conventions cited in the third report revealed that they generally mentioned both the owner and the operator only when they dealt with ships used in non-commercial government service. When they dealt with ships used strictly for commercial purposes, only the operator was mentioned.

55. He had serious doubts about the Special Rapporteur's proposal to add a new subparagraph (*d*) to article 19, under which a State could not invoke immunity from jurisdiction in a proceeding relating to recognition of an arbitral award. Such a provision might even be dangerous, for it might lead States to question the binding nature of the arbitration procedure.

56. Article 20 did not belong in an instrument on jurisdictional immunities and should be deleted.

57. In the proposed new article 21, on State immunity from measures of constraint, 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 paragraph 1 (*c*), should be retained; otherwise, measures of constraint might be taken against any property of a foreign State if it was used for commercial purposes.

58. Article 25 should be worded most carefully. In particular, it could not be presumed that the various documents mentioned in the article had been received. Like Mr. Tomuschat (2158th meeting), he believed the court could not issue a default judgment against a State until it had examined *ex officio* the question of the sovereign immunity of that State. In fact, courts should be bound in all cases to verify whether or not State immunity excluded their competence and a provision to that effect should be included in the draft articles. Since such a provision was a general one that went beyond the framework of article 25, it might be included in article 7, which dealt with modalities for giving effect to State immunity.

59. Lastly, he suggested that article 28, which was superfluous at the very least, should be deleted.

The meeting rose at 11.25 a.m. to enable the Drafting Committee to meet.

2160th MEETING

Friday, 18 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/415,[1] A/CN.4/422 and Add.1,[2] A/CN.4/431,[3] A/CN.4/L.443, sect. E)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

1. Mr. McCAFFREY said that the Special Rapporteur had once again, in his third report (A/CN.4/431), responded to the discussion in the Sixth Committee of the General Assembly and in the Commission of the draft articles adopted on first reading and the various alternatives already submitted in previous reports.

2. He endorsed the proposal to change the expression "commercial contract" to "commercial transaction" in the new text proposed for article 2, as well as the consequential change in article 11. He also supported the merging of articles 2 and 3 as adopted on first reading, for he had always been mystified by the distinction between articles on "Use of terms" and on "Interpretative provisions". "Commercial transaction" was a broader expression and covered cases in which there was no formal contract under the law applied by the court of the forum State. In any event, the definition of a commercial contract in paragraph 1 (*b*) (iii) of article 2 as adopted on first reading broadened the notion so far as to make it almost equivalent to the expression "commercial transaction" as defined.

3. The text proposed for paragraph 2 of article 2 represented a commendable effort at a compromise between the "nature" test and a more "purpose-oriented" test for the determination of what a commercial transaction was. But the new text still begged the question of the relevance of an asserted governmental purpose of a transaction which was by its nature commercial. Any reference to purpose merely confused the issue.

4. The Special Rapporteur's proposal to delete the words in square brackets in article 6 depended ultimately on the final content of the entire draft, especially parts III and IV. Therefore both the Commission and the Drafting Committee should defer any decision until that content was clear. At the previous session, he had suggested that the forum court should *ex officio* satisfy itself that the requirements of the present articles were met before allowing a case to proceed. He agreed with Mr. Graefrath (2159th meeting) that the place for such a provision would be in article 7.

5. With regard to article 12, while it was true, as the Special Rapporteur had said in his oral introduction (2158th meeting), that legislation in the United States of America contained no specific provision on contracts of employment, there was no doubt that such contracts were covered by the general commercial-activity exception in section 1605 (*a*) (2) of the *Foreign Sovereign Immunities Act of 1976*. The legislative history of the Act made that point clear. Contracts of employment were not mentioned simply because the entire approach was different from that taken in the present draft.

6. As to whether the exception to State immunity contained in article 13 should be retained, he would reiterate his conviction that the provision was essential. Without it, an injured individual would as a practical matter be without remedy, for in nearly all cases of personal injury and damage to property diplomatic protection would probably be unavailable. As a matter of international human-rights law, individuals must have some effective recourse. It was hard to understand Mr. Graefrath's point that the article was meaningless because all States that had ratified the 1961 Vienna Convention on Diplomatic Relations would be considered to have "otherwise agreed" under the terms of the article. Although that Convention provided for various immunities for diplomatic and consular premises and personnel, it contained nothing to make a foreign State immune from the courts of the State of the forum itself with respect, for example, to actions arising out of commercial contracts between the former State and a private person, or out of torts. That was precisely why the present articles were needed.

7. The Commission should not accept the proposal to delete subparagraphs (*c*), (*d*) and (*e*) of paragraph 1 of article 14 without thinking through the effects of such a deletion. Since the cases in question did not seem to be covered by other, more general provisions, the Commission should either retain the subparagraphs or add some such general provisions; there should certainly be no immunity in the cases covered in the subparagraphs.

8. The proposed addition to subparagraph (*a*) of article 15 and the suggestion to add a new subparagraph to article 19 reading: "(*d*) the recognition of the award" met with his approval.

9. The title of part IV of the draft might be altered to "Jurisdictional immunities of States in respect of their property", which would be clearer and much closer to the title of the topic. It was not certain that the expression "measures of constraint" in the present title of part IV really covered execution, which went well beyond constraint.

10. As to the Special Rapporteur's proposal to combine articles 21 and 22, the Commission must decide whether execution should be allowed whenever there was jurisdiction over the foreign State. If the answer was in the negative, the Commission was really saying that it thought an injured party should be able to sue the foreign State responsible, but that that State should not have to comply with any judgment rendered against it, something that seemed unsatisfactory from both a legal and a moral perspective. His basic position, therefore, was that there should be no requirement of a link between the claim and the property against which execution was sought. Because of the way the law in that area had developed, the extent of immunity of State property from execution in some régimes was different from the extent of State immunity

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

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

[3] Reproduced in *Yearbook ... 1990*, vol. II (Part One).

[4] For the texts, see 2158th meeting, para. 1.

from jurisdiction. If the Commission wanted to maintain that difference, it should consider the requirement of a link. But it was often hard in practice to establish a link, as Mr. Tomuschat (2158th meeting) had pointed out, especially where money was involved. A court might well simply decide that a property or a bank account was being used for commercial purposes if it was not clearly earmarked otherwise.

11. United States legislation followed a two-track approach on the question of linkage, treating the property of State agencies and instrumentalities differently from other State property. If a judgment was against an agency or instrumentality engaging in commercial activities in the United States, it might be executed against any of the property of that agency or instrumentality, whether commercial or non-commercial, provided that the judgment related to a claim for which the agency or instrumentality was not immune. But other property of a foreign State was available for execution if used for the commercial activity on which the claim was based. There were thus many cases in which a plaintiff could obtain a judgment against a foreign State without being able to execute the judgment. Hence the problem of the United States approach was that it might permit the exercise of jurisdiction against a foreign State but not permit execution of the resulting judgment.

12. The Special Rapporteur's proposed textual changes to articles 21 to 23 were generally acceptable as a way of simplifying the texts. With reference to paragraph 1 (*c*) of the new article 21, he had just given his views on the question of linkage, and the Commission might want to consider introducing some of the kinds of nuance contained in United States or other legislation. However, he was not sure what it meant to say that property "has a connection with the . . . agency or instrumentality against which the proceeding was directed", although that formula had been adopted on first reading in subparagraph (*a*) of article 21. He agreed with Mr. Tomuschat that the proposed new article 23 might not be necessary, but the Commission should await the final definition of the term "State" in article 2 and the ultimate fate of draft article 11 *bis*.

13. He agreed with other members that article 26 needed clarification. If the only purpose was to protect States from "monetary penalties", it could be achieved in a much more direct way. The present wording would certainly not bar the issuance of an injunction against a foreign State, at least to the extent allowed under article 21.

14. Mr. BENNOUNA congratulated the Special Rapporteur on his third report (A/CN.4/431), which would greatly facilitate the adoption of the draft articles on second reading. He was optimistic about the future work on the topic, for it was proceeding along the right lines, i.e. on the basis of compromise. Articles 1 to 11 and the new draft articles 6 *bis* and 11 *bis* were already before the Drafting Committee, and the Commission should await the outcome of the Committee's work before commenting further on them.

15. The second alternative proposed by the Special Rapporteur for paragraph 2 (*a*) of article 12 was acceptable, since it endeavoured to make the same content clearer and might provide a way out of the difficulty. He endorsed Mr. Mahiou's comment (2159th meeting) about the word "recruitment", now placed in square brackets in paragraph 2 (*b*). Since the State's discretionary power was total, jurisdictional recourse should not be permitted. In other words, the Commission should not exclude immunity with respect to recruitment.

16. Article 13 would probably cause problems in the Drafting Committee, because it contained a number of related notions whose difficulties could not be avoided. In particular, as Mr. Graefrath (*ibid.*) had pointed out, there was the problem not only of immunity, but also of diplomatic protection. The danger was that, by adopting too broad an article, the Commission might deprive immunity of its content and perhaps also jeopardize some aspects of diplomatic protection. The article spoke only of the State, not of diplomats, and of an act or omission "attributable to the State", a distinction that must be made clear. *A priori*, he was in favour of retaining the article, subject to the comments just made. Diplomatic protection in itself was not sufficient because, in the end, it depended on the good will of States. Individuals must have a means of recourse to protect their fundamental human rights.

17. He agreed with the Special Rapporteur's suggestion to delete subparagraphs (*c*), (*d*) and (*e*) of paragraph 1 of article 14, which were based on the common law. That would help the Commission to arrive at a consensus.

18. In article 15, the Special Rapporteur had taken account of certain views expressed both in the Sixth Committee of the General Assembly and in the Commission and had made a commendable effort to enlarge the notion of intellectual property by including a reference to plant breeders' rights and rights in computer-generated works in subparagraph (*a*). Personally, he was not opposed to that proposal, but wondered whether the two items in question could be said to be exhaustive and whether it would not be preferable simply to refer to them in the commentary rather than to cite them expressly in the text. It could, however, be left to the Drafting Committee to arrive at an appropriate formula.

19. He would have no objection to deletion of the bracketed term "non-governmental" in paragraphs 1 and 4 of article 18, provided that the meaning of the expressions "in commercial service" and "for commercial purposes" was made quite clear in the commentary and that it was explained that, if a ship was engaged on a government mission, the immunity would revive.

20. The Special Rapporteur's proposal that article 20 should be deleted also enlisted his support, since it would avoid a discussion on nationalization; in any event, the article had no place in the draft.

21. The proposal to simplify the texts of articles 21 and 22 by combining them in a single new article 21 was welcome. The phrase in square brackets in paragraph 1 (*c*) of the new article should be retained, for it provided a necessary link with the object of the claim, or with the agency or instrumentality against

which the proceeding was directed. That phrase would avoid confusion between different institutions that were autonomous, each of which being accountable for its own management. That, of course, was the theory of segregated property, which should also apply under the new article 21.

22. With regard to article 25, he fully agreed with Mr. Tomuschat (2158th meeting) that it should be made clear, in the Drafting Committee, that it was for the court of a State to raise the question of jurisdictional immunity on its own initiative, and that a foreign State was neither obliged nor required to appear before any court in the world to plead such immunity. That would provide States with the necessary protection and have the added advantage of avoiding the heavy legal costs they would otherwise incur.

23. In connection with article 27, the Special Rapporteur suggested that the provision in paragraph 2 on the non-requirement of security should apply solely to the defendant State. At first sight that suggestion seemed to have a certain logic, in so far as it was the plaintiff State that decided to bring a case before the courts and that could thus be said to submit, unlike the defendant State, to the same rules as those applying to any other plaintiff.

24. He had already spoken in favour of the deletion of article 28, but noted that the Special Rapporteur suggested that it be re-examined when all the other articles in the draft had been reviewed. He continued to believe, however, that the article would be dangerous for the existing balance with respect to treaties.

25. Lastly, it was gratifying to see that the Commission was moving forward in a spirit of compromise which alone would enable something tangible to be achieved on a difficult topic.

26. Mr. SEPÚLVEDA GUTIÉRREZ expressed appreciation to the Special Rapporteur for his third report (A/CN.4/431), which would facilitate the Commission's further work on the topic.

27. Commenting specifically on articles 12 to 28, he said that article 12 should be retained, as it would provide employees with protection. He agreed with the Special Rapporteur that the reference in paragraph 1 to the social-security requirement should be deleted. The second alternative of paragraph 2 (*a*) called for further discussion, while the deletion of paragraph 2 (*b*) seemed advisable, as it would help to clarify the provision.

28. Although some members of the Commission were in favour of deleting article 13, after careful reflection he had come to the conclusion that, to facilitate adoption of the article, it should be limited to damage caused by traffic accidents.

29. The Special Rapporteur was right to propose retaining article 14, subject to the deletion of subparagraphs (*c*), (*d*) and (*e*) of paragraph 1, for the reason given in the comments on the article in his report.

30. The text proposed for article 15, including the reference to plant breeders' rights in subparagraph (*a*), was acceptable. The nature and scope of those new rights, which were a hallmark of progress, should, however, be made clear in the commentary. The same applied to rights in computer programmes and semiconductor-chip layouts, which once again involved new subjects.

31. He agreed that the text of article 16 would be improved if the words "State" and "another State" were replaced by "foreign State" and "forum State", respectively. Furthermore, he would have no objection to retaining article 17 subject to the minor drafting amendments suggested by the Special Rapporteur.

32. The bracketed term "non-governmental" in paragraphs 1 and 4 of article 18 should indeed be deleted. He did not, however, concur with the recommendation that a new subparagraph, reading: "(*d*) the recognition of the award", should be added to article 19, and he preferred the text of the article adopted on first reading.

33. Article 20 dealt with a very sensitive matter—nationalization—and should therefore be removed from the draft as it would only give rise to controversy; in any event, the wording left much to be desired.

34. Combining articles 21 and 22 in a single new article 21 was a wise suggestion and acceptable as a matter of good legal technique. However, as already pointed out, it would be advisable to cover legally protected interests while, at the same time, deleting the phrase in square brackets in paragraph 1 (*c*) of the new text, "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed". The provision, given its importance, should be considered very carefully in the Drafting Committee.

35. The new article 22 (formerly article 23) should be retained. On the other hand, the new article 23 should be deleted or, if retained, be held in abeyance until article 11, on commercial transactions, had been carefully examined to ascertain the links between the two provisions.

36. Article 24 was superfluous and should be deleted.

37. He agreed with the Special Rapporteur with regard to article 25, and considered that a separate paragraph should be included to provide that it was for the court to ascertain whether it had jurisdiction. Mr. McCaffrey had spoken at some length on that point and he would not repeat the arguments advanced.

38. Lastly, article 28 should be deleted or at least be the subject of careful revision.

39. Mr. AL-BAHARNA, congratulating the Special Rapporteur on his third report (A/CN.4/431), said that the frequent revisions in the draft articles had caused him to alter his own position since the previous session.

40. With regard to article 12, the provisions which the Special Rapporteur, in his preliminary report, had suggested deleting had been restored and now appeared in square brackets in paragraph 1 and paragraph 2 (*a*) and (*b*) of the proposed text. Upon reflection, he himself had come to the conclusion that the reference to social security provisions in paragraph 1 was unnecessary, since several countries had no such provisions. As to paragraph 2 (*a*), he supported the first alternative, reading: "(*a*) the employee has been recruited to

perform services associated with the exercise of governmental authority", but not the second. Paragraph 2 (*b*) should be retained, for he was inclined to agree with the Special Rapporteur's statement in paragraph (4) of his comments on the article that "if immunity could be invoked in proceedings relating to recruitment, renewal of employment or reinstatement, little would remain to be protected by the local court".

41. The Special Rapporteur had withdrawn the changes he had proposed earlier for article 13, and was now recommending the text as adopted on first reading. That was acceptable, subject to the addition of a clause to the effect that the article applied to injuries or losses arising out of traffic accidents. Also acceptable was the Special Rapporteur's suggestion that subparagraphs (*c*), (*d*) and (*e*) should be deleted from paragraph 1 of article 14.

42. The terms of article 15 had been enlarged to cover plant breeders' rights and rights in computer-generated works, additions which unduly extended the scope of the protection offered and thereby restricted the immunity principle. Unless it was absolutely essential, the Commission should be wary of extending the scope of the article, although he retained an open mind on the issue.

43. The changes proposed for the wording of articles 16 and 17 were acceptable. Furthermore, he agreed that the bracketed term "non-governmental" should be deleted from paragraphs 1 and 4 of article 18.

44. In article 19, the expression "commercial contract" was more precise in meaning and scope and therefore preferable to "civil or commercial matter". The proposed new subparagraph (*d*), however worded, should not be retained, since recognition of an arbitral award was a first step towards execution, which required the express consent of the State concerned. In the last part of the introductory clause, the phrase "before a court of another State which is otherwise competent" was clearer than the alternative formula referred to by the Special Rapporteur in paragraph (3) of his comments on the article.

45. Article 20 should indeed be deleted, since the question of nationalization was far too complex to be dealt with in such a manner.

46. In paragraph (5) of his comments on articles 21 to 23, the Special Rapporteur expressed the view that "limited execution rather than its total prohibition would have a better chance of obtaining general approval". Accordingly, he had proposed a revised article 21 which, in effect, withdrew the principle of prohibition set forth in the text adopted on first reading, despite the fact that, as he pointed out in paragraph (4) of his comments, several Governments had said that they were not basically opposed to that text. The Special Rapporteur thus proposed a radical departure from the balance struck between the interests of the parties concerned. Personally, he had an open mind as to whether to retain articles 21 and 22 as adopted on first reading, subject to certain changes, or to adopt the new article 21. If the original articles 21 and 22 were retained, however, he could agree to the deletion of the bracketed words "non-governmental" and "or property in which it has a legally protected interest", provided that 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 article 21 (*a*), was retained. In that way, the balance of the text adopted on first reading would be restored. In that connection, he drew attention to the text proposed for article 21 by Mexico in its comments and observations,[5] which, in his view, was a better formulation and one he would commend for adoption.

47. With regard to article 23, he wished to confirm his earlier support for the deletion of the bracketed term "non-governmental" in paragraph 1 and for the addition of the words "and used for monetary purposes" at the end of paragraph 1 (*c*). While he agreed with the principle underlying the proposed new article 23, the wording was not satisfactory and he proposed the following text:

> "A State cannot invoke immunity from measures of constraint, including measures of attachment, arrest and execution, in respect of the property of a State enterprise."

48. As to article 24, he considered the text proposed by the Special Rapporteur in his preliminary report (A/CN.4/415, para. 248) far less ambitious than that adopted on first reading; to that extent, it was no doubt welcome. He still felt, however, that something was missing in the formulation. Every State had its own rules regarding service of process, and courts attached the greatest importance to those rules. As the Governments of the Nordic countries had rightly pointed out in their comments and observations,[6] it could not be assumed that States would be willing to modify their domestic rules of civil procedure if a national ratification or accession so required. In the case of the present draft articles, it was advisable to include a clause ensuring service of process under the domestic law of the State of the forum. Article 24 should therefore include a new paragraph 1 (*a*), reading: "(*a*) in accordance with the rules of civil procedure of the State of the forum". If such a clause could not be added, he would find it difficult to accept paragraph 4 of the article, which, in its present formulation, denied the State concerned the right to seek annulment of the proceeding on the ground that it had not been duly impleaded. He was not in favour of the amendments concerning translation suggested by the Special Rapporteur and appearing in square brackets in paragraph 3 of the text submitted in his third report as a basis for consideration, for they did not adequately safeguard the interests of the State concerned.

49. He could endorse article 25, subject to the adoption of the new paragraph 1 (*a*) he had proposed for article 24 (see para. 48 above); the reference to paragraph 1 of article 24 would thus extend to paragraph 1 (*a*), (*b*) and (*c*). Similarly, he had no objection to adding the words "and if the court has jurisdiction in accordance with the present articles" at the end

[5] *Yearbook ... 1988*, vol. II (Part One), p. 76, document A/CN.4/410 and Add.1-5.

[6] *Ibid.*, p. 78.

of paragraph 1 of article 25, as suggested by the Special Rapporteur. However, for the reasons stated in connection with article 24, he was not in favour of deleting the words "if necessary" in paragraph 2.

50. He agreed with the suggestion made by the United Kingdom in its comments and observations[7] that article 26 should be reframed in such a way that the immunity which it conferred was immunity not merely from the liability to a monetary penalty if an order of the kind referred to was disobeyed, but immunity from the very possibility of having such an order made against a State. In order to reflect that view, he proposed the following text for article 26:

> "Where a State enjoys immunity in a proceeding before a court of another State, the court cannot issue any order against the State requiring it to perform or to refrain from performing a specific act."

That reformulation would dispose of the objection mentioned by the Special Rapporteur in the comments on the article in his third report.

51. He had no difficulty in accepting the addition to paragraph 2 of article 27 proposed by the Special Rapporteur in both his preliminary and his third reports.

52. Noting that article 28 was modelled on article 47 of the 1961 Vienna Convention on Diplomatic Relations and article 72 of the 1963 Vienna Convention on Consular Relations, he remarked that, while there might be a justification for such a provision to appear in those Conventions, he was not sure whether it needed to be included in the present draft. In the first place, the object of immunity was not the same in the two sets of cases: in the conventions on diplomatic and consular relations it was a diplomatic or consular agent, whereas in the present case it was the State itself. Since diplomatic and consular agents of several countries were present in the host country at a given time, it was logical that a rule of non-discrimination should be laid down; but since the matter of State immunity came before the Ministry of Foreign Affairs or the court of the forum State in one single instance, there was no need for such a rule in the present case. Secondly, the basis for immunity was not the same: whereas, in the case of the immunities of diplomatic and consular agents, it was reciprocity, in the case of State immunity it was the principle *par in parem imperium non habet*. Thus the inclusion of the principle of non-discrimination in the present articles seemed superfluous. Moreover, the qualifications in paragraph 2 of article 28 might upset the balance carefully worked out between the principle of immunity and the exceptions thereto. Thirdly, paragraph 2, which in subparagraph (*a*) referred to restrictive application and in subparagraph (*b*) to extension by agreement of the provisions of the present articles, seemed to be somewhat tangential. It should be noted that Governments which had commented on article 28 were sceptical about its formulation and its content. He personally would be in favour of eliminating the article altogether, especially if the Commission decided to delete the bracketed phrase in article 6.

53. Lastly, noting that articles 12 to 18 all began with the words "Unless otherwise agreed between the States concerned", he said that it might be preferable from the drafting point of view to state in a general provision that the articles in question would apply only in the absence of an agreement to the contrary between the States concerned.

54. Mr. KOROMA said that the Special Rapporteur's proposal for a neutral formulation for the title of part III of the draft was commendable and should not give rise to any objections, for the implication was that States were agreed that certain activities were excluded from the jurisdictional immunities of States.

55. He would have preferred a reformulation of article 11 which did not include any reference to the applicable rules of private international law. The text proposed by the Special Rapporteur was, in his view, somewhat eclectic and left room for a good deal of uncertainty. In that connection, he recalled that the business community had in the past deplored the frequent inclusion of similar vaguely worded references in international agreements. In his view, it would be preferable if paragraph 1 referred to international agreements concerning choice of jurisdiction or to clauses designating the governing law, and he requested the Special Rapporteur and the Drafting Committee to consider that suggestion.

56. Draft article 11 *bis* did not cover the situation in which, even if the State enterprise was engaged in a commercial transaction as defined in the article, differences arose regarding the contract as a result of *acta jure imperii*. Neither article 11 nor draft article 11 *bis* would seem to cover that possibility, and he would like to hear whether the Special Rapporteur considered that it was adequately addressed elsewhere in the draft.

57. Article 12, on contracts of employment, raised many issues and a number of problems. It drew on the 1972 European Convention on State Immunity and on the United Kingdom *State Immunity Act 1978*, whereas the United States *Foreign Sovereign Immunities Act of 1976* and Canada's *State Immunity Act, 1982* contained no provisions on the matter. In that connection, Mr. McCaffrey had provided helpful information earlier in the meeting. In the past, States had consistently granted immunity from claims brought by employees of a diplomatic mission employed in the work of the mission, the main reason for doing so being that working for a foreign State involved participation in the public functions of that State and that hearing the complainant was likely to involve investigation of governmental functions. It should be noted that most cases adjudicated in the past had fallen outside the category of governmental activity and involved employees working in semi-governmental institutions, such as cultural agencies and the like; in such cases, jurisdictional immunity clearly could not be claimed. On the other hand, where employees were recruited to work for a governmental institution or for the Government itself, their activities were considered to be governmental functions and the prerogatives of Governments were, by and large, respected. With those considerations in mind, he preferred the text of article 12 adopted on

[7] *Ibid.*, p. 89.

first reading, which, while protecting the rights of the employee, also respected the jurisdictional immunity of the State. He would not wish the prerogatives of States to be further diluted.

58. With regard to article 14, he could agree to the Special Rapporteur's suggestion to delete terminology which was not universally accepted, but hoped that the underlying concept, which surely was universally valid, would not be lost in consequence.

59. He associated himself with the view expressed by one Government that article 15 applied only to the commercial use of patents or trade names in the forum State and not in connection with the determination of the ownership of such rights (see A/CN.4/415, para. 160). Even with that qualification, however, article 15 was not strictly necessary, since the problems it was intended to resolve were of a highly technical nature and should be left to specialized international conventions, such as those concluded under the auspices of WIPO.

60. Article 16 should be redrafted along the lines of article 29 of the 1972 European Convention on State Immunity.

61. Although he could accept article 19 as presently formulated and agreed with the suggestion that its scope be limited to commercial contracts, he would none the less suggest the inclusion of a provision to the effect that submission to arbitration should not be construed as submission to the jurisdiction of the forum State. The distinction might appear self-evident, but the tendency to construe submission to arbitration as a waiver of immunity did exist and a proviso along those lines would lend greater clarity to the text.

62. The Special Rapporteur's recommendation to delete article 20 was acceptable.

63. The reformulation of the articles in part IV of the draft, on State immunity in respect of property from measures of constraint, was to be welcomed. If the texts adopted on first reading were retained, he would prefer the bracketed phrase "or property in which it has a legally protected interest", in the introductory clause of article 21, to be retained also, so as to make it clear that the provision was concerned with legally protected interests. As to the texts proposed by the Special Rapporteur as the second alternative, his own view was that the basic rule prohibiting execution should be stated and the exceptions to that rule spelt out. That was the pattern followed in many municipal legislations, and he wished to recommend it for the Special Rapporteur's consideration.

64. He welcomed the changes suggested for article 24 and, in particular, the inclusion in paragraph 3 of a reference to translation into one of the official languages of the United Nations. Article 26 definitely had a place in the draft.

65. With regard to article 28, on non-discrimination, he recalled that in the past he had advocated a moratorium on national legislation on State immunities so as to allow the Commission to elaborate proposals for a uniform régime. Article 28, if retained, might interfere with that objective. In considering whether to delete or retain it, the Commission should bear in mind the importance of avoiding a multiple régime and ensuring uniformity of the law on the matter.

66. Mr. PAWLAK said that, since he had spoken at some length on parts I, II and III of the draft at the previous session, he would confine his remarks to parts IV and V.

67. As he saw it, the most important problems involved with regard to those parts related to immunity from measures of constraint, and especially questions of execution. For that reason, he welcomed the Special Rapporteur's efforts to present new formulations of articles 21 to 23. The Special Rapporteur was in fact opposed to the idea of total prohibition of execution, an approach that had been endorsed in the comments and observations of many Governments and one that would probably enhance the chances of securing more universal approval for the draft articles.

68. Against that background, he himself could accept the new formulation of article 21. The text was simpler and clearer, although it still called for drafting improvements to eliminate some ambiguities. Mr. McCaffrey had already pointed to some of the weaknesses in the article, especially in paragraph 1 (*c*). A proper approach was also needed in regard to separation of property. He shared the view of Mr. Mahiou (2159th meeting) and Mr. McCaffrey that the proposed new article 23 was probably unnecessary in the light of draft article 11 *bis*. The question of retaining article 23 could be settled after a decision had been taken regarding article 11 *bis*.

69. It would be right to insert the words "and if the court has jurisdiction in accordance with the present articles" at the end of paragraph 1 of article 25, for express provision should probably be made for the right of *ex officio* examination of State immunity by the court.

70. As to article 26, he tended to agree with Mr. Tomuschat (2158th meeting) and Mr. Bennouna that a State should be free from unnecessary burdens other than monetary ones as a result of proceedings before a court of another State. As far as the wording was concerned, however, it would be best to retain the existing formulation.

71. The Special Rapporteur's proposal for article 27 was acceptable and, as other speakers had pointed out, article 28 should be deleted.

72. The topic now seemed ripe for completion during the term of office of the Commission's current members, but the draft articles should reflect the changes in relation to State property which were taking place in many countries, especially in eastern and central Europe. Constant observation of that problem was necessary and a new approach should be reflected in the formulations adopted by the Commission at the final stage.

Co-operation with other bodies

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

73. The CHAIRMAN invited Mr. Njenga, in his capacity as Observer for the Asian-African Legal Consultative Committee, to address the Commission.

74. Mr. NJENGA (Observer for the Asian-African Legal Consultative Committee) said that the Asian-African Legal Consultative Committee had held its twenty-ninth session at Beijing in March 1990. As the Committee's Secretary-General, he could vouch for its commitment to further strengthening its ties with the Commission. The Committee had been particularly happy to welcome at its twenty-ninth session the Commission's outgoing Chairman, Mr. Graefrath, who had stressed how valuable the Committee's experience was to members of the Commission, bearing in mind that the two bodies often worked on similar or closely related topics. The mutual exchange of experience was therefore a constant and much needed practice.

75. The Committee's twenty-ninth session had witnessed the largest number of representatives of member States and observer delegations at the very highest level, and had been attended by, among others, the Chairman of the Sixth Committee of the General Assembly, Mr. Türk. The Committee had expressed the hope that the participation of the Chairman of the Sixth Committee would become a regular feature at future sessions. He took the opportunity of drawing the attention of the Legal Counsel of the United Nations to that point, because of possible financial implications.

76. The Committee deeply appreciated the role of the Commission in the progressive development and codification of international law and its meticulous work on matters of vital importance to the family of nations. At the Commission's previous session, he had proposed the convening of a joint seminar on the law of the non-navigational uses of international watercourses and jurisdictional immunities of States and their property, adding that such a seminar would underscore the spirit of co-operation between the two bodies and would be of considerable benefit to them in their future work. At the Committee's twenty-ninth session, it had also been emphasized that it would be useful to hold regular meetings of legal advisers in order to benefit from the expertise of the special rapporteurs in their respective fields.

77. With regard to the law of the non-navigational uses of international watercourses, the view had been expressed that the Commission's work should be conducted within the conceptual framework of a formula based on optimum equitable and reasonable utilization of international rivers. In addition, it had been stated that an international watercourse was a shared natural resource and was therefore subject to equitable distribution among upper and lower riparian States. The use of, or activities involving, an international watercourse by an upper riparian State should not therefore adversely affect the rights and interests of lower riparian States. Accordingly, an enumeration of factors determining "appreciable harm" had to be part of any agreement on the subject. Emphasis had also been placed on the close connection between the law of the non-navigational uses of international watercourses and environmental problems. Co-operation between States in such uses was thus becoming increasingly important at a time when the international community was called upon to co-operate on environmental protection. Lastly, it had been decided to put the international watercourses item back on the Committee's active agenda and to discuss it during the thirty-first session, in 1992.

78. On the topic of State responsibility, the view had been expressed that the Commission should speed up its work and attention had been focused on the concept of a "crime" as distinct from a "delict", on the responsibility of the wrongdoer *erga omnes* and on the notion of *jus cogens* as stipulated in the 1969 Vienna Convention on the Law of Treaties.

79. As to the draft Code of Crimes against the Peace and Security of Mankind, it had been thought that the Commission's work should proceed with the requisite degree of priority. Successful conclusion of the work on the topic would provide the international community with an instrument of deterrence and punishment for present and future violations of its provisions. To constitute a complete legal instrument, the code had to incorporate the three elements of crimes, penalties and jurisdiction. To be effective, it should concentrate on the hard core of clearly understood and legally definable crimes. The proposed establishment of an international criminal court had been endorsed, and it had been said that the court should have clearly defined jurisdiction, including jurisdiction over drug traffickers. It had also been suggested that the code should cover: (*a*) expulsion or forcible transfer of populations from their territory; (*b*) the establishment of settlers in occupied territory; (*c*) changes in the demographic conditions of a foreign territory.

80. The Committee had considered a number of other substantive items. Following the declaration by the General Assembly of the United Nations Decade of International Law,[8] the Committee's secretariat had prepared a note for the twenty-ninth session on the role of the Committee in the realization of the objectives of the Decade. The Committee had called for the preparation of an in-depth study on the Decade, which would be submitted to the Legal Counsel of the United Nations, setting out the Committee's proposals and views on the matter. The Committee looked forward to making an active contribution to the realization of the Decade.

81. Among other things, the Committee hoped to undertake an in-depth study on enhanced use of the International Court of Justice in the broader context of promoting means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the ICJ, as stated in the General Assembly resolution on the United Nations Decade of International Law. The Registrar of the International Court of Justice had offered his co-operation in carrying out that venture.

82. The Committee had always attached great importance to the law of the sea, and an initiative would be

[8] General Assembly resolution 44/23 of 17 November 1989.

undertaken by the secretariat on the subject of "Alternative cost-effective models for pioneer activities in exploration, development and training for joint ventures in deep-sea mining". Together with the International Ocean Institute and the Law of the Sea Institute, the Committee's secretariat proposed to organize a workshop on the subject of joint ventures in deep-sea mining in August 1990, in New York.

83. The significant and topical subject of the control of transboundary movements and disposal of hazardous wastes, particularly in the Afro-Asian region, was viewed by many as a vitally important aspect of acts not prohibited by international law. Many of the Committee's member States had already expressed concern at the Conference of Plenipotentiaries held at Basel in March 1989 and at the OAU. meetings of legal and technical experts held at Addis Ababa in December 1989 and early May 1990. At the Committee's twenty-ninth session, the secretariat had been called upon to draw up a draft Asian-African convention on the control of transboundary movements and disposal of hazardous wastes, with a view to totally prohibiting the import of hazardous wastes in the region.

84. Other items in the Committee's work programme included the preparation of documents and studies on the status and treatment of refugees; the deportation of Palestinians as a violation of international law, particularly the 1949 Geneva Conventions; the criteria for distinguishing between international terrorism and national liberation movements; the extradition of fugitive offenders; the debt burden of developing countries; and a number of other subjects. Work was continuing on all those topics, which were among those to be considered at the Committee's thirtieth session, early in 1991.

85. The item "Co-operation between the United Nations and the Asian-African Legal Consultative Committee" was on the agenda of the forty-fifth session of the General Assembly. In pursuance of the programme of co-operation between the Committee and the United Nations, the Committee's secretariat would again prepare brief notes and comments on the legal aspects of some selected items likely to be allocated to the Sixth Committee at the forty-fifth session of the General Assembly, including notes on the progress of the work of the Commission at the present session and on other items related to the Committee's overall work programme.

86. Lastly, he extended an invitation, on behalf of the Committee, to the Chairman of the Commission to represent the Commission at the Committee's thirtieth session, to be held at Cairo in March 1991.

87. The CHAIRMAN thanked the Observer for the Asian-African Legal Consultative Committee for his statement. The Committee's twenty-ninth session at Beijing had been a very happy occasion indeed. In keeping with its established policy, the Commission was committed to promoting co-operation with regional intergovernmental bodies involved in the field of international law. The Commission was particularly interested to have reports on activities of special concern to each region. It was equally interested to learn of activities on which the Committee was working in close co-ordination with the Commission itself. Such co-operation between the two bodies would help the Commission, which would thus benefit from the views and comments from Asia and Africa.

88. He sincerely hoped that co-operation between the Committee and the Commission would not only be continued but also be intensified. He wished to thank the Observer for the Asian-African Legal Consultative Committee for his invitation to attend the Committee's thirtieth session, which he gladly accepted.

The meeting rose at 1 p.m.

2161st MEETING

Tuesday, 22 May 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/415,[1] A/CN.4/422 and Add.1,[2] A/CN.4/431,[3] A/CN.4/L.443, sect. E)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

1. Mr. BARSEGOV thanked the Special Rapporteur for endeavouring once again to find mutually acceptable compromise solutions and for submitting a third report (A/CN.4/431) which created the conditions for fruitful co-operation among the members of the Commission.

2. Recalling that he had had occasion to state his position on articles 1 to 11 and the new draft articles 6 *bis* and 11 *bis* at the previous session, he said that he would not revert to those articles, especially as they had been referred to the Drafting Committee, of which he was a member and in which he would be able to express his views on the proposed new texts. He would

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

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

[3] Reproduced in *Yearbook ... 1990*, vol. II (Part One).

[4] For the texts, see 2158th meeting, para. 1.