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Summary record of the 2247th meeting

Topic:
Other topics

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Paragraph (19)

Paragraph (19) was deleted.

Paragraph (20)

48. Mr. TOMUSCHAT proposed that, since paragraph (19) had been deleted, the word "Thus" at the beginning of paragraph (20) should also be deleted.

It was so agreed.

Paragraph (20), as amended, was approved.

Paragraphs (21) and (22)

Paragraphs (21) and (22) were approved.

Paragraphs (23) and (24)

49. Mr. PELLET, referring to the first footnote to paragraph (23), said that the draft report did not have to contain the full text of all the instruments cited. He hoped that, when the Special Rapporteur rearranged the reference material, he would eliminate the footnotes for the paragraphs which had been deleted and shorten those for the paragraphs which had been retained.

50. Mr. OGISO (Special Rapporteur) said that his intention was to retain only the references to sources. Relevant case material contained in the deleted paragraphs would be reproduced in footnotes elsewhere in the commentary.

51. The CHAIRMAN said that, as the basis of that approach, the first to sixth footnotes would be shortened.

52. Mr. PELLET said that the footnotes were intended only as references and should not contain quotations or additional comments. He also hoped that the Special Rapporteur and the secretariat would eliminate references which were merely of academic interest.

53. The CHAIRMAN said he was confident that the Special Rapporteur would treat the reference material appropriately. He agreed that footnotes which were not directly relevant to the text should be deleted.

54. Mr. EIRIKSSON said that in addition to those footnotes that related to parts of the text which had now been deleted, the working group also recommended that the three footnotes to paragraph (24) should be deleted, as they referred to controversial aspects of the text.

Paragraphs (23) and (24) were approved.

Paragraph (25)

55. Mr. EIRIKSSON said that the working group had decided to recommend that paragraph (25), together with the footnote, should be deleted.

56. The CHAIRMAN said that the retention or deletion of footnotes should be left to the Special Rapporteur to decide.

It was so agreed.

Paragraph (25) was deleted.

Paragraph (26)

57. The CHAIRMAN said that the working group recommended that the word "comparable" should be deleted.

Paragraph (26), as amended, was approved.

Paragraph (27)

Paragraph (27) was approved.

Paragraph (28)

58. The CHAIRMAN said that the working group recommended that the last four sentences should be deleted.

Paragraph (28), as thus amended, was approved.

Paragraphs (29) to (33)

59. The CHAIRMAN said that the working group recommended that paragraphs (29) to (33) should be deleted and that the references in the headings to the Institute of International Law, the International Law Association, the Harvard Research Institute and the International Bar Association should be incorporated in a footnote.

Paragraphs (29) to (33) were deleted on that understanding.

Paragraph (34)

60. The CHAIRMAN said that the working group recommended that the words "the present article" should be followed by the words "finds precedent in the sources reviewed above".

Paragraph (34), as amended, was approved.

Paragraph (35)

Paragraph (35) was approved.

The meeting rose at 1 p.m.

2247th MEETING

Wednesday, 17 July 1991, at 3.15 p.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindrambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-third session (continued)

CHAPTER II. Jurisdictional immunities of States and their property (concluded) (A/CN.4/L.462 and Add.1 and Corr.2 and 3, Add.2 and Corr.1, Add.3 and Corr.1)

D. Draft articles on jurisdictional immunities of States and their property (concluded) (A/CN.4/L.462/Add.2 and Corr.1)

Commentary to article 10 (Commercial transactions) (concluded)

Paragraph (11) (concluded)

1. The CHAIRMAN said that the text of the sentence the Commission had agreed to insert at the end of paragraph (11) at Mr. Pellet's request¹ had been submitted to the secretariat. It read: "Other members emphasized that the provisions of paragraph 3 (a) and (b) added nothing to the notion of independent legal personality and were therefore superfluous."

Paragraph (11), as amended, was approved.

The commentary to article 10, as amended, was approved.

Commentary to article 11 (Contracts of employment)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

2. Mr. BENNOUNA, referring to the second sentence, said it was inappropriate to use the word "administrative" to describe the law that the employer State was to apply. The State did not necessarily employ civil servants, and other branches of law could well be applied, for example in the case of contractual employees. He therefore proposed that the term "administrative", in the second and the third sentences, should be deleted.

Paragraph (3), as amended, was approved.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

3. Mr. TOMUSCHAT, pointing out that the Commission wanted to remain neutral in the debate on the conflicting concepts of restricted immunity and absolute immunity, proposed that the phrase "or another exception to the general rule of State immunity" should be deleted from the title of the paragraph. Again, for the reasons advanced by Mr. Bennouna, the word "administrative" should be removed.

Paragraph (5), as amended, was approved.

Paragraph (6)

4. Mr. PAWLAK said that, in paragraph (6) too, the phrase "or another exception to the general rule of State immunity", in the first sentence, should be deleted.

5. Mr. TOMUSCHAT said that the last sentence of the paragraph was worded in such a way that it appeared to contradict the provision it commented on.

6. Mr. EIRIKSSON proposed that the sentence should be shortened to make it clearer, in other words, it should stop after the words "has also been deleted".

Paragraph (6), as amended, was approved.

Paragraph (7)

7. Mr. EIRIKSSON said that the examples given in the paragraph were not a good illustration of the cases that were intended to be covered. It was improper, in such a text, to speak of "employees of lower echelons" and "menial tasks". The paragraph should be deleted.

Paragraph (7) was deleted.

Paragraph (8)

8. Mr. BENNOUNA proposed that the second part of the first sentence, starting with the words "thus permitting . . .", should be deleted. It contained an idea that was adequately conveyed by the first part of the sentence.

9. The CHAIRMAN, speaking as a member of the Commission, said he was not opposed to such a deletion, but it made for an abrupt transition to the next sentence.

10. Mr. NJENGA said he shared the Chairman's views. He was not opposed to deletion of the phrase, but it would detract from the paragraph's consistency and it would be difficult to see the logic between the first and the second sentences. Moreover, generally speaking all such selective deletions might well affect the intelligibility of the report, which had been very carefully drafted, and the Commission did not have proper time to discuss their merits.

Paragraph (8), as amended by Mr. Bennouna, was approved.

Paragraph (9)

11. Mr. PELLET pointed out that he had entered formal reservations when article 11 had been adopted. Unlike other members, he thought that immunity was the rule and that non-immunity was the exception. He would like that view to find a place in the commentary on the article in question. It could be inserted with a sentence stating that "While not opposed to the adoption of article 11, some members stated a preference for reversing the rule and the exception, and considered that immunity constituted the principle in this field."

12. Mr. NJENGA, supported by Mr. BARBOZA, said he thought that the commentary was not the place to mention members' reservations. Rather, they should appear in the summary record and in that part of the Com-

¹ See 2246th meeting, para. 7.

mission's report dealing specifically with its deliberations.

13. Mr. AL-BAHARNA (Rapporteur) proposed that, as had been done earlier, the phrase "or the exception to State immunity" should be deleted.

Paragraph (9), as amended, was approved.

Paragraphs (10) to (15)

Paragraphs (10) to (15) were approved.

Paragraphs (16) and (17)

14. Mr. CALERO RODRIGUES said that the two paragraphs reported views of individual members, which should not appear in a commentary, as had just been pointed out in reply to Mr. Pellet.

15. Mr. BENNOUNA, supported by Mr. BARBOZA, said that the purpose of the commentary was to explain the articles and not to report the opinions of members; the commentary related to the essence of the provisions and not to the Commission's discussion.

16. Mr. PELLET said that the two paragraphs raised a fundamental question. When a member entered a reservation to a particular article, he did so to indicate his opposition, without hindering completion of the work. The fact remained that the Commission should disclose that the compromise solution it had worked out and proposed had been much debated. Otherwise, positions would harden and compromises would become impossible. He therefore proposed that at least paragraph (17) should be retained.

17. Mr. SHI said his was the opinion that was mentioned in paragraph (16). He would have no objection if the paragraph was eliminated. As for paragraph (17), it was for the members concerned to decide. Personally, he took the view that the solution chosen should be equitable and should also apply to all members. If not, the entire report would have to be rethought.

18. Mr. PAWLAK said that, in principle, the commentary should not record positions of a technical nature adopted by members of the Commission in the form of reservations or withdrawals of reservations. Such positions were duly set out in the summary records. There was only one instance in which an individual opinion should appear in the commentary, namely, when such a course was stipulated as a prerequisite to facilitate a compromise in the Drafting Committee.

19. Mr. BARSEGOV said that the issue was much broader than the matter now at hand. At the next session, it should be settled before the report was drafted. Opinions were divided, and one reason was as good as another. He had no set position of his own and he trusted that the Commission would discuss the question in depth.

20. The CHAIRMAN said he too thought that the Commission should, once and for all, settle the question at the next session.

21. Mr. BENNOUNA formally proposed that paragraph (16) should be deleted and that an impersonal turn of phrase should be used for paragraph (17), so that it would start with the phrase: "It was pointed out in the Commission that paragraph 2 (c) . . .".

22. Mr. PELLET said he supported that solution.

Paragraph (16) was deleted.

Paragraph (17), as amended, was approved.

The commentary to article 11, as amended, was approved.

Commentary to article 12 (Personal injuries and damage to property)

Paragraph (1)

23. Mr. SHI proposed that the word "delict" should be replaced by "tort" in the English version and that the other versions should be altered if necessary.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were approved.

Paragraph (4)

24. Mr. TOMUSCHAT said that an insurance company was not a State and could not avail itself of immunity. Accordingly, the fourth sentence should be deleted, for it had no place in the paragraph. However, if the majority of members were in favour of keeping it, he would not press the proposal.

25. The CHAIRMAN said his interpretation of the sentence was that, if an insurance company refused to meet its liability and the State invoked immunity, the company would not be required to meet its liability. On the other hand, it would have to if there was no immunity. In short, the insurance company could not hide behind immunity in order to evade its liability.

Paragraph (4) was approved.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were approved.

Paragraph (7)

26. Mr. TOMUSCHAT said that he could in no way agree to the rule being construed in such a way that it could protect those who knowingly committed wrongful acts, such as sending letter-bombs. Consequently, it would be best to delete the word "letter-bombs" from the first sentence, along with the last phrase: "or indeed with intent to inflict physical injury upon a person or cause damage to tangible property". The second sentence would start with the words "It is also clear that cases of shooting . . .".

27. Mr. EIRIKSSON proposed that the phrase "which constitute clear violations of the territory of the neigh-

bouring State under public international law” should be deleted from the second sentence.

28. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to the amendments proposed by Mr. Tomuschat and Mr. Eiriksson.

Paragraph (7), as amended, was approved.

Paragraphs (8) to (11)

Paragraphs (8) to (11) were approved.

The commentary to article 12, as amended, was approved.

Commentary to article 13 (Ownership, possession and use of property)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

29. Mr. RAZAFINDRALAMBO drew attention to an editorial change required in the first sentence of the French version.

30. Mr. CALERO RODRIGUES proposed that the penultimate sentence should be deleted.

It was so agreed.

31. Mr. PELLET said he could not accept in the French version the use of the English expression “which is otherwise competent” when the self-same expression was translated in the article itself. The commentary should therefore use the expression *compétent en l’espèce*.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

32. Mr. RAZAFINDRALAMBO said that the fifth sentence was quite clumsy, for it conveyed the idea that there were a number of legal systems within the English system; the point perhaps was that there were different interpretations of what constituted property and what constituted interest. He proposed that the sentence should be amended to read: “Accordingly, even in the English usage, what constitutes a right in property may be considered as an interest.”

33. The CHAIRMAN suggested that the sentence should be deleted.

34. Mr. GRAEFRATH proposed that the words “and niceties within each municipal legal system”, at the end of the fourth sentence should be deleted.

35. Mr. PELLET, supported by Mr. CALERO RODRIGUES, said he was troubled by the use of the words “right or interest” in the French version, which should be replaced by the French expression *droit ou intérêt*.

36. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph (4), taking into account Mr. Pellet’s comment and amending the fourth and fifth sentences to read: “The law of property, especially real property or immovable property, contains many peculiarities. What constitutes a right in property in one system may be regarded as an interest in another system.”

Paragraph (4), as thus amended, was approved.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were approved.

Paragraph (8)

Paragraph (8) was deleted.

The commentary to article 13, as amended, was approved.

Commentary to article 14 (Intellectual and industrial property)

Paragraphs (1) to (9)

Paragraphs (1) to (9) were approved.

Paragraph (10)

37. Mr. BENNOUNA said he took objection to the use of the words “including any developing State”, in the second sentence, for they were discriminatory. The fact was that every State was free to pursue its own policy within its own territory. The words should be deleted.

It was so agreed.

Paragraph (10), as amended, was approved.

The commentary to article 14, as amended, was approved.

Commentary to article 15 (Participation in companies or other collective bodies)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were approved.

Paragraph (5)

38. Mr. PAWLAK proposed that the words “or the exception to State immunity”, in the first sentence, should be deleted, as had been done elsewhere.

It was so agreed.

Paragraph (5) as amended, was approved.

Paragraph (6)

Paragraph (6) was approved.

Paragraph (7)

39. Mr. BENNOUNA proposed that the words *les plus compétents*, in the last sentence of the French version, should be replaced by *les plus qualifiés*.

It was so agreed.

Paragraph (7), as amended, was approved.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were approved.

The commentary to article 15, as amended, was approved.

Commentary to article 16 (Ships owned or operated by a State)

Paragraphs (1) to (16)

Paragraphs (1) to (16) were approved.

Paragraphs (17) to (20)

40. Mr. CALERO RODRIGUES said that paragraph (17) posed some problems: it spoke of the question raised by one Government, without mentioning the reply that had been given, and it went on to refer to the Drafting Committee instead of Commission. He suggested that the phrase "which was also considered by the Commission" should be added at the end of the second sentence, in order to justify the paragraphs that followed.

41. Mr. BARSEGOV said that, since the Commission had not had the opportunity to consider the questions mentioned in paragraph (17) and the paragraphs that followed, he wondered whether it was indeed appropriate to refer to them in the commentary. He also wondered about the origin of the conclusions set out in paragraph (18), however valid they might be.

42. Mr. NJENGA suggested that paragraphs (17), (18) and (19) should be deleted.

43. Mr. RAZAFINDRALAMBO pointed out that paragraphs (17), (18) and (19) gave an account of the work of the Drafting Committee. Were the Committee's deliberations simply to be ignored?

44. Mr. PELLET said he shared the views of Mr. Razafindralambo and supported Mr. Calero Rodrigues' suggestion. The questions mentioned in paragraphs (17), (18) and (19) had been the subject of long and lively discussion in the Drafting Committee, which had ultimately decided not to place them before the Commission, on the understanding that the Commission, in its report, would draw the General Assembly's attention to them.

45. Mr. GRAEFRATH said he, too, was of the opinion that paragraphs (17) to (20), which set out essential information, should be retained as they stood.

46. Mr. MAHIOU said that, while he understood Mr. Razafindralambo's and Mr. Pellet's point of view, care should be taken not to liken the commentary to the consideration of the report made by the Chairman of the Drafting Committee on its work. He proposed that paragraph (17) and the following paragraphs should be merged; the international instruments that were listed would be mentioned in footnotes.

47. Mr. CALERO RODRIGUES said that he was concerned above all by the presentation of the paragraphs in question. It was merely stated at the end of paragraph (18) that "the Commission . . . simply took note of the

views exchanged in the Drafting Committee", again in paragraph (20) that "The Commission thus simply took note of the exchange of views in the Drafting Committee", and the remainder of the paragraphs consisted solely of references to international instruments. Perhaps Mr. Mahiou's suggestion would be a solution to the problem.

48. Mr. BEESLEY suggested that the conclusions in paragraphs (18) and (20) should be set out in the following terms: "The Commission took note of the problem and agreed to bring it to the attention of the General Assembly." The instruments mentioned would appear in a footnote. Since the part of the commentary appearing in paragraph (18) did no more than recount the discussion in the Drafting Committee and the question had not been brought before the plenary, he wondered whether that part had a place in the Commission's report.

49. Mr. BARSEGOV said that the solution would be to mention briefly the questions raised and refer readers to the relevant summary records. If the list of instruments was useful, it could form the subject of a footnote. On the other hand, the Commission should indicate why it had not considered the questions raised.

50. Mr. SHI said it would be logical for the commentary to follow closely the provisions of article 16, which related to ships. Paragraphs (17) to (20), however, had nothing to do with ships. Hence, they had no place in the commentary, especially as the Commission had taken no position on the issues mentioned. Those paragraphs should therefore be eliminated. Nevertheless, he could accept the compromise formula, namely a brief statement in a footnote of the Commission's position on aircraft.

51. Mr. PELLET said that, to supplement Mr. Mahiou's proposal, which seemed acceptable to a large number of members, he would suggest that paragraph (17) should be retained, with the last sentence to read: "The Drafting Committee, then the Commission, briefly examined the question." The list at the beginning of paragraph (18) would be deleted, together with the next four sentences after the list. Paragraph (18) would then read: "The relevant conventions [with a footnote listing the conventions] do not deal expressly with the question . . . further analysis. Recognizing that the question arose, the Commission, while noting the importance of the problem, simply took note of the views exchanged in the Drafting Committee." Only the first sentence of paragraph (19) would be retained and it could be followed immediately by paragraph (20), the last sentence of which would read: "The Commission also took note of the exchange of views in the Drafting Committee"; the relevant conventions would be the subject of a footnote. He still preferred the present text, for all that.

52. Mr. NJENGA said it would be enough to replace paragraphs (17) to (20) by a footnote which would follow the wording of paragraph (17), together with a phrase reading "during which various views were expressed as to the need for inclusion of a provision on this topic".

53. Mr. BENNOUNA said that paragraphs (17), (18) and (19) were not a commentary to article 16 and furnished no explanation as to why the Commission had not deemed it necessary to include a specific provision on the topic, while showing that there was a wealth of treaty practice on civil aviation law and space law. He proposed that the first sentence of paragraph (17) should be retained, followed by a text reading: "The Commission discussed this question and that of space objects. In view of the large body of treaty practice concerning international civil aviation rules, space law and space objects, the Commission did not consider it necessary to include a general provision in this regard." The titles of the conventions in question would appear in the footnotes. Lastly, in commentaries to articles there was no need to mention the Commission's relations with the Drafting Committee.

54. Mr. PELLET said that Mr. Bennouna's proposal would endorse the view of members who considered that, since the subject was covered by a large number of conventions, there was no need to engage in codification work. However, the very fact that there was a wealth of practice afforded room for discussion, as in the case of ships. If the Commission accepted Mr. Bennouna's and Mr. Njenga's arguments, it would then have to develop the argument that the former had advanced—something that his own proposal would avoid.

55. Prince AJIBOLA said that paragraphs (17) to (20) reflected ideas that did indeed have a place in the commentary to article 16. However, the instruments listed in paragraphs (18) and (19) should be mentioned in footnotes.

56. Mr. TOMUSCHAT proposed that paragraphs (17) to (20) should be deleted and replaced by a paragraph reading: "Article 16 does not deal with the issue of immunity of States in relation to aircraft or space objects, and hence it cannot be applied to such objects." The paragraph would be accompanied by a footnote stating: "For the discussion of this issue in the Commission, see summary records . . ."; it would be enough for the secretariat to insert the symbols of the relevant summary records.

57. Mr. GRAEFRATH said he supported Mr. Tomuschat's proposal, but would point out that the note should refer to the oral report by the Chairman of the Drafting Committee to the Commission, in which Mr. Pawlak had mentioned the question.

58. Mr. MAHIOU said that he endorsed Mr. Tomuschat's proposal, and especially since it was Mr. Tomuschat who had first raised the question in the Drafting Committee.

59. Mr. OGISO (Special Rapporteur) said that, in his second report,² he had drawn attention to the problem of aircraft, but the Commission had never considered the matter before referring the draft articles to the Drafting Committee. In the Committee, some members had rather belatedly raised the question of aircraft and space objects. Although he had stated in his second report that, in his opinion, it would not be appropriate at that stage to

try to formulate basic principles on immunity for aircraft and space objects and had therefore been very reluctant about submitting a draft article to the Commission, the Chairman of the Drafting Committee had asked him to formulate a proposal for the purposes of discussion in the Committee. Consequently, he had proposed a very straightforward provision whereby only aircraft used by the armed forces, the police and the Customs were considered as State aircraft enjoying immunity. However, following the discussion in the Drafting Committee, he had received a suggestion that he should mention the question of aircraft and space objects in the commentary, explain why the Commission had left the question aside and draw the General Assembly's attention to it. That was the purpose of paragraphs (16) to (20) and was the reason why they had nothing to do with article 16. Since very marked differences of opinion had emerged in the Drafting Committee it had seemed difficult to arrive at a text that was acceptable to everybody. Accordingly, he had had no choice but to indicate the treaty regime in force and then go on to state that the Commission had simply taken note of the exchange of views in the Drafting Committee. Moreover, in fact it was the question of aircraft that had been the subject of an exchange of views in the Committee and he had spoken of space objects in the commentary only because the Chairman of the Drafting Committee had asked him to do so.

60. The many criticisms of the paragraphs in question were understandable, in view of the positions of the members of the Drafting Committee. He wondered whether it was legitimate to say that the Commission had discussed the question, even in the setting of the Drafting Committee, for the summary records would undoubtedly show that such consideration had been very brief.

61. He would prefer paragraphs (17) to (20) to be deleted and the question of aircraft and space objects not to be mentioned in the commentary. A very frank account would thus be given of the Commission's work on the question at the present session. However, if members wanted the problem to be mentioned in a footnote, he would not be opposed to such a course.

62. Mr. PELLET pointed out that some members of the Commission, including the Chairman of the Drafting Committee and himself, considered that the absence of a provision on aircraft and space objects was a very serious lacuna. It was precisely because the question had posed a problem that it needed to be discussed in the commentary, and he saw no better place to do so than in the commentary to article 16, on ships, an article that would in some sense have a natural counterpart in one on aircraft and space objects.

63. In addition, he noted once again that, in the Commission, flexibility did not pay off. The members of the Drafting Committee who had wanted to include such a provision had agreed to give up the idea in view of the time that would have been needed to elaborate it, but on the express understanding that the question would not be side-stepped, as was now the case, simply by mentioning it in two lines in a footnote. Accordingly, he was completely against the proposed solution.

² See *Yearbook . . . 1989*, vol. II (Part One), document A/CN.4/422 and Add.1

64. The CHAIRMAN said that, in reporting to the Commission on the work of the Drafting Committee, the Chairman of the Committee, who was very much in favour of considering the question, had mentioned it at some length at the Commission's 2221st meeting, and he confirmed that the summary record of the meeting reflected that. He therefore proposed, in order to respond to Mr. Pellet's concern and the wishes of other members, that a sentence should be added at the end of paragraph 7 of the introduction to chapter II of the Commission's report (A/CN.4/L.462): "At the request of some members, the Commission briefly considered the question of State-owned or operated aircraft engaged in commercial service as well as the question of space objects. Recognizing that this question would call for more time and study, the Commission, while noting the importance of the problem, took note of the exchange of views."

65. As to the commentary, paragraphs (17) to (20) would be deleted and replaced by a new paragraph (17) stating simply, as proposed by Mr. Tomuschat, that: "Article 16 does not deal with the issue of immunity of States in relation to aircraft or space objects, and hence it cannot be applied to such objects." It would be accompanied by a footnote reading: "For the discussion of this question in the Commission, see the summary record of the 2221st meeting."

It was so agreed.

66. Mr. BEESLEY said it was he who had chaired the meeting at which the Chairman of the Drafting Committee had raised the question of aircraft and space objects in the terms reported by the Chairman. However, he recalled that there had been no discussion of the proposal by the Chairman of the Drafting Committee to bring the question to the attention of the General Assembly. The Chairman of the Drafting Committee himself had not insisted. Accordingly, the proposal the Commission had just approved could well give the impression that the question had been considered when in actual fact it had not been examined, except at the present meeting.

67. Mr. SHI said he would like to correct a point of detail. Contrary to what the Special Rapporteur had said, the question of aircraft mentioned in his second report had been discussed in the Commission and he (Mr. Shi) had commented on that part of the report. Moreover, he thought, as did the Special Rapporteur, that a provision on aircraft should not be included in the draft.

Paragraphs (17) to (20), as amended, were approved.

The commentary to article 16, as amended, was approved.

Commentary to article 17 (Effect of an arbitration agreement)

Paragraph (1)

68. Mr. MAHIOU said that the footnote to that paragraph was too long; there was no need for it to reproduce legal provisions that a jurist could easily find if he so wished. Consequently, he suggested that it should be shortened by deleting the quotations from United States legislation.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were approved.

Paragraph (6)

69. Mr. TOMUSCHAT said it was not possible to affirm that recognition of an award was a measure of constraint within the meaning of article 18. Recognition of an award was not even the start of an execution procedure. He therefore proposed the deletion of the fourth to last sentences.

70. Mr. NJENGA supported Mr. Tomuschat's proposal: the opinion of "one Government" had no place in a commentary.

71. Mr. OGISO (Special Rapporteur), replying to Mr. Tomuschat, confirmed that it was precisely because it had considered that recognition should be regarded as being "among the measures of constraint referred to in article 18" that the Drafting Committee had decided to reject his own proposal to include a provision on it in article 17.

72. Mr. DÍAZ GONZÁLEZ said that the commentary should reflect the opinions and decisions of the Commission, not of the Drafting Committee. Consequently, it was surprising to find that paragraph (6) stated that "the Drafting Committee decided . . .", when the Commission itself had decided to avoid that kind of formulation.

73. Mr. MAHIOU said that Mr. Tomuschat's proposal, which he endorsed, solved the problem mentioned by Mr. Díaz González.

74. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to delete the fourth to last sentences.

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraph (7)

75. Mr. RAZAFINDRALAMBO drew attention to the need to insert a phrase which had been erroneously omitted from the first sentence of the French version.

Paragraph (7) was approved on that understanding.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were approved.

The commentary to article 17, as amended, was approved.

Commentary to articles 18 and 19 as a whole (A/CN.4/L.462/Add.3 and Corr.1)

Paragraphs (1) to (3)

76. Mr. PELLET said that, logically, paragraph (3), which was concerned with the content and title of part IV, should precede paragraphs (1) and (2). He therefore proposed that it should be placed first, and paragraphs (1) and (2) should be renumbered accordingly.

It was so agreed.

Paragraphs (1) to (3), as renumbered, were approved.

Commentary to article 18 (State immunity from measures of constraint)

Paragraph (1)

77. Mr. PELLET said that article 18 dealt with immunity from measures of constraint connected with the exercise of jurisdiction and not measures of constraint in general. He would therefore propose that a sentence should be added at the beginning of paragraph (1) reading: "Article 18 concerns immunity from measures of constraint only in so far as they are connected with the exercise of jurisdiction."

Paragraph (1), as amended, was approved.

Paragraph (2)

78. Mr. RAZAFINDRALAMBO, referring to the French version, said that the words *règlements judiciaires*, in the last sentence, were unfortunate, for the expression had a very special meaning. It should therefore be replaced by the words *qu'il s'agisse de règlement par voie judiciaire ou par voie d'arbitrage*.

It was so agreed.

79. Mr. PELLET, recalling his remarks in connection with paragraph (1), said the second sentence of paragraph (2) should be amended. Some thought the question of immunity from execution could be separated from that of immunity from jurisdiction. Accordingly, the words "the fact remains that" in the second sentence, should be replaced by "for the purposes of this article".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraphs (3) to (12)

Paragraphs (3) to (12) were approved.

The commentary to article 18, as amended, was approved.

Commentary to article 19 (Specific categories of property)

Paragraphs (1) to (8)

Paragraphs (1) to (8) were approved.

The commentary to article 19 was approved.

Commentary to article 20 (Service of process)

Paragraph (1)

80. Mr. PELLET, supported by Mr. NJENGA and Mr. RAZAFINDRALAMBO, said paragraph (1) stated the obvious. In view of the differences between procedural systems, most of the time one had to make do with "approximate equivalents", and that remark applied to virtually all the draft articles. He therefore proposed that the paragraph should be deleted.

Paragraph (1) was deleted.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

81. Mr. RAZAFINDRALAMBO said that the word "However", at the beginning of the third sentence, was inappropriate, since there was no contrast between the sentence it introduced and the preceding one. It should be replaced by "Then".

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were approved.

The commentary to article 20, as amended, was approved.

Commentary to article 21 (Default judgement)

Paragraphs (1) to (4)

82. Mr. TOMUSCHAT drew attention to the need for a minor editorial change.

Paragraphs (1) to (4) were approved.

The commentary to article 21 was approved.

Commentary to article 22 (Privileges and immunities during court proceedings)

Paragraph (1)

83. Mr. AL-KHASAWNEH pointed out that the footnote related not to paragraph (1) but to paragraph (2).

Paragraph (1) was approved.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were approved.

Paragraphs (5) and (6)

84. Mr. BENNOUNA, supported by Mr. AL-BAHARNA, proposed that the last two sentences of paragraph (5) should be linked by the word "since" and the word "however" should be deleted. Paragraph (6), which added nothing to what was said in paragraph (5), since it only mentioned a proposal by the Special Rapporteur that had been rejected and the position of one member of the Commission, should simply be eliminated.

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6) was deleted.

The commentary to article 22, as amended, was approved.

Chapter II of the draft report, as amended, was adopted.

85. The CHAIRMAN said that, if he heard no objection, he would give the floor to Prince Ajibola, who wished to speak in connection with article 2 of the draft articles on jurisdictional immunities of States and their property.

86. Prince AJIBOLA said that, inasmuch as article 2, on the use of terms, defined "court", "State", and "commercial transactions", he saw no reason why it should not define "State enterprise", the interpretation of which had given rise to a great deal of litigation. The uncertainty about what amounted to commercial activities by States had given room for some States to assume "long-arm jurisdiction" against other sovereign States for acts outside their territory, and State property had been attached in execution of judgements obtained.

87. It would therefore be desirable, in order to eliminate that type of problem, to define the term "State enterprise". An "agency" of the State would be a State enterprise if it was a sovereign State's "alter ego", in such a way that it could bind that State to a contract. He therefore proposed a definition that would read: "A 'State enterprise' means an agency or organ or instrumentality of a sovereign State or a political subdivision thereof which enjoys an *alter ego* relationship with that State or a political subdivision thereof".

88. In that regard, he would refer members to article 31 of the Havana Charter,³ which contained the notion of effective control.

89. The CHAIRMAN said that he took note of Prince Ajibola's proposal, which would appear in the summary record.

The meeting rose at 6.50 p.m.

³ Havana Charter for an International Trade Organization (*United Nations Conference on Trade and Employment, Final Act and Related Documents*, Havana, 1948 (E/CONF.2/78, sect II)).

2248th MEETING

Wednesday, 17 July 1991, at 7.25 p.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-third session (*continued*)

CHAPTER III. *The law of the non-navigational uses of international watercourses* (A/CN.4/L.463 and Corr.1 and Add.1-4)

1. The CHAIRMAN invited the Commission to consider chapter III of its draft report, paragraph by paragraph.

A. *Introduction* (A/CN.4/L.463 and Corr.1)

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Section A was adopted.

B. *Consideration of the topic at the present session* (A/CN.4/L.463 and Corr.1)

Paragraphs 7 to 19

Paragraphs 7 to 19 were adopted.

Paragraph 20

2. Mr. NJENGA requested that the following sentence should be added at the end of the paragraph: "A view was, however, expressed by one member that ground-water travelling between two or more States should also be included, since the same rules were applicable."

It was so agreed.

Paragraph 20, as amended, was adopted.

Paragraphs 21 to 23

Paragraphs 21 to 23 were adopted.

Paragraphs 24 and 25

3. Mr. BARSEGOV proposed that, in the first sentence of paragraph 24, the words "most members" should be replaced by the words "many of the members" and that, at the beginning of paragraph 25, the words "certain members" should be amended to read: "several members".

Paragraphs 24 and 25, as amended, were adopted.

Paragraphs 26 to 29 bis

Paragraphs 26 to 29 bis were adopted.

Section B, as amended, was adopted.

C. *Tribute to the Special Rapporteur, Mr. Stephen McCaffrey* (A/CN.4/L.463 and Corr.1)

Paragraph 30

Paragraph 30 was adopted.

Section C was adopted.