UNITED NATIONS **LOS**

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

Distr.
LIMITED

LOS/PCN/SCN.4/L.13/Add.2
25 January 1994

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEABED AUTHORITY
AND THE INTERNATIONAL TRIBUNAL
FOR THE LAW OF THE SEA
Special Commission 4

CHAIRMAN'S SUMMARY OF DISCUSSIONS

Addendum

Revised draft Protocol on the Privileges and Immunities of the International Tribunal for the Law of the Sea

(LOS/PCN/SCN.4/WP.6/Rev.1)

1. At its ninth session, Special Commission 4 began the examination of the revised draft Protocol on the Privileges and Immunities of the International Tribunal for the Law of the Sea (LOS/PCN/SCN.4/WP.6/Rev.1). It concluded its task at the tenth session, where a final draft was requested, taking into consideration the views expressed. It was later published as document LOS/PCN/SCN.4/WP.15/Add.3 (or LOS/PCN/SCN.4/WP.6/Rev.2) and entitled "Final draft Protocol on the Privileges and Immunities of the International Tribunal for the Law of the Sea".

2. When introducing the revised paper, the Secretary stated that the new paper was an attempt to reflect all the proposals where an agreement had been reached along with necessary adjustments. He also said that, as had been requested, the Secretariat had taken some guidance from document LOS/PCN/SCN.4/WP.5/Rev.1 on the Headquarters Agreement between the Tribunal and Germany, but keeping in mind that both documents addressed two different audiences. The Secretary reminded delegations that the legal mandate to draft a protocol on privileges and immunities was contained in the Convention at its Annex VI and in particular in article 10 of the Statute of the International Tribunal for the Law of the Sea (hereinafter referred to as "the Tribunal"). He also referred delegations in that regard to the introductory note of document LOS/PCN/SCN.4/WP.6.

3. Beginning a detailed description of the new text, the Secretary pointed out that a new article on the use of terms had been added, dealing with different

definitions. He stated that basically the thrust of the Protocol had not been changed but that a separate article on the waiver had been drafted. He also pointed out that the question of arrangements with Governments had been addressed.

4. He then referred delegations to documents LOS/PCN/SCN.4/WP.6, WP.5/Rev.1, L.13 and L.13/Add.1, CRP.24, 27, 30, 31, 34 and 35, as documents needed for the consideration of this new, revised Protocol on Privileges and Immunities. He also pointed out that it had been a very delicate task to include reference to the Vienna Convention, on the one hand, and to international law, on the other.

5. Delegations were called upon not to look too intensively at provisions that had not raised any controversy, in order to allow more time for those which were problematic. It was also suggested that whenever amendments were proposed by delegations and no agreement was reached in the Commission, working groups would be created on an ad hoc basis to deal with the matter, and then report back to the Commission as a whole.

Preamble

6. Delegations were referred to paragraph 5 of document LOS/PCN/SCN.4/L.13 to refresh their memory as to the agreement arrived at with regard to the preamble.

7. One delegation wanted to know if the reference to "State Party" in the second and third paragraphs would mean a country which would accede to the Protocol. He was supported by another delegation, who suggested that the matter of the definition of "State Party" should be resolved at article 1 on the use of terms, since the article was also ambiguous. Another delegation wondered what had been the motivation in putting the final "look-alike clauses" in the last preambular paragraph. Another delegation was of the view that the reference to Annex VI in the fourth preambular paragraph should be deleted. He was supported by another representative, who also wished the last preambular paragraph to be reformulated.

8. The Secretary answered that, when looking at existing precedents, this constituted standard procedure. With regard to the fourth preambular paragraph, it was agreed to delete the reference to Annex VI since it already appeared in the first preambular paragraph.

Article 1. Use of terms

9. The Secretary pointed out that the chapeau of article 1 should read "for the purpose of this Protocol", not "Agreement". He also pointed out that with regard to paragraph 1 (d) and the definition of the "States Parties", he was of the view that no distinction should be made between the States parties to the Convention and States parties to the Protocol. He insisted that the Protocol was to be adopted by the Meeting of States Parties to the Convention.

10. Some delegations supported his analysis. However, one delegation pointed out that there was a difference between this article and article 23. Article 1

stated "For the purposes of this Agreement", which therefore meant that in subparagraph (d) the State Party would be party to the Agreement [Protocol].

11. Another delegation suggested redrafting article 1 (d) as follows: "States parties" means States that have consented to be bound by this Protocol and for which this Protocol is in force". He added that necessary adjustments would be made to article 23 (1) and suggested the following: "This Protocol is submitted for accession to every State Party to the Convention as understood in article 1 of the Convention."

12. Another delegation was of the view that problems would arise whenever the Tribunal decided to sit, temporarily, somewhere other than at Hamburg; this would raise the necessity of ad hoc agreements. He was therefore in favour of a redraft of article 1 (d).

13. The main concern of some delegations was what would happen if a State was party to the Convention and not to the Protocol. This concern was also linked to the views expressed by other delegations that wished the Tribunal to be independent even from the United Nations Convention on the Law of the Sea (hereinafter referred to as "the Convention"), which meant that they wished for States to be able to be party to the Protocol without being necessarily party to the Convention. This view was strongly opposed by many other delegations.

14. Therefore, delegations insisted upon a clarification of paragraph 1 (d), and many proposals for redrafting the article were once again put forward.

15. It was pointed out that subparagraphs (h) and (j) of article 1 concurred with the idea that "States Parties" meant States parties to the Protocol. Other delegations pointed out that taking into account article 23 of the revised Protocol, a "State Party" could only be a State party to the Convention that would have acceded to the Protocol. If the accession was not effected, the Protocol would not apply to that State.

16. Delegations finally seemed to agree that there was a need for parties to the Convention to become parties to the Protocol. This would not be automatic, but through signature or accession. What was needed was a drafting of article 1 (d) that would be clear and precise but acceptable for most delegations.

17. The issue was taken into informal discussions, with a suggestion to discuss the issue later on within an ad hoc working group if the Commission could not reach a consensus. Some delegations recalled that the Protocol was to be open to every State. A definition of "States Parties" was also contained in the Convention, article 2, paragraph 1. It was also recalled that the text of article 1 of the Protocol on Privileges and Immunities had been drafted without any prejudgement, with the only idea that the Convention was the basic text for the Protocol.

18. One delegation was of the view that the latter comment restricted the definition of States parties, while it was not necessary to link both texts i.e., the Convention and the Protocol. It was pointed out that States not parties to the Convention should be able to appeal to the Tribunal. The formula

at article 1 (d) should therefore consider as States parties to the Protocol other countries than those States which were party to the Convention.

19. Another delegation criticized article 1 (d) as drafted because it stated that parties qualifying for the Protocol were automatically to be parties to the Protocol. This was stated to be in contradiction with article 23 where a simple accession was required to be party to the Protocol. He therefore suggested including in article 1 (d) a reference to article 23 and to the fact that article 23 referred also to entities as enumerated in article 305 of the Convention.

20. In drafting article 1 (d) it was suggested to keep in mind situations raised as in article 6, paragraph 2, article 19, paragraphs 2 and 3, article 23, paragraphs 1 and 2 and preambular paragraphs 2 and 3.

21. The Commission was informed that consultations with the Chairman of the Preparatory Commission on the International Seabed Authority and the International Tribunal for the Law of the Sea had been conducted on the basis of article 1, paragraph 2, of the Convention (see LOS/PCN/WP.49/Add.1). At that time, delegations were informed of the possible confusion between Member States and "States Parties" to an international organization as referred to in article 1, paragraph 2 and subparagraph 2. To make the distinction, it was suggested to use the wording "acceding States". But the Commission was warned that there was not the same link between the Convention and the Tribunal as there was between the Convention and the Authority. He explained that there could be physical or juridical persons parties to the same Protocol.

22. It was therefore up to the Commission to decide if it agreed on whether: (a) all States could be parties to the Protocol; (b) States that had signed the Convention and were parties to it could enjoy rights under the Protocol; and (c) States that had not signed the Convention could be part of the Protocol.

23. One delegation, summing up the different views, stated that the objective of the Protocol was to give application to Annex VI. He then insisted that there should not be a formal linkage between the Protocol and the Convention, meaning that the Protocol should not be dependent on the Convention. It was then suggested that article 1 (d) be amended to read as follows: "'States Parties to the Protocol' shall mean the States who have fulfilled the conditions laid down in article 23 of this Protocol". 1/

24. On the question of how the Tribunal could perform its functions in a State which was not a party to the Convention, reference was made to articles 20, 21, 22 and 23 of the Statute of the Tribunal and article 291 of the Convention. It was pointed out that the Convention itself stated that those States who were not party to the Convention, as well as entities, could submit a dispute to the Tribunal.

25. One formulation for article 1 (d) and article 23 was proposed in document LOS/PCN/SCN.4/1992/CRP.46, according to which article 1 (d) would read: "'States parties' means those States which have completed the formalities for accession prescribed in article 23." Article 23 would read: "This Protocol is open to every State Party to the Convention for accession."

26. One delegation found the word "formalities" inappropriate and suggested the following instead: "'States Parties' means those States that have agreed to be bound by the Protocol and for which the Convention is in force."

27. One delegation however insisted upon retaining the important reference to article 23.

28. In the end, with regard to paragraph 1 (d) and the definition of "States Parties", the Commission generally agreed upon the following wording: "'States Parties' means those States which have consented to be bound by the Protocol, in accordance with article 23, and for which the Convention is in force."

29. Subparagraph (g) was also generally agreed upon taking into account the agreement reached on subparagraph 1 (d).

30. The Commission also generally agreed on subparagraphs (a), (b), (c), (e), (f), (i), (j), (k), (l), (m), (n) and (o) of paragraph 1. On subparagraph (h), one delegation was of the view that the term "Government" was difficult to define. When considering the different occasions where it appeared (see article 11, para. 4, article 12, para. 4, article 5 (e) and article 9, para. 1 and article 10, para. 1 in the French version) the word "Government" did not have the same meaning, and in particular with regard to article 6. It was later generally agreed that it was not necessary to give any definition since there already was a delimitation of the term "States Parties".

Article 2. Juridical personality and capacity

31. The Secretary introduced the article and said that it had been based on the original draft in WP.6. However, as suggested by the Commission, paragraph 2 had been deleted and transferred to the administrative rules of the Tribunal. It was also recalled that there had been a general consensus not to change the heading.

32. The Commission generally approved article 2.

Article 3. Immunity of the Tribunal, its property and assets

33. The Secretary stated that the article had been based on the discussions in the Special Commission. Suggestions introduced through document LOS/PCN/SCN.4/1989/CRP.34 were reflected in this new article and in this regard attention was drawn to the new paragraph 4 which had been based on the draft Convention on the diplomatic courier and the report of the International Law Commission on that Convention. This represented a new trend in international activities.

34. Starting with the heading of the article and then paragraphs 1, 2 and 4, the Commission generally approved the article as it stood. However, some delegations wanted paragraph 3 to stand alone as a separate article since it stated an important principle. The Secretariat submitted a redraft of the article entitled "Inviolability of the premises of the Tribunal" and an

article 3 bis entitled "Immunity of the Tribunal, its property and assets" (see LOS/PCN/SCN.4/1991/CRP.43).

35. The Commission generally approved both articles.

Article 4. Exercise of the functions of the Tribunal outside the host country

36. The Secretary stated that the article had been drawn from earlier provisions in WP.6. The issue in this article was to respond to the situation where the Tribunal might function in a country which was not a party to the Protocol. This issue had also been touched upon in the discussion on article 1 (d).

37. One delegation wanted to know if the article applied to a country not party to the Protocol or to the Convention. He was of the view that article 1, paragraph 3, of the Convention did not clarify that point. He suggested therefore that the word "State" be used instead of "State Party". He explained that the Tribunal should be able to sit in any country, and if that country was not a party to the Protocol, an ad hoc arrangement should be made between that State and the Tribunal.

38. It was argued that, in that case, the Tribunal would be imposing its will on a State, by deciding to sit in that country.

39. One delegation was of the view that the above situation was covered by the last part of the article which begins: "Upon request ... as soon as possible". However, he also was of the view that the two situations should be clearly delineated and differentiated.

40. Another delegation was of the view that there should also be taken into account the situation where a country which was not a party to the Convention appealed to the Tribunal. He referred to article 20, paragraph 2, of the Statute of the Tribunal which opened the Tribunal to entities other than States parties. He was also concerned by the last sentence of article 4, which stated that a country not party to the Protocol could be obligated by the Protocol.

41. At that point the Secretary stated that the Protocol had been based on existing precedents, i.e., the Convention on Privileges and Immunities of the United Nations, which is of universal character. Of course, the situation of the Tribunal was slightly different. Article 1, paragraph 3, of the Statute allowed the Tribunal to sit anywhere, including in a country which was not a party to it. Article 4 was drafted to cover practical or administrative arrangements. He nevertheless reminded delegations that the problem demanding solution would arise when the Convention was not universal and the place where the Tribunal sat was not even a party to the Convention.

42. Two categories of suggestions were therefore supported by delegations: (a) to delete the word "Party" which would, however, broaden the article; (b) to have a separate paragraph that would cover the situation where when the Tribunal sat in a country which was neither a party to the Convention nor a party to the

Protocol. In this case it should also be stated that the country would then have to accede to the Protocol or conclude, with the Tribunal, another arrangement.

43. One delegation recalled that similar discussions had been held on document LOS/PCN/SCN.4/1989/CRP.24. He was of the view that reference to article 20, paragraph 2, of the Statute, as had been done, did not cover the situation. The Commission had to decide whether the Tribunal would sit elsewhere, i.e., in a country not party to the Protocol. In this case, as stated by another delegation, the country that has agreed that the Tribunal might sit in its territory would conclude arrangements as soon as possible. In this case, it would also be more accurate to say in article 4, last sentence: "conclude arrangements with the Tribunal etc. ...".

44. Another delegation stated that the obligation to conclude arrangements with the Tribunal referred not only to a State not party, but also to any country which agreed to host the Tribunal, provided that that State was not Germany.

45. It was recognized that article 4 enunciated a strong commitment that the Tribunal be able to enjoy privileges and immunities wherever it might decide to sit. The formula to be chosen should not be restrictive and should open the Protocol to non-States parties. However, some delegations rejected the situation where the State would not be a party either to the Convention or to the Protocol.

46. In the end, it was left to the Secretariat to draft a compromise taking into consideration the proposals made and the two situations, i.e., when the Tribunal sat in the territory of a State party and when the country was not a State party. The definition of "State Party" was taken as that agreed by the Commission in article 1 (see para. 28 above).

47. The Secretariat should take into consideration the fact that some States wanted the article to admit States that were neither party to the Convention or to the Protocol. In this regard it was reminded that for the sake of efficiency the Commission had agreed that States which were parties in a dispute but which were not party to the Convention could be considered under the Protocol.

48. A proposal was temporarily put forward by the Chairman to add at the end of article 4 the following: "Every State may become party to the Protocol and the Convention."

49. This proposal was provisionally adopted pending discussions, inter alia, on article 23. Some delegations were of the view that it was a reasonable compromise with universal openness. In that regard, one delegation insisted that, rather than being restrictive, the Protocol should be open for signature to those entities enumerated in article 305 of the Convention.

50. It was agreed that there would no longer be a paragraph 2. It was also pointed out that the matters dealt with in article 4 would be discussed again when dealing with articles 21 and 22.

51. Thus, document LOS/PCN/SCN.4/1991/CRP.43 was subsequently circulated containing a redraft by the Secretariat of, inter alia, article 4 and article 4 bis.

52. The Commission generally approved article 4 as it was drafted in the above document. Article 4 bis was considered unnecessary.

Article 5. Archives

53. The Secretary reminded delegations that they had agreed that the provisions of this article should not be unduly elaborated. It was also recalled that, in 1988, there had been a decision to retain article 3 of document WP.6 without changes.

54. To a question raised by one delegation, it was stated that article 5 would be generally agreed upon with the understanding that the Protocol would have to be harmonized with document LOS/PCN/SCN.4/WP.5/Rev.1, in order to clarify that the word "wheresoever" did not imply an imposition of will on a third party.

Article 6. Funds and freedom from currency restrictions

55. In introducing the article the Secretary stated that it had not been too controversial. The revision reflected the discussions in the Special Commission. He drew the attention of the Commission on the deletion of the word "gold", as had been requested by the Commission. The title has also been slightly modified so that it would read more smoothly.

56. One delegation drew attention to the French version of the title, which was said to be incorrect. It was generally agreed that necessary adjustments would have to be made.

57. Paragraph 1 of article 5 was also generally approved by the Commission.

58. With regard to paragraph 2, it was stated that its drafting was in accordance with the summary of discussions in document LOS/PCN/SCN.4/L.13.

59. One delegation pointed out, however, that taking into consideration the definition of "States Parties" adopted by the Commission (see para. 28 above), the words "to this Protocol" should be deleted. The Commission generally agreed to the deletion.

Article 7. Exemption from taxes and custom duties

60. In introducing the article, the Secretary stated that it was still basically the earlier text from LOS/PCN/SCN.4/WP.6. However, it attempted to accommodate some of the views expressed during extensive discussions on the matter. Mention was also made of the Commission's decision to draft the article in two paragraphs (see Chairman's summary of discussions (LOS/PCN/SCN.4/L.13,

para. 42)). Delegations were also asked in the first paragraph, third line, to insert "charges" instead of "changes". There was no comment on the heading.

Paragraph 1

61. One delegation sought a clarification as to why the words "public utility services" were used in the article. This delegation was of the view that the terminology, i.e. "services rendered" in the Convention (article 183) should be used in this article as well as in document LOS/PCN/SCN.4/WP.5/Rev.1, article 14, paragraph 4. Some of the delegations supported his point of view.

62. However, the Secretary pointed out that this matter had already been extensively discussed (see LOS/PCN/SCN.4/L.13/Add.1, para. 23). It was also pointed out that the changes in the wording might also bring about a change in the status of the Tribunal.

Paragraph 2

63. Two suggestions were made with regard to the paragraph. The first one was a drafting comment, requesting that the words "in the territory" be used instead of "country". The second suggestion, which was to delete the last sentence of the paragraph and add at the end of the first sentence the words "including its publications" gave rise to some debate.

64. Some delegations were of the view that the last sentence meant that the Tribunal's publications were in addition to articles imported or exported and that, therefore, it should not be deleted. Moreover it was pointed out that not only did the last sentence deal with a different category, i.e., publications, but also the whole paragraph was linked to article 4. One delegation stated that if on one hand the Commission were to decide that the Tribunal could sit in a country which was not party to the Protocol, then the paragraph should change; if on the other hand the opposite was the case, then the paragraph should remain as it stood.

65. Therefore, taking into account the decision reached with regard to article 4 (see para. 46 above), it was generally agreed to use the words "in the territory" and to retain paragraph 2 as currently drafted.

Article 8. Reimbursement of duty or tax

66. In introducing the article, the Secretary stated that it had not given rise to much controversy although there had been thorough discussions on the word "important". He added that the text reflected those discussions and the decisions taken, as reflected in document LOS/PCN/SCN.4/L.13/Add.1, paragraph 31. The text, however, had been generally adopted by the Commission as currently formulated.

67. One delegation apologized for raising once again issues concerning an article which had already been agreed upon, but he was of the view that it was important to redraft article 8, including the title.

68. Some delegations supported him. He then suggested that the new title should read: "Reimbursement of duties and/or taxes". The rest of the article would read:

> "The Tribunal shall not, as a general rule (delete "claim exceptions" and add) be exempted from duties and taxes which are included in the price of movable and immovable property and of services. Nevertheless, when the Tribunal is making (delete "important" and say:) major purchases for official use of property, goods and services on which duties and taxes have been charged or are chargeable, States Parties (delete "whenever possible") make appropriate administrative arrangements for the remission or reimbursement of the amount of duties and/or taxes paid by the Tribunal."

69. He explained that the aim of his changes was to take into account excise duties and the fact that States were sovereign in the matter.

70. Another delegation wished to add in the English version, at the fourth line, the word "such": "... on which such duties and taxes ...", so that a differentiation could be made with respect to article 7.

71. Other delegations raised the question of non-conformity between the different language versions, such as between the English, the French and the Arabic.

72. The Secretary stated that the matter of language harmonization would be taken care of.

73. One delegation suggested adding, after the words "goods and services" the words "of substantial value". He was supported by other delegations.

74. Another delegation was of the view that the content of the article did not correspond to the title because of certain phrases or concepts that were not quite precise. He noted a certain contradiction between the title, containing the word "reimbursement", and the phrase "the tribunal shall not claim exemption". He added that although Germany had a value-added tax on goods, it had a separate practice for the diplomatic corps. He pointed out that the Tribunal should provide for the same treatment.

75. He was supported by another delegation, which suggested a title with a neutral phraseology, such as "purchases of the Tribunal".

76. Some other delegations did not find any contradiction between the title and the text.

77. One delegation pointed out the ambiguous character of the word "important". He suggested its deletion because that which was important could vary from country to country. He suggested instead that it be stated that the reimbursement should be "in accordance with national laws and regulations".

78. He was supported by one delegation, who wished to know who would be deciding, between the Tribunal and the country, on which purchases were important and which were not. He insisted that this fell under the competence

of the country and suggested the following wording: "in accordance with the laws of the country".

79. The Secretary pointed out that the language used in article 8 was consistent with the language used in the Convention on Privileges and Immunities of the United Nations. He explained that the current language provided for more flexibility on both sides. He added that, with regard to the suggestion to add the words "substantial value", this would restrict the meaning of the article and small purchases over a period of time might not be reimbursable. He also explained that the word "claim" had been used because there was no automaticity; a request would have to be made before a reimbursement was effected. The Secretary appealed to delegations to take the above comments into consideration.

80. Some other delegations supported the content and intent of article 8 but still had some difficulties with its formulation. Further suggestions were made and it was agreed to keep the article in abeyance pending a compromise to be drafted by the Secretariat.

81. The Secretariat did so in document LOS/PCN/SCN.4/1991/CRP.43.

82. The Secretary pointed out that the wording "important purchases" had been changed to "major purchases" and that "whenever possible" now read "as soon as possible".

83. The Chairman took note of the Commission’s general approval of the changes and of the new text of article 8.

Article 9. Facilities in respect of communications

84. The Secretary stated that article 9 had been drafted on the basis of document LOS/PCN/SCN.4/1988/CRP.27. Article 13 of the International Atomic Energy Agency (IAEA) Safeguards Agreement had also been taken into account. He referred the delegations to document LOS/PCN/SCN.4/L.13/Add.1, paragraphs 35, 36 and 37, for previous discussions and decisions on the article.

85. As a matter of form, some delegations pointed out that in the French version there was no third paragraph. One delegation insisted, however, that his delegation did not view the first paragraph as necessary. He noted that the paragraph had been taken directly from the Convention on Privileges and Immunities of the United Nations, which was now outdated.

86. Another delegation did not agree on the equivalency drawn between the intergovernmental organization and the Government. He explained that the Tribunal should only be equated with other tribunals and the way their privileges and immunities were dealt with. With regard to paragraph 2, he pointed out that the Commission should only be concerned about using its communications without "interference" or "censorship" and not about "interception" or "restrictions".

87. The Chairman appealed to delegations not to reopen a debate that had already taken place. He reminded them that they had already generally agreed on the article.

Article 10. Members of the Tribunal

88. The Secretary stated that the article had been drafted on the basis of the Chairman's summary of discussions (L.13/Add.1). He pointed out that the first paragraph had been an agreed text. A consequential change to reflect the discussions had only been introduced. He continued that paragraph 6 was the same draft as in document LOS/PCN/SCN.4/WP.6 and that paragraph 7 merely gave the same privileges to ad hoc members.

89. He also communicated to the Commission that after consulting with the International Court of Justice (ICJ) he had been informed that there had never been any problem with the privileges and immunities of the judges and that there had thus never been any waiver.

Title

90. There were several proposals regarding the title of the article. Some delegations were of the view that the words "ad hoc" should be added, while others opposed it because, as in the Security Council, there was no differentiation between permanent and non-permanent members.

91. Another delegation was of the view that since the article was related to privileges and immunities, those two words should be added to the title. This was considered cumbersome by one delegation. Another delegation suggested deleting article 13 and adding those provisions to article 10, with, consequently, a new title.

92. One delegation referred the Commission to the different definitions of "members" and "ad hoc members". He stated that article 1 (j, k) on the use of terms, defines "Members" as "an elected member of the Tribunal as referred to in article 2 of the Statute and article 2 of the Rules"; "ad hoc members" meant "a person chosen under article 17 of the Statute for the purpose of a particular case".

93. The Chairman stated that those comments would be taken into account when redrafting the article.

Paragraph 1

94. A lengthy debate was opened on this paragraph although it had already been generally approved.

95. Some delegations were of the view that, basically, there should be consistency between document LOS/PCN/SCN.4/WP.6/Rev.1 and document LOS/PCN/SCN.4/WP.5/Rev.1 when dealing with the same subject-matter, in this case, with privileges and immunities.

96. One delegation pointed out that the privileges given to the members of the Tribunal covered more than they should according to Annex VI, article 10, of the Convention. He stated that full enjoyment of privileges and immunities was given to the members of the ICJ only when residing at headquarters. The same delegation also objected to the use of the words "heads of diplomatic missions" and preferred the expression used in the Vienna Convention of 1961: "diplomatic agents". He argued that there was no longer any differentiation between the immunities and privileges of heads of mission and other diplomats.

97. Another delegation was concerned here also by the lack of harmonization and wished his comment to apply mutatis mutandis throughout the provisions of the article. He suggested deleting the word "prerogatives" because, contrary to the word "facilities", he did not find the term sufficiently clear.

98. In the second sentence of paragraph 1, he raised the question of the reference to international law and to the Vienna Convention. He was of the view that it was not necessary to refer to both since the Vienna Convention was so widely accepted. He then suggested replacing the word "adopted on" by "of".

99. Another delegation however did not agree and insisted upon retaining the reference to international law with the words "in accordance with International Law". He explained that there might be practices which would have developed into customary international law.

100. Another delegation was of the view that the reference to international law was too general. He insisted however that if the reference was to be retained, then it should be used with consistency throughout the text and in the same order when cited with the Vienna Convention.

101. With regard to the comment that members of the Tribunal only enjoyed prerogatives when at headquarters, and after a definition of the latter term in international law was given, some texts were cited to illustrate that such had not been the practice. Thus, reference was made to a letter by the Minister for Foreign Affairs of the Netherlands which first stated that the judges of the ICJ shall enjoy the same privileges and immunities as the heads of diplomatic missions; another reference was made to a General Assembly resolution which, complementing in a way the above letter, stated that the privileges and immunities should be enjoyed by the judges of the ICJ when residing in some other country than at headquarters for the purpose of holding themselves available.

102. It was argued that those documents had appeared prior to the Vienna Convention and therefore should not constitute a valid reference.

103. The Secretary stated that the redraft of the paragraph had been based on the discussions held by the Commission on the same matters which were now being raised once again. He explained that, in this article, reference had been made to the Fourth Protocol of the Council of Europe which referred to the European Court of Human Rights where the expression "head of diplomatic missions" was used. He pointed out that some of the protocols of the Council had been adopted in the 1960s, subsequent to the Vienna Convention.

104. One delegation argued that the point of granting facilities, prerogatives and immunities was to facilitate the judges' carrying out their functions. He also stated that changing the privileges would introduce inequality between the Tribunal and the ICJ. In this regard, he recalled that President Amerasinghe had said that the Tribunal shall have equal precedence with the ICJ (ref. A/CONF.62/WP.9/Add.1, para. 30). He insisted that this was a matter of prestige not to be overlooked.

105. It was left to the Secretariat to attempt to redraft a new paragraph that would take into account the above comments.

Paragraph 2

106. Two categories of questions were raised with regard to the paragraph. One delegation wanted some harmonization between paragraph 2 and paragraph 3. He suggested deleting in paragraph 3 the words "other than their own" and retaining paragraph 2 as drafted, but adding at the end of paragraph 2 the restriction introduced in paragraph 3. Another delegation however was of the view that, although he agreed that the restriction found in paragraph 3 should be added in paragraph 2, he would prefer a rewording of the whole paragraph. He suggested stating at the beginning of paragraph 2 the following: "Members, their spouses, their family and members of their household ..."; the end of paragraph 2 would then read: "other than that of their own or which they are permanent residents."

107. The Secretary stated that the latter proposal would give rise to difficulties because some members of the Tribunal could be resident in two countries.

108. Because of the complexity of the matter, some delegations suggested a separate article dealing with that issue.

109. One delegation raised the issue regarding the family members. He wanted to know what kind of "facilities" the member of the Tribunal would be given with regard to his family members. He also found ambiguous the use of the word "they" since it was not clear if it referred to the members or their families.

110. In that regard, a suggestion was made to delete the words "forming part of their household" as well as the words "for leaving the country where they happen to be".

111. The Chairman pointed out that the issue raised was of importance and he wanted to know if the Commission was in favour of a separate article concerning the members and their families.

112. It was argued that the privileges or immunities with regard to the travel of the member could also apply to the member when residing in his own country. In this connection, a delegation drew the attention of the Commission to article 38 of the Vienna Convention. He stated that if they were travelling, the members should be accorded such privileges and immunities as would cover any, and only, official acts.

113. It was agreed that the Secretariat would attempt to write a compromise text on the paragraph.

Paragraph 3

114. There were few comments on the paragraph. However, one delegation was of the view that under the proposal to redraft the paragraph, i.e., replacing the sentence that begins with: "Members of the Tribunal, for the purpose of holding themselves available ...", by: "for the exercise of their functions", paragraph 3 would become superfluous because it would only be a repetition of paragraph 1.

115. Another delegation stated that paragraph 3 could only lead to confusion and suggested that it be deleted. He was supported by other delegations on the condition, for some of them, that the word "country" would refer to "States Parties". It should be impermissible to oblige non-States parties to grant privileges and immunities to the Members of the Tribunal.

116. The Secretary proceeded to identify on which grounds article 10 had been drafted. He stated that the first paragraph was general, the second one dealt with transit, the third with the Members holding themselves available but not performing actual duty for the Tribunal, etc. He pointed out that the paragraphs dealt with different situations. He asked the delegations how the countries would be able to deal with the situation described in paragraph 3 if the paragraph were to disappear.

117. It was agreed that the Secretariat would attempt to redraft a compromise on this paragraph as well.

Paragraph 4

118. After reference was made to the Chairman’s summary of discussions (document LOS/PCN/SCN.4/L.13, para. 38), a few drafting suggestions were put forward and generally agreed upon with regard to this paragraph. Thus, one delegation suggested substituting the words "no longer performing those functions" by "no longer Members". In this regard, another delegation recalled the necessity to use the capital "M" for "Members" and another, to choose the word that would be used throughout the text, i.e.. between the words "duties" and "functions".

119. The Secretary stated that the drafting changes would not only be reflected in the text of article 10, but also throughout the whole document.

Paragraph 5

120. There were no comments on paragraph 5, but it was agreed that adjustments in accordance with proposals to other paragraphs’ proposals would also be made.

Paragraph 6

121. One delegation doubted the necessity of the paragraph and suggested that it be merged with article 16.

122. The Secretary reminded the Commission that there was no waiver for the Members of the Tribunal. He specified that article 16 dealt with the waiver provisions, which could only apply from article 11 to article 14.

123. In the end it was agreed that the language of paragraph 6, which had been taken from a standard clause in another Protocol, would remain as it stood. Eventually, the words "facilities and prerogatives", if used in paragraph 1, would also be utilized in this paragraph.

Paragraph 7

124. In response to the question of one delegation, the Secretary explained that the paragraph dealt with the instance where a Member was involved in a case when his term came to an end. The paragraph stated that he should nevertheless be able to continue serving on the case.

125. One delegation took the opportunity to raise the issue of the waiver. He made a general statement that the Tribunal not only had the right but was under the duty to waive immunities of the Members in any case where, in the opinion of the Tribunal, the immunities would impede the carrying out of justice. As a point of reference, he cited article 9 of the Statute of the Tribunal. He insisted that "this reminder would not reduce the prestige and independence of the judges". On the contrary, it would give them, in fact, a sort of guarantee. He was supported by several other delegations.

126. The Chairman read out an abstract of paragraph 44 of document LOS/PCN/SCN.4/L.13/Add.1, where the Commission had agreed to follow the rules and practice of the ICJ in the matter of waiver of privileges and immunities. He added that it had been decided to recommend to the Tribunal to include in its internal rules provisions on the waiver of privileges and immunities of the Members to the extent that such rules existed for the ICJ.

127. One delegation pointed out that, moreover, nothing in the Convention and the Statute was clear-cut enough that it would lead one to believe that the Third United Nations Conference on the Law of the Sea had wanted waiver provisions for the Tribunal. He referred to the provisions of the Statute of the ICJ which at its Article 18, states the following: "No member of the Court can be dismissed unless, in a unanimous opinion of the other members, he has ceased to fulfil the required conditions. Formal notification thereof shall be made to the Secretary-General by the Registrar. This notification makes the place vacant." He insisted that there were no provisions for the waiver; in article 6 of the Rules of Court, which refer to Article 18, there was an elaborate explanation of the procedure to follow in order to implement Article 18.

128. Another delegation was of the view that if delegations were to insist on the matter, his delegation would suggest, and agree to, including in the Protocol article 9 of the Statute of the Tribunal (Annex VI), mutatis mutandis. However, he still thought that it was not necessary to do so because the issue was linked to the functions of the Members of the Tribunal, which could not be waived.

129. Some other delegations supported the above comments on the ground that the independence of the judge was focal and that even the Vienna Convention made a distinction in its article 31 between penal, civil and administrative immunities. Specific exceptions were stated with regard to the waiver of immunities.

130. Some other delegations, however, felt strongly that it was important to have waiver provisions. They insisted that there was a legal lacuna to be filled in this matter. They argued that it was not unreasonable to make waiver provisions even if it had not been done by the ICJ and that there had not been any practical case. It was stated that all precedents of the ICJ should be discussed and not transferred to the Tribunal without careful consideration.

131. Some delegations pointed out that they were perfectly aware that the question of the waiver of privileges and immunities was not merely a theoretical matter.

132. One delegation shared the view that waiver provisions, even if not detailed, should be provided for the Members of the Tribunal because, contrary to the judges of the ICJ, the Members of the Tribunal were allowed to exercise other functions during the time when they were not working for the Tribunal. In that period of time, they would be enjoying full immunities. It was thus reasonable to have a safeguard in case there was a serious violation of those privileges and immunities. He agreed, however, that the waiver should be decided by the Tribunal as a whole.

133. Another delegation recognized that the immunities were not only functional, but also absolute, as stated in article 10, paragraph 3. He stated that this absolute approach was the reason why some States had not ratified the 1975 United Nations Convention on functional immunities. He asked the Commission if it was its intention to draft a document that could not be ratified in the future, i.e., a mere academic exercise.

134. At this point, one delegation stated that although he hoped that no case of waiver of the Members' immunities would arise, he understood the reasons of those who wanted waiver provisions. He pointed out that in this case his delegation was of the view that it should be left to the Tribunal to take care of the issue.

135. Another delegation wanted to know how article 10, paragraph 3, and paragraph 16 of document LOS/PCN/SCN.4/WP.8/Add.2 could be reconciled without a provision on the waiver of the Members' privileges and immunities.

136. In the end the Chairman took note of the lack of decision on the above matter and he suggested that a special summary on the question should be presented to the Meeting of States Parties; he stated that delegations could refer to his summary of discussions on the matter.

137. However, the Secretary drafted a new compromise on the entire article 10, entitled "Members and ad hoc members" (LOS/PCN/SCN.4/1991/CRP.43). The Secretary, with regard to the new document, drew the attention of the Commission to the fact that it should avoid creating confusions since the Vienna Convention

referred to "members" as members of the families, while the Protocol referred to "Members" as members of the Tribunal. That was why it was necessary to detail, in the earlier paragraph 2, the notion and say "Members and members of their families, i.e., spouses, dependent relatives etc. ... who are also concerned by the privileges and immunities". The new text was more accurate and stated as follows: " ... for the purpose of holding themselves at the disposal of the Tribunal for the exercise of their functions etc. ..." The new wording covered the hypothesis of the Members of the Tribunal being nationals of the host country; they would be under its sovereignty as long as it did not interfere with their duty to the Tribunal. The Secretary added that there had been no major problem with paragraphs 4, 5 and 6, and as to paragraph 7, only the words "mutatis mutandis" had been added.

138. With regard to paragraph 7, one delegation was concerned by the fact that a judge might continue to exercise his functions without a mandate. He was not convinced by the reference to Annex VI of the Convention and its article 5, paragraph 3.

139. It was agreed that there would be a reformulation of the provision, including a direct reference to Annex VI, article 5, of the Convention. 2/

140. Another delegation expressed reservations with regard to paragraph 2.

141. However, in the end, the article as redrafted was approved by the Commission, taking into consideration that some delegations had expressed their reservations on some paragraphs of the new article 10.

142. The Chairman took note of the general approval of article 10 by the Commission, with the above comments.

Article 11. Agents representing parties, counsel and advocates designated to appear before the Tribunal

143. The Secretary stated that in the original paper there had been different articles for the various categories of people involved in this unified new article. After careful review and taking into account discussions held with regard to the relevant articles of document LOS/PCN/SCN.4/WP.5/Rev.1, this article had been drafted combining the two categories of persons.

144. There were no comments on the title of the article.

145. Some delegations stated, as a general comment, that the Commission was being too generous in its granting of privileges and immunities. In this regard, several formulations were pointed out throughout the different paragraphs.

146. One delegation objected to the use of the words "in particular", which led to the belief that the list of privileges and immunities was not limited. Therefore, it was suggested that these words be deleted.

147. This proposal was supported by some delegations.

148. One delegation insisted that there should be equality between the categories of persons. He stated that if a distinction could be made for an agent who might be a diplomatic agent, there should not be any distinction between a counsel and an advocate. Privileges and immunities should also be limited to functional immunities. He questioned the meaning of the words "diplomatic envoy" and wished to know if the term constituted a new entity.

149. Another delegation requested the inclusion in paragraph 1 (e) of the question of a visa, so that the arrival of a judge might not be unduly delayed.

150. Another delegation wanted to know what was the meaning of "any acts done by them" in paragraph 1 (b). He found the privileges and immunities granted in this paragraph too sweeping.

151. With regard to paragraph 1 (a), it was stated that there should be an exemption for flagrante delicto. It was also pointed out that the Commission should use the language of the Convention, article 182 in particular, and use the words "currency restrictions" instead of "currency transactions".

152. One delegation was of the view that article 11 had been drafted in an understandable way but pointed out that it was usually impossible to foresee all details. He suggested using the less elaborate wording of paragraph 42 of the Statute of the ICJ. He also thought that, since the formula in paragraph 3 of article 10 was too vague, the criteria under which functions would be exercised should be the focus of article 11. He therefore suggested that paragraph 1 end with the words "their functions".

153. In the end, it was agreed that the Secretariat would redraft paragraph 1 taking into account the suggestions put forward at the current as well as previous sessions. Thus, it was also agreed that paragraph 1 (e) would be harmonized with paragraph 1 (f) with regard to the words "if the State concerned". It was also agreed to incorporate paragraph 6 in paragraph 1 (g).

154. It was furthermore pointed out that paragraphs 2 and 3 were discriminatory and too broad. Many delegations were of the view that those paragraphs were not clear or constituted a repetition.

155. Some proposals were made to redraft both paragraphs. One delegation, however, said that paragraph 3 should be deleted since it repeated 1 (g).

156. With regard to paragraph 2, it was suggested that it should also be deleted. One delegation however pointed out that there might be cases where a counsel might have to act as a diplomatic agent, which had certain legal qualifications. Another delegation insisted that it would create unequal treatment to give to them special rights.

157. In accordance with the suggested deletion of paragraphs 2 and 3, it was pointed out that the issue in fact was whether a counsel would need a safeguard clause that would not be prejudicial to the other status which he enjoyed. It was suggested that, instead of two paragraphs, there should be included similar provisions to those of the Vienna Convention on Consular Relations, which deals

with consular functions being provided by diplomatic agents. Attention was also drawn to article 75 of the same Convention.

158. It was considered a mere technical matter to redraft the whole text as two separate articles.

159. The Commission finally agreed that paragraphs 2 and 3 would be deleted but that the Secretariat would draft another article on the basis of article 75 of the Vienna Convention on Consular Relations to cover the situation referred to by some delegations. The Commission approved the deletion throughout the text of the term "envoy", to be replaced by the word "agent". The word "prerogatives" would also be deleted in paragraph 5.

160. Paragraphs 4 and 7 would remain as they were.

Article 12. Officials

161. In order to harmonize and to emphasize the official capacity of the officials' functions, a suggestion was made to merge paragraph 1 and paragraph 5 of article 12. It was also suggested to add at paragraph 5 (b) the words "as are engaged by officials of the United Nations". It was understood that in redrafting the paragraph the Secretariat would try to use, as much as possible, the language of the Advisory Committee on Administrative and Budgetary Questions (ACABQ) or the Committee for Programme Coordination (CPC). It was pointed out that the United Nations taxation system, although complex, could be of reference in exempting the officials from emoluments taxation.

162. It was further suggested to merge and redraft in paragraph 2, the two sentences concerning diplomatic agents. One of those proposals read as follows: "The Registrar and any official of the Tribunal shall be accorded privileges and immunities, facilities and prerogatives as accorded to diplomatic envoys, in accordance with international law and the Vienna Convention on Diplomatic Relations, adopted on 18 April 1961."

163. The reference to the diplomatic agents was agreed upon, along with the merger of the two sentences in paragraph 2.

164. Based on the reasoning that paragraph 3 of article 12 granted excessive rights to spouses and children, and also because other paragraphs, such as paragraphs 5 (c) and (f), already dealt with those rights, it was suggested to curtail paragraph 3 or delete it altogether.

165. The Commission agreed on the deletion of paragraph 3 and the redrafting of paragraph 5 as appropriate.

166. Paragraph 4 was generally agreed upon as drafted.

167. Although the merger of paragraph 5 with paragraph 1 was generally agreed upon, some delegations, however, wanted to make sure that some of their concerns were adequately reflected in the paragraph.

168. Thus, the question was raised as to the meaning of the definition of the word "relatives" in paragraph 5 (d). Some delegations wanted the word to include children. Some other delegations insisted upon referring to "dependent children" while others wanted the word to include elderly dependent relatives. It was pointed out that the formulation in paragraph 5 (d) was not in line with formulations adopted earlier on the same matter. Some delegations suggested harmonizing whatever language was used in that regard with the language concerning the privileges and immunities of the International Seabed Authority or on the basis of the Vienna Convention and the language used for privileges and immunities for specialized agencies.

169. One delegation suggested the following language as a definition for the word "relatives": "the spouses and dependent members of their families".

170. It was recalled that the Tribunal was not a body of the Authority and also that harmonization had been requested, but with the Headquarters Agreement. In that regard, one delegation insisted that both documents would have to be harmonized with Plenary documents since within the Preparatory Committee four documents on privileges and immunities were currently being drafted.

171. The Secretary pointed out that delegations should not worry about what would be the basis for the harmonized provisions. He stated that the Secretary could refer to the exchange of letters between the ICJ and the Netherlands that stated: "The wives and unmarried children of members of the Court, the Registrar and the higher Officials of the Court, when of non-Netherlands nationality, shall receive the same treatment as the head of the family if they live with him and are without profession. The household of the family (governesses, private secretaries, servants et cetera) occupy the same position as is accorded in each case to the domestic staff of diplomatic persons of comparable rank." It was pointed out that the "household" was given a detailed definition.

172. Attention was also drawn to the provisions of the Convention on Privileges and Immunities of the Specialized Agencies, which states that: "... Be immune together with their spouses and relatives dependent on them from immigration restriction and alien registration."

173. In the end, delegations were divided as to whether the word "relatives" would include dependent children or minor children; whether it would encompass also elderly dependants and in that case, because of too broad a meaning, would the word "relatives" not have to be defined in article 1.

174. The Secretariat issued a redraft of the article in document LOS/PCN/SCN.4/1991/CRP.44. Some delegations opposed article 12, paragraph 4 (b). One delegation suggested simply deleting it.

175. The Chairman reminded delegations that, previously, article 12 had been almost totally agreed upon. He appealed to delegations not to reopen new discussions on old issues.

176. One delegation nevertheless objected to the privileges and immunities, outlined as in this article, as being made to encompass spouses and dependent children (para. 4 (d)).

177. Another delegation suggested moreover using in paragraph 5 (f) the word "accorded" instead of "given", and with regard to paragraph 5 (e), deleting the words "in accordance with international law and practice" because that was a wide formulation.

178. In the absence of consensus, the article was nevertheless provisionally approved by the Commission, with the understanding that any redraft would take into account the outcome on article 10.

Article 13. Experts appointed under article 289 of the Convention

179. In introducing the article, the Secretary stated that it had already been discussed at length. In article 13, the experts under article 289, had been equated with advisers of the ICJ, as reflected in the Chairman's summary of discussions on the matter. He concluded that no major changes had been made and assured delegations that there would be some harmonization with regard to the terms diplomatic "agents" or "envoys" (paras. 1 (e) and 2) would be harmonized.

180. There were no comments on the title of the article.

Paragraph 1

181. It was agreed to delete the words "in particular" in the French version. More substantively, some delegations were of the view that paragraph 1 (b) was too broad as to the privileges and immunities being accorded to the experts. One delegation was of the view that the experts should be liable for statements made, even when they were not connected with their functions.

182. Another delegation pointed out that some words were missing in paragraph 1 (e); he stated that "currency transactions" should be mentioned in this paragraph, and idem at article 11, paragraph 1 (f). He said that in this paragraph the sentence should read as follows: "The same immunities as are accorded to diplomatic agents". More precisely, it was requested that the language in article 13, paragraph 1 (e), be brought in line with article 11, paragraph 1 (f).

183. Another delegation suggested that paragraph 1 (c) be harmonized with article 11, paragraph 1 (c). He also added that, in so doing, the Commission should take into consideration the privileges and immunities of the Authority. It was pointed out that, in taking into consideration article 15, the immunity in paragraph 1 (c) might be jeopardized.

184. The Secretary replied that the presentation of article 13 was taken from the ICJ practice that differentiated between the advisers and the representatives of States. Article 13 made the separation between representatives of States and entities.

185. One delegation was of the view that article 13, paragraph 1 (c), should remain as drafted while article 11, paragraph 1 (c), should be harmonized with it. Another delegation thought article 13, paragraph 1 (a), should be based on article 11, paragraph 1 (f).

186. It was generally agreed that paragraph 1 (a) of article 13 would be harmonized with article 11, paragraph 1 (f). With regard to the comment that paragraph 1 (b) covered too wide a range, it was agreed that the Secretariat would redraft the paragraph, taking into account the above concern and the discussions held on the matter.

187. With regard to paragraph 1 (a) of article 13, it was recalled that the problem in that paragraph was linked to the understanding of the word "household". It was agreed that whatever phraseology or definition was approved, it would be used throughout the text.

187. It was also understood that when taking article 13, paragraph 1 (c), as the basis for the harmonization of language with article 11, paragraph 1 (c), the words "relevant to the exercise of their functions" in the latter paragraph would be deleted.

188. As to paragraph 1 (e), it was agreed that the subparagraph would be redrafted, taking into consideration the proposal to include a provision on non-seizure of personal baggage.

189. The Commission also agreed to redraft a subparagraph (f) which would attempt to incorporate paragraph 1 of article 12.

Paragraph 2

190. The Commission agreed to the drafting of this paragraph, taking into consideration any decision taken on paragraph 1 (d) with regard, in particular, to the question of repatriation facilities.

Article 14. Witnesses, experts and persons performing missions

191. The Secretary stated that article 14 was in accordance with the discussions held previously on the article and reflected agreements achieved during those discussions.

192. There was no comment on the title, which was generally accepted by the Commission.

193. With regard to paragraph 1, some delegations requested the deletion of the words "in particular" in the French version as misleading. This was generally accepted by the Commission.

194. One delegation stated that his delegation was strongly opposed to the linkage made in this paragraph with the diplomatic envoys. His delegation was not against granting facilities in case of repatriation. He insisted that, contrary to the experts being nominated by parties, the experts in this case

should not be treated as diplomats or heads of missions. He also objected to the reference to the Vienna Convention. It was clear to him that the reference to articles 13 and 14 did not include the families of the experts involved.

195. It was recalled that no satisfactory conclusion had been reached as to the definition of the people concerned in article 14.

196. The Secretariat submitted a redraft of article 14 (LOS/PCN/SCN.4/1991/CRP.41). Paragraph 2 of article 14 was replaced by the following wording: "On journeys in connection with the accomplishment of their missions, experts, witnesses and persons performing missions by order of the Tribunal enjoy such immunities as may be required to ensure their transit or return."

197. It was agreed that the Secretariat would harmonize both texts of article 14 in documents LOS/PCN/SCN.4/WP.6/Rev.1 and LOS/PCN/SCN.4/1991/CRP.41. The Chairman took note of the new text and the suggested amendments.

Article 15. Respect for law and regulations

198. The Secretary stated that the article reflected the agreement reached during previous discussions and contained in document LOS/PCN/SCN.4/1989/CRP.33.

199. The article 15 along with its title, was generally approved by the Commission as drafted.

Article 16. Waiver

200. The Secretary introduced the article and said that it had been drafted on two understandings; first, there could be no waiver for the Members of the Tribunal (judges); and secondly, for the other officials of the Tribunal the waiver would be provided for in the Protocol. He referred delegations to the thorough discussions held on the different paragraphs of the article. He also pointed out that the article had been drafted on the basis of article 22 of document LOS/PCN/SCN.4/WP.5/Rev.1.

201. There were no comments on the title of the article.

202. Although it was clarified that article 10 did not, concern the Members of the Tribunal, one representative stated that his delegation’s acceptance of article 16 would depend on the solution adopted with regard to article 10.

203. It was recalled that, with regard to article 10, there had been a suggestion to put forward all the options and opinions on the matter and submit them to the Meeting of States Parties.

204. One delegation was of the view that paragraph 1 of article 16 set out a fundamental principle while the other paragraphs constituted applications or modalities. Therefore, his delegation wished to have paragraph 1 as an independent article between articles 15 and 16.

205. Another delegation referred to the French version and wanted to know if the Tribunal had the right and the duty to waive the immunities. It was explained that the language had been taken from the Geneva Convention on Privileges and Immunities of the United Nations, article IV, section 14 and article V, section 20. However, the Secretary stated that any harmonization between the language versions would be taken care of. In this regard, one delegation called attention to the fact that any modification would also have to be reflected in paragraph 3.

206. Another delegation supported the above and stated that it was only the State that decided, since it was its prerogative and not its duty. Therefore, his delegation was also of the view that the wording "not only has the right but is under a duty" was not an appropriate legal wording. He continued that even though this language had been taken from the Geneva Convention, the Commission should not lose this opportunity to redraft with a view to improving the text.

207. However, in the end, paragraph 2 and 3 were generally accepted as drafted by the Commission.

208. One representative stated his concern with regard to paragraph 4. He was of the view that in the French version there was confusion between the decision being taken unanimously and then by two thirds of the members present. In this regard, the English version was correctly drafted. But looking at the English version, his delegation also noted another confusing drafting detail; he asked about the meaning of the word "available"; did it mean members who are present, or those who were at the disposal of the Tribunal?

209. It was suggested that the two versions be harmonized. In that regard, the following language was suggested: in French: "à l'unanimité de ses membres présents qui doit comprendre une majorité des deux-tiers."; in English: "by a unanimous decision of the members present which shall include a majority of two thirds of the Members of the Tribunal".

210. This redrafting was generally approved by the Commission, along with paragraph 4 thus modified (ref. LOS/PCN/SCN.4/1991/CRP.41).

211. The Commission also generally agreed on paragraphs 5 and 6, as drafted.

212. One delegation, however, wanted to know what was the decision on the proposal of an article 16 bis as contained in document LOS/PCN/SCN.4/1989/CRP.35. The proposal dealt with the situation where there was an abuse of privileges. It was recalled that the matter had already been discussed (see LOS/PCN/SCN.4/L.13/Add.1, paras. 49-52 and 53-54). There had been arguments in favour and against, and in the face of the inconclusive situation, the matter had not been reflected in this article. No clear support was given by delegations while some of them did in fact object to it; also, no proposal or reformulation had been put forward.

213. However, some delegations once again insisted that there be an article dealing with abuse of privileges.

Article 17. Taxation

214. There was no comment on the title. One delegation however had two remarks to make on the article. The first line was too vague and general; he wanted to know what were the salaries, emoluments and allowances, who would pay them (the Tribunal?), who would allow for the exemption of taxes for the officials of the Tribunal, etc. His delegation also wanted to express its strong reservations with regard to the article. He stated that current experience in the matter showed that there could not be exemption of any taxes for the members of an international organization without some kind of compensation. Moreover, the exemption would only concern tax on salaries. His delegation therefore suggested the following drafting in French: "Les traitements ou émoluments versés seront exonérés de l'impôt sur le revenu à la date où ils seront assujettis à un impôt effectif par le Tribunal, etc" (see LOS/PCN/SCN.4/1989/CRP.31). He also stated that paragraph 2 repeated what had already been provided for in article 10 when referring to the fiscal residence.

215. Furthermore, other delegations found the article unacceptable despite the reference to previous discussions where it had been stated that the opportunity of tax exemption should not suffer from any restriction.

Article 18. Laissez-passer

216. One delegation stated that it did not want the proliferation of laissez-passer. Another delegation requested that the asterisk disappear because the Tribunal was to be independent from the United Nations and, in that case, it would be improper to use the United Nations travel document. He also wanted the Commission to examine carefully when it would be necessary to use the laissez-passer.

217. Although the title was generally agreed upon, the discussions on it and the asterisk were suspended pending the finalization of the text on the Agreement on the relationship between the United Nations and the International Tribunal for the Law of the Sea (LOS/PCN/SCN.4/WP.9 and WP.9/Add.1).

218. One delegation suggested the deletion of paragraph 2, taking into account previous comments. This deletion was generally agreed upon by the Commission.

219. Another delegation wanted to know if the omission of the Deputy Registrar was a voluntary one. It was clarified that the same privileges would apply to the Deputy Registrar only when acting as the Registrar.

220. Some other delegations asked about the necessity to give certificates to those travelling for the Tribunal. It was suggested to introduce a distinction in paragraph 3. One of the proposals was to use the word "letters" instead of "certificates" and it was pointed out that the distinction had already been made with regard to the status of the people travelling. It was also explained that the paragraph reflected the practice of the United Nations, but in order to be clear it was suggested to introduce the words "and the other people" and then to delete the second part of the paragraph. It was also stated that there were indeed several types of laissez-passer and that none of them were the same.

221. In the end, paragraph 3 was generally accepted by the Commission as drafted.

Article 19. Cooperation with the authorities of States Parties

222. The Secretary introduced the article by reminding delegations that during a previous meeting of the Commission delegations had requested that the article conform to international practice. At that time there was only one paragraph. The new article comprised three paragraphs covering cooperation with the authorities of States parties.

223. The title was approved, although it differed from the earlier article 15 of document LOS/PCN/SCN.4/WP.6, which dealt with the same matter.

224. The Commission generally agreed also on paragraph 1.

225. One delegation did not agree on paragraph 2 owing to the fact that, as drafted, the text seemed to imply that the President of the Tribunal could call for security measures in any case. His delegation was of the view that this could only apply in relation to the functions of the Tribunal. He suggested deleting paragraph 2. Some other delegations were of the same view since they argued that the provisions of paragraph 2 were not usually included in a document on privileges and immunities. One delegation, however, although agreeing on the deletion of paragraph 2, was of the view that adjustments would have to be made to paragraph 3.

226. The majority of delegations did not object to the deletion of paragraph 2.

Article 20. Maintenance of security and public order

227. The article was generally approved by the Commission as drafted.

Article 21. Restrictions by a national Government

228. The Secretary introduced the article and stated that article 21 was former article 16 in document WP.6. He reminded delegations that there had been a proposal to divide the article in two. Therefore, he pointed out that paragraph 2 was based on a proposal contained in document LOS/PCN/SCN.4/1989/CRP.31, page 4. He also reminded delegations that at that time there had not been any objections to the proposal. (See the Chairman’s summary of discussions, L.13/Add.1.)

229. One delegation was concerned by paragraph 1 which was found to be too general. He suggested redrafting it as follows: "No administrative or other restrictions shall be imposed by any State Party on the free movements of the Members of the Tribunal ... except after having obtained the consent of the President of the Tribunal."

230. With regard to paragraph 2, many delegations pointed out the inconsistencies between the paragraph and the title. Some delegations were in favour of a simple deletion of the paragraph taking into consideration that it was not consistent with the title. Also, article 10 covered the case of Members of the Tribunal while article 12 dealt with the Registrar.

231. However, other delegations were in favour of redrafting the paragraph and the title. One delegation suggested dividing the article in two. The first article would be entitled "Movements, facilities and restrictions"; the second would effect an amalgam between the Members of the Tribunal and the Registrar who shall, in the matter of customs and exchange control, be given the same facilities as those accorded by States Parties to their officials on temporary missions.

232. In the end, the deletion of paragraph 2 was generally agreed upon by the Commission along with the suggestion to give to the article another title that would read as follows: "Free movement" or Libre déplacement" (see LOS/PCN/SCN.4/1991/CRP.42)

Article 22. Settlement of disputes

233. The Secretary pointed out some corrections to be made to the text. He suggested that article 22, paragraph (a), second line should read: "disputes arising out of contracts and relating to the application of the provisions of article 3 ...". He also suggested replacing the word "differences" by "disputes" and deleting the word "Convention".

234. As a general request, it was agreed to harmonize the Protocol with the Headquarters Agreement. Also, one delegation pointed out that the text could be harmonized with the Protocol on Privileges and Immunities of the International Seabed Authority and in particular with article 30. He suggested that the Secretariat take care of the matter.

235. Paragraph 1 (a) and 1 (b) was then generally agreed upon by the Commission.

236. One delegation pointed out that "a Tribunal of three arbitrators" did not have the same meaning as a "group of three arbitrators". His delegation was also concerned by the lack of a fixed time-frame for the party to answer a request. He suggested that in article 22, paragraph 2, the Commission could adopt the formula of the Protocol on the Authority so that no party could paralyse the procedure. The new wording would read as follows: "Any dispute ... which is not settled by consultation, negotiation or other agreed mode of settlement within three months following such request by one of the parties to the dispute ...". He was of the view that article 22 should be adjusted, mutatis mutandis, in relation to article 30 of LOS/PCN/WP.49.

237. The proposal to include a time-frame of three months was supported by several other delegations.

238. It was finally agreed that since the Protocol and Privileges and Immunities of the Tribunal would be the most relevant, the Secretariat was requested to

make the necessary changes to this article taking into account the above discussions.

Article 23. Final provisions

239. The Secretary stated that there had been no previous discussions on the article. He explained that the article had been based on sections 31 and 36 of the Convention on the Privileges and Immunities of the United Nations. He drew the attention of delegations to the proposals contained in document LOS/PCN/SCN.4/1992/CRP.46. He also referred them to the first introduction to the article, as contained in L.13/Add.1.

240. The title was generally accepted by the Commission.

241. One delegation wanted to know if it was necessary to have a final provision calling for accession to the instrument since the Protocol was to be an independent instrument and not part of any other Convention. It was explained that the question had already arisen in relation to the "accession", as reflected in document L.13/Add.1. It had been noted at that time that it was unusual in an international treaty to call for accession to it. The Secretary had stated that paragraph 6 of former article 18 merely reflected the content of the resolution expected to be adopted by the Meeting of States Parties to the Convention and which would recommend to each State to accede to the Protocol. He reminded delegations that there had been three views on the status of the Protocol; some thought that the Protocol was separate from the Headquarters Agreement; others that the Headquarters Agreement was the main document and the Protocol an addition to it; and, finally, others were of the view that the Protocol was above the Headquarters Agreement. No decision had been taken with regard to that issue.

242. One delegation insisted that the Protocol could not be part of the Headquarters Agreement, as suggested. He stated that the Protocol was part of the United Nations Convention on the Law of the Sea and therefore States could not be called upon to accede to it.

243. He was supported by other delegations, who agreed that the question was linked to the definition of "States Parties" because if the States parties were parties to the Convention on the law of the sea, then they were already parties to the Protocol. He insisted that since the Convention was not sufficiently clear on the matter, delegations needed to take a clear-cut decision on the matter.

244. The Chairman drew the attention of delegations to the document dealing with the Authority, which differentiated between "States parties" and "State Party".

245. Some delegations insisted that the Protocol had been intended to be independent from the Convention. One delegation stated that the international practice in this regard was for signature to occur first, followed by accession.

246. Other delegations stated that they were aware that the same questions had also been raised with regard to the Authority. It had been suggested that the matter should be left to the Meeting of States Parties.

247. Returning to the adopted procedure for the consideration of articles, the Chairman asked the delegations to comment on the title of article 23. The title was provisionally approved pending more substantial discussions on the content of the article.

248. Upon the introduction of paragraph 1, it was said that the paragraph followed, mutatis mutandis, the same provisions as for the Authority. The Chairman informed delegations on the consultations he had had with the President of the Preparatory Commission on the definition of "States Parties". 3/

249. Therefore, taking into account the definition adopted by the Commission on the meaning of "States Parties", 4/ one delegation then suggested the following wording in paragraph 1 of article 23: "The Protocol is submitted to every State Party to the Convention for accession." He stated that, with the accepted definition of "States Parties", the Protocol, as it should be, would stand on its own and not be dependent on the Convention; there would be no formal linkage between them.

250. Another delegation asked, since the Protocol defined the relationship between the Tribunal and other States, how would the Tribunal be able to perform its functions in a State not party to the Convention? His attention was drawn to article 20 of the Statute of the Tribunal which stated: "The Tribunal shall be open to States Parties. The Tribunal shall be open to entities other than States Parties in any case expressly provided in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case." The same delegation was also referred to articles 22 and 23 of the Statute and article 291 of the Convention. It was explained that States could apply to the Tribunal and that the Tribunal might proceed to the spot for certain judicial functions.

251. Another delegation insisted that it would be more logical to think that the fact alone that a party appeared before the Tribunal, or that a State submitted a dispute to the Tribunal, showed that the jurisdiction of the Tribunal had been recognized. Therefore, that State or entity should be a party to the Convention.

252. It was also clarified that, in any event, a State party to the Convention did not automatically become party to the Protocol; it had to accede to it. It was also pointed out that only article 23 mentioned the form by which States could become party to the Protocol.

253. In the end, the suggested proposal for article 23, as contained in LOS/PCN/SCN.4/CRP.46, was generally approved by the Commission.

254. The Commission thus concluded its consideration of the revised draft Protocol on the Privileges and Immunities of the International Tribunal for the Law of the Sea (LOS/PCN/SCN.4/WP.6/Rev.1).

255. In the course of the article-by-article examination of the revised draft Protocol on the Privileges and Immunities of the International Tribunal for the Law of the Sea, a number of other proposals of a drafting nature were made. They involved primarily suggestions to bring the text of one language in line with the text of the other languages and proposals to make the wording clearer without affecting the substance in any way. Some of these are not reflected in the present summary. Although the Secretariat has committed itself to introducing also all the consequential changes, and since the present document is a summary of discussions, it is not possible to reflect each and every intervention fully or to reproduce suggested formulations.

256. The Secretariat has maintained a complete record of all suggestions and these have been taken into account in revising this text. In this regard delegations are invited to refer to document LOS/PCN/SCN.4/WP.15/Add.3 or document LOS/PCN/SCN.4/WP.6/Rev.2.

257. However, should any representative feel that an important matter has been omitted, the Chairman would appreciate being informed.

Notes

1/ For the formulation of article 23, see para. 253 below.

2/ For the new draft of the entire article and the paragraph, see document LOS/PCN/SCN.4/WP.15/Add.3, article 12, paragraph 8.

3/ For the outcome of the consultations and the decision of the Commission, see paras. 21, 23 and 27 above.

4/ See note 3 above.

Annex

VISIT OF THE REGISTRAR OF THE ICJ TO SPECIAL COMMISSION 4

1. During the ninth session of the Preparatory Commission, Special Commission 4 received the visit of Mr. Eduardo Valencia Espina, Registrar of the International Court of Justice (ICJ). His visit was to give to delegations first-hand information about the ICJ. Delegations would seize the opportunity to ask him about the aspects of the would-be relationship between the ICJ and the Tribunal. Delegations were reminded that they had requested the Secretariat to draft a relationship agreement between the ICJ and the Tribunal.

2. On this matter, the Registrar stated that he had received the first draft of the agreement between the United Nations and the Tribunal (LOS/PCN/SCN.4/WP.9 and Add.1). His first reading of the document seemed to indicate that it would not be necessary to draft a supplementary text between the Tribunal and the ICJ. He added that although the Court had not had time to examine it, he wanted to draw the attention of the Commission to the fact that already some of the matters were of relevance on the Court. He stated that the draft would raise questions as to its implications and consequences for the Court. The Registrar reminded the Commission that although the Court was an independent body, any agreement with the United Nations could affect the Court and would require the Court to give its opinion if not its consent.

3. He stated that the Charter of the United Nations gives preponderance to the Court over any other judicial body (ref. Articles 1 and 3 of the Charter) and therefore, in this case, over the Tribunal, which had only been created by a Convention. He pointed out that some conflict of interests might arise between the two institutions. He concluded by saying that he would convey to the Court any impressions or remarks that the delegations would like to make regarding the matter.

4. One delegation wanted to know if article 287 of the Convention on the Law of the Sea did not resolve the question of coexistence of both institutions. Another delegation inquired what was usually the practice of the ICJ when dealing with law of the sea matters. He also wanted to know if it was possible, based on the will of parties, that one court rather than another be deemed immediately competent.

5. The Registrar stated that both institutions would have sovereignty as to the definition of their jurisdiction, which might lead to conflict of jurisdiction. In the case, for example, of prompt release of vessel and crew, who would take the provisional measures? There would arise a question of competence.

6. It was true that article 287 of the Law of the Sea Convention had settled the issue of the coexistence of both institutions by providing for an agreement between them. However the problem would be that it might be necessary to amend the Statute of the ICJ, which would influence the reading of the Charter. The Registrar stated that, with regard to law of the sea matters, the Court, which

is usually competent in such cases, sometimes used the Convention as it constituted customary law until its entry into force.

7. Recalling discussions on the privileges and immunities of the Tribunal, one delegation wanted to know who represented the Court in matters of police in the Netherlands and who would sign the authorization for the police to enter the premises of the Court.

8. The Registrar stated that the relations of the Court with the Government of the Netherlands were regulated by an exchange of letters with annexes that contained principles endorsed by the General Assembly in 1946. Consequently, a great deal of flexibility was applied in daily application. He explained that when an administrative question arose, that usually would fall under the competence of the Registrar. He also added that the Registrar had the financial power to use the budget agreed upon by the General Assembly. Those proceedings were however contained in the internal rules. He said that if an unusual question arose, the Court as a party had to examine it. In that regard, he wished to state that the usual tendency was to resolve the issues on friendly terms.

9. At the tenth session of the Preparatory Commission, a letter was received from the ICJ and was read out to the Commission. It stated that there had been no precedent for a relationship agreement between the ICJ and another judicial body. Such a relationship should be examined on an ad hoc basis.

10. It was agreed that the Commission would not proceed further with the question of elaborating a relationship agreement between the ICJ and the Tribunal since the usefulness of preparing such a document had not been established.
