Document:-
A/CN.4/SR.2162

Summary record of the 2162nd meeting

Topic:
<multiple topics>

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

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).

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

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

1. Mr. OGISO (Special Rapporteur) said that he would sum up the debate on articles 12 to 28 (parts III, IV and V of the draft), which, in accordance with the Commission's decision at its previous session, had been the main subject of consideration. Some comments had been made on the earlier articles, but the points raised would be taken up by the Drafting Committee.

2. With regard to the title of part III, in his introductory statement (2158th meeting) he had asked members for their views on a neutral formulation such as "Activities of States to which immunity does not apply" or "Cases in which State immunity may not be invoked before a court of another State". In that connection, one member had proposed the formulation: "Activities of States in respect of which States agree not to invoke immunity". Two other members had commended both that proposal and his own suggestion. Actually, a neutral formulation had not been opposed by any member of the Commission, and the Drafting Committee could perhaps be requested to find one.

3. With one exception, all members who had spoken on article 12, concerning contracts of employment, appeared to recognize the need to retain it, and there was general support for deletion of the reference to the social-security requirement in paragraph 1.

4. The first alternative text for paragraph 2 (*a*), i.e. the text adopted on first reading, made the provisions of paragraph 1 inapplicable to an employee who had been recruited to perform services associated with the exercise of governmental authority. The second alternative limited the exception further by requiring the employee to be a member of the "administrative or technical staff of a diplomatic or consular mission". In that respect, the opinions of members were divided, some supporting the second alternative and others favouring the text adopted on first reading. Views were also divided on paragraph 2 (*b*). Three members had suggested deletion of the word "recruitment", appearing between square brackets, or indeed deletion of the entire subparagraph, while three other members had opposed such deletion. One member had suggested that paragraph 2 (*b*) might not be useful in the light of article 26, on immunity from measures of coercion. One solution might be to specify that, when the proceeding related to the recruitment, renewal of employment or reinstatement of an individual, it should be allowed only in so far as it was aimed at ensuring pecuniary compensation, but without allowing the court to issue an injunction against the foreign State. One member had suggested deleting the words "nor a habitual resident" in paragraph 2 (*c*), but a great variety of examples could be given in support of that formulation. The problem could be referred to the Drafting Committee.

5. Most members favoured retaining article 13, although one advocated deleting it and another agreed to retaining it on condition that a new paragraph 2 was included, reading:

> "2. Paragraph 1 does not affect any rules concerning State responsibility under international law."

Five members supported the idea that application of the article should be limited to pecuniary compensation arising from traffic accidents, but that idea had been opposed by at least two other members. One member urged retention of the concluding phrase, "and if the author of the act or omission was present in that territory at the time of the act or omission", a view that had already been expressed by several members at the previous session. As Special Rapporteur, he would have no objection to keeping that phrase in order to ensure that article 13 would not apply to transboundary cases.

6. His own suggestion had been to consider the advisability of deleting paragraph 1 (*c*), (*d*) and (*e*) of article 14, an idea which had enlisted considerable support at both the previous and the present sessions. One member, however, had suggested a different course, namely to replace those subparagraphs by more general provisions and, if that proved impossible, to keep the text as it was. Another member had proposed deleting paragraph 1 (*b*) as well, and another had pointed out that the right or interest referred to in paragraph 1 (*b*) should be limited to those situated in the forum State. The majority view in the Commission was in favour of deleting paragraph 1 (*c*), (*d*) and (*e*), which were mainly based on the common-law system, and one member had even urged deletion of paragraph 2 as well.

7. With regard to article 15, he had proposed the insertion in subparagraph (*a*) of the phrase "including a plant breeder's right and a right in computer-generated works". Several members supported that proposal but others objected that a specific reference to a plant breeder's right might result in an unlimited enumeration of similar rights or that such a reference might cause an undue extension of the scope of the subparagraph. Some members had suggested that more general wording would be preferable. Actually, plant breeders' rights had, in some countries, been protected under specific legislation independent of patent law and the United Kingdom had referred to that point in its comments and observations. Computer-generated works, often referred to as computer-software, were a new area of intellectual property. As recently as 1989, a treaty on intellectual property in respect of integrated circuits had been concluded under WIPO auspices, representing one of the efforts to establish an international legal régime to protect such new types of intellectual property. His own view was that it would be proper to extend the scope of subparagraph (*a*) so as to cover new rights corresponding to recent technical developments. In any case, the problems involved were of a highly technical nature and the Drafting Committee should be asked to find an appropriate formulation for the subparagraph in question.

8. The only change he had recommended in article 16 was to substitute the words "foreign State" and "forum

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

State" for "State" and "another State", respectively. That change had been suggested by one Government in its written comments and the problem was at present under consideration by the Drafting Committee in connection with other articles containing the same expressions. The question was one of drafting and should be carefully co-ordinated by the Drafting Committee. No member was opposed to the substance of the article. At the previous session, one member had urged that diplomatic and consular property should be excluded from the scope of article 16. At the present session, two members had recommended a simplified formulation in line with article 29 of the 1972 European Convention on State Immunity. All those questions should be referred to the Drafting Committee.

9. Three members had expressed support for the proposed changes in article 17. The substance of the article had not given rise to any opposition at either the present or the previous session.

10. No change other than the deletion of the bracketed term "non-governmental" in paragraphs 1 and 4 had been recommended for article 18, and the proposal had enlisted the support of three members and met with opposition from three others. Since many other members had expressed themselves in favour of the proposal at the previous session, he suggested that the term "non-governmental" be omitted from the text referred to the Drafting Committee.

11. As to the introduction into the draft of the concept of segregated State property, which had been suggested by some Governments, he would reiterate the opinion set out in paragraph (2) of the comments on article 18 in his third report (A/CN.4/431), namely that the Commission should be careful to avoid unnecessary duplication, in particular between draft article 11 *bis* and article 18. In that connection, one member had expressed concern that the present formulation of article 18 might not take fully into account the fact that, under the system adopted by some States, State-owned ships were operated for commercial purposes by independent State enterprises; and, according to that member's interpretation, such a system did not fall within the scope of draft article 11 *bis*. Personally, he was not convinced that such an interpretation was consistent with the 1926 International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, but the Drafting Committee could consider carefully that member's view.

12. Two questions had been highlighted in the debate on article 19. On the first—the choice between the expressions "commercial contract" and "civil or commercial matter"—members' views still seemed to be divided. At the previous session, three members had expressed a preference for the latter wording, while several others at both the previous and the present sessions were in favour of the expression "commercial contract". One member had proposed a third formulation along the lines of "commercial or accessory [assimilated] matter". Whatever the preference might be, the scope of an arbitration and the extent of a resulting waiver of State immunity depended primarily on the terms of the arbitration agreement, as he pointed out in paragraph (1) of his comments on article 19, and he would recommend that the Drafting Committee decide the question in the light of all the views expressed.

13. As to the second question concerning article 19, namely the possible addition of a new subparagraph (*d*) on the recognition of the arbitral award, three members had spoken in favour and several others had opposed the addition on the grounds that recognition of the award could be deemed to constitute a first step towards execution. If recognition of the arbitral award was indeed interpreted under many domestic civil-law procedures as the first step towards its execution, it would be best not to include the proposed subparagraph (*d*). However, in view of the highly technical nature of the legal point involved, it should doubtless be considered by the Drafting Committee.

14. All members who had expressed their views on article 20 had agreed that the article should be deleted.

15. With reference to part IV of the draft (State immunity in respect of property from measures of constraint), he wished first of all to point out that an extensive debate had taken place at the previous session on the question of the principle involved. In his third report he had proposed alternative texts for articles 21 to 23 based on the idea that carefully limited execution, rather than total prohibition, would stand a better chance of obtaining general approval. On that point, a few members had reiterated their basic position that the draft articles should clearly set forth the principle of immunity from measures of constraint. The impression he had gained from the debate at the present session, however, was that the Drafting Committee should be able to reach agreement if the scope of the measures was carefully limited. It had been suggested that the title of part IV should read "Jurisdictional immunities of States in respect of their property", in which connection he drew attention to the commentary to article 21[5] and proposed that the wording of the title be left to the Drafting Committee.

16. The new text he had proposed for article 21 took into account the comments made by members at the previous session. Most of those who had spoken on article 21 at the present session had supported the idea of combining it with article 22, and accordingly the Drafting Committee should be able to proceed on the basis of the proposed new article 21. Views on the substance of the new article continued, however, to be divided, in particular with regard to two points. The first related to the proposed 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 as adopted on first reading. At both the previous and the present sessions, several members had endorsed that proposal, while some others had opposed it. One member had made a drafting suggestion in that connection at the present session. The second point concerned the bracketed phrase "and has a connection with the object of the claim, or with the agency for instrumentality against which the proceeding was directed" in paragraph 1 (*c*) of the new

[5] *Yearbook ... 1986*, vol. II (Part Two), pp. 17-18.

article 21. Most speakers had argued that the phrase was of crucial importance and should be retained, but two members had strongly criticized it and advocated deleting it. His own view was that both those points involved delicate legal problems and should be given careful consideration by the Drafting Committee.

17. Many members supported the proposed addition of the words "and used for monetary purposes" in paragraph 1 (*c*) of the new article 22. Three members agreed with the idea underlying the new article 23, but several others had doubted its necessity or usefulness. He would suggest that the Drafting Committee consider whether the use of such expressions as "segregated property", which were peculiar to only a small number of legal systems, would be appropriate. In any event, article 23 should not be considered until the Drafting Committee had reached a decision regarding draft article 11 *bis*.

18. Turning to part V of the draft (Miscellaneous provisions), most of the members who had spoken on article 24 had expressed support for the proposed changes. Some discussion had taken place on paragraph 3, with regard to the translation of documents. One member had opposed deleting the words "if necessary" and another had suggested that, if the parties explicitly agreed on the proper law of the contract, the specific language of the legal order concerned should be deemed sufficient. While welcoming the suggestion concerning translation into one of the official languages of the United Nations, the latter member stressed the need for a reasonable link between the official language used and the proceeding. The same point was also made by another member. The Drafting Committee should be asked to give due consideration to those suggestions.

19. The proposed addition of the words "and if the court has jurisdiction in accordance with the present articles" at the end of paragraph 1 of article 25 had commanded general support. On another point relating to the article, one member had drawn attention to the fact that, in some countries, default judgment was rendered against a foreign State simply because it failed to enter an appearance before the court in order to invoke immunity. With a view to affording States better protection, that member had suggested adding a separate paragraph stating that it was incumbent upon the judge to inquire *ex officio* into the issue of immunity under the present articles. The suggestion had been supported by several other members, one of whom had further suggested that, in view of its general nature, the proposed new paragraph should be inserted in article 7. In that connection, it would be recalled that, at the previous session, another member had suggested that it be stated, either in article 25 or in the commentary thereto, that the court of the forum must *ex officio* determine that the present articles had been complied with prior to rendering judgment. The Drafting Committee should consider those suggestions in conjunction with article 7.

20. Some members had sought clarification as to the objective of article 26. One member had referred to two possible interpretations of the article, one being that it prohibited domestic courts from issuing any order or injunction against a foreign State carrying the threat of a monetary penalty, and the other that it would prohibit only the imposition of a monetary penalty on a foreign State. Another member had commented that article 26 in its present form seemed to allow only the latter interpretation. A third member had suggested a new text in order to accommodate the suggestion by one Government referred to in the comments on the article in his third report. In his own view, the article definitely required further consideration by the Drafting Committee, which should also consider the possibility of deleting it.

21. Members' views differed as to the proposed addition of the words "which is a defendant in a proceeding before a court of another State" in article 27, paragraph 2. The point—on which he had an open mind—involved legal technicalities and he therefore recommended that it be referred to the Drafting Committee.

22. Two members were in favour of retaining article 28, whereas several others were in favour of deleting it. As he stated in the comments on the article in his report, he would prefer to retain it in its present form for the time being, since the subject would require careful consideration after general agreement had been reached on the preceding articles.

23. In his opinion, articles 12 to 28 should now be referred to the Drafting Committee.

24. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer articles 12 to 28 to the Drafting Committee for their second reading, together with the amendments proposed by the Special Rapporteur.

It was so agreed.[6]

25. In reply to a point raised by Mr. KOROMA, the CHAIRMAN said that it was understood that the Drafting Committee would take into consideration all the views expressed by members of the Commission during the debate on the topic.

The law of the non-navigational uses of international watercourses (A/CN.4/421 and Add.1 and 2,[7] A/CN.4/427 and Add.1,[8] A/CN.4/L.443, sect. F, ILC (XLII)/Conf.Room Doc. 3)

[Agenda item 6]

Fifth and sixth reports of the Special Rapporteur

Parts VII to X of the draft articles *and*

Annex I

26. The CHAIRMAN recalled that, at the previous session, the Special Rapporteur had introduced articles 24 and 25 of parts VII and VIII of the draft,[9] as contained in his fifth report (A/CN.4/421 and Add.1

[6] For the report by the Chairman of the Drafting Committee on the draft articles proposed by the Committee, see 2191st meeting, paras. 24 *et seq.*

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

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

[9] For a summary of the Special Rapporteur's introduction, see *Yearbook ... 1989*, vol. II (Part Two), p. 128, paras. 677-682.

and 2), but that they had not been considered by the Commission due to lack of time. Those articles were therefore still before the Commission. He now invited the Special Rapporteur to introduce the first part of his sixth report on the topic (A/CN.4/427 and Add.1), namely chapters I to III containing articles 26 to 28 of parts IX and X of the draft and the eight articles of annex I. The draft articles in question read as follows:

PART VII

RELATIONSHIP TO NAVIGATIONAL USES AND ABSENCE OF PRIORITY AMONG USES

Article 24. Relationship between navigational and non-navigational uses; absence of priority among uses

1. In the absence of agreement to the contrary, neither navigation nor any other use enjoys an inherent priority over other uses.

2. In the event that uses of an international watercourse [system] conflict, they shall be weighed along with other factors relevant to the particular watercourse in establishing equitable utilization thereof in accordance with articles 6 and 7 of these articles.

PART VIII

REGULATION OF INTERNATIONAL WATERCOURSES

Article 25. Regulation of international watercourses

1. Watercourse States shall co-operate in identifying needs and opportunities for regulation of international watercourses.

2. In the absence of agreement to the contrary, watercourse States shall participate on an equitable basis in the construction and maintenance or, as the case may be, defrayal of costs of such regulation works as they may have agreed to undertake, individually or jointly.

PART IX

MANAGEMENT OF INTERNATIONAL WATERCOURSES

Article 26. Joint institutional management

1. Watercourse States shall enter into consultations, at the request of any of them, concerning the establishment of a joint organization for the management of an international watercourse [system].

2. For the purposes of this article, the term "management" includes, but is not limited to, the following functions:

(*a*) implementation of the obligations of the watercourse States under the present articles, in particular the obligations under parts II and III of the articles;

(*b*) facilitation of regular communication, and exchange of data and information;

(*c*) monitoring international watercourse[s] [systems] on a continuous basis;

(*d*) planning of sustainable, multi-purpose and integrated development of international watercourse[s] [systems];

(*e*) proposing and implementing decisions of the watercourse States concerning the utilization and protection of international watercourse[s] [systems]; and

(*f*) proposing and operating warning and control systems relating to pollution, other environmental effects of the utilization of international watercourse[s] [systems], emergency situations, or water-related hazards and dangers.

3. The functions of the joint organization referred to in paragraph 1 may include, in addition to those mentioned in paragraph 2, *inter alia*:

(*a*) fact-finding and submission of reports and recommendations in relation to questions referred to the organization by watercourse States; and

(*b*) serving as a forum for consultations, negotiations and such other procedures for peaceful settlement as may be established by the watercourse States.

PART X

PROTECTION OF WATER RESOURCES AND INSTALLATIONS

Article 27. Protection of water resources and installations

1. Watercourse States shall employ their best efforts to maintain and protect international watercourses and related installations, facilities and other works.

2. Watercourse States shall enter into consultations with a view to concluding agreements or arrangements concerning:

(*a*) general conditions and specifications for the establishment, operation and maintenance of installations, facilities and other works;

(*b*) the establishment of adequate safety standards and security measures for the protection of international watercourses and related installations, facilities and other works from hazards and dangers due to the forces of nature, or to wilful or negligent acts.

3. Watercourse States shall exchange data and information concerning the protection of water resources and installations and, in particular, concerning the conditions, specifications, standards and measures mentioned in paragraph 2 of this article.

Article 28. Status of international watercourses and water installations in time of armed conflict

International watercourses and related installations, facilities and other works shall be used exclusively for peaceful purposes consonant with the principles enshrined in the Charter of the United Nations and shall be inviolable in time of international as well as internal armed conflicts.

ANNEX I

IMPLEMENTATION OF THE ARTICLES

Article 1. Definition

For the purposes of this annex, "watercourse State of origin" means a watercourse State within which activities are carried on or planned that affect or may affect an international watercourse [system] and that give rise or may give rise to appreciable harm in another watercourse State.

Article 2. Non-discrimination

In considering the permissibility of proposed, planned or existing activities, the adverse effects that such activities entail or may entail in another State shall be equated with adverse effects in the watercourse State where the activities are or may be situated.

Article 3. Recourse under domestic law

1. Watercourse States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of appreciable harm caused or threatened in other States by activities carried on or planned by natural or juridical persons under their jurisdiction.

2. With the objective of assuring prompt and adequate compensation or other relief in respect of the appreciable harm referred to in paragraph 1, watercourse States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

Article 4. Equal right of access

1. A watercourse State of origin shall ensure that any person in another State who has suffered appreciable harm or is exposed to a significant risk thereof receives treatment that is at least as favourable as that afforded in the watercourse State of origin in cases of domestic appreciable harm, and in comparable circumstances, to persons of equivalent condition or status.

2. The treatment referred to in paragraph 1 of this article includes the right to take part in, or have resort to, all administrative and judicial procedures in the watercourse State of origin which may be utilized to prevent domestic harm or pollution, or to obtain compensation for any harm that has been suffered or rehabilitation of any environmental degradation.

Article 5. Provision of information

1. A watercourse State of origin shall take appropriate measures to provide persons in other States who are exposed to a significant risk of appreciable harm with sufficient information to enable them to exercise in a timely manner the rights referred to in paragraph 2 of this article.

To the extent possible under the circumstances, such information shall be equivalent to that provided in the watercourse State of origin in comparable domestic cases.

2. Watercourse States shall designate one or more authorities which shall receive and disseminate the information referred to in paragraph 1 in sufficient time to allow meaningful participation in existing procedures in the watercourse State of origin.

Article 6. Jurisdictional immunity

1. A watercourse State of origin shall enjoy jurisdictional immunity in respect of proceedings brought in that State by persons injured in other States only in so far as it enjoys such immunity in respect of proceedings brought by its own nationals and habitual residents.

2. Watercourse States shall ensure, by the adoption of appropriate measures, that their agencies and instrumentalities act in a manner consistent with these articles.

Article 7. Conference of the Parties

1. Not later than two years after the entry into force of the present articles, the Parties to the articles shall convene a meeting of the Conference of the Parties. Thereafter, the Parties shall hold regular meetings at least once every two years, unless the Conference decides otherwise, and extraordinary meetings at any time upon the written request of at least one third of the Parties.

2. At the meetings provided for in paragraph 1, the Parties shall review the implementation of the present articles. In addition, they may:

(*a*) consider and adopt amendments to the present articles in accordance with article 8 of this annex;

(*b*) receive and consider any reports presented by any Party or by any panel, commission or other body established pursuant to annex II to the present articles; and

(*c*) where appropriate, make recommendations for improving the effectiveness of the present articles.

3. At each regular meeting, the Parties may determine the time and venue of the next regular meeting to be held in accordance with the provisions of paragraph 1 of this article.

4. At any meeting, the Parties may determine and adopt rules of procedure for the meeting.

5. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State not a Party to the present articles, may be represented at meetings of the Conference by observers, who shall have the right to participate but not to vote.

6. Any of the following categories of bodies or agencies which is technically qualified with regard to the non-navigational uses of international watercourses, including the protection, conservation and management thereof, and which has informed the Parties of its desire to be represented at meetings of the Conference by observers, shall be admitted unless at least one third of the Parties present object:

(*a*) international agencies or bodies, either governmental or non-governmental, and national governmental agencies and bodies; and

(*b*) national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located.

Once admitted, observers representing these agencies and bodies shall have the right to participate but not to vote.

Article 8. Amendment of the articles

1. An extraordinary meeting of the Conference of the Parties shall be held on the written request of at least one third of the Parties to consider and adopt amendments to the present articles. Such amendments shall be adopted by a two-thirds majority of the Parties present and voting. For the purposes of this article, "Parties present and voting" means Parties present and casting an affirmative or negative vote. Parties abstaining from voting shall not be counted among the two thirds required for adopting an amendment.

2. The text of any proposed amendment shall be communicated by the Party or Parties proposing it to all Parties at least 90 days before the meeting.

3. An amendment shall enter into force for the Parties that have accepted it 60 days after two thirds of the Parties have deposited an instrument of acceptance of the amendment with the [Depositary Government] [Secretary-General of the United Nations]. Thereafter, the amendment shall enter into force for any other Party 60 days after that party deposits its instrument of acceptance of the amendment.

27. Mr. McCAFFREY (Special Rapporteur) said that chapter IV of his sixth report (A/CN.4/427 and Add.1), containing annex II of the draft on fact-finding and settlement of disputes, would be issued later in the session. The Commission might wish to discuss that part of the report at its next session. Since the questions raised by article 1 [Use of terms] concerning the scope of the draft articles and the definition of the expression "international watercourse [system]" had not been discussed by the Commission in its present membership, he also intended to report briefly on them at the next session.

28. With regard to chapter I of his sixth report, he said it might be thought that draft article 26, on joint institutional management, was superfluous or at least went beyond the needs of a framework agreement. However, the needs of the modern world's expanding population made such an attitude obsolete. By virtue of the hydrologic cycle the amount of water on Earth was static, whereas the population depending on that water was increasing at an alarming rate and would continue to do so until well into the twenty-first century. The world's population would therefore have to become increasingly efficient in its utilization of freshwater resources. Every year the amount of water that could be wasted decreased radically, and in some parts of the world there was already a shortage. Since most of the world's major watercourses were international, greater efficiency in water use would depend on increased co-operation among watercourse States in the planning, management and protection of international watercourses. He did not therefore regard article 26 as a luxury, for joint management of international watercourses was an increasingly important form of international co-operation. The Commission would be remiss if it did not demonstrate to the international community that it recognized that fact.

29. As he noted in his report (*ibid.*, para. 7), the theme emerging from the extensive work done by international organizations on watercourse management was that, while there was no obligation under general international law to form joint management institutions, management through such institutions was not only an increasingly common phenomenon, but also almost indispensable to optimum utilization and protection of watercourse systems. The international agreements and studies reviewed in chapter I recognized the need for such institutions, not only to resolve issues of utilization, but also to undertake affirmative development and protection. Article 26 was a modest provision. At the previous session, he had been criticized for placing too much material in the survey section of his report and not enough in the comments. He had tried to correct that shortcoming, but no doubt the reverse criticism would now be levelled at him. He hoped that the Commission would realize that it was difficult to distil into a single article all the existing treaty provisions on watercourse management.

30. Turning to chapter II, he pointed out that he had listed (*ibid.*, para. 20) seven elements that could be included in draft articles on the subtopic of security of hydraulic installations. Two of his predecessors as Special Rapporteur, Mr. Evensen and Mr. Schwebel, had

both expressed hesitation about how far the Commission should go in that area. Mr. Evensen had subsequently concluded that a modest article was required on the question of security in times of armed conflict. He had himself reached a similar conclusion and was therefore submitting draft article 28. Draft article 27 was concerned with safety—a widespread problem—from a more general standpoint. For example, whenever a large volume of water was collected behind an unsuitable structure, the downstream State had an obvious interest in the safety standards applied in construction and maintenance of the structure.

31. With regard to chapter III of the report, on implementation of the articles, he wished to apologise for not mentioning that question in the outline of the topic presented in his fourth report.[10] The more he had thought about how watercourse problems were dealt with in practice, the more he had become convinced that the draft should include a section on such principles as equal right of access and non-discrimination. In their statement in the Sixth Committee of the General Assembly at its forty-fourth session on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, the Nordic countries had stressed the importance of civil-liability régimes in ensuring compensation to victims. Their arguments applied equally to the case of international watercourses, for both topics dealt to some extent with transboundary harm. The Nordic countries had pointed to the need for State and civil-liability régimes to complement each other and for States to be encouraged to use existing civil-liability régimes. It was in that spirit that he was submitting the eight draft articles on implementation contained in annex I. The principles covered by those articles were summarized in the report (*ibid.*, para. 38). He had initially envisaged that articles 7 and 8 of the annex would be included among the provisions on the settlement of disputes, but on reflection he had thought them better placed in the articles on implementation.

32. Mr. AL-BAHARNA said that, in view of the provision contained in paragraph 2 of article 2 as provisionally adopted by the Commission,[11] the inclusion of part VII of the draft (Relationship to navigational uses and absence of priority among uses) was clearly necessary. Since the two paragraphs of draft article 24 dealt with two separate subjects, however, each paragraph should be made a separate article.

33. Although he agreed with the principle of law contained in paragraph 1 of article 24 as formulated by the Special Rapporteur, he wished to submit for consideration the following alternative wording:

> "In the absence of agreement to the contrary, navigational uses are not entitled to any preference over any other use or category of uses."

The suggested changes consisted, on the one hand, in the replacement of the word "priority" by "preference" and, on the other hand, in widening the meaning of the words "other uses" by including a reference to "category of uses".

34. Paragraph 2, concerning the absence of priority among uses, was by far the more important of the article's two provisions; the subject-matter was of real significance and had implications for watercourse States. In postulating that uses should be weighed along with other factors relevant to the particular watercourse, the Special Rapporteur appeared to have over-simplified the issue of conflict between uses of international watercourses. The problem called for more comprehensive and detailed treatment, and he urged the Commission to consider incorporating in the draft the substance of articles VII and VIII of the Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the International Law Association in 1966 (see A/CN.4/421 and Add.1 and 2, footnote 197), which dealt with that aspect of the matter.

35. In his fifth report, the Special Rapporteur said that the expression "regulation of international watercourses" in draft article 25 meant specifically "the control of the water in a watercourse, by works or other measures, in order both to prevent harmful effects . . . and to maximize the benefits that may be obtained from the watercourse" (*ibid.*, para. 129). It might therefore be necessary to define the term "regulation", either in article 25 itself or in the article on the use of terms. He personally endorsed the following definition proposed by Mr. Schwebel and cited by the Special Rapporteur in paragraph (3) of his comments on article 25 in his fifth report:

> "Regulation", for the purposes of this article, means the use of hydraulic works or any other continuing measure to alter or vary the flow of the waters in an international watercourse system for any beneficial purpose.

36. He agreed with the underlying idea of paragraph 2 of article 25 that the construction and maintenance of regulation works should be based on the principle of equitable utilization. However, the Commission should also include some of the more important provisions of the articles on "Regulation of the flow of water of international watercourses" adopted by ILA at Belgrade in 1980 (*ibid.*, para. 139), particularly the substance of articles 4 and 6 thereof, for such provisions might be helpful in resolving conflicts arising from the regulation of international watercourses.

37. He welcomed the sixth report of the Special Rapporteur (A/CN.4/427 and Add.1) and thanked him for keeping to the schedule of work outlined in his fourth report. The Special Rapporteur had completed the major part of his work, and it was now for the Drafting Committee and the Commission to ensure that the first reading of the draft articles was completed by the end of the term of office of the Commission's current members. The methodology adopted by the Special Rapporteur in the sixth report, as in his previous reports, namely first to set out State practice and resolutions of intergovernmental organizations and then to present the draft articles, had somewhat impaired the full impact of the analysis and presentation of the subjects covered. Nevertheless, the report was quite stimulating.

[10] *Yearbook . . . 1988*, vol. II (Part One), pp. 207-208, document A/CN.4/412 and Add.1 and 2, para. 7.

[11] *Yearbook . . . 1987*, vol. II (Part Two), p. 25.

38. In its present formulation, draft article 26, on joint institutional management, went beyond general or customary international law. As the Special Rapporteur pointed out (*ibid.*, para. 7), there was no obligation under general international law to form joint organizations. The State practice cited indicated, at best, the conclusion of bilateral or regional treaties setting up joint commissions, but such treaties could not be regarded as typical of general practice. It was probably for that reason that the articles on "International water resources administration" adopted by ILA at Madrid in 1976 (*ibid.*, para. 17) suggested only that "the basin States concerned and interested *should** negotiate in order to reach agreement on the establishment of an international water resources administration" (art. 2, para. 1). Similarly, the Economic Commission for Europe had recommended in a recent decision containing "Principles regarding co-operation in the field of transboundary waters" (see A/CN.4/427 and Add.1, para. 15) that "riparian countries *should** consider the setting up ... of appropriate institutional arrangements" (Principle 6). The Commission should therefore proceed cautiously in formulating proposals for institutional arrangements. Specifically, in paragraph 1 of article 26 the verb "shall" should be replaced by "should" and the words "at the request of any of them" should be deleted, in order to diminish the obligatory character of consultations. As the institutional arrangements could proceed only with the consent of the watercourse States concerned, wording suggestive of an obligation should be replaced by wording suggestive of consent or co-operation. Again, paragraph 1 should be worded so as to encourage watercourse States to strengthen existing institutional arrangements, as in the corresponding draft articles submitted by Mr. Schwebel and Mr. Evensen, which were reproduced in paragraph (2) of the Special Rapporteur's comments on article 26 in his sixth report. Furthermore, the word "rational" should be inserted before "management" in paragraph 1, so as to impart a sense of realism to the whole scheme.

39. From both the substantive and the drafting standpoints it might be desirable to combine paragraphs 2 and 3 of article 26, and the functions described therein should be made sharper in tone and language. Paragraph 2 (*b*), for example, might mention the research function of the international organ, and in paragraph 2 (*e*) the qualification "optimum" should be added before the word "utilization". Lastly, the article should appear in the main body of the text rather than in an annex, if the Commission decided to add such an annex.

40. Draft article 27 imposed a direct obligation, in paragraph 1, with regard to the safety of water resources and installations, and it might therefore be appropriate to include a reference in the text to the safety element. Thus the words "the safety of" could be added between the words "protect" and "international watercourses". Also, while he agreed with the general thrust of paragraph 2 (*a*), he would suggest that the word "sites" be added before "installations", and again in paragraph 2 (*b*), in order to strengthen the protection of water resources. The Special Rapporteur stated in paragraph (3) of his comments on article 27 that he had not included a reference to "hazards and dangers created by faulty construction, insufficient maintenance or other causes" in paragraph 2 (*b*) as such hazards and dangers were covered by paragraph 2 (*a*). It was hard to share that reasoning, since paragraph 2 (*a*) laid down a general obligation with regard to the safety of watercourses, whereas paragraph 2 (*b*) provided for specific arrangements. He would therefore like the reference to such dangers to be included in the article.

41. Draft article 28, as the Special Rapporteur pointed out in paragraph (1) of his comments on the article, closely paralleled the corresponding provision submitted by Mr. Evensen in 1984. The article reflected modern trends in international law as evidenced by the resolution on "Protection of water resources and water installations in times of armed conflict" adopted by ILA at Madrid in 1976 (*ibid.*, para. 30) and the 1977 Additional Protocols to the 1949 Geneva Conventions. The text also had his support because, as a shared natural resource, an international watercourse should be held immune from attack in both peacetime and wartime. A state of war or armed hostilities was no longer a justification for an attack on an international watercourse. Consequently, he did not share the scepticism of the Special Rapporteur, who expressed the view in paragraph (2) of his comments that the first limb of article 28 "is not clearly required" by Additional Protocol I and that it was uncertain whether the second limb "is literally required by international law". He would urge the Special Rapporteur to reconsider his comments in the light of contemporary trends in international law. He also had reservations about the reference in paragraph (2) of the comments to the views of Fauchille and Oppenheim, which did not seem to be in keeping with the spirit of the times. Indeed, in the same paragraph, the Special Rapporteur himself recognized that the rule formulated in article 28 had "compelling force".

42. Referring to annex I, on implementation, he reserved his position as to the desirability of including the principles contained therein, and felt bound to comment on the unorthodoxy of such an approach. Except in cases where an institutional mechanism was set up for implementation purposes, States parties normally implemented a treaty in such manner as they saw fit, under their municipal-law procedures. The draft articles in annex I, however, seemed to go beyond that practice, and articles 2, 3, 4 and 5 were frankly impracticable. He also had misgivings about the Special Rapporteur's approach in relying for precedents on recommendations of the OECD Council and on the 1974 Nordic Convention on the protection of the environment (*ibid.*, annex). Whatever the justification for such principles in Western and developed countries, there was no reasonable ground for introducing them into a convention of universal significance.

43. Furthermore, he had doubts about the effect annex I would have on municipal law and procedure. For instance, the effect of draft article 2, legally construed, would be to equate a nuisance caused by harmful activities in a downstream State with a nuisance in an upstream State. So long as the rules of liability for

tortious acts were not internationally uniform, and so long as rules of procedure and evidence differed from one country to another, how could such a rule be grafted on to international law? The same criticism applied to draft article 3, since the rule laid down in paragraph 1 would have the effect of altering municipal law and procedure with respect to the cause of action and to the forum. It might therefore be unwise to include such provisions until their full implications were examined and a consensus was reached in the Commission on the matter.

44. Mr. TOMUSCHAT said it had been with great pleasure that he had read the Special Rapporteur's sixth report (A/CN.4/427 and Add.1), which contained a wealth of information on parallel instruments and thus made it clear that the Commission was on safe ground. The Special Rapporteur had done his work, and it now remained for the Commission to examine the draft articles he had proposed with a view to giving them definitive shape.

45. Draft article 26 enlisted his support. It could be argued that the establishment of joint institutions for the management of international watercourse systems was no more than a consequence of the general obligation of co-operation under article 9 of the draft and, consequently, that there was no need to refer to it. He did not agree. The entire draft boiled down to the elaboration of a few basic principles, and the obligation of co-operation figured prominently among those principles. The merit of such elaboration was that the draft would help to stimulate and educate, while setting out in detail all the elements of an efficient watercourse régime.

46. There could, of course, be no obligation under international law to establish common institutions, as States must be free to decide whether it was necessary or appropriate to confer certain functions on an international body. The Special Rapporteur's proposition that watercourse States should simply be required to enter into consultations at the request of any one of them therefore struck a fair balance, particularly since the establishment of a joint organization presupposed the consent of each individual watercourse State in accordance with the general rules of treaty law. He did not agree that the obligation in article 26 was too rigid: all that would be required of a watercourse State was for it to enter into consultations.

47. The list in article 26 of functions to be discharged by a joint watercourse organization also seemed satisfactory, particularly since the draft was designed to offer guidelines for the future activities of States. Although conventions such as that creating the Niger Basin Authority were far more detailed, a framework agreement necessarily had to be modest in its objectives and to adopt fairly broad formulas in order to remain flexible. He could accept the drafting proposals made by Mr. Al-Baharna in that connection (para. 39 above).

48. There seemed to be some uncertainty about the scope of draft article 27, for it appeared in the chapter of the report entitled "Security of hydraulic installations" yet seemed to go further by providing that international watercourses themselves should be maintained and protected. The Special Rapporteur had provided a considerable amount of information on the prohibition on poisoning water or rendering it otherwise unfit for human consumption. For his own part, however, he was not convinced that that latter aspect could be regarded as a typical component of the present topic, since it applied to all kinds of water supplies, whether national or international, small or large. In his view, protection of water as such was to be distinguished from specific aspects of international watercourses, on which topic the Commission was required to concentrate. He had no doubt that intentional poisoning fell within the purview of pollution, although it constituted an aggravated case of pollution. His conclusion, therefore, was that the scope of article 27 should be confined to hydraulic works and related installations, as suggested by the title of chapter II of the report.

49. He agreed with the Special Rapporteur that artificial man-made works, such as dykes, dams and sluices, gave rise to special safety problems. Accordingly, for protection of the population it was necessary to comply with safety standards that were constantly adapted to developments in the relevant technology. Consequently, there was a clear need for international regulation with regard to man-made water-related installations but not with regard to the protection of watercourses in general, which was the subject of the draft as a whole. If the Commission favoured the adoption of a provision on contamination of water supplies, however, it should be incorporated in a separate article, so as to avoid confusion.

50. Draft article 28 would gain in clarity if the different legal concepts it contained were separated. He agreed that water-related works and installations, and dams and dykes in particular, should be protected from any form of attack in time of armed conflict, as provided for in Additional Protocol I to the 1949 Geneva Conventions, but found it hard to understand what was meant by the inviolability of a watercourse. Of course, dams and dykes might be wilfully destroyed in order to inflict harm upon an enemy, but he doubted whether it was really necessary to have a rule to cover that eventuality. Comparison with article 56 of Additional Protocol I also revealed the dangers inherent in a succinct reference to the laws of war. Article 56 contained many important conditions that were absent from draft article 28—and understandably so, since the function of article 28 was basically to serve as a reminder. On balance, therefore, he was in favour of deleting article 28.

51. Annex I as proposed by the Special Rapporteur contained a number of extremely important provisions, all of which were concerned with the role of the individual in fending off environmental hazards. Conferring the right of legal action on individuals would give teeth to the draft articles. An aggrieved individual would have far fewer inhibitions about asserting his rights than Governments, which often adopted a give-or-take approach. The greatest success story in that regard was the treaty establishing the European Economic Community, whereby, in principle, all obligations incumbent on Member States could also be claimed by individuals as subjective rights, provided

that those obligations were sufficiently precise. Given the crucial importance of the articles on implementation, he would have preferred them to be incorporated in the body of the draft, rather than in an annex, and he wondered why the Special Rapporteur had not adopted such a course. Also, many other articles in the draft already dealt with implementation. In any event, the title of annex I would have to be modified, for the special feature of the annex was the fact that it dealt with the active role accorded to individuals, not the fact that it dealt with implementation.

52. He agreed with the substance of draft article 2 of annex I, but would ask, first, by what criteria "another State" would be identified. To put it more bluntly, were the provisions of the annex also designed to operate in favour of third States that were not parties to the articles? Was article 2 to be conceived as a provision conferring rights on third States irrespective of considerations of reciprocity? Again, with regard to the title of the article, one normally spoke of non-discrimination in reference to a right bestowed on a person. Under the terms of article 2, however, State agencies were enjoined to take harm caused abroad as seriously as harm caused at home. In the circumstances, he would prefer some other wording, such as "Identity of standards of assessment".

53. He agreed in principle with draft article 3, yet considered that the order of the remedies should be reversed. Indeed, throughout the draft, the main emphasis should be on prevention, financial compensation being treated as a subsidiary remedy. The reason was simple: in many instances, environmental damage could never be made good, and that was justification enough for departing from the model afforded by article 235 of the 1982 United Nations Convention on the Law of the Sea.

54. He fully endorsed the rule, laid down in draft article 4, of equal right of access to administrative and judicial procedures in the State of origin, but considered that the article as worded, like the OECD Council recommendation cited by the Special Rapporteur in paragraph (1) of his comments on the article, missed the point, namely that there should be equality of treatment between alien victims of harm and the nationals of the State of origin—to the extent that, apart from the criterion of nationality, the circumstances were the same or similar, of course. The essence of the rule, to his mind, should lie in a prohibition on discrimination on the ground of nationality. States should be under an obligation to treat everyone alike, taking account solely of the extent to which the person concerned was affected. Many States had not so far granted foreign citizens the right to participate in administrative proceedings or to challenge an administrative decision before the courts. In that connection, the decision of 17 December 1986 by the Federal Administrative Court of the Federal Republic of Germany,[12] referred to in the Special Rapporteur's comments (A/CN.4/427 and Add.1, footnote 97), represented a landmark. That decision, however, was somewhat more limited in scope than the excerpt cited by the Special Rapporteur seemed to suggest, for the court had hinted that one of its main considerations was the existence of strong ties of solidarity within the EEC. It was not clear, therefore, whether the court would extend its case-law for the benefit of countries outside the EEC which did not grant reciprocal treatment.

55. Draft article 6 seemed unnecessary, for it regulated a situation already fully covered by draft article 4. If article 4 were clearly formulated, there would be no need for a provision that enunciated the same rule in slightly restricted terms. Also, he would prefer not to speak of "immunity" in cases where the judicial system of the State of origin did not provide for a remedy. Immunity should remain a term of art for cases in which a foreign State was impleaded in a forum State. The Special Rapporteur did not deal, however, with situations in which an aggrieved individual sued the State of origin before the courts of another country, since that fell within the scope of the topic of jurisdictional immunities. Obviously, the management of a watercourse did not qualify as a commercial activity and would therefore come under the special protection of sovereign immunity.

56. Paragraph 2 of article 6 was also unnecessary. If such a provision were deemed essential, however, then it should be set forth in the first part of the draft. A number of treaties in which the obvious was stated sprang to mind—article 2 of the International Covenant on Civil and Political Rights and article 2 of the International Covenant on Economic, Social and Cultural Rights being cases in point—but, strictly speaking, such reminders were superfluous.

The meeting rose at 1 p.m.

2163rd MEETING

Friday, 25 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. 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.

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[12] *Entscheidungen des Bundesverwaltungsgerichts*, vol. 75 (1987), p. 285.