

Document:-
A/CN.4/SR.2218

Summary record of the 2218th meeting

Topic:
<**multiple topics**>

Extract from the Yearbook of the International Law Commission:-
1991, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

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

The meeting rose at 11.50 a.m.

2218th MEETING

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

Chairman: Mr. John Alan BEESLEY

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

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

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR
(concluded)

PART I OF THE DRAFT ARTICLES

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

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

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

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

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

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

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

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

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

³ See 2213th meeting, footnote 12.

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

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

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

9. In short, the debate had strengthened his conviction that groundwater should be included in the scope of the articles, at least in so far as it was related to surface water. Such an approach was also supported by the heavy reliance on groundwater for such basic needs as drinking water, which would increase dramatically in the near future, as populations continued to grow. As illustrated in the diagram showing the elements of a hypo-

thetical international river use system, pollution of surface waters could contaminate aquifers and vice versa, making those precious resources unusable for many human needs.

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

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

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

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

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

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

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

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

17. He appealed to the Commission not to adopt a definition of the scope of the draft articles that would make them outmoded before they were presented to the

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

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

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

It was so agreed.

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

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES
ON SECOND READING⁴

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

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

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

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

ARTICLE 1 (Scope of the present articles)

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

Article 1. Scope of the present articles

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

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

Article 1 was adopted.

ARTICLE 2 (Use of terms)

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

Article 2. Use of terms

1. For the purpose of the present articles:

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

(b) "State" means:

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

(ii) constituent units of a federal State;

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

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

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

(c) "commercial transaction" means:

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

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

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

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

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

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

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

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

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

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

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

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

31. Mr. Tomuschat said that he was in favour of the words "and other entities" which would take account of the specific situation in which corporate bodies had an important role to play in cooperating in the discharge of public tasks. Even if such cases occurred infrequently, as Mr. McCaffrey suggested, they should not be

left out of account altogether. Furthermore, since it was recognized that agencies, instrumentalities and public bodies could wield public power, it seemed clear that there was no substantive difference between sovereign authority, on the one hand, and other elements of governmental authority, as defined under articles 7 and 8 of the draft articles in part 1 of the topic of State responsibility, on the other. For the sake of clarity, it would be better to delete the word "commercial" from paragraph 1 (c) (i), which contained a circular definition that confounded the elementary laws of logic.

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

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

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

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

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

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

Article 2 was adopted.

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

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

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

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

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

(b) persons connected with them.

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

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

Article 3 was adopted.

ARTICLE 4 (Non-retroactivity of the present articles)

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

Article 4. Non-retroactivity of the present articles

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

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

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

Article 4 was adopted.

ARTICLE 5 (State immunity)

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

Article 5. State immunity

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

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

Article 5 was adopted.

ARTICLE 6 (Modalities for giving effect to State immunity)

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

Article 6. Modalities for giving effect to State immunity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 6 was adopted.

ARTICLE 7 (Express consent to exercise of jurisdiction)

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

Article 7. Express consent to exercise of jurisdiction

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

- (a) by international agreement;
- (b) in a written contract; or
- (c) by a declaration before the court or by a written communication in a specific proceeding.

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

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

Article 7 was adopted.

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

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

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

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

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

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

- (a) invoking immunity; or
- (b) asserting a right or interest in property at issue in the proceeding.

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

4. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be interpreted

as consent by the former State to the exercise of jurisdiction by the court.

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

Article 8 was adopted.

ARTICLE 9 (Counter-claims)

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

Article 9. Counter-claims

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

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

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

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

Article 9 was adopted.

ARTICLE 10 (Commercial transactions)

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

Article 10. Commercial transactions

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

2. Paragraph 1 does not apply:

- (a) in the case of a commercial transaction between States;
- (b) if the parties to the commercial transaction have expressly agreed otherwise.

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

- (a) suing or being sued; and
- (b) acquiring, owning or possessing and disposing of property including property which the State has authorized it to operate or manage.

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

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

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

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

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

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

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

a commercial transaction of a State enterprise was initiated.

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

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

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

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

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

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

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

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

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

73. Mr. McCAFFREY said that his intention was not to prolong the debate but simply to explain his earlier remarks. In reply to Mr. Shi, he would point out that he had not said that State enterprises were "often" under-

capitalized but only that they "might be". The difference between a private enterprise and a State enterprise, as he saw it, was that a private enterprise did not purport to have anything behind it, whereas a State enterprise carried the possibly dangerous implication of being backed by the full resources of the State. He had not accused States of deliberately undercapitalizing their enterprises and he fully agreed that private enterprises, too, were sometimes financially unsound.

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

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

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

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

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

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

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

The meeting rose at 12.55 p.m.

2219th MEETING

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

Chairman: Mr. John Alan BEESLEY

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

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

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING¹ (*continued*)

ARTICLE 10 (Commercial transactions) (*continued*)

1. The CHAIRMAN invited the Commission to resume its consideration of article 10.²

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

3. Mr. MAHIOU said that he favoured the deletion of that word. In his view, the issue raised in article 10, paragraph 3, was governed by article 2, paragraph 1 (*b*)

(*iv*), which extended the term “State” to agencies or instrumentalities of the State and other entities acting in the exercise of the sovereign authority of the State. The deletion would therefore not give rise to any particular problems and would not leave a gap in the draft articles.

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

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

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

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

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

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

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

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