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SUMMARY RECORD OF THE 25th MEETING

Chairman: Mr. MIKULKA (Czechoslovakia)

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The meeting was called to order at 10.15 a.m.

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (continued) (A/45/10, A/45/469)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/45/437)

1. Mr. SUN Lin (China), commenting on the draft articles on jurisdictional immunities of States and their property, said that the definition of the term "State" in article 2 should not include State enterprises and corporations. As independent legal persons, such entities could both institute a proceeding and be sued against and should not therefore, in principle, enjoy jurisdictional immunities, as they did not enjoy immunity even under the domestic law of many States. To confuse those independent legal entities with States and thereby subject them to State immunities amounted in practice to confusing the liabilities of those entities with those of States. It was therefore necessary to draw a clear distinction between "State" and "State enterprise and corporation" with regard to jurisdiction and the limits of liability. Paragraph 2 of draft article 11 should provide that States should not be held responsible for State enterprises and corporations and that no proceeding could be instituted against a State before a court of a foreign State in connection with disputes with those enterprises and corporations.

2. The inclusion of article 12, on contracts of employment, among exceptions to State immunity was not justified, as it did not have sufficient basis in practice. As regarded the guarantee of the interests of the employee, disputes relating to the contract of employment could, as stated in paragraph 175 of the report of the International Law Commission (A/45/10), be settled by mutual agreement or by insurance coverage.

3. It was difficult to accept article 13, "Personal injuries and damage to property". Firstly, according to article 31 of the Vienna Convention on Diplomatic Relations, diplomatic representatives should enjoy immunities from judicial proceedings in tort in the receiving State; it was obviously illogical for the sending State of diplomatic representatives not to be entitled to enjoy those jurisdictional immunities itself. Secondly, the article had gone even further than the restrictive doctrine, for it made no distinction between sovereign acts and private law acts. Thirdly, the question of a wrongful act or omission attributable to a State was within the scope of the international responsibility of a State. In his delegation's view, the article should be deleted.

4. With regard to article 14, "Ownership, possession and use of property", subparagraphs (c), (d) and (e) of paragraph 1 should be deleted because those provisions were likely to be interpreted as allowing courts of a State to exercise jurisdiction over a foreign State even in the absence of a link between the property and the foreign State.

(Mr. Sun Lin, China)

5. Fiscal matters fell under the category of public law and proceedings relating to taxation were normally instituted by competent authorities of the foreign State. It would therefore be inappropriate for article 16 to permit a State to institute a proceeding before a court in its territory against another State.

6. Article 18, which considered State-owned or State-operated ships engaged in commercial service as exceptions to State immunity was in principle acceptable to his delegation. The Special Rapporteur and some developed countries had recommended the deletion of the word "non-governmental" in subparagraphs 1 and 4. However, the word could serve as a supplementary criterion for judging the nature of the use of the ships.

7. Article 19 dealt with the effects of an arbitration agreement. It could be presumed that a State's consent to arbitration implied its consent to the exercise of supervisory jurisdiction over the implementation of the arbitral agreement by a court of the arbitral forum State. But that exception to immunity should be confined to arbitration arising out of commercial contract disputes rather than extended to cover civil or commercial matters in general. Moreover, his delegation was not in favour of adding a new subparagraph concerning the recognition of the arbitral award, because that could be deemed to constitute a first step towards execution of the award, which, however, required the express consent of the State concerned.

8. His delegation supported the the Special Rapporteur's recommendation for the deletion of article 20, as sovereign acts of State should not be subject to the jurisdiction of a court of another State.

9. In principle, his delegation accepted article 15 on "Patents, trademarks and intellectual or industrial property" and article 17 on "Participation in companies or other collective bodies".

10. His delegation agreed to the recommendation mentioned in paragraph 216 of the report that the title of Part IV of the draft articles should be altered to read "Jurisdictional immunities of States in respect of their property".

11. Article 21 should explicitly provide that without the express consent of a State no measure of constraint, including measures of execution, should be taken on the property of a foreign State. It should also be explicitly provided that consent to exercise of jurisdiction pursuant to article 8 must not be construed as implying consent to measures of constraint in accordance with Part IV of the draft articles.

12. Article 22 should be reformulated. The text proposed by a member of the International Law Commission, as reflected in paragraph 582 of document A/44/10, could be made the basis of discussion on second reading. It was of crucial importance that the phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed" be retained in article 21, paragraph 1 (c), because measures of constraint might

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otherwise be taken against property of a foreign State if it were used for commercial purposes.

13. His delegation accepted the reformulations proposed by the Special Rapporteur relating to paragraphs 1 (a) and (b) of article 24. With regard to article 25, it welcomed the Special Rapporteur's recommendation to add at the end of paragraph 1 a phrase reading "and if the court had jurisdiction in accordance with the present articles".

14. In the efforts to develop a legal régime relating to jurisdictional immunities of States and their property, the principle of State immunity under international customary law should be emphasized and strengthened and, on that basis, and taking into account different social, economic and legal systems of various countries, some provisions developed regarding the exceptions to the principle of State immunity, with a view to striking a necessary balance between efforts to seek fair and reasonable settlement of disputes and the elimination of abuse of domestic juridical procedures of a State against another sovereign State.

15. Turning to the topic on the law of the non-navigational uses of international watercourses, he said that article 24, proposed by the Special Rapporteur, was necessary because article 2, provisionally adopted by the Commission, had recognized the relationship between navigational and non-navigational uses of international watercourses. In view of the development of technology, rapid population growth and the scarcity of water resources, no one use of international watercourses should have priority over other uses. On the other hand, the general rule did not imply the exclusion of the possibility that watercourse States might assign priority to navigation through specific agreements. Paragraphs 1 and 2 of article 24 were therefore appropriate. The proposal by some members to include a reference to the obligation not to cause appreciable harm, set forth in article 8, merited consideration.

16. With regard to article 25, it seemed necessary to define the term "regulation". The approach reflected in paragraph 1, whereby regulation was not regarded as a general obligation for watercourse States but as an obligation of co-operation, was no doubt correct. Watercourse regulation was conducive to optimum utilization and prevention of potential harm. Co-operation should be based on general principles of international law, such as sovereign equality, territorial integrity and mutual benefit, in accordance with the provision laid down in article 9.

17. Some members had expressed doubt about the necessity of article 2. They had a point, since it was inconceivable that a watercourse agreement on regulation works would neglect the provision for a sharing of the burdens. However, should the Commission decide to retain the article, his delegation would have no objection.

18. With regard to article 26, a study of relevant international instruments and State practice revealed that management through joint institutions was a very good form of international co-operation to ensure optimum utilization and protection of

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international watercourses. The obligation to enter into consultation was not entirely the same as the obligation to negotiate, and consultation did not necessarily lead to negotiation. If that understanding was correct, he could, in principle, accept the article, but the word "shall" in paragraph 1 could be changed to "should" or "may", and the phrase "at the request of any of them" could be deleted. A concise definition of the term "management" could be made instead of drawing out an exhaustive list. Watercourse States had the freedom to make decisions on the functions of the joint institutions through their negotiations on specific agreement.

19. Articles 27 and 28 concerned the protection of water resources and installations. Article 27 was necessary. Nevertheless, more studies were needed on the scope of the provision, as well as on the question as to whether the obligation of consultation should be mandatory or optional. In principle, he also agreed to article 28, the provisions of which went beyond the requirements of general international law and the relevant provisions of the two Protocols to the Geneva Conventions of 1949. However, the concepts of "exclusively for peaceful purposes" and "inviolability", viewed as the progressive development of international law, seemed to be acceptable.

20. Annex I, "Implementation of the Draft Articles", needed improvement. The provisions of the annex had introduced certain concepts and rules that were disputable in international law; certain obligations in the annex called for a revision of the domestic legislation of States Parties. His delegation welcomed the Special Rapporteur's suggestion that he was willing to consider that part further and submit new draft articles.

21. His delegation needed to study further the draft articles of Part IV, on protection and preservation of ecosystems, and Part V, on harmful conditions and emergency situations, and would comment on them at an appropriate time.

22. Mr. RANJEVA (Madagascar) said that the fact that there was broad agreement, in principle, on the advisability of establishing a permanent international criminal jurisdiction linked to the United Nations system indicated that there was general agreement on enhancing the effectiveness of international law. Indeed, it was evident that a decisive stage had been reached in the creation of an international society that would truly be under the rule of law. The creation of an international jurisdiction should set in motion a process that would progressively bring about a revolutionary transformation in the very functioning of international law, setting it on a sounder course.

23. With regard to the jurisdictional immunities of States and their property, the Commission had been right in postponing until its next session the endorsement of the articles already adopted by the Drafting Committee, as that would improve the overall balance of the Code that was being prepared.

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24. In cases where jurisdictional immunity ceased to apply, that would not be the result of a sovereign act of the State, but rather and essentially a matter of protecting the legitimate rights of third parties and, specifically, of the nationals of the receiving State. It would therefore be advisable to make a study of the situation referred to in the provisions in order to determine the real nature of the event or act concerned or to establish a mechanism for effectively guaranteeing the rights of third parties.

25. With regard to the title of Part III of the draft, a neutral but sufficiently explicit formulation should be worked out. In that regard, limitations or exceptions would not affect the immunity of the State, but rather the activities referred to in Part III. In that case, there could be no reference to elimination of the immunity of the State.

26. Although the decision taken by the Commission on article 12 seemed to be appropriate, he made two observations on the matter. In the first place, recruitment, termination and the renewal of contracts of employment were discretional acts of the employer State, and hence it would be difficult to bring a case against those acts. Nevertheless, in order to avoid arbitrary acts, it would be desirable to establish at least the obligation to notify the employee of the reasons for his dismissal or non-renewal of his contract. In the second place, an indication should be given as to which rights of the employee must be effectively protected. Finally, the reference in article 12 paragraph 1, to social security provisions should be replaced by a reference to the social laws and provisions regulating employment contracts.

27. With regard to article 13, the concerns expressed by different members of the Commission were justified. Consequently, the article should retain the substantive provisions regulating the jurisdictional immunities of States and the institutional régime of the international liability of the State, on the one hand, and the right of victims to compensation for damage, on the other. His delegation supported the Special Rapporteur's proposal to include a new paragraph which would read "Paragraph 1 does not affect any rules concerning State responsibility under international law". In addition, as a condition for jurisdictional immunity, the article should establish the obligation to take out insurance policies guaranteeing compensation for injury to the person and damage to property. In that way, the victims could bring a case against the insuror, whereby the State would not have to participate in a sometimes cumbersome procedure.

28. Article 18 should include an expression similar to that appearing in Part II, Section 3, of of the United Nations Convention on the Law of the Sea, "government ships operated for non-commercial purposes". In the case of article 18, immunity would have a functional basis, and non-immunity would be imposed by the profit-making nature of a given activity, no distinction being drawn between the persons performing the activity.

29. The title proposed for Part IV of the draft articles in paragraph 216 of the report of the Commission seemed sufficiently broad to include measures of

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constraint and execution. It would also be desirable for instruments of analysis and research to benefit from State immunities, in order to avoid plundering of the scientific assets of third-world countries.

30. Mr. TREVES (Italy), speaking on the jurisdictional immunities of States and their property, said that the prerequisite established in article 12 to preclude immunity, namely, that the employee should be covered by the social security provisions, could raise problems where proceedings were instituted to request the State to include the employee in its social security system. Furthermore, the exception to the rule of non-immunity in article 12, paragraph 2 (b), seemed too sweeping, even though it was taken for granted that the sovereign State must enjoy a good measure of freedom in hiring and firing foreign employees. Thus, the compromise solution proposed in paragraph 182 of the report, which would allow only pecuniary compensation in cases brought against a State concerning recruitment, renewal of employment or reinstatement of an individual, seemed sensible.

31. Although not a common-law country, Italy shared the concern expressed at the proposal to delete article 14, subparagraphs (c), (d) and (e), because they contained legal concepts existing in the common-law countries that could not be deemed to be included in subparagraphs (a) and (b).

32. With regard to article 18, his delegation did not agree with the proposal to specify only "ships engaged in commercial service", and preferred the expression "ships engaged in commercial or non-governmental service".

33. The codification of the law of jurisdictional immunities of States included a few general rules on which all States were in agreement and focused on immunity for governmental activities, but differences emerged with regard to the expression "progressive development" which, for some States, entailed the adoption of provisions limiting State immunity as much as possible, while for others it was an incentive to broaden immunity. Consequently, and bearing in mind the absence of unanimity, the expression "progressive development" could only mean that it was necessary to make the law more uniform. Consequently, the aim was to reach a compromise, and the final text being drafted must be more flexible and must reflect some elements of the differing positions of States. The text would thus retain divergences, which should be kept to a minimum, of which account would need to be taken so as to develop provisions for regulating their consequences, namely, rules concerning reciprocity.

34. Turning to annex I of the draft articles on the law of the non-navigational uses of international watercourses, he reiterated his delegation's view that reparation could be invoked only where the mechanisms and procedures provided for avoiding or minimizing damage as well as for repairing it under private law had produced no results. That philosophy seemed to have been adopted also by the Special Rapporteur.

35. His delegation endorsed the general thrust of the articles proposed for annex I, but wished to make two comments: first, in view of their importance, those articles should be included in the main body of the draft convention;

(Mr. Treves, Italy)

secondly, draft articles 7 and 8 of annex I belonged with the final clauses; it was thus odd for them to appear under the heading "Implementation of the draft articles".

36. Article 24 established an important presumption, namely, that no use should enjoy priority over other uses. That provision was consistent with the idea that priority for navigation could no longer be defended, even though re-established by specific agreement in particular circumstances.

37. As stipulated in article 28, international watercourses should be used only for peaceful purposes and should be "inviolable" in times of international and internal armed conflict. Nevertheless, the Drafting Committee should replace the term "inviolable" by another, less problematical term.

38. Parts IV and V of the draft articles made an important contribution to the consolidation of general principles on international environmental law. The fact that those articles were based on Part XII of the United Nations Convention on the Law of the Sea showed that there was a trend towards regarding them as an integral part of customary law on protection of the environment.

39. Mr. PUISSOCHET (France), referring to the jurisdictional immunities of States and their property, noted with satisfaction that the majority of members of the Commission had considered that it was not necessary to take account of a single legal system. Nevertheless, it was disappointing that the Commission had not taken account of the comment of France that it would be preferable not to take up the question of measures of constraint for the time being. It should be noted that the scope of immunity from execution differed from that of immunity from jurisdiction. As could be seen from paragraph 217 of the report of the Commission, the Special Rapporteur himself had pointed out that, owing to the independent development of the issue of immunity from measures of constraint and that of immunity from jurisdiction, there was still a division of opinion on the first-mentioned subject. Consequently, there was a risk that the Commission might be unable to propose widely acceptable solutions unless it changed its view. A possible solution might be to make Part IV of the draft articles optional.

40. He did not share the pessimism of one member of the Commission, whose view was reflected in paragraph 171 of the report, for he was convinced that, if formulas based on doctrine were avoided as far as possible, it would be possible to find generally acceptable practical solutions.

41. With regard to article 1 in the text recommended by the Special Rapporteur (A/CN.4/431), his delegation did not agree with including immunity from measures of constraint in the definition of the scope of the draft articles. Nor did the reference to immunity from jurisdiction of the legislative or institutional organs of another State, proposed by one member of the Commission, seem appropriate.

42. The combined text of articles 2 and 3 recommended by the Special Rapporteur raised problems of two kinds. Firstly, with respect to the definition of "State", subparagraphs (b) and (i) bis and (b) (ii) of paragraph 1 would constitute an

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extension of State immunity under French law. In principle, French courts regarded the territorial subdivisions of a foreign State as subject to their jurisdiction. He therefore reserved his position on that point. On the other hand, he had no objections to subparagraph (b) (iii) because under French law the bodies referred to in that provision could enjoy immunity subject to certain conditions. Secondly, the Special Rapporteur had substituted the concept of "commercial contract" for that of "commercial transaction". Although he understood the reasons for that substitution, he wondered whether the term "opération" was not the most appropriate in French. Thirdly, paragraph 3 of the article provided that in determining whether a contract was commercial, reference should be made primarily to the nature of the transaction, but the courts of the forum State were not precluded from taking into account their governmental purpose. His delegation found the formulation hard to accept because it created great legal uncertainty.

43. With respect to article 12, his delegation considered a restriction of the principle of immunity from jurisdiction in the case of labour disputes legitimate. Nevertheless, it was necessary to strike a balance between two equally valid concerns: that of protecting the interests of employees of a foreign State and respect for the social legislation of the forum State on one hand, and that of avoiding abusive intervention into activities connected with the exercise of governmental authority by the foreign State on the other. With regard to the proposed text, his delegation considered that although the reference to the criterion of coverage by social security appearing in paragraph 1 was inadequate, it could not simply be deleted. For that reason, it would be advisable for the International Law Commission to consider the possibility of taking into account not coverage by social security but the absence from the contract of exorbitant provisions of domestic common law.

44. With respect to the exceptions provided for in paragraph 2, although the new version of subparagraph (a) prepared by the Special Rapporteur was helpful, it seemed too restrictive. His delegation would prefer to retain the more general formulation approved at the first reading. The retention of the subparagraph (b), on the other hand, was essential. It did not seem normal for a court to be able to impose on a foreign State the reinstatement to a mission of a person who no longer enjoyed its confidence. It had been maintained that that possibility could be ruled out in view of article 26 concerning immunity from coercive measures, but it was doubtful that the article referred to would have the effect suggested. The Rapporteur's proposal that a proceeding should be allowable only to the extent that the purpose of the action was pecuniary compensation, unless the court was authorized to issue an order against the foreign State, seemed attractive but might raise difficulties.

45. With respect to article 15, he shared the view of those members of the International Law Commission who had expressed reservations concerning the special references to plant breeders' rights or rights in computer-generated works. As no enumeration could be exhaustive, his delegation considered it preferable to make use of formulations which would cover the various possibilities.

46. In connection with article 18, his delegation noted that the objections it had

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expressed since 1985 concerning the wording of that article had apparently not caught the attention of the International Law Commission. In its view, it was important that the text being prepared should be legally compatible with the various instruments on which it was based. A clear rule emerged from the Geneva Convention on the international régime of maritime ports, the Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels and the United Nations Convention on the Law of the Sea: in order to enjoy immunity, a ship must be State-owned or State-operated and at the same time in use for non-commercial governmental purposes. His delegation considered that the present text of article 18 departed from the definition derived from those rules of maritime law in two respects, as it: (a) would allow immunity from jurisdiction for a State-owned ship in use for a non-commercial private purpose; and (b) would allow for abandonment of the criterion of actual use of the ship as a means for determining its status. The words "intended exclusively for use" would allow a ship to enjoy such immunity on the basis not of its actual but merely of its potential use. That might give rise to many controversies between States. For that reason, his delegation would renew its request that the International Law Commission refer to the definition appearing in article 6 of the Montego Bay Convention.

47. He accepted the Special Rapporteur's proposal for the deletion of article 20. With respect to Part IV, which dealt with measures of constraint, his delegation's position was well known and he would therefore simply refer to the written comments submitted by his country.

48. With respect to Part V, he wondered if all its provisions actually related to the general theme of the jurisdictional immunity of States. Article 24 moved directly from a definition of the principles applicable with respect to State immunity to a detailed description of the procedure to be followed in bringing an action against a foreign State. The deletion of that article would have no prejudicial implications; the retention of the provision, on the other hand, would give rise to possibly difficult technical discussions. That observation also applied, mutatis mutandis, to articles 25 and 27. His delegation had no substantive objections to article 26.

49. Summing up, he said that although the draft articles in their present form were not completely acceptable to his delegation, he looked forward with interest to the complete series of articles that would emerge from the second reading by the International Law Commission.

50. Turning to the law of the non-navigational uses of international watercourses, he recalled that he had stated his opinion on article 24 at the past session. His delegation could accept the principle of not giving priority to any use stated in paragraph 1, but was not sure that the provision established a conventional rule which could only be abrogated by a contrary conventional rule. With respect to paragraph 2, and to the extent that reference was made in it to articles 6 and 7, he recalled his delegation's reservations concerning the creation in the abstract of a legal obligation to co-operate. Although it was advisable to promote co-operation, only the States concerned could transform it into an obligation. His

(Mr. Puissochet, France)

delegation would prefer that the International Law Commission reconsider the draft as a whole from that point of view.

51. Paragraph 1 of article 25 did not stipulate an obligation to co-operate with respect to the regulation of international watercourses but only in identifying needs and opportunities for regulating them. He shared the opinion referred to in paragraph 270 of the report that the provisions should be formulated in less mandatory terms. With respect to paragraph 2, his delegation had already indicated that, in its view, the principle of equitable State participation could not be established as a general rule. Paragraph 2 should rather be formulated as a recommendation directed towards States in negotiating their individual agreements and not as an additional rule.

52. Article 26 gave rise to some concern. If it was included in the draft text, the Commission would be deliberately exceeding the scope of the framework agreement that it had intended to draw up. It would also be exceeding, no less deliberately, the scope of applicable international law. France, of course, could not but favour the conclusion of agreements similar to those envisaged by the Commission, as was demonstrated by the conventions to which his country was a party. Nevertheless, it could not accept the obligation to enter into consultations on the basis of a unilateral request. Aware of the fact that the work of the Commission included not only the codification of law, but also its progressive development, the French delegation shared, in the case under consideration, the views of the members of the Commission reflected in paragraph 278 of its report. The best approach would be to draw up recommendations which would help States determine for themselves the functions of the body which they might decide to establish. In any case, if the provision was retained, it would be necessary to define the nature of the joint organization. His delegation also had doubts as to the precise scope of paragraph 2 (a).

53. Referring to article 27, paragraph 1, he said that he was surprised by the content of paragraphs 293 and 294 of the report and wondered whether that provision did not repeat other draft articles that had already been adopted by the Commission. Furthermore, he shared the view that, since the title referred to water resources, the scope of the provision was considerably broadened. With regard to paragraph 2, he reiterated his reservations concerning the obligation to enter into consultations. Lastly, he expressed his greatest misgivings with regard to the appropriateness of draft article 28, which considered problems relating to armed conflicts. Its adoption would entail the danger of interference with legal provisions governing armed conflicts and even with other studies by the Commission itself, such as the draft code of crimes against the peace and security of mankind. That article should be reformulated since the notion of the inviolability of international watercourses was surprising a priori.

54. Lastly, recalling the request made by the Commission in paragraph 313 of its report, he said that his Government would, at an appropriate time, submit in written form its views on the draft articles contained in annex I.

55. Mr. GODET (Observer for Switzerland), referring to the law of non-navigational uses of international watercourses, said that the Commission, in drawing up the draft articles, had not intended to transpose the limits of a framework agreement. That expression denoted an instrument that contained general residual norms to serve as a source of inspiration for riparian States. Those States would have the freedom to derogate from such norms on the basis of specific agreements. Under those circumstances, and since the Commission wished to learn the views of Governments on that question, his delegation wondered whether it was really appropriate to include in a framework agreement an annex designed to facilitate the application of the draft articles. That might involve a contradiction. Of course, the annex introduced plausible concepts, such as non-discrimination and equal right of access to the procedures. Nevertheless, it would be preferable to include those articles in the body of the draft text. Although the idea of facilitating procedures and promoting the functioning of civil liabilities systems in order to provide due compensation to victims was correct, his delegation felt that, in regulating such complex problems, the possibilities for adopting the instrument were diminished. An option protocol might be a solution, as had been suggested in the Commission.

56. With regard to article 22, the obligation imposed on States concerning the protection and preservation of ecosystems was perfectly in keeping with practice. That obligation was not self-contained but should be viewed within the context of article 6, namely, the framework of equitable and reasonable utilization and participation. That was tantamount to saying that article 22 did not guarantee absolute protection since the requirements of interdependence and good neighbourliness necessitated a certain tolerance of pollution. Article 23, which set the threshold for observing the obligation to prevent, reduce and control pollution at the level of appreciable harm, seemed to confirm that interpretation of article 22. Since certain watercourses were already polluted, States were expected to do what they could to reduce pollution to mutually acceptable levels. That was the thrust of the two 1976 conventions on protection of the Rhine from chemical pollution and chloride pollution respectively.

57. The concept of the environment referred to in article 23 was broader than the concept of the ecosystem in article 22 so that using both concepts, in spite of their similarity, gave rise to difficulties in interpretation.

58. His delegation supported the idea in article 25 that watercourse States should take measures to protect and preserve the marine environment. Nevertheless, the inclusion of that provision did not mean that all States could intervene in activities aimed at protecting the environment since watercourse States did not have a responsibility "erga omnes", but only to the other watercourse States or riparian States directly affected.

59. Referring to article 26, which had been provisionally adopted, he pointed out that the obligation to take appropriate measures to prevent or mitigate harmful conditions was equivalent to an obligation to act with diligence and that the measures should be adapted to the case in question and take account of both the situation of the State concerned and the harmful situations themselves.

(Mr. Godet, Observer, Switzerland)

60. With regard to article 27, he wondered whether it was realistic to require watercourse States to develop contingency plans for responding to emergencies in co-operation with other potentially affected States and competent international organizations. That would unduly increase the number of those called upon to participate in the application of alarm or information systems; the obligation to reach agreement should only relate to States that were at risk because of an emergency.

61. Article 26 of the text proposed by the Special Rapporteur, which was one of the key provisions of the draft articles, should be considered more thoroughly, even though it had not yet been adopted provisionally. The establishment of joint organizations for management created certain problems. Without prejudice to the general obligation to co-operate, it should be asked whether a framework agreement should define the institutional form that co-operation between the watercourse States should take and whether those States themselves should not agree on that form. Similarly, the obligation to initiate negotiations should not depend on a mere request by one of the watercourse States. In that regard, Switzerland favoured adding an element of objective evaluation, such as had been proposed by some members of the Commission.

62. With respect to the settlement of disputes, his country shared the view of the Special Rapporteur that it was advisable to attempt resolution of any differences at the technical level before proceeding to invoke more formal procedures (document A/CN.4/427/Add.1). Nevertheless, he did not feel that inquiry should involve a separate mechanism because that procedure could be utilized even before a dispute arose. In actual fact, a request to initiate an inquiry involved a use of the watercourse by one of the riparian States which encountered opposition or at least caused certain fears. It was difficult to envisage a fact-finding procedure which was not preceded by a stage of direct consultations between the States concerned and that seemed to be the understanding of the Special Rapporteur when he proposed that the watercourse States concerned might establish a commission of inquiry. For that reason, the Commission should include the inquiry mechanisms among the other settlement procedures.

63. Switzerland agreed that a time limit should be placed on the negotiations, however much the idea of a uniform time limit was open to criticism. The lack of a time limit would enable a reluctant party to oppose indefinitely the application of the conciliation procedure. Otherwise, the parties were free to shorten or extend the negotiation period. His country had no objection to obligatory arbitration or, in other words, resorting to [illegible] on the initiative of one of the parties when conciliation failed.

64. Lastly, he felt that in general the draft text was a good starting point. Nevertheless, his country was concerned at the dependent situation of a State which planned a new use of a watercourse in relation to the State that might possibly be affected. There was no doubt that the draft text favoured the State situated downstream since, by claiming that a new use might prejudice its own use, that State received a sort of right of veto over the activities of the State situated upstream. For that reason, a certain balance should be introduced.

The meeting rose at 12.20 p.m.