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Summary record of the 2161st meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
1990, **vol. I**

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.

therefore comment only on articles 12 to 28, but first wished to stress once more that draft article 11 *bis*, on segregated State property, was of capital importance to all countries, since every country in the world had economic relations with countries such as the USSR and China, where to varying degrees segregated State property played a considerable role. The proposals made on the question of segregated State property were aimed at promoting close economic relations in the interests of all parties. The dynamic process of reconstruction in progress in the Soviet Union and, in particular, the adoption of a new law on property and the economic reforms involving the introduction of a market economy brought the issue sharply into focus.

3. With regard to article 12 (Contracts of employment), he said that, like other members, he had doubts as to the appropriateness of some of its provisions. The Special Rapporteur himself showed that he was aware of the problem by placing in square brackets certain terms and phrases in paragraph 1 and paragraph 2 (*a*) and (*b*) of the proposed new text.

4. He agreed with the views expressed by several Governments and various members of the Commission and was prepared to accept the Special Rapporteur's suggestion that the reference to social security provisions in paragraph 1 should be deleted, since not all States had social security systems. He recalled that, in its comments and observations, Switzerland had suggested that, in order to deal with that problem, the word "and" in the phrase "and is covered by the social security provisions . . ." should be replaced by "or".[5] He was also prepared to accept the proposal made by the Special Rapporteur in his preliminary report that paragraph 2 (*a*) and (*b*) should be deleted. However, if subparagraph (*a*) was to be retained, he would prefer the original text. A problem arose in cases where a contract of employment was concluded between a State and one of its nationals who had kept the nationality of that State, but did not habitually reside in its territory. The Soviet Union today was no longer indifferent to the fate of Soviet citizens residing abroad; those who wished to keep their Soviet nationality were considered fully-fledged Soviet citizens, with all the legal consequences deriving from that status. He therefore proposed that the words "nor a habitual resident" in paragraph 2 (*c*) should be deleted.

5. He found article 13 (Personal injuries and damage to property) as a whole unacceptable. In the first place, it referred to damage to persons or property resulting from an act or omission whose author—a physical or legal person—was a subject of law distinct from the State and present in the territory of the State of the forum, and it provided for the possibility that a court might attribute such an act or omission to a foreign State and declare that State to be responsible. The regulation of legal relations arising in connection with compensation for damage obviously went beyond the scope of the draft articles under consideration. Secondly, in matters of State responsibility, the question whether the conduct of a State was in conformity with the law was determined through international procedures under the rules of international law and could not be determined by national courts. One of the reasons why it had been proposed that article 13 should be deleted was that its application could lead to a situation where a State enjoyed less immunity than its diplomats did under article 31 of the 1961 Vienna Convention on Diplomatic Relations. It should also be borne in mind that the existence of insurance policies and the possibility of settling problems of that kind through diplomatic channels reduced the number of disputes and made the issue less important.

6. In his preliminary report, the Special Rapporteur had endorsed the argument advanced by Spain with regard to article 13[6] and had recommended the inclusion of a new paragraph 2 (A/CN.4/415, para. 143). Although that proposal had not given rise to any objection in the Commission, it was not taken up in the third report. On the other hand, it was true that, in reverting to the text adopted on first reading, the Special Rapporteur had abandoned the idea of extending the scope of the article to transboundary damage.

7. It should be noted that, at the present session, some members had made their acceptance of article 13 conditional upon its scope being limited to damage to persons or property caused by traffic accidents. Pending a decision on the desirability of retaining the article and on the definition of its scope, he wished to state that, if the article were retained, the expression "act or omission which is alleged to be attributable to the State" should be redrafted in more precise terms and the subjects and objects of regulation should be defined more clearly in the light of the comments made by Governments and by members of the Commission.

8. Article 14 (Ownership, possession and use of property) was difficult to understand because its scope was too broad and ill-defined. The practice of a limited number of States could not be adopted as the basis of the article; to do so would inevitably affect the content of the draft and its degree of acceptability. The differences and particularities of the legal systems of all groups of States should, on the contrary, be taken into account as far as possible. In that spirit, he thought that it would be advisable to delete subparagraphs (*c*), (*d*) and (*e*) of paragraph 1, as the Special Rapporteur suggested. The other subparagraphs listing categories of property required additional work and more precise drafting; their principal shortcoming was that they did not establish a connection between the place where the property was situated and the State of the forum.

9. With regard to article 15 (Patents, trade marks and intellectual or industrial property), he said that a clear statement was needed to the effect that the exception envisaged in the case of a proceeding relating to the determination of a right in intellectual or industrial property was applicable only in the State of the forum and did not extend to rights which were exercised or which existed in other countries. As Mr. Koroma (2160th meeting) had pointed out, the problem which article 15 was intended to regulate was that of the exercise of intellectual or industrial property rights in the

[5] *Yearbook . . . 1988*, vol. II (Part One), p. 95, document A/CN.4/410 and Add.1-5.

[6] *Ibid.*, p. 80.

forum State, not that of their acquisition. As to subparagraph (*b*), which the Special Rapporteur was recommending in the form adopted on first reading, he said that, in Soviet law, the State was not the subject of the rights in question; the subjects and beneficiaries of those rights in legal relations of that kind were specific physical or legal persons. The words "alleged infringement" were too broad and might pave the way for abuses. For those reasons, he was in favour of deleting subparagraph (*b*).

10. Like other members of the Commission, he did not think that the scope of protection of patents should be unduly expanded, since that would automatically limit the scope of the immunity principle. In his view, it was not the Commission's task to draw up either an exhaustive or an illustrative list of different types of intellectual or industrial property. Some members had pointed out that the highly technical nature of article 15 would make it very difficult to formulate in the context of the present draft.

11. The terminological changes proposed in articles 16 (Fiscal matters) and 17 (Participation in companies or other collective bodies) were acceptable. With regard to the proposal to redraft article 16 along the lines of article 29 (*c*) of the 1972 European Convention on State Immunity, concerning customs duties, taxes or penalties, he thought that the matter could, as the Special Rapporteur suggested, be left to the Drafting Committee. Article 17 as a whole could be referred to the Drafting Committee.

12. With regard to article 18, he was not in a position to give more than his personal view as to the advisability of extending the concept of segregated State property to State-owned or State-operated ships engaged in commercial service. He believed, however, that the reforms which would be carried out in that field in the Soviet Union would be in the spirit of the new laws on property and enterprises.

13. Concerning article 19 (Effect of an arbitration agreement), it should be assumed that the State agreed, voluntarily and contractually, that the difference in question should be submitted to arbitration. He endorsed the arguments of some Governments and members of the Commission to the effect that a State party to an arbitration agreement must retain its right to invoke immunity before the courts of a State that was not involved or designated by the agreement, unless the agreement contained an explicit provision to the contrary.

14. As to article 20 (Cases of nationalization), he believed that, as drafted, it might lend itself to an interpretation that would undermine the firmly established principle of international law that nationalization laws were applicable beyond the national territory. Measures of nationalization, as sovereign acts, were not subject to the jurisdiction of another State and could not be considered as representing an exception to the principle of immunity. He agreed that the question of nationalization was far too complex to be dealt with as it was in article 20. The members of the Commission who had suggested deleting the article had done so on the basis that the applicable rules of public or private international law could be relied on to settle questions relating to nationalization before the courts. And, in fact, the Special Rapporteur, with his customary realistic approach, was recommending that the article be deleted.

15. Turning to part IV of the draft, he recalled that the text of article 21 (State immunity from measures of constraint) as adopted on first reading set forth, in its introductory clause, the principle of the inadmissibility of measures of constraint against a State on the basis of a decision by a foreign court—thus meeting the requirements of contemporary international law—but linked it to two exceptions, contained in subparagraphs (*a*) and (*b*). He also recalled that that text had been criticized and that the Special Rapporteur, having initially been opposed to the proposal to delete subparagraphs (*a*) and (*b*) on the ground that it might make all measures of constraint against a State inadmissible, had, in his third report, in paragraph (5) of his comments on articles 21 to 23, taken a different stand based on the idea that "carefully limited execution rather than its total prohibition would have a better chance of obtaining general approval". Thus the Special Rapporteur was proposing a new article 21, combining articles 21 and 22 as adopted on first reading. He himself was not opposed to the principle of such a combination, but the resulting text departed radically from article 21 and the principle of the inadmissibility of measures of constraint. He found that surprising and doubted that efforts to find compromise solutions would be successful if precisely that principle were not enunciated. At the current stage, in any event, the situation was unclear: some were trying to find a solution on the basis of the improvement of the texts of articles 21 and 22 as adopted, and others on the basis of the new article 21.

16. With regard to the new article 22 (Specific categories of property) and to the comments that had been made within and outside the Commission, he endorsed the opinion that there was an organic link between that article and draft article 11 *bis* that should be duly taken into account. He did, however, wish to draw attention to certain questions of principle that he found important. According to paragraph 1 (*c*) of the text adopted on first reading (art. 23), property of the central bank of the foreign State which was in the territory of the forum State was unconditionally exempted from measures of constraint, whatever the purpose for which it was used. That provision was based on the idea that central banks were instruments of the sovereign power of a State and that all the activities conducted by them enjoyed immunity from measures of constraint. What was more, in view of their legal status, central banks should be considered as State bodies and automatically enjoy immunity on that basis.

17. The Drafting Committee should consider how the wording of paragraph 2 of the new article 22 could better establish the protection of the specific categories of property in question against all measures of constraint, or, in other words, allow no derogations from the principle of immunity in respect of that property.

18. As for the advisability of the new article 23, he could only accept the legal arguments developed by the Special Rapporteur, especially with regard to the approach reflected in draft article 11 *bis*. He did not understand why the concept of segregated State property continued to raise opposition from certain members of the Commission. In the socialist States, where the immunity of State property had formerly been an iron-clad principle, consideration was now being given to using that concept to restrict considerably, at the least, the scope of immunity in order to promote economic relations. He wondered why that should raise objections in other countries.

19. Turning to part V of the draft (Miscellaneous provisions), he said that the changes proposed by the Special Rapporteur were for the most part an improvement over the previous texts. The Commission might entrust the Drafting Committee with the task of producing the final texts on the basis of the opinions expressed. With regard in particular to article 28 (Non-discrimination), he understood the position of the members of the Commission who had suggested either deleting the article or thoroughly examining its consequences in the context of the draft articles as a whole. In particular, consideration should be given to Mr. Al-Baharna's comments (2160th meeting) in that connection. As the Special Rapporteur said in the comments on article 28 in his third report, "the subject will require careful consideration after general agreement has been reached on the preceding articles".

20. Mr. ILLUECA said that he would speak first on articles 1 and 6, which determined the scope of jurisdictional immunities of States, and then on articles 12 to 28 under consideration by the Commission, reserving the possibility of attending the meetings of the Drafting Committee when it discussed the articles referred to it at the previous session.

21. In his third report (A/CN.4/431), the Special Rapporteur suggested adding to the text of article 1 adopted on first reading the words "and measures of constraint", which apparently amounted to adding to the idea of immunity from jurisdiction proper the idea of immunity from execution, to be dealt with in articles 21 to 23. However, in addition to the two types of jurisdiction mentioned, namely judicial procedures and measures of execution, there was a third type which should not be forgotten: legislative jurisdiction. As was well known, the jurisdiction of legislative bodies had the same status as that of other State bodies, including judicial bodies. Thus the PCIJ had stated in 1926, in the case concerning *Certain German Interests in Polish Upper Silesia*:

> ... From the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. ...[7]

The words "or bodies" should thus be added to the text of article 1 proposed by the Special Rapporteur, which would then read: "The present articles ... from the jurisdiction and measures of constraint before the courts or bodies of another State." Article 6 should be amended in the same way, the relevant passage reading: "from the jurisdiction of the courts or bodies of another State".

22. According to the doctrine of absolute immunity, the question of immunity from legislative jurisdiction did not arise. It did become important under the method adopted by the Commission, which had decided at its previous session to come to an agreement on which State activities should enjoy immunity. Without going into detail concerning the act of State doctrine, it should be recalled that certain eminent jurists maintained that a foreign State could claim immunity from legislative jurisdiction in cases where the proceedings had been instituted as a result of a public act of the foreign State separate from the act that had been the basis for judicial competence.

23. Article 12, concerning contracts of employment, should be retained. The Special Rapporteur was correct in suggesting the deletion of the reference to social security provisions in paragraph 1. Paragraph 2 (*b*) could also be deleted for the reasons given by the Special Rapporteur, since subparagraphs (*c*) and (*d*) provided sufficient support for the rule set forth in the article.

24. Article 13 was a complex provision, and should be given careful consideration in the Drafting Committee. In particular, its legal relationship to the law of State responsibility should be clarified. The previous Special Rapporteur, Mr. Sucharitkul, had drafted the text thinking that it would apply only to traffic accidents. The present Special Rapporteur intended to limit the application of the article mainly to "pecuniary compensation arising from traffic accidents involving State-owned ... means of transport and occurring within the territory of the forum State", as he stated in paragraph (2) of his comments on the article. That was a fully acceptable approach.

25. Subparagraphs (*c*), (*d*) and (*e*) of paragraph 1 of article 14 could be deleted, as the Special Rapporteur proposed, for they had not been shown to reflect universal practice. Paragraph 2 might also be deleted, since it seemed to duplicate paragraph 3 of article 7.

26. Article 15, with its new reference to "a plant breeder's right and a right in computer-generated works", as well as article 17, were on the whole acceptable. Article 16, however, should be deleted because of the implications it carried, unless the subject-matter of article 11 (Commercial contracts) was incorporated in it, as Mr. Koroma (2160th meeting) had suggested.

27. In article 18, dealing with State-owned or State-operated ships engaged in commercial service, it should be made clear that, in all cases where the public interest was involved in a particular commercial activity carried on by a State ship, the State concerned could invoke the immunity of the ship. That question was not purely theoretical and, to illustrate that point, he cited the following case: in 1973, at the time of the overthrow of the Allende Government, two ships, one chartered by Cuba and the other by the Soviet Union, had been unloading in Chilean ports. For political reasons, those two States had decided to recall their ships, which had

[7] Judgment of 25 May 1926 (Merits), *P.C.I.J., Series A, No. 7*, p. 19.

had to pass through the Panama Canal. The United States of America had then taken action to stop them from continuing their route and had arrested them at the entrance to the Canal. A protest had been made, not by the Soviet Union or by Cuba, but by Panama, which had invoked the immunity of the ships. The United States authorities had considered that protest admissible and had released the ships.

28. Also in connection with article 18, it was worth recalling that article 3, paragraph 1, of the 1926 International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels recognized the immunity of ships "used at the time a cause of action arises exclusively on *governmental and non-commercial** service". It would therefore be logical to delete the square brackets in paragraphs 1 and 4 so that the expressions in question would read "commercial and non-governmental service" and "commercial and non-governmental purposes".

29. In article 19, the Special Rapporteur proposed the addition of a new subparagraph (*d*) referring to "the recognition of the award", but that addition would not be appropriate. However, as the Special Rapporteur indicated in paragraph (1) of his comments on the article, the terminology used should be brought into line with that of article 2, on the use of terms.

30. Article 20, dealing with cases of nationalization, should be deleted, as recommended by the Special Rapporteur. In the new article 21, the words in square brackets in paragraph 1 (*c*) should be retained. The new article 22 (formerly article 23) was acceptable, whereas the new article 23 in its present wording was unnecessary.

31. As a matter of prudence, article 25 should be amended, as one Government had pointed out in its written comments, in order to make it clear that a default judgment should not be rendered merely by virtue of due service of process. In addition, the words "and if the court has jurisdiction in accordance with the present articles" could be added at the end of paragraph 1, as the Special Rapporteur suggested. It would also be very important to include in that article, in one form or another, the idea that, in accordance with the provisions of article 9, paragraph 3, non-appearance could not be taken to constitute consent by the foreign State to the exercise of jurisdiction by a court of another State.

32. The Special Rapporteur preferred to retain the text of article 26 adopted on first reading. That wording should be strengthened as much as possible in order to stress that measures of coercion were not warranted.

33. The new wording proposed for paragraph 2 of article 27 was acceptable. Article 28, relating to non-discrimination, should either be deleted or be reworded.

34. Mr. EIRIKSSON, noting that he belonged to the school which supported the restrictive theory of State immunity, said that he would not dwell on the articles which took a position on the theoretical issues involved, some of which had already been referred to the Drafting Committee. He nevertheless took note of the Special Rapporteur's proposals regarding article 6 and the title of part III of the draft. As Mr. McCaffrey (2160th meeting) had suggested, no decision on wording in those cases should be taken until the Commission had the entire draft before it. Thus he would comment only on a few of the articles which had not yet been referred to the Drafting Committee.

35. He agreed with the Special Rapporteur's proposal that, in article 18, the bracketed term "non-governmental" should be deleted. In article 19, he preferred the expression "civil or commercial matter" to "commercial contract" and suggested that the Special Rapporteur's proposal to add a new subparagraph (*d*) referring to the recognition of the award should be considered in the context of part IV of the draft. He was in favour of the deletion of article 20.

36. He welcomed the proposed reformulation of articles 21 to 23 and supported the deletion of the bracketed phrase "or property in which it has a legally protected interest" in the introductory clause of article 21 and in paragraph 1 of article 22. In paragraph 1 (*c*) of the new article 21, the phrase in square brackets, "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed", should also be deleted. He agreed that the words "and used for monetary purposes" should be included in paragraph 1 (*c*) of the new article 22. The fate of the new article 23 depended on that of draft article 11 *bis*.

37. He generally supported the proposed redrafting of article 24, but, with regard to the provision in paragraph 3 on the language to be used for service of process by writ or other document instituting a proceeding, he proposed the following wording: "The documents should be made available in a language acceptable to the State concerned." The same proposal applied to paragraph 2 of article 25.

38. He supported the suggestion that wording on the obligation of *ex officio* determination of jurisdiction should be added to article 25. Like other members of the Commission, he had doubts about article 26. Lastly, he would have no objection to the deletion of article 28.

39. Mr. SOLARI TUDELA said that he had had the opportunity to speak on some of the draft articles at the previous session and would therefore comment only briefly on some of the amendments proposed by the Special Rapporteur in his third report (A/CN.4/431) for the articles that were before the Drafting Committee, before turning to the remaining articles 12 to 28.

40. In paragraph 2 of the proposed new text of article 2, concerning the criteria to be taken into account in determining whether a transaction was commercial, the Special Rapporteur had considerably reduced the importance to be attached to the purpose of the transaction. While it was true that the nature of the transaction had to be taken mainly into consideration, the purpose could not be disregarded. It would have been preferable to retain the text adopted on first reading (art. 3, para. 2).

41. With regard to article 4, on privileges and immunities not affected by the present articles, the Spe-

cial Rapporteur proposed the introduction in paragraph 2—which, as adopted on first reading, had embodied a rule of customary law—of wording recognizing the immunity *ratione personae* of heads of Government and Ministers for Foreign Affairs, in order to reflect the new situation. In the past 100 years, heads of Government had become more numerous and had acquired considerable political importance. In many countries, the head of Government had more power than the head of State. He could accept the text adopted on first reading, which limited that immunity *ratione personae* to heads of State, but he understood the concern that had led the Special Rapporteur to propose the addition.

42. The new article 6 was acceptable, because it would avoid the risk of unilateral interpretations of international law by domestic courts.

43. With regard to article 12, dealing with contracts of employment, he considered that State immunity should be subject to as few limitations as possible, but believed that the article had its justification and that, in general, the cases of non-application provided for in paragraph 2 had to be as few as possible.

44. As suggested by the Special Rapporteur, subparagraphs (*c*), (*d*) and (*e*) of paragraph 1 of article 14 could be deleted.

45. With regard to article 15, in which it was proposed to add a reference to "a plant breeder's right and a right in computer-generated works", he said that, even if those forms of intellectual property were already covered by the general formula "any other form of intellectual . . . property", it would be possible to devise a broader formula that would apply to other developments in intellectual property in the field of science and technology. Perhaps WIPO could lend assistance in that regard.

46. The drafting amendments proposed by the Special Rapporteur for articles 16 and 17 made for greater precision. He had no objection to the deletion in article 18 of the bracketed term "non-governmental". Like the majority of the members of the Commission, he supported the deletion of article 20.

47. He also supported the proposed combination of articles 21 and 22. In paragraph 1 (*c*) of the new article 22, however, referring to the property of the central bank, he could not agree to the addition of the words "and used for monetary purposes", because of the way they could be interpreted by local courts.

48. The new text proposed for paragraph 3 of article 24, providing for documents to be translated into one of the official languages of the United Nations, did not entirely solve all the problems that could arise in connection with service of process.

49. Lastly, he supported the Special Rapporteur's proposals for articles 25 and 27 and would prefer article 28 to be deleted.

50. Mr. ROUCOUNAS said that he supported the Special Rapporteur's proposal to combine articles 2 and 3 and, in paragraph 2 of the new combined article 2 submitted in his third report (A/CN.4/431), to treat the nature of a transaction as the primary criterion, and its governmental purpose as the subsidiary criterion. That solution seemed acceptable to him in view of the fact that, in several countries, case-law was not entirely settled one way or the other. In certain countries which had changed from a policy of absolute immunity to one of restricted immunity, courts faced with problems of characterization might prefer to have to deal with a single criterion, notwithstanding the rigidity of such a solution. Practice in other countries since the early part of the century had, however, shown that it was preferable to leave it to the courts to decide with flexibility the most appropriate approach in each particular case. On the other hand, the inclusion of the words "and the relevant rules of general international law" in article 6 would add nothing, in his view, for, even if the draft was incomplete, there would always be room for the application of new rules of international law.

51. The deletion of the express reference in paragraph 1 of article 11 to a presumption of consent by the State to the exercise of jurisdiction was acceptable.

52. The reference to social security provisions in paragraph 1 of article 12 should be retained, as difficulties often arose in that connection. Besides, the words "which may be in force" made it clear that States that did not have a social security system would not on that account be required to introduce one.

53. While he appreciated the problems to which the wording of article 13 gave rise, he considered that it should be retained, because it provided precisely for those situations that were not normally covered by international law.

54. He had voiced his support for the deletion of subparagraphs (*c*), (*d*) and (*e*) of paragraph 1 of article 14 at the previous session, since it was unnecessary for matters that came exclusively under certain domestic systems of law to be regulated by a text intended for universal application.

55. He agreed with the Special Rapporteur's proposal to delete the bracketed term "non-governmental" in paragraphs 1 and 4 of article 18. The idea it reflected had no basis in law and, moreover, conflicted with the 1982 United Nations Convention on the Law of the Sea, under which immunity derived from the non-commercial, and not the non-governmental, character of a ship. Some other form of words should also be found for paragraph 7 of the article, under which the sole proof of the governmental and non-commercial character of a ship or cargo would be a certificate signed by the diplomatic representative or other competent authority of the State to which the ship or cargo belonged. Quite apart from the fact that the question dealt with in that paragraph was a procedural one, the result could be to make the rules of evidence more restrictive for the court of the forum.

56. He agreed with the Special Rapporteur that, in the last part of the introductory clause of article 19, it would be better to use the other formula considered by the Commission, namely "a court of another State on the territory or according to the law of which the arbitration has taken or will take place", rather than the formula which it had adopted on first reading. In

the case of a contract or international agreement in which the place of arbitration was named, it would, in his view, be advisable to be able to create a jurisdictional link with that place for any questions that might arise in connection with the arbitration. It had actually happened in practice that, in the absence of an express indication of the existence of a "territorial" link with the jurisdiction of the State where the arbitration was meant to take place, the courts of that State had declared that they had no jurisdiction, with the result that the provisions agreed on in respect of arbitration had remained a dead letter.

57. The deletion of article 20 was justified because questions of nationalization did not fall within the scope of application of the draft articles on jurisdictional immunities of States as envisaged by the Commission.

58. The proposal that article 25 should be amended to provide that the court of the forum would *ex officio* raise the question of immunity in the event of default procedure had definite advantages. It corresponded to the practice of some States whose constitutional law provided that international law should have primacy over domestic law or under which the rule of the immunity of foreign States was incorporated in civil-procedure codes. As immunity from jurisdiction of the foreign State was a rule of public law, the court automatically took that into account. In other countries where that was not the case, however, and where the court could not know that the subject of the dispute involved the sovereignty of the foreign State, the proposal in question could be very useful. The implications should, of course, be weighed, particularly so far as a possible multiplication of judgments by default was concerned, since the question of immunity would be raised in one form or another at the second tier of jurisdiction, provided that such a second tier existed. Possibly some other equally expeditious procedural way of solving the problem should be found.

59. The question dealt with in article 28 had caused perplexity from the outset of the Commission's work on the topic. While he had no objection to paragraph 2 (*a*), which reflected the immutable principle of reciprocity, he would point out that, as he had stated at the previous session with regard to article 32 (Relationship between the present articles and other conventions and agreements) of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the endeavour to codify international law was not compatible with an "open door" system, which would be tantamount to leaving the parties free to act as they saw fit, even if that had been the case with certain texts prepared by the Commission over the past 25 years.

60. Mr. CALERO RODRIGUES, noting that many members of the Commission had spoken on the topic, said that he did not want silence on his part to be interpreted as a lack of interest in the matters dealt with in articles 12 to 28 of the draft. That silence was due to the fact that he had already stated his position on those articles at the previous session.[8] The Special Rapporteur's third report (A/CN.4/431) contained proposals which had been carefully formulated in the light of the comments and observations made. Some of those proposals related to substance and indicated that a particular question should be studied from a fresh standpoint. Sometimes they coincided with his own analysis; sometimes they differed from it. All in all, however, his position remained unchanged and he was not convinced by the amendments proposed. Other proposals related solely to drafting amendments which, in his view, it was not appropriate to consider in the plenary Commission. He therefore saw no need to dwell further on the topic.

61. Mr. BEESLEY said that his position was very close to that of Mr. Eiriksson, whose support for the "restrictive" approach he endorsed, for the reasons Mr. Eiriksson had clearly explained.

62. He agreed with the general thrust of the proposals that had been made but, like Mr. Calero Rodrigues, considered that it was better to submit drafting points to the Drafting Committee rather than to the plenary Commission. The Special Rapporteur had made a praiseworthy attempt to reconcile opposing points of view. It was not certain, however, that those views could be reconciled in the Drafting Committee. There was a need for further discussion in the Sixth Committee of the General Assembly, or even at a diplomatic conference, in order to reach a basis for agreement.

The meeting rose at 11.30 a.m. to enable the Working Group on the question of the establishment of an international criminal jurisdiction to meet.

[8] See *Yearbook ... 1989*, vol. I, pp. 168-169, 2119th meeting, paras. 13-25.

2162nd MEETING

Wednesday, 23 May 1990, at 10.05 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. 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)

[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).