Document:-
**A/CN.4/SR.2220**

**Summary record of the 2220th meeting**

Topic:
**Jurisdictional immunities of States and their property**

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

100. He therefore preferred the new text, which had two advantages by comparison with the original text. First, the deletion of the word "exclusively" brought the objective into sharper focus. Secondly, and above all, the purpose for which an entity had been established would have no bearing in the case of a proceeding and had nothing to do with the problem of the immunity of the State in a given situation. The State might have wanted to establish a commercial entity which would, in fact, carry out activities other than commercial activities: in that case, immunity would apply. It might also have wanted to establish a primarily governmental entity which engaged in commercial transactions: in that case, immunity would not apply. Thus, it was not the purpose for which the State enterprise or other State entity had been established which counted, but its activity at the time when the problem of immunity arose.

101. He did not consider that provision to be essential, but he understood the concerns of some members of the Commission who had raised the question of the immunity of the State that had established an enterprise which did not enjoy immunity and did not want the provision to prejudice the answer. That answer would, however, depend on the draft as a whole.

102. Mr. TOMUSCHAT said that the discussion had taken a new turn, whereas a consensus had seemed to be emerging.

103. The Commission could stay with the original text proposed by the Drafting Committee by deleting the word "exclusively"—the main bone of contention—and replacing the words "with regard to" by the word "in" in the English version. Mr. Pellet's fears could be dispelled. The case of an entity established initially to perform government service and then transformed by the State to perform commercial transactions was covered by the words "to perform" contained in the Drafting Committee's original provision.

104. The CHAIRMAN invited the members of the Commission to continue their consultations on article 10, paragraph 3.

ARTICLE 15 (Fiscal matters ) (*continued*)

105. Mr. McCAFFREY emphasized that article 15 was based on extensive legislative practice.

106. The CHAIRMAN suggested that consultations should continue and that the Commission should come back later to article 15.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

---

# 2220th MEETING

*Thursday, 6 June 1991, at 10.10 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. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, 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 READING[1] (*continued*)

ARTICLE 10 (Commercial transactions) (*concluded*)

1. The CHAIRMAN invited the Commission to resume consideration of article 10.[2]

2. Mr. PAWLAK (Chairman of the Drafting Committee) said that, at the previous meeting, he had proposed a revised draft of paragraph 3.[3] Following consultations and in view of the fact that the draft had not enlisted the support of the majority of members in plenary, he wished to withdraw it and, instead, to put forward another solution. It should be emphasized that the provision contained in paragraph 3 was most important. Its purpose was to indicate that a State enterprise or an establishment set up by the State could not be identified with the State. It had to have separate legal personality and had to be liable for its actions. His new proposal, which, he believed, preserved that central meaning yet met the concerns expressed by some members, was that the words "to perform exclusively commercial transactions", in the text proposed by the Drafting Committee,[4] should simply be deleted.

3. The CHAIRMAN thanked the Chairman of the Drafting Committee for his efforts to arrive at an acceptable solution. He said that, if he heard no objection, he would take it that the Commission agreed to adopt article 10, as amended.

*Article 10, as amended, was adopted.*

---

[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.

[3] For text, see 2219th meeting, para. 87.

[4] See footnote 2 above.

4. Mr. McCAFFREY said that, while he had not wanted to obstruct the adoption of paragraph 3 as amended, he continued to have serious reservations as to whether the provision it contained was supported in State practice, was workable as a practical matter, or was generally acceptable to States.

ARTICLE 15 (Fiscal matters) (*concluded*)

5. Mr. MAHIOU, speaking as the former Chairman of the Drafting Committee, said that, in accordance with the Chairman's suggestion, he had held consultations with other members of the Commission and was now in a position to suggest the deletion of article 15[5] subject to certain explanations which he intended to present very briefly so as to avoid reopening the debate.

6. An article adopted by the Drafting Committee on second reading obviously could not simply disappear without trace; the reasons for deleting it had to be clear. The first was that the article concerned only relations between two States, the forum State and the foreign State; it therefore dealt with a bilateral international problem governed by existing rules of international law and, as such, covered by the provisions of article 3, already adopted by the Commission. The second reason was that the draft as a whole dealt with relations between a State and foreign natural or juridical persons, the purpose being either to protect the State against certain actions brought against it by such persons or, conversely, to enable those persons to protect themselves against the State. Hence, article 15, dealing as it did solely with inter-State relations, did not fall within the real scope of the draft articles: it merely gave rise to problems of interpretation *vis-à-vis* the diplomatic and consular conventions. In his opinion, therefore, it should be deleted.

7. Mr. OGISO (Special Rapporteur) said that he had been consulted by Mr. Mahiou about the proposal and would not oppose it if the majority endorsed it. However, since article 15 had been included in the draft articles from the first and since a number of domestic legislations referred to similar, though not identical, matters, it was advisable to retain the article in a somewhat amended form. It could read:

> "Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the fiscal obligations derived from the commercial transactions engaged in by the former State in the territory of the latter State."

8. Deletion of the article had been suggested first by a member from one of the European Community countries, which were now approaching harmonization of all their fiscal regimes. Quite understandably, the subject dealt with in the article was of no particular interest to those countries. It might, however, be of some interest to others, particularly countries which had legislation on the matter. Since no member from those countries was present in the Commission, he was hesitant about deleting the article at so late a stage. Secondly, it would be noted that he had narrowed the matter down to the fiscal obligations derived from the commercial transactions engaged in by States. Since, under the draft articles, a State had no immunity in respect of commercial transactions, the question of fiscal obligations might arise in future in countries which did not belong to the European Community, and some of them might consider it desirable to keep the subject in the draft. However, if most members thought the article should be removed he was ready to withdraw his proposal for the sake of achieving consensus.

9. Mr. McCAFFREY said that, as already stated at the previous meeting, he would normally feel rather uncomfortable about deleting an article which had been adopted on first reading, and was in the process of being considered on second reading. Although he still believed the article had some basis in international law, as Mr. Ogiso had demonstrated at the previous meeting, he was appreciative of Mr. Mahiou's explanations and the efforts to reach a mutually acceptable decision. Accordingly, he would not stand in the way of deletion of the article, provided it was made entirely clear, in the commentary or elsewhere, that the deletion did not in any way prejudge the question of State immunity in fiscal matters.

10. The CHAIRMAN thanked members for their conciliatory attitude.

11. Mr. TOMUSCHAT said that he agreed with the reasons given by Mr. Mahiou in support of deleting the article, which was on relations between two States and thus failed to fit into the framework of a draft in which the foreign State appeared in the role of a potential defendant. However, he also concurred with Mr. McCaffrey that the commentary should clearly indicate that the deletion of the article did not prejudge the question of State immunity in fiscal matters.

12. Mr. DÍAZ GONZÁLEZ said he, too, agreed with the proposal to delete the article, but endorsed the points made by Mr. McCaffrey and wondered whether the Commission should not pursue the search for a compromise solution.

13. Mr. PELLET said that, like Mr. McCaffrey, he had serious doubts about deleting article 15. At the same time, he had doubts about the principle of absolute non-immunity of States in fiscal matters set forth in the article and about the wording proposed by Mr. Ogiso, for he failed to see why fiscal obligations derived from commercial transactions should be singled out for special treatment. For those reasons, he was prepared, although with little enthusiasm, to accept the proposal to delete the article, but would wish to see it stated explicitly—if possible in the body of the draft rather than in the commentary—that the draft articles did not cover the question of relations between States.

14. Mr. MAHIOU, speaking as the former Chairman of the Drafting Committee, said that the Commission had to choose between deleting article 15, in which case the Special Rapporteur's views should be reflected in the commentary to article 10, paragraph 1, and maintaining

[5] For text, see 2219th meeting, para. 41.

the article but amending the wording, possibly on the basis of the Special Rapporteur's proposal.

15. Mr. OGISO (Special Rapporteur) said that none of the members who had spoken preferred his proposal. Consequently, he was prepared to withdraw it for the sake of consensus, on the understanding that the commentary to article 10 would state that the non-immunity of States in connection with commercial transactions also included non-immunity in fiscal matters arising from commercial transactions.

16. The CHAIRMAN thanked the Special Rapporteur for his spirit of cooperation. He said that, if he heard no objection, he would take it that members agreed to delete article 15.

*Article 15 was deleted.*

ARTICLE 17 (Ships owned or operated by a State) (*continued*)

17. The CHAIRMAN invited the Commission to resume consideration of article 17.[6] Although doubts had been expressed during the earlier discussion, particularly about the deletion of the criterion of intended use from paragraphs 1 and 2, he believed that only two points had given rise to actual divergences of views. One concerned the second half of paragraph 2, which some members considered unnecessary and illogical. Perhaps they would not object to adoption of the paragraph in its present form, on the understanding that their reservations would be duly recorded in the summary record. The second point concerned the bracketed phrase in paragraph 3 (*d*). He suggested that the Commission should examine it after considering paragraph 2.

18. Mr. EIRIKSSON said that, at least, the first part of paragraph 2 was not illogical. As for the second part, he still believed it was both illogical and unnecessary.

19. Mr. OGISO (Special Rapporteur) said he had reservations about the deletion of the words "intended for use" from paragraphs 1, 2 and 4, for reasons stated at the previous meeting by Mr. Mahiou. For his own part, he would add further reasons in support of the contention that the removal of the words "intended for use" left an undesirable gap in the draft articles.

20. For example, State A could order from a shipbuilding yard in State B a ship intended to be used for commercial purposes. After it was built, the ship sailed from a port in State B to a port in State A. During that first voyage the ship was not being actually used for commercial purposes, but was intended for future commercial use. With the deletion of the words "intended for use" that situation would not be covered by article 17.

21. Again, a training ship might sail from a port in State A to a port in State B. That type of ship was usually owned or operated by the Government and would enjoy immunity during the voyage in which the training took place. After the arrival of the ship in State B, however, the men who had been trained during the voyage might be assigned to another vessel. The training ship would then return to State A, without trainees, to pick up another group on arrival at State A. The situation was one in which the ship was not in actual use but was "intended for use" as a training ship. There again, the elimination of the words "intended for use" would mean that that situation would not come under the terms of article 17.

22. Mr. McCAFFREY associated himself with the Special Rapporteur's reservations regarding the deletion of "intended for use", particularly since those words were to be found in practically all relevant provisions of the legislation of States. The deletion would also have the undesirable effect of broadening the meaning of the term "use". For example, a ship which was undergoing repairs would have to be said to be "used" for a commercial purpose.

23. Mr. PAWLAK (Chairman of the Drafting Committee) said the point had been discussed at length in the Drafting Committee, which had considered the Special Rapporteur's views but had decided to remove the words in question. The important thing, it had been felt, was what the ship was doing at the time of transport of the goods. The operation of the ship "at the time the cause of action arose"—the wording of paragraph 4—indicated whether the ship was being used for a commercial purpose or not. It was the actual use that mattered, not the intention. The issue of intention was material with regard to the cargo but not to the ship.

24. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 2 on the understanding that members' reservations were placed on record.

*It was so agreed.*

25. The CHAIRMAN pointed out that the phrase "loss or damage resulting from", at the beginning of paragraph 3 (*d*), had been placed between square brackets so as to indicate clearly that the Drafting Committee had not been able to reconcile differing views; the same divergence was apparent in the Commission's debate. He believed it was unprecedented for the Commission to leave formulations in square brackets in drafts adopted on second reading. On the basis of established practice, he would therefore have no choice but to put the issue to the vote. An alternative course—one which he himself favoured—would be to depart from the Commission's practice and to leave the text as it stood, in other words, with the square brackets, so as to signal the problem to the Sixth Committee and elicit comments which would help in solving the problem when final action was taken on the Commission's draft. Again, it had been suggested that, as far as paragraph 3 (*d*) was concerned, the Commission was not in fact engaged in a second reading. The idea embodied in paragraph 3 (*d*) was a new one and had been put forward only recently.

26. Speaking as a member of the Commission, he urged the Commission to show flexibility. He was in favour of retaining the square brackets, a course that would place the issue clearly before Governments.

[6] For text, see 2219th meeting, para. 55.

27. Mr. BARSEGOV said he remained convinced that the words in square brackets were necessary in paragraph 3. As far as procedure was concerned, however, he would reiterate his view that the issue should be decided by consultation and not by a vote.

28. Mr. HAYES said that he continued to object to the phrase "loss or damage resulting from". The divergent views of members on the subject would be seen from the summary record.

29. Mr. FRANCIS said that sound arguments had been advanced on both sides with regard to the words in question. Personally, he was convinced that the issue should not be put to a vote. If it did not prove possible to arrive at a decision by consultations, the appropriate thing would be to retain the square brackets, even if, as had been suggested, such a course was being adopted for the first time.

30. Mr. McCAFFREY said he agreed with Mr. Barsegov and Mr. Hayes on the desirability of not putting the matter to a vote, even though it was undoubtedly important. It would not be appropriate to place the phrase between square brackets, thereby suggesting to the General Assembly that it was the one issue on which the Commission had been unable to decide, when it was obvious from the draft that decisions had been taken on a great many more important issues. He therefore suggested that the square brackets around the words "loss or damage resulting from" should be eliminated and paragraph 3 (*d*) should be adopted.

31. The CHAIRMAN said that he had specifically pointed out that the Commission's practice would require a vote. He did not favour one and it was not his intention to force one.

32. Mr. PAWLAK (Chairman of the Drafting Committee) suggested that the Commission should close its debate on article 17. The paragraph in question did not create any obligations. It simply gave examples and he agreed with Mr. McCaffrey that the subject should be placed in its proper perspective.

33. Mr. OGISO (Special Rapporteur) said that a lot of time had been spent on a problem that was not of great substance and did not create rights or obligations.

34. Mr. THIAM said that it was not correct to say that a vote had never been taken in the Commission on second reading; he remembered such a case, namely, on the topic on the succession of States in respect of State property, archives and debts, because he himself had been chairman at the time.[7] He was not against taking a vote. The Commission should not shy away from difficulties by sending the Sixth Committee a text containing square brackets. When all possibilities of reaching a compromise had been exhausted, which he did not consider to be the case at hand, the Commission must vote.

35. The CHAIRMAN said he agreed with Mr. Thiam that the Commission had in the past voted on second reading, but it would be preferable if that could be avoided.

36. Mr. AL-KHASAWNEH said he seemed to recall that a phrase had been left in square brackets in the text of the draft articles on the law of treaties between States and international organizations or between international organizations. If such a precedent had already been established, it would be useful.

37. The CHAIRMAN said that paragraph 3 (*d*) was not being considered on second reading. It was based on the desire to take account of environmental issues. The subject had arisen in 1991 and had not been discussed, voted on or accepted previously. Thus, the situation was sufficiently unusual for the Commission to decide what procedure it intended to adopt in the particular case.

38. Mr. PAWLAK (Chairman of the Drafting Committee) proposed that the phrase in the square brackets should be deleted and replaced by "consequences of".

39. Mr. BARSEGOV said he regretted that the word "injurious" was not used before "consequences". As it stood, the proposal left a large area in which State immunity could not be invoked and it went much further than had the Third United Nations Conference on the Law of the Sea.

40. The CHAIRMAN thanked Mr. Barsegov for not opposing the proposed change, despite his reservations.

41. Mr. Sreenivasa RAO said that the subparagraph was no clearer with the proposed amendment and it was to be hoped that that situation could be remedied in the commentary. He objected to deleting the words "loss or damage". Environmental protection was an emotional issue and that made it all the more inappropriate to leave such a broad formulation as "consequences of" in a text on the jurisdictional immunities of States. If his fears could be allayed in the commentary, however, he could withdraw his objection.

42. The CHAIRMAN suggested that reference might be made to the fact that paragraph 3 (*d*) was being adopted on first reading and that it was an important enough issue to be included in the draft. Perhaps the Special Rapporteur could be asked to produce an acceptable commentary.

43. Mr. BARSEGOV expressed strong reservations about the text. Such a broad provision might cause enormous loss to international shipping, especially that of developing countries. However, he would not stand in the way of the provision's adoption and would not ask for a vote.

44. Mr. SHI said that he could accept the compromise proposal of the Chairman of the Drafting Committee only if the commentary to the paragraph made the Commission's position clear. Otherwise, he was in favour of retaining the text in the square brackets and referring it to the Sixth Committee. As already pointed out, the provision was new and was therefore being considered on first reading. Hence, it would be appropriate to let Governments decide.

[7] See *Yearbook ... 1981*, vol. I, p. 270, 1692nd meeting, paras. 86 *et seq.*

45. Mr. PAWLAK (Chairman of the Drafting Committee) suggested that the Special Rapporteur should reflect the discussion in the commentary. For his part, he considered that the words "loss or damage" should be used in the commentary and that an explanation should be added on the position taken in the Commission.

46. Mr. BARSEGOV said that it was plain that the question had not yet been resolved. He suggested postponing a decision until conditions for reaching a compromise were ripe.

47. Mr. Sreenivasa RAO said that, if the commentary explained the scope and structure of the provision and made it clear that it was not too general, that would allay his fears and he could support the provision. He was not asking for a precise wording yet—simply one or two sentences that captured the general sense of what later would become the final formulation.

48. Mr. EIRIKSSON said that it would be preferable to take account in the commentary of the views of Mr. Barsegov and others. He would not object to seeing more of the commentary before the actual form of language was adopted. The proposal by the Chairman of the Drafting Committee was a compromise. The formulation of the subparagraph should not be viewed as having the dire consequences to which reference had been made. Clearly, that was not the intention.

49. Mr. HAYES said it would be better for paragraph 3 (*d*) to begin with the word "pollution", but he could agree to inserting the words "consequences of" in order to arrive at an agreement and avoid a vote.

50. In his view, paragraph 3 did not, and could not, create any exceptions to immunity. Paragraph 1 did so, and paragraph 3 gave examples of proceedings in which a court was otherwise competent, competence being a matter of national and not international legislation in those circumstances. Paragraph 3 must not have any other function than to give those examples. Specifically, he could not accept that it should have the effect of modifying the basic provision in paragraph 1 by saying that some kinds of actions in which a court might otherwise have competence would not be the kind of actions in which, in the circumstances in paragraph 1, immunity could not be invoked. In other words, paragraph 3 could not be a substantive article changing the meaning of paragraph 1. The law on the immunity of States was not concerned in any way with the merits of litigation. Thus, the argument about facilitating frivolous or vexatious litigation was invalid in the context of the provisions on the immunity of States now being prepared. For that reason, he had objected to the words "loss or damage resulting from", but he could agree to the formula "consequences of". In his opinion, the commentary should explain fully the two points of view, but it must not indicate that the effect of the revised formula was the same as that sought by including the words "loss or damage resulting from".

51. Mr. TOMUSCHAT said that, admittedly, the Commission was not drafting substantive rules, but the text of the article might have repercussions, or might be interpreted as having repercussions, on substantive law. Given the marked divergence of views in the Commission, he would prefer to retain the words "loss or damage resulting from" between square brackets. If those words were deleted, however, the two points of view in the Commission should be carefully reflected in the commentary. It might therefore be better to defer final adoption of article 17 until the Commission had before it a commentary which commanded the support of both sides.

52. Mr. BARSEGOV said it had been argued that paragraph 3 was merely illustrative and did not enlarge the sphere of immunity. The Commission's practice in cases where a list was not exhaustive—such as the list of crimes in the draft Code of Crimes against the Peace and Security of Mankind—was not to give illustrations. He therefore proposed, in line with that practice, that paragraph 3 as a whole should be omitted.

53. The CHAIRMAN, speaking as a member of the Commission, said that paragraph 3 was indeed meant to be illustrative and non-exhaustive. It was also a new provision, which allowed for a measure of flexibility so far as procedure was concerned. It was an *a contrario* argument to say that the inclusion of the words "loss or damage resulting from" would not have the effect of restricting immunity. He also agreed that subparagraph (*d*) was not the same as the other subparagraphs, but that it should be. To that end, the Commission might wish to consider adding the words "consequences of", or a similar formulation, to the opening clause of paragraph 3 or, alternatively, to each of subparagraphs (*a*), (*b*), (*c*) and (*d*). Again, it could add the words "loss or damage resulting from" to each of those subparagraphs. In that way, the Commission would underline the importance it attached to the issue without over-emphasizing it in such a way as to give rise to misinterpretation. In other words, there was perhaps room for constructive ambiguity.

54. In his view, although the members of the Commission did not differ greatly in their motivation, they had still not arrived at a fully satisfactory solution to the problem and should therefore explore further all the drafting possibilities.

55. Mr. FRANCIS said that he was concerned to note that both the Special Rapporteur and Mr. Thiam had indicated their readiness to accept a vote. True, a vote had once been taken in the Commission, but it was the only occasion he could remember in all his 15 years as a member. He particularly welcomed the attitude of Mr. Barsegov, who, in voicing the opinion that the Commission should not proceed to a vote, had carried on in the tradition of his eminent predecessor, Mr. Ushakov, who had always favoured decisions by consensus. A vote by the Commission on the issue at hand could only have serious repercussions for the future. Though it might be laborious, it would be better for the Commission to settle issues by consensus rather than by a show of hands.

56. Mr. Sreenivasa RAO said that, having re-read the article, he was reassured by the words "determination of a claim in respect of", which went to the heart of the matter. In a court of law, it was not so much a question of voicing opposition to pollution as of showing that damage had occurred. On that basis, he could go along with the wording of the article. He would suggest that the commentary should make it quite clear, first and

foremost, that all members were opposed to pollution of the seas. He would also like to be certain that the possibility of vexatious and frivolous claims was precluded.

57. Mr. PAWLAK (Chairman of the Drafting Committee) said that the wisest course would be to defer further discussion so as to draft a commentary that would reflect all views. At the same time, it should be remembered that a commentary merely reflected intentions, whereas the text of an article was binding.

58. The CHAIRMAN suggested that further discussion of article 17 should be postponed and that the Special Rapporteur should be asked to draft a commentary to the article for consideration by the Commission at the next meeting.

*It was so agreed.*

ARTICLE 18 (Effect of an arbitration agreement)

59. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 18, which read:

***Article 18. Effect of an arbitration agreement***

**If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:**

**(*a*) the validity or interpretation of the arbitration agreement;**

**(*b*) the arbitration procedure;**

**(*c*) the setting aside of the award,**

**unless the arbitration agreement otherwise provides.**

60. Mr. PAWLAK (Chairman of the Drafting Committee) said that, in line with its decision on article 2, paragraph 1 (*c*), the Drafting Committee had opted for the term "commercial transaction". It would, of course, be interpreted by the courts in the light of their respective legal systems. The advantage of that term over "civil or commercial matter" was that it would not force an interpretation on States that might be inconsistent with those systems. After consideration, the Drafting Committee had decided not to include a subparagraph (*d*) on recognition of the award since it was a matter that pertained more to immunity from execution and, accordingly, had no place in article 18.

61. The Drafting Committee had deleted former article 20, on cases of nationalization.

62. Mr. EIRIKSSON proposed that the word "or" should be added at the end of subparagraph (*b*).

*It was so agreed.*

63. Mr. Sreenivasa RAO said that he had no objection to the article, but would like some clarification. Normally, where a State and a natural or legal person agreed on arbitration, the relevant procedural matters—for example, the venue and the applicable law—were laid down in the arbitration agreement. Thus, the court which was appointed pursuant to such an agreement would deal with the question of immunity rather than the court of any other State, and the arbitration procedure prescribed in the arbitration agreement would govern the three matters referred to in subparagraphs (*a*), (*b*) and (*c*) of article 18. He trusted that his understanding was correct and that no fundamental change in arbitration law was contemplated by the article.

64. Mr. OGISO (Special Rapporteur) said that Mr. Sreenivasa Rao's interpretation was correct. Normally, the arbitration agreement provided for the arbitration procedures. In cases where the arbitration agreement was not sufficiently clear in that respect, however, the matter could be dealt with by the supervisory jurisdiction of the court which was otherwise competent in the proceeding.

65. Mr. McCAFFREY said that he wished to enter a reservation with regard to the article, as it did not appear to provide for enforcement of the agreement to arbitrate. While it could be argued that that point was covered by subparagraph (*a*), it was not clear to him that that was the case.

*Article 18, as amended, was adopted.*

TITLE OF PART III (Proceedings in which State immunity cannot be invoked)

66. Mr. PAWLAK (Chairman of the Drafting Committee) reminded members that the Commission, having been unable to agree on first reading whether part III should be entitled "Limitations on State immunity" or "Exceptions to State immunity", had finally decided to place the words "Limitations on" and "Exceptions to" between square brackets and to consider the matter further on second reading. Although many members of the Committee had favoured the words "Exceptions to", the title "Proceedings in which State immunity cannot be invoked" had been adopted as a compromise in the belief that the title "Exceptions to State immunity" might give rise to objections in view of the strong views voiced earlier by a number of members. Should that belief prove unfounded, the Commission might wish to consider replacing the proposed title by "Exceptions to State immunity". He would none the less propose that the title should be retained.

*It was so agreed.*

*The title of part III (Proceedings in which State immunity cannot be invoked) was adopted.*

*The meeting rose at 1.05 p.m.*

---

## 2221st MEETING

*Friday, 7 June 1991, at 10.10 a.m.*

*Chairman*: Mr. John Alan BEESLEY

*Present*: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Díaz González,