

Document:-  
**A/CN.4/SR.2221**

**Summary record of the 2221st meeting**

Topic:  
**<multiple topics>**

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

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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 mat-

ters 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,*

Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, 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<sup>1</sup> (continued)

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

1. The CHAIRMAN invited the Commission to resume its consideration of article 17.<sup>2</sup>

2. Mr. PAWLAK (Chairman of the Drafting Committee) said that, following consultations on paragraph 3, a commentary had been drafted for subparagraph (d) which reflected the difficulties encountered and the positions taken.

3. Mr. OGISO (Special Rapporteur) said that the commentary read:

Paragraph 3 (d) has been introduced on second reading in response to a suggestion put forward by a Government in the Sixth Committee at the forty-fifth session of the General Assembly. Although the provisions of paragraph 3 are merely illustrative, the Commission deemed it appropriate to include this additional example in view of the importance attached by the international community to environmental questions and of the unabated problem of ship-based marine pollution. In consideration of the fact that this subparagraph was not contained in the text of former article 18 adopted on first reading, both the Commission and the Drafting Committee discussed the question in some detail.

The words "consequences of" are intended to convey the concern of some members that unqualified reference to pollution of the marine environment from ships might encourage frivolous claims or claims without tangible damage or loss to the claimant. Some other members, on the other hand, felt that this concern was unjustified inasmuch as no claim would be entertained by a court if the claimant did not establish that he had suffered loss or damage. After extended discussion, the Commission agreed to insert the words "consequences of", on the understanding that the latter would include loss or damage resulting from pollution of the marine environment.

It should be noted that subparagraph (d) serves merely as an example of the claims to which the provision of paragraph 1 would apply, and, as such, does not affect the substance or scope of the exception to State immunity under paragraph 1. It should be noted also that subparagraph (d) does not create substantive law concerning the legitimacy or receivability of a claim. Whether or not a claim is to be deemed actionable is a matter to be decided by the competent court. One member considered, however, that a more qualified wording such

<sup>1</sup> For texts of draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 7-22.

<sup>2</sup> For text, see 2219th meeting, para. 55.

as "injurious consequences" would have been acceptable to him. He therefore wished to reserve his position on this subparagraph.

4. He said that if the second paragraph of the commentary gave rise to any difficulty, there was no reason why it should not be deleted. He suggested that the adoption of the commentary should be deferred until members had had time to reflect upon it.

5. Mr. EIRIKSSON and Mr. McCAFFREY observed that they would have some suggestions to make on the commentary.

6. Mr. HAYES said that he too wished to propose certain changes to the commentary, which, in his view, was not altogether satisfactory. He would, however, have no objection to paragraph 3 (d) as it stood.

7. Mr. SHI recalled that his acceptance of the compromise formula for subparagraph 3 (d) was dependent on the commentary. Since the text of the commentary had been distributed only shortly before the meeting, he would request the Commission not to take a decision in haste on either the draft article or the commentary.

8. The CHAIRMAN, noting that consultations would have to be held on the commentary which the Special Rapporteur had read out, suggested that the Commission should take up article 19, article 18 having been adopted at the previous meeting, and that it should revert to article 17 after further consultations had taken place on the commentary to paragraph 3 (d).

*It was so agreed.*

ARTICLE 19 (State immunity from measures of constraint)

9. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 19, which read:

*Article 19. State immunity from measures of constraint*

1. No measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) The State has expressly consented to the taking of such measures as indicated:

(i) by international agreement;

(ii) by an arbitration agreement or in a written contract;

(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) The State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

(c) The property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum and has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed.

2. Consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint under paragraph 1, for which separate consent shall be necessary.

10. Mr. PAWLAK (Chairman of the Drafting Committee) recalled that the title of part IV adopted on first reading read: "State immunity in respect of property from measures of constraint". As part IV of the draft dealt only with measures of constraint which related to a proceeding before a court, some members of the Drafting Committee had felt that the title should be changed accordingly. Some other members of the Committee, who did not attach so much importance to the titles of the various parts of the draft and of the articles, had nevertheless agreed to the new title. The words "in respect of property" had been deleted, since it was obvious that a question of immunity of State property was concerned.

11. The Special Rapporteur had proposed that articles 21 and 22 adopted on first reading should be merged and that proposal had met with the support of the Commission since the ideas expressed in the two articles were closely related: article 21 dealt with State immunity from measures of constraint and article 22 with consent to such measures. The introductory phrase of article 19, paragraph 1, therefore embodied the general principle of State immunity from measures of constraint and the subparagraphs which followed stated the exceptions to that principle. The Drafting Committee had deleted from the introductory phrase the words "in the territory of a forum State", which appeared to introduce an unnecessary limitation that had not in fact existed in the original text of article 21. The Drafting Committee had, however, added to the new text the clause which appeared in the original text of article 21 and which stated that the article applied only to measures of constraint relating to State property "in connection with a proceeding before a court of another State". Also, the words "foreign State" and "forum State" had been replaced by the words "the State" and "another State" to conform to the terms used in the rest of the articles.

12. Subparagraph (a) corresponded to paragraph 1 of original article 22. The introductory phrase had been simplified without changing its meaning. The order of modalities by which a State could indicate its consent had been slightly changed as compared with the text adopted on first reading. Obviously, subparagraph (a) should be read together with the introductory phrase of paragraph 1; accordingly, a "declaration before the court" meant a declaration before the court of the State of the forum.

13. Subparagraph (b) corresponded to subparagraph (b) of article 21 adopted on first reading, apart from a minor drafting change because of the structure of the new introductory phrase.

14. Subparagraph (c) corresponded to subparagraph (a) of article 21 adopted on first reading, except that the expression "commercial [non-governmental] purposes" had been changed to "other than government non-commercial purposes", as in the earlier articles.

15. Paragraph 2 corresponded to paragraph 2 of article 22 adopted on first reading, with some minor drafting changes.

16. Lastly, the title of article 21 adopted on first reading had been maintained for article 19.

17. Mr. Sreenivasa RAO said he understood that subparagraph (b) had been adopted on first reading at the time when the concept of State enterprise had not been introduced into the draft. Even if a State had earmarked or allocated funds to a State enterprise, immunity should not operate in favour of that enterprise, since the property in such funds would have passed to it; accordingly, the enterprise should be held responsible for its activities. To infer from such situations that there was an exception to State immunity was neither necessary nor logical.

18. Mr. PAWLAK (Chairman of the Drafting Committee), noting that the draft should be considered as a whole, said he would interpret Mr. Sreenivasa Rao's comment as underlining the complexity of paragraph 1 (b) and not as a reservation.

19. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 19.

*Article 19 was adopted.*

#### ARTICLE 20 (Specific categories of property)

20. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 20, which read:

##### *Article 20. Specific categories of property*

1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under paragraph 1 (c) of article 19:

(a) property, including any bank account, which is used or intended for use for the purpose of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;

(b) property of a military character or used or intended for use for military purposes;

(c) property of the central bank or other monetary authority of the State;

(d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;

(e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

2. Paragraph 1 is without prejudice to paragraph 1 (a) and (b) of article 19.

21. Mr. PAWLAK (Chairman of the Drafting Committee) said that article 20 (originally article 23) was designed to protect certain specific categories of property by excluding them from any presumption of consent to measures of constraint.

22. Paragraph 1 sought to prevent any interpretation to the effect that property classified as belonging to one of the categories listed fell under the exception provided for

in article 19, paragraph 1 (c). The cross-reference to that particular provision had, of course, been adjusted in the light of the merger and renumbering of original articles 21 and 22. The Drafting Committee had made two changes in the introductory phrase of paragraph 1. The first concerned the words “for commercial [non-governmental] purposes”, which, as in other provisions, had been replaced by the words “for other than government non-commercial purposes”. The second consisted in the addition of the words “in particular” after the words “the following categories” to indicate that the enumeration in subparagraphs (a) to (e) was merely illustrative.

23. With regard to subparagraphs (a), (c), (d) and (e), the Drafting Committee had observed that, since the criteria listed in article 19, paragraph 1 (c) already included the requirement that the property should be “in the territory of the State of the forum”, the phrase “which is in the territory of another State” was unnecessary. In subparagraph (e), the Drafting Committee had deemed it useful to add the word “cultural” after the word “scientific”.

24. Some members of the Drafting Committee had wondered whether paragraph 2 was necessary, since the sovereign power of the State to dispose of its property as it saw fit was already safeguarded by article 19, paragraph 1 (a) and (b). The Committee had concluded that, in the light of those subparagraphs, article 20, paragraph 2, did not have to be as elaborate as it was in the draft adopted on first reading. It had, however, felt that a reference to article 19, paragraph 1 (a) and (b), would serve as a useful reminder in view of the categorical language used in paragraph 1.

25. The title of the article remained unchanged.

26. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 20.

*Article 20 was adopted.*

#### ARTICLE 21 (Service of process)

27. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 21, which read:

##### *Article 21. Service of process*

1. Service of process by writ or other document instituting a proceeding against a State shall be effected:

(a) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(b) in the absence of such a convention:

(i) by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or

(ii) by any other means accepted by the State concerned, if not precluded by the law of the State of the forum.

2. Service of process referred to in paragraph 1 (b) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

28. Mr. PAWLAK (Chairman of the Drafting Committee) said that article 21 largely corresponded to the text of article 24 adopted on first reading. Paragraph 1 as adopted on first reading had been much too detailed and had given preference to special arrangements between the claimant and the State over other means. The Committee had considered it unnecessary to go into too much detail on modes of service of process, which could be placed in three general categories: arrangements made in a binding international convention to which both States concerned were parties; diplomatic channels; and other means agreed between the claimant and the State concerned.

29. The Committee was of the view that there should be a preference for treaty provisions in force, where such provisions existed, and that it was only in the absence of a convention that service of process could be made either through diplomatic channels or by any other means. In that case, the parties should be free to agree on their own method of service of process, provided, however, that the method chosen was not precluded by the law of the State of the forum. The State concerned could also indicate by unilateral declaration that it would accept service of process through certain means. If those means were accepted by the claimant and were not precluded by the law of the State of the forum, they were valid under paragraph 1 (b) (ii).

30. Paragraphs 2, 3 and 4 were the same as those adopted on first reading and the title of the article remained unchanged.

31. Mr. Sreenivasa RAO said that he had no objection to the proposed article, but recalled that there were problems involved in going through diplomatic channels.

32. Mr. DÍAZ GONZÁLEZ, supported by Mr. BARBOZA, said that he could not endorse article 21 as it was drafted in Spanish.

33. Mr. AL-KHASAWNEH pointed out that, in the vast majority of cases, there was no international convention applicable in the matter. The exception appeared to have been taken as the starting point rather than the general situation, in which the solution was to go through diplomatic channels.

34. Mr. MAHIU said that, in the French text of paragraph 1, the words *peut être effectuée* should be replaced by the words *est effectuée*.

35. Mr. PAWLAK (Chairman of the Drafting Committee) said it was understood that all the language versions would be harmonized and brought into line with the English text, which did not give rise to any problems.

36. Mr. THIAM proposed that the words *ou de toute autre pièce* should be used in the first line of the French text of paragraph 1.

37. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 21, taking into account the drafting comments made on it.

*Article 21 was adopted.*

#### ARTICLE 22 (Default judgement)

38. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 22, which read:

##### *Article 22. Default judgement*

1. A default judgement shall not be rendered against a State unless the court has ascertained that:

(a) the requirements laid down in paragraphs 1 and 3 of article 21 have been complied with;

(b) a period of not less than four months has expired from the date on which the service of the writ or other document instituting a proceeding has been effected or deemed to have been effected in accordance with paragraphs 1 and 2 of article 21; and

(c) the present articles do not preclude it from exercising jurisdiction.

2. A copy of any default judgement rendered against a State, accompanied if necessary by a translation into the official language, or one of the official languages of the State concerned, shall be transmitted to it through one of the means specified in paragraph 1 of article 21.

3. The time-limit for applying to have a default judgement set aside shall not be less than four months and shall begin to run from the date on which a copy of the judgement is received or is deemed to have been received by the State concerned.

39. Mr. PAWLAK (Chairman of the Drafting Committee), noting that article 22 had originally been numbered 25 when adopted on first reading, said that the Drafting Committee had felt that paragraph 1 would be clearer if the conditions required for a court to be able to render a default judgement were dealt with in three separate subparagraphs. The words "except on proof of" had been replaced by the words "unless the court has ascertained that" in the phrase introducing the three conditions in question so as to indicate clearly that it was incumbent on the court to ascertain that the required conditions were met and that it had to do so prior to rendering its judgement.

40. The text of subparagraph (a) was the same as that of the provision adopted on first reading, except for the renumbering of the cross-reference. That was also true of subparagraph (b), except that the time-limit had been increased from three to four months because it might take over a month for the document instituting the proceeding to reach the authorities of the State concerned and as much time for those authorities' reaction to reach the forum State. Subparagraph (c) had been introduced in response to a suggestion supported by several delegations in the Sixth Committee. The new subparagraph, nevertheless, had no bearing on the question of the competence of the court, which was a matter for each legal system to determine.

41. As to paragraph 2, the text adopted on first reading had dealt in one single sentence with two separate issues, namely, the transmittal of the text of the default judgement and the time-limit for requesting the setting aside

of the judgement. The Drafting Committee had considered that it was preferable to devote separate paragraphs to each of those issues. Paragraph 2 reproduced without change the first part of the former paragraph 2. Paragraph 3 did not differ in substance from the latter part of paragraph 2 of the original text, except that, for the reasons explained in connection with paragraph 1, a four-month time-limit had been substituted for the six month time-limit envisaged in the original text.

42. Mr. McCAFFREY proposed that, in the introductory phrase of paragraph 1, the word "ascertained" should be replaced by the word "found".

43. Mr. THIAM said that he doubted whether the four-month period referred to in paragraph 1 (b) could be applied uniformly to all States without taking account of the distance between the State serving process and the addressee State. There might be some unfairness involved.

44. Mr. HAYES supported the proposal made by Mr. McCaffrey with regard to the introductory phrase of paragraph 1.

45. At the end of paragraph 2, he proposed that the words "and in conformity with the provisions of the said paragraph" should be added for the sake of clarity. The requirement was not simply to resort to one of the means specified in article 21, paragraph 1, but to do so in accordance with the order set out in the paragraph.

46. Mr. PAWLAK (Chairman of the Drafting Committee) said that he had no objection either to Mr. McCaffrey's proposal or to that of Mr. Hayes, which would be useful. With regard to Mr. Thiam's comment, he believed that, in the age of facsimile transmission, the problem of distance did not arise.

47. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 22, as amended by Mr. Hayes and Mr. McCaffrey.

*Article 22, as amended, was adopted.*

#### ARTICLE 23 (Privileges and immunities during court proceedings)

48. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 23, which read:

##### *Article 23. Privileges and immunities during court proceedings*

1. Any failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act or to produce any document or disclose any other information for the purposes of a proceeding shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State shall not be required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a party before a court of another State.

49. Mr. PAWLAK (Chairman of the Drafting Committee) said, for the purposes of convenience and drafting, that text combined what had originally been article 26 (Immunity from measures of coercion) with what had originally been article 27 (Procedural immunities), both of which had been designed to reduce the exercise of coercive measures on States to achieve compliance with court orders. Although the form of the two original texts had been changed, their content was the same.

50. Paragraph 1 was the result of the merger of article 26 adopted on first reading and paragraph 1 of article 27 adopted on first reading. Paragraph 2 corresponded to paragraph 2 of article 27 adopted on first reading, except that the words "a State is not required" had been replaced by the words "a State shall not be required" for drafting purposes only.

51. The new title reflected the Drafting Committee's belief that the article in fact dealt with certain privileges and immunities granted to States, for example, those relating to the provision of securities or deposits.

52. Mr. TOMUSCHAT said that he endorsed paragraph 1, but had a reservation with regard to paragraph 2. A foreign State, acting as defendant, should not be bound to provide security. However, acting as plaintiff, the foreign State should be required to provide security, since the defendant might find it difficult or even impossible to obtain reimbursement from that State for the costs of the proceedings. The rule enunciated in paragraph 2 was thus unfair and accorded an unwarranted privilege to States. None the less, he would not oppose the adoption of article 23.

53. Mr. EIRIKSSON, supported by Mr. McCAF-FREY, Mr. HAYES and Mr. THIAM, said that he shared Mr. Tomuschat's view.

54. Mr. Sreenivasa RAO said that, while he understood those reservations, he believed that paragraph 2 met a practical need and was entirely logical when read in conjunction with paragraph 1, which enumerated the cases in which a State was or was not required to perform a particular act, provide a document or disclose any other information.

55. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 23.

*Article 23 was adopted.*

56. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Drafting Committee was recommending the deletion of article 28 (Non-discrimination), which had been approved on first reading, albeit with considerable reluctance on the part of some members. Several delegations in the Sixth Committee had indicated that they favoured the deletion of article 28. The same differences of opinion had resurfaced at the time of the second reading.

57. The arguments in favour of the retention of the article had been, first, that paragraph 1 embodied the universally accepted principle of non-discrimination and should thus not give rise to any difficulty, secondly, that paragraph 2 (a) was based on the concept of reciprocity,

which was also a generally recognized concept, and, thirdly, that subparagraph (b) had the advantage of safeguarding the position of States that were parties to regional conventions providing for a treatment different from that required by the draft articles.

58. The prevailing view in the Drafting Committee had been that article 28 created more problems than it solved. It had been emphasized in particular that paragraph 2 contradicted paragraph 1 and allowed States so much leeway that it might be used to undermine the principle of immunity, which all States recognized as covering *acta jure imperii*. The Drafting Committee had concluded that, while none of the provisions of article 28 contradicted State practice, it might be better to rely on general international law and, in particular, on the law of treaties.

TITLES OF PART I (Introduction), PART II (General principles), PART IV (State immunity from measures of constraint in connection with proceedings before a court) and

PART V (Miscellaneous provisions)

59. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the titles of parts I, II, IV and V of the draft articles.

*The titles of parts I, II, IV and V were adopted.*

60. The CHAIRMAN suggested that the Commission should consider agenda item 6 while awaiting the results of the consultations on the commentary relating to article 17, paragraph 3 (d).

*It was so agreed.*

**International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/437,<sup>3</sup> A/CN.4/L.456, sect. G, A/CN.4/L.465)**

[Agenda item 6]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR<sup>4</sup>

61. The CHAIRMAN invited Mr. Barboza, the Special Rapporteur, to introduce his seventh report on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/437).

62. Mr. BARBOZA (Special Rapporteur) said that he had tried to comply with the suggestion of one delegation in the Sixth Committee of the General Assembly that the Commission should prepare an overall review of the current status of the topic and indicate the direction it intended to take in the future, instead of continuing with an article-by-article analysis.<sup>5</sup> The texts of the articles

<sup>3</sup> Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

<sup>4</sup> For outline and texts of articles 1-33 proposed by the Special Rapporteur, see *Yearbook . . . 1990*, vol. II (Part Two), chap. VII.

<sup>5</sup> *Official Records of the General Assembly, Forty-fifth Session, Sixth Committee*, 30th meeting, para. 69.

submitted thus far had therefore been referred to in his report simply to facilitate the work of the Commission and he suggested that members should focus not on those texts, but rather on the basic issues.

63. The debate in the General Assembly had proved that, while agreement had not been reached on certain aspects of the topic, consensus had definitely been emerging with regard to some important points. In his opinion, the General Assembly had answered very clearly the questions put to it by the Commission. The majority of the delegations had been opposed to establishing a list of dangerous substances and in favour of providing for the liability of the State of origin in the case of transboundary harm caused by an activity carried out by a private enterprise under its jurisdiction. In the light of those trends and since the task at hand was the development of the law rather than its codification, he believed that negotiations were inevitable and that, instead of continuing the debate on issues on which consensus had not yet been reached, the Commission should consider the possibility, at least for certain articles, of submitting several alternatives to the General Assembly. To that end, it must identify first the main issues and then the various currents of opinion on those issues. It could then suggest the legal formulas which would give expression to those opinions. He was thus not proposing that the general debate should be reopened. The seventh report was an attempt to sum up and assess the situation; it was for the Commission to decide whether that assessment was accurate or not.

64. Another preliminary question was that of the Commission's contribution to UNCED, to be held in Brazil in 1992, and to the United Nations Decade of International Law. Since the Drafting Committee would apparently be unable to consider the articles submitted to it, particularly those relating to principles, in time for them to be presented to the Conference, it might be appropriate to establish a working group to study those principles in particular, so that the Commission could discuss them at its current session, with a view to the 1992 Conference.

65. Opinions were divided on the nature of the instrument that the Commission was drafting. Some members were of the opinion that if the Commission did not concern itself with drafting rules for a convention which required acceptance by States, it could more easily accept certain hypotheses and draft articles, but there was a strong current of opinion in favour of some type of framework convention. In the end, it was the General Assembly that would make the final decision on that issue, and the Commission should postpone its recommendation as to the nature of the instrument.

66. As a preliminary solution to the problem of the English title of the topic, which seemed to be more restrictive in terms of the Commission's mandate than it was in the other language versions, he thought that the current title could be replaced by "Responsibility and liability regarding the injurious consequences of activities not prohibited by international law", although he did not think that the Commission should consider that issue at the current session.

67. With regard to the scope of the draft articles, the main question was to determine whether article 1 should include both activities involving risk and activities with harmful effects or whether those two types of activities should be covered by two separate instruments. The majority of members and of delegations to the Sixth Committee seemed to be in favour of the first solution. Even if the scope in that case might seem somewhat broad, it should be remembered that the obligations arising from the provisions of article 1 were not too burdensome.

68. As to the principles contained in draft articles 6 to 10, a broad consensus seemed to exist on the basic principle (art. 6), the wording of which was inspired by Principle 21 of the Stockholm Declaration.<sup>6</sup> The same was true of the principle of international cooperation (art. 7). The principle of prevention assumed preventive action in order to avert transboundary harm or to reduce the risk of such harm to a minimum or, if harm had already been caused, in order to minimize the harmful effect. Two types of obligations derived from that principle: procedural obligations, which consisted mainly in assessing the transboundary effects of the intended activities, notifying the State presumed affected and holding consultations; and unilateral obligations, namely, the adoption by States of the necessary legislative, regulatory and administrative measures to ensure that operators took all steps to prevent harm, minimize the risk of harm or limit the harmful effects that had been unleashed in the territory of the State of origin. The principle of reparation (art. 9) should reflect the majority opinion in the Sixth Committee, namely that compensation was the responsibility of the operator, under the mechanism of civil liability, with the State assuming residual liability; that was in conformity with many conventions governing specific activities. The principle set forth in draft article 9 therefore needed to be reformulated. The Commission might also consider extending the liability of the State to cases where the victim was unable to obtain compensation because the operator could not provide restitution in full or to cases where the responsible party could not be identified. As indicated in the report, the question should be settled on the basis of negotiations between the State of origin and the State presumed affected. The principle of non-discrimination (art. 10) had given rise to very few objections because it was essential to the proper functioning of the system of civil liability.

69. Referring to article 2, which dealt *inter alia* with dangerous activities, he recalled that most delegations in the Sixth Committee had favoured a general definition of activities involving risk and had felt that a list of substances would be unhelpful and inappropriate. In his opinion, it would be preferable to include in an annex an illustrative list of substances which could help determine the activities which, by virtue of using one of the substances listed, presented a significant risk of transboundary harm. However, that was a matter for the Commission to decide.

<sup>6</sup> Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

70. The issue of prevention was dealt with in greater detail separately in the report. The procedural obligations gave rise to a problem in that it would be difficult to burden States with obligations of that kind within the framework of a legal regime as general as that envisaged in the draft articles. However, such obligations were fairly well established in international law and States usually required previous authorization for activities of the type described in article 1, in order to protect their own population. The procedure should therefore be simplified, possibly by allowing the State presumed affected some degree of participation in the authorization procedures for the activity in question. In addition, the procedure should not be made a condition for the granting of the authorization, it being understood that the State of origin would be liable in the event of actual harm. Furthermore, no State could be compelled to tolerate significant harm or a significant risk of harm. That brought in the idea of the prohibition of an activity and the need to establish a threshold for prohibition, which was in turn related to the idea of a threshold for harm or risk, bearing in mind the balance of interests and the factors referred to in draft article 17. It remained to determine how to settle possible disputes: the Commission would have to decide whether there should be a mandatory system or whether the methods of general international law should be applied. As had been indicated, prevention included procedural obligations and unilateral measures. While the former might or might not be mandatory, depending on the case, some were of the opinion that the latter certainly should be, and that meant that failure to give effect to them would entail the consequences provided for by general international law.

71. The last chapter of the report dealt with State liability and with civil liability. There seemed to be a majority in favour of residual State liability. The question was whether there should be an "original" State liability in cases where the author of the damage could not be identified and whether the State should have an obligation to notify, inform and consult with the States presumed affected. The report considered three possible approaches to civil liability. The first would be not to deal with civil liability at all in the draft. However, the Sixth Committee had already rejected that approach. The second would be to regulate only the interrelationship between State liability and civil liability, in which case claimants would have to deal with the national law of the State of origin. The third would be to include in the draft articles provisions designed to ensure the application of the principle of non-discrimination and certain other international standards. The report also considered the question of the channelling of liability, to which there was no simple answer in the context of a general instrument. There seemed to be three possible solutions, first, not to deal with the question in the articles, leaving the court to decide who was liable according to the criteria of existing national law, the solution adopted in the sixth report;<sup>7</sup> secondly, to establish criteria whereby liability would be attributed to the person exercising control of the activity at the time when the incident had taken

place, the solution adopted in the European draft;<sup>8</sup> and thirdly, to impose the obligation on States to establish the criteria for channelling liability in their domestic legal systems, in the light of the activity in question.

72. With regard to liability for damage to the environment in areas not under national jurisdiction (the "global commons"), he did not think that the Commission was in a position to consider the question immediately, since it did not yet have all the information it needed to reach a decision.

73. In conclusion, he emphasized that he had no wish to reopen a general debate on the draft articles. His report merely attempted to evaluate the present situation and to consider certain methods of work.

74. The CHAIRMAN thanked the Special Rapporteur for his introduction of the seventh report.

**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<sup>9</sup> (*continued*)

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

75. The CHAIRMAN invited the Commission to resume its discussion of article 17, paragraph 3 (*d*).

76. Mr. OGISO (Special Rapporteur) read out the revised text of the commentary on article 17, paragraph 3 (*d*):

Paragraph 3 (*d*) has been introduced on second reading in response to a suggestion put forward by a Government in the Sixth Committee at the forty-fifth session of the General Assembly. Although the provisions of paragraph 3 are merely illustrative, the Commission deemed it appropriate to include this additional example in view of the importance attached by the international community to environmental questions and of the problem of ship-based marine pollution. In consideration of the fact that this subparagraph was not contained in the text of former article 18 adopted on first reading, both the Commission and the Drafting Committee discussed the question in some detail.

Since subparagraph (*d*), like subparagraphs (*a*) to (*c*), serves merely as an example of the claims to which the provisions of paragraph 1 would apply, it does not affect the substance or scope of the exception to State immunity under paragraph 1. Nor does the subparagraph establish substantive law concerning the legitimacy or receivability of a claim. Whether or not a claim is to be deemed actionable is a matter to be decided by the competent court.

The words "consequences of" are intended to convey the concern of some members that unqualified reference to pollution of the marine environment from ships might encourage frivolous claims or claims without tangible loss or damage to the claimant. One member, indeed, considered that a more qualified wording such as "injurious conse-

<sup>8</sup> Council of Europe, document CDCJ (89) 60, Strasbourg, 8 September 1989.

<sup>9</sup> For texts of draft articles provisionally adopted by the Commission on first reading, see *Yearbook... 1986*, vol. II (Part Two), pp. 7-12.

<sup>7</sup> *Yearbook... 1990*, vol. II (Part One), document A/CN.4/428 and Add.1.

quences" would have been necessary and he therefore reserved his position on the subparagraph. Some other members, on the other hand, felt that this concern was unjustified since no frivolous or vexatious claims would be entertained by a court and that furthermore it was not the function of rules of State immunity to prevent claims on the basis of their merits.

77. Mr. TOMUSCHAT, speaking also on behalf of Mr. SEPÚLVEDA GUTIÉRREZ, Mr. Sreenivasa RAO and Mr. SHI, said that he endorsed the commentary, since the word "tangible" had been added in the third paragraph before the words "loss or damage". That word introduced a shade of meaning which he felt was necessary. It should also be pointed out that the article did not establish any substantive rule relating to the legitimacy or receivability, as such, of a claim and it made no difference to the law already applicable.

78. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the text of the commentary read out by the Special Rapporteur.

*It was so agreed.*

79. Mr. SOLARI TUDELA said that he could accept article 17, paragraph 3 (d), with or without square brackets, even though he thought that the words in brackets were redundant, since pollution of the marine environment was itself a consequence and where pollution occurred, there was necessarily loss or damage.

80. Mr. HAYES said that he associated himself with the reservations expressed in connection with the second part of paragraph 2 of article 17.

81. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 17 as a whole.

*Article 17 was adopted.*

82. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Drafting Committee had also considered the question of the immunity of State-owned or State-operated aircraft engaged in commercial service. The Committee had noted that the Special Rapporteur had tackled the issue in an addendum to his second report<sup>10</sup> and had reviewed the existing treaties on international civil aviation law, pointing out that aircraft used for military, customs and police service were deemed to have immunity. The Special Rapporteur had also stated that, apart from that rule, there did not seem to be any clear rule conferring immunity on planes and that the practice of States was not entirely clear. He had therefore come to the conclusion that it was preferable to deal with the matter in a commentary instead of including a special provision concerning aircraft in the draft.

83. The Drafting Committee had also considered the possibility of including in the draft articles certain rules on immunity applicable to aircraft and objects launched into outer space. It had observed that the matter was a

complex one and that a definition of specific categories of aircraft, such as presidential planes, civil aircraft chartered by Government authorities for relief operations and planes used by diplomatic missions, would require a thorough analysis of existing conventions, domestic legislation and case law. Because of the lack of time and documentation, however, it had been able only to examine briefly a draft article prepared at its request by the Special Rapporteur. The Drafting Committee nevertheless recognized that the question was a topical one and was aware that the absence of provisions on aircraft in the draft might be viewed as a lacuna, particularly in the light of the general principle embodied in article 5. It therefore wished to draw the Commission's attention to the question of the status, from the point of view of immunity, of aircraft and objects launched into outer space. The Commission might in turn wish to draw the attention of the General Assembly to the matter.

84. He explained that Mr. Pellet had stated that he was in favour of the inclusion in the draft articles of provisions on the immunity of aircraft and objects launched into outer space.

#### ADOPTION OF THE DRAFT ARTICLES ON SECOND READING

85. The CHAIRMAN invited the Commission to take a decision on the draft articles as a whole, as amended.

*The draft articles on jurisdictional immunities of States and their property as a whole, as amended, were adopted on second reading.*

#### TRIBUTE TO THE SPECIAL RAPPORTEUR

86. The CHAIRMAN thanked the Chairmen of the Drafting Committee at the forty-second and forty-third sessions of the Commission, Mr. Mahiou and Mr. Pawlak respectively, and the Special Rapporteur, Mr. Ogiso, for the work they had done to enable the Commission to complete its consideration of the topic. The Commission still had to formulate its recommendations to the General Assembly on the action to be taken on the draft articles, but meanwhile he was sure that the Commission would wish to express its gratitude to the Special Rapporteur. He therefore proposed that it should adopt a draft resolution, which read:

*"The International Law Commission,*

*"Having adopted the draft articles on the jurisdictional immunities of States and their property,*

*"Expresses to the Special Rapporteur, Mr. Motoo Ogiso, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft by his tireless efforts and devoted work and for the results achieved in the elaboration of draft articles on jurisdictional immunities of States and their property."*

<sup>10</sup>See *Yearbook... 1989*, vol. II (Part One), document A/CN.4/422/Add.1.

87. Mr. JACOVIDES said that he supported the draft resolution and that all members of the Commission could not but recognize the excellent work done by Mr. Ogiso.

*The draft resolution was adopted.*

*The meeting rose at 1.05 p.m.*

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## 2222nd MEETING

*Tuesday, 11 June 1991, at 10 a.m.*

*Chairman:* Mr. Abdul G. KOROMA

*Present:* Mr. Al-Khasawneh, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, 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. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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### International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/437,<sup>1</sup> A/CN.4/L.456, sect. G, A/CN.4/L.465)

[Agenda item 6]

#### SEVENTH REPORT OF THE SPECIAL RAPPORTEUR<sup>2</sup> (*continued*)

1. Mr. JACOVIDES, congratulating the Special Rapporteur on the progress achieved in a difficult and challenging area of the law, said that there was sufficient agreement on the underlying principles to enable the Commission to finalize its work on the topic. The final form the draft should take, whether a convention, a code of conduct or some other form of legal guidelines should none the less be decided later, in the light of the views of Governments expressed at the General Assembly or in their written comments. It would also be useful if the results of the Commission's endeavours, and in particular the draft articles prepared by the Special Rapporteur and referred to the Drafting Committee, could be presented to UNCED, to be held in Brazil in 1992. In that way, the

Commission would make a contribution to the global efforts to protect the environment, something which deserved high priority in the United Nations Decade of International Law. In voicing that opinion, he was in no way underestimating the continuing difficulties that would have to be faced. The questions of methodology would, for instance, have to be tackled and an overall assessment made of the status of the item, of the direction it should take, and of the pace at which work should proceed. The approach might not be orthodox, but, then again, neither was the topic, for it was concerned more with progressive development than with codification of the law and should be examined accordingly.

2. One positive element was the response by the Sixth Committee to the two policy questions raised in the Commission's report on the work of its forty-second session.<sup>3</sup> The Commission might wish on the basis of that precedent to put to the General Assembly further policy questions: the resulting interaction between the two bodies would be particularly appropriate in such a new area of the law. That did not, of course, mean that the Commission could simply pass on its responsibility to the General Assembly. There was much legal material and State practice, and also many treaties, particularly regional treaties, which were of relevance to the topic and should be studied first.

3. The Special Rapporteur had rightly urged the Commission to concentrate not on the draft articles he had submitted earlier but on certain important issues. The first of them, a decision on the nature of the instrument could, as the Special Rapporteur had stated at a previous session, wait until coherent, reasonable, practical and politically acceptable draft articles had been developed,<sup>4</sup> after which the Commission could consider whether to recommend that the articles should be incorporated in a draft convention or in some other legal instrument.

4. With regard to the title of the topic, he saw merit in using in the English version the words "responsibility and liability" and in replacing "acts" by "activities"; that would more closely reflect the broadening of the scope to encompass activities involving risk and activities with harmful effects. The fundamental principle underlying the topic was acceptable, though the drafting of certain articles should be re-examined.

5. As to the procedural obligations regarding prevention, the obligation of due diligence should be "hard". Also, in the absence of some form of dispute settlement under Article 33 of the Charter of the United Nations, a compulsory system for the settlement of disputes should be introduced. As he had long advocated, a comprehensive system of third-party dispute settlement must form an integral part of any treaty if the rule of law among nations was to acquire real meaning.

6. The aim with regard to responsibility and liability should be to provide for State responsibility for breach of due diligence and for original State liability where it

<sup>1</sup> Reproduced in *Yearbook... 1991*, vol. II (Part One).

<sup>2</sup> For outline and texts of articles 1-33 proposed by the Special Rapporteur, see *Yearbook... 1990*, vol. II (Part Two), chap. VII.

<sup>3</sup> *Yearbook... 1990*, vol. II (Part Two), para. 531.

<sup>4</sup> *Yearbook... 1987*, vol. II (Part Two), p. 49, para. 192.