

Document:-  
**A/CN.4/SR.1981**

**Summary record of the 1981st meeting**

Topic:  
**Other topics**

Extract from the Yearbook of the International Law Commission:-  
**1986, vol. I**

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110. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 33 [43].

*Article 33 [43] was adopted.*

#### TITLES OF THE FOUR PARTS OF THE DRAFT ARTICLES

111. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that, from the outset, the Special Rapporteur had proposed that the draft should be divided into parts, but the matter had been left pending until further progress had been made. Now that the complete draft had been prepared, the Drafting Committee proposed that the articles should be divided into the following four parts:

Part I. General provisions: articles 1 to 6;

Part II. Status of the diplomatic courier and the captain of a ship or aircraft entrusted with the diplomatic bag: articles 7 to 23;

Part III. Status of the diplomatic bag: articles 24 to 29;

Part IV. Miscellaneous provisions: articles 30 to 33.

*The titles of the four parts of the draft articles were adopted.*

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

112. The CHAIRMAN, noting that the first reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier had been completed, suggested that the Commission should adopt the whole set of draft articles.

*The draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier were adopted on first reading.*

#### TRIBUTE TO THE SPECIAL RAPPORTEUR

113. Mr. REUTER, speaking also on behalf of many other members of the Commission, proposed the following draft resolution:

*"The International Law Commission,*

*"Having adopted provisionally the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier,*

*"Desires to express to the Special Rapporteur, Mr. Alexander Yankov, its deep appreciation for the outstanding contribution he has made to the treatment of the topic by his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier."*

*The draft resolution was adopted.*

114. Mr. YANKOV (Special Rapporteur) sincerely thanked all the members of the Commission for their appreciation of his efforts in what had, in fact, been a

collective undertaking by the Commission and its Drafting Committee. He was most grateful to the Secretariat for the valuable assistance it had given him in his work.

*The meeting rose at 1.20 p.m.*

## 1981st MEETING

*Friday, 4 July 1986, at 10 a.m.*

*Chairman: Mr. Doudou THIAM*

*Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.*

#### Draft report of the Commission on the work of its thirty-eighth session

1. The CHAIRMAN invited the Commission to consider its draft report, chapter by chapter, starting with chapter II.

#### CHAPTER II. Jurisdictional immunities of States and their property (A/CN.4/L.403 and Add.1 and 2 and Add.2/Corr.1)

##### A. Introduction (A/CN.4/L.403)

*Section A was adopted.*

##### B. Consideration of the topic at the present session (A/CN.4/L.403)

*Section B was adopted.*

##### C. Tribute to the Special Rapporteur, Mr. Sompong Sucharitkul (A/CN.4/L.403)

*Section C was adopted.*

##### D. Draft articles on jurisdictional immunities of States and their property (A/CN.4/L.403/Add.1 and 2 and Add.2/Corr.1)

SUBSECTION 1 (Texts of the draft articles provisionally adopted by the Commission on first reading) (A/CN.4/L.403/Add.1)

2. Mr. USHAKOV said that the reservations he had expressed in connection with the draft articles, both at previous sessions and at the present session, were still entirely valid.

*Section D.1 was adopted.*

SUBSECTION 2 (Texts of draft articles 2 (paragraph 2), 3 (paragraph 1), 4 to 6 and 20 to 28, with commentaries thereto, provisionally adopted by the Commission at its thirty-eighth session) (A/CN.4/L.403/Add.2 and Corr.1)

*Commentary to article 2 (Use of terms)*

*Paragraph (1)*

*Paragraph (1) was approved.*

Paragraph (2)

3. Sir Ian SINCLAIR proposed that the second part of the last sentence should be amended to read: "... the term does not, for the purposes of the present articles, cover the administration of justice in all its aspects, which, at least under certain legal systems, might include other functions related to the appointment of judges."

4. Mr. TOMUSCHAT said that the penultimate sentence should be deleted, for the reference to "administrative or police authorities" meant that the sentence went beyond the realm of the judiciary and invaded that of the executive.

5. Mr. McCAFFREY said that the penultimate sentence should not be deleted in its entirety, because the form of language it employed allowed for systems in which judgments were not enforced by the judge or court rendering them but by other State authorities. The words "administrative or police" could be deleted.

6. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve paragraph (2) with the amendments proposed by Sir Ian Sinclair and Mr. McCaffrey.

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

Paragraph (3)

*Paragraph (3) was approved.*

Paragraphs (4) to (9)

7. The CHAIRMAN pointed out that paragraphs (4) to (9) of the commentary to article 2 had been deleted, as indicated in the corrigendum A/CN.4/L.403/Add.2/Corr.1.

8. In reply to a question by Mr. USHAKOV, Mr. SUCHARITKUL (Special Rapporteur) explained that paragraphs (4) to (9) had been deleted because of the reservations expressed by some members.

9. Mr. USHAKOV recalled that he had proposed (1945th meeting, para. 26) the inclusion in article 2 of a definition of the expression "State property" based on the corresponding definition in article 8 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts. The definition was necessary for two reasons. First of all, it should be made clear that, in the case of a dispute, the applicable law was the internal law of the State in question. When an individual contested the property rights of another individual of a different nationality, the dispute was decided by the court of the place where the property was situated. However, when the dispute was between an individual and the State of which he was a national, the only law applicable was the internal law of that State. Furthermore, the time of the dispute should be specified, whether the time when the proceeding was initiated, or when a measure of constraint was sought, or when execution was levied against the property.

10. The Commission would therefore have to revert to that question when it considered article 2 on second reading.

11. Sir Ian SINCLAIR said that he welcomed the deletion of paragraphs (4) to (9). The commentary to article 2 should simply explain the definitions the Commission had actually adopted. It would, of course, be possible to revert on second reading to the question of defining State property. In view of the difficulties regarding the precise role of internal law in the matter, it had not been possible at the present session to reach agreement on that subject.

12. Mr. MAHIOU, supported by Mr. RAZAFINDRALAMBO, proposed that the heading and the second sentence of paragraph (4) should be deleted, but that the first sentence should be retained, thereby making it perfectly clear that other definitions had indeed been proposed but that none of them had been adopted.

13. Mr. LACLETA MUÑOZ endorsed Mr. Mahiou's proposal, but suggested that the first sentence should be amended by replacing the words "earlier proposals by the Special Rapporteur having been withdrawn due to absence of utility" by "earlier proposals by the Special Rapporteur having been withdrawn because they were considered to be superfluous".

14. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt Mr. Mahiou's proposal to retain the first sentence of paragraph (4), as amended by Mr. Lacleta Muñoz, the rest of paragraph (4) and paragraphs (5) to (9) being deleted.

*It was so agreed.*

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

Paragraphs (10) and (11) (new paragraphs (5) and (6))

*Paragraphs (10) and (11) (new paragraphs (5) and (6)) were approved.*

15. Mr. KOROMA said that he wished to place on record his reservation regarding the use of the adjective "commercial" in paragraph 1 (b) (i) of article 2 concerning the definition of the term "commercial contract". He hoped that the matter would be taken up on second reading of the article.

*The commentary to article 2, as amended, was approved.*

*Commentary to article 3 (Interpretative provisions)*

Paragraph (1)

16. Sir Ian SINCLAIR said that the fourth sentence was difficult to understand. He therefore proposed that the phrase beginning "in the light of its purposes ..." should be amended to read: "in the light of its object and purpose, namely to identify those entities or persons entitled to invoke the immunity of the State and also to identify certain instrumentalities and subdivisions ..."

*It was so agreed.*

*Paragraph (1), as amended, was approved.*

Paragraph (2)

17. Mr. MALEK said that, in the first sentence of paragraph (2) of the French text of the commentary, the

word *qui* should be placed between the word *international* and the word *jouit*.

18. As to article 3 itself, the word “but”, at the beginning of the last phrase of paragraph 2, introduced a restriction that was completely out of place. The word “and” should have been used.

19. Mr. CALERO RODRIGUES pointed out that Mr. Malek’s comment applied also to the English text of article 3.

20. Mr. DÍAZ GONZÁLEZ said that the same was true of the Spanish text.

21. Sir Ian SINCLAIR said that the point was a valid one, but could not be dealt with at the present stage, since the articles themselves had already been adopted. The matter could be held over to the second reading of the draft articles.

22. Mr. USHAKOV said he recognized that, once articles had been adopted, they could not be altered in terms of substance. However, changes for the purpose of correcting mere translation errors were surely permissible.

23. Mr. SUCHARITKUL (Special Rapporteur) said that the valid point raised by Mr. Malek was one of substance and, like the one raised earlier by Mr. Koroma in connection with article 2, should at the present stage be simply placed on record; it would no doubt be taken up on second reading.

24. Mr. ARANGIO-RUIZ criticized the reference in the first sentence of paragraph (2) of the commentary to the State “acting in its own name as an international legal person, enjoying jurisdictional immunities under international law”. The statement was inaccurate, because a foreign State acting in the courts appeared not as “an international legal person” but as a juridical person in the eyes of the domestic law of the forum State.

25. Mr. TOMUSCHAT, supported by Mr. McCAFREY, proposed that the concluding words of the first sentence, namely “as an international legal person, enjoying jurisdictional immunities under international law”, should be deleted.

26. Sir Ian SINCLAIR said that he too supported that proposal and suggested that the word “principal” before “category”, in the second sentence, should also be deleted.

27. Mr. ARANGIO-RUIZ urged that the phrase “acting in its own name”, in the first sentence, should also be deleted because it was unnecessary.

28. Mr. USHAKOV said that the commentary was posing so many problems because article 3 itself was not satisfactory. In particular, the interpretation given to the word “State” was inadequate and extremely ambiguous. On second reading of the draft, the Commission would therefore have to revert to the provisions of article 3, which was open to a number of objections in its present form.

29. Mr. CALERO RODRIGUES said that the words “acting in its own name” should be retained in the first sentence of paragraph (2) of the commentary. A State

could appear in a proceeding acting either in its own name or through one of its organs.

30. Mr. ARANGIO-RUIZ said that the organs in question were all part of the State. He saw no distinction between the various cases contemplated in paragraphs (2), (3) and (4) of the commentary.

31. Mr. SUCHARITKUL (Special Rapporteur) explained that the commentary was intended to reflect actual practice in the courts. It was not concerned with legal philosophy. In some cases, the foreign State had been sued in its own name, in others through one or other of its ministries.

32. Mr. ARANGIO-RUIZ said that, in all the cases referred to in paragraph (2), it was unquestionably the State that was sued. In the cases covered by the subsequent paragraphs of the commentary, the State was sued through one of the entities which represented it.

33. Mr. SUCHARITKUL (Special Rapporteur) said that, in order to meet the point raised by Mr. Arangio-Ruiz, the first sentence and the beginning of the second sentence of paragraph (2) could be reformulated to read: “The first category includes the State itself, acting in its own name and through its various organs of government, however designated ...”

34. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve paragraph (2) with the amendments proposed by Mr. Tomuschat and Sir Ian Sinclair and the change made by the Special Rapporteur.

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

Paragraph (3)

35. Mr. MAHIOU said that he had serious reservations about the equivalence of the English expression “sovereign authority” and the French expression *prérogatives de la puissance publique*, especially in view of what was said in the last sentence of the paragraph. Local or municipal authorities could not be said to exercise sovereign authority, since sovereign authority, at least in the French sense of the term, was exercised mainly at the international level, but they did exercise *prérogatives de la puissance publique*. In most countries, the mayor, the prefect or the governor of a region exercised police powers, for example, and they were definitely *prérogatives de la puissance publique*.

36. Furthermore, in some systems of internal law, there was a functional overlap at the local level. In other words, the same agent could act either in the name of the local community, the municipality or the region, or in the name of the State, in which case he was exercising *prérogatives de la puissance publique*. The problem of terminology, therefore, was actually cloaking a problem of substance. There was obviously confusion between acts of sovereignty falling within the international sphere and acts falling within the internal sphere.

37. Mr. LACLETA MUÑOZ pointed out that the formula “in the name or on behalf of the federal union”, at the end of the third sentence of paragraph (3) of the commentary, had the definite effect of limiting the

scope of application of paragraph 1 (b) of article 3 to federal unions, which did not appear to be the intention. It would be better simply to say "in the name of the State". If the Commission wished to mention federal unions expressly, the words "or of a federal union" could be added after the words "in the name of the State"; but such a detail was not necessary because, at the international level, any federal union was a State.

38. Mr. TOMUSCHAT said he agreed with both Mr. Mahiou and Mr. Lacleta Muñoz and felt that the whole of the last portion of the paragraph should be deleted. The statement that the component units of a federal union were "endowed with international legal personality or capacity to perform sovereign authority in the name or on behalf of the federal union" made surprising reading for those familiar with the workings of a federal State.

39. Mr. McCaffrey proposed that the words "federal union", at the end of the third sentence, should be replaced by "State"; a point of substance was involved in that change. The last sentence should be retained, because it followed on logically from the previous one, but the word "however" should be inserted between commas after the opening words "It was relatively clear".

40. Sir Ian SINCLAIR said that he agreed with Mr. Mahiou's remark regarding the two expressions "sovereign authority" and *prérogatives de la puissance publique*. The point was not simply one of translation, for it concerned the equivalence of two legal institutions. Accordingly, the words "which has been translated from the French expression", in the second sentence, should be changed to "which seems to be the nearest equivalent to the French expression". He agreed that the last sentence should be retained.

41. Mr. USHAKOV pointed out that the expression "political subdivisions" was not clear. To say, in the first sentence, that the State comprised "political subdivisions ... which are entitled to perform acts in the exercise of the sovereign authority of the State" was to give an interpretation which might well not be in conformity with the Constitution of one country or another. Under the Constitution of the USSR, for example, all of the Soviet Socialist Republics were sovereign States and could therefore participate in international relations, by concluding agreements with other countries for instance. Two of them, moreover, the Byelorussian and the Ukrainian Soviet Socialist Republics, were Members of the United Nations. International law could not define what was meant by "federal State", or by "department" in the French sense of the term. The only valid definition was the one which appeared in the Constitution of the State in question.

42. Consequently, on second reading of the draft articles, the Commission would have to either simply delete article 3, or word it differently and indicate expressly that the State comprised organs and other entities which were entitled to exercise sovereign authority under the internal law of that State.

43. Mr. BALANDA, supported by Mr. MAHIOU, proposed that the words *prérogatives de la puissance publique de l'Etat*, in the last sentence of the French

text, should be replaced by *prérogatives de la souveraineté de l'Etat*.

44. Mr. SUCHARITKUL (Special Rapporteur) said that Mr. Mahiou was correct in pointing out the difference between the two expressions, which of course was due to the differences between the two legal systems involved. He accepted the proposals to replace the words "federal union" by "State" and to introduce the word "however" in the last sentence.

45. Chief AKINJIDE said that he entirely agreed with Mr. Ushakov. If he had been able to see the commentaries before the adoption of article 3, he would not have been in favour of the article.

46. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve paragraph (3) with the amendments accepted by the Special Rapporteur, together with the changes proposed by Sir Ian Sinclair and Mr. Balanda to deal with the problem posed by the use of the expressions "sovereign authority" and *prérogatives de la puissance publique*.

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

Paragraph (4)

47. Mr. MAHIOU said that the word *mécanisme*, in the last sentence of the French text, should be deleted because it did not appear in the text of article 3.

*It was so agreed.*

48. Mr. BALANDA proposed that the words "they need not be accorded any jurisdictional immunity", at the end of the second sentence, should be replaced by "they do not enjoy any jurisdictional immunity".

49. Mr. SUCHARITKUL (Special Rapporteur) said that he was entirely willing to accept Mr. Balanda's proposal.

*Mr. Balanda's amendment was adopted.*

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

Paragraph (5)

50. Sir Ian SINCLAIR proposed that the words "proceedings are likely to be instituted", in the last sentence, should be replaced by "proceedings may be instituted". Proceedings would not be instituted in every case.

*It was so agreed.*

*Paragraph (5), as amended, was approved.*

Paragraphs (6) and (7)

*Paragraphs (6) and (7) were approved.*

*The commentary to article 3, as amended, was approved.*

*Commentary to article 4 (Privileges and immunities not affected by the present articles)*

Paragraph (1)

51. Mr. McCaffrey proposed that the word "therefore", in the third sentence, should be deleted.

*It was so agreed.*

52. Sir Ian SINCLAIR said that the last sentence was not clear and proposed that it should read: "Both paragraphs are intended to preserve the privileges and immunities already accorded to specific entities and persons by virtue of existing general international law and more fully by relevant international conventions in force, which remain unaffected by the present articles."

53. Mr. LACLETA MUÑOZ endorsed Sir Ian Sinclair's proposal. The new text should be translated into Spanish carefully, for the present Spanish text contained a concept completely unknown to him which was not found in the English and French texts, namely the concept of *convenciones de derecho internacional general*.

*Sir Ian Sinclair's amendment was adopted.*

*Paragraph (1), as amended, was approved.*

Paragraphs (2) to (4)

*Paragraphs (2) to (4) were approved.*

Paragraph (5)

54. Mr. MAHIOU said that, in his opinion, only the first two sentences of paragraph (5) should be retained. The remainder of the paragraph was of no great use, but if it were to be retained he would request that the fifth sentence, concerning the *Mercantile v. Regno di Grecia* case, should be deleted. The commentary was intended to explain the meaning of article 4 and avoid any reference to case-law that might be contested. But the footnote concerning the *Mercantile* case referred to a court decision that could be contested. Moreover, the Commission should not give preference to one court over another.

55. Mr. LACLETA MUÑOZ said that he agreed with Mr. Mahiou's proposal. There were some indications that, with regard to the privileges of diplomatic agents, the same distinction might well be drawn as between acts of the State, namely the distinction between *acta jure gestionis* and *acta jure imperii*.

56. Sir Ian SINCLAIR endorsed Mr. Mahiou's comments and proposed that only the first two sentences of the paragraph should be retained.

*It was so agreed.*

*Paragraph (5), as amended, was approved.*

Paragraph (6)

57. The CHAIRMAN drew attention to the deletion of paragraph (6) of the commentary to article 4 (A/CN.4/L.403/Add.2/Corr.1).

Paragraph (7) (new paragraph (6))

*Paragraph (7) (new paragraph (6)) was approved.*

Paragraph (8) (new paragraph (7))

58. Mr. MAHIOU said that the word *maison*, in the French text, was ambiguous and therefore posed problems of interpretation.

59. Mr. SUCHARITKUL (Special Rapporteur) suggested that the word could be replaced by *suite*.

*It was so agreed.*

*Paragraph (8) (new paragraph (7)), as amended in the French text, was approved.*

*The commentary to article 4, as amended, was approved.*

Commentary to article 5 (Non-retroactivity of the present articles)

Paragraph (1)

60. Sir Ian SINCLAIR said it should be emphasized that the rule being proposed by the Commission was a departure from article 28 of the 1969 Vienna Convention on the Law of Treaties. Accordingly, the first sentence should be deleted and the second sentence should begin: "Under article 28 of the 1969 Vienna Convention on the Law of Treaties, non-retroactivity is the rule ..."

*It was so agreed.*

61. Mr. LACLETA MUÑOZ said that, rather than the fourth sentence being expressed in the negative, it would be more natural to word it in the positive form by deleting the term "not".

*It was so agreed.*

*Paragraph (1), as amended, was approved.*

Paragraph (2)

*Paragraph (2) was approved.*

Paragraph (3)

62. The CHAIRMAN drew attention to the deletion of paragraph (3) of the commentary to article 5 (A/CN.4/L.403/Add.2/Corr.1).

*The commentary to article 5, as amended, was approved.*

Commentary to article 6 (State immunity)

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were approved.*

Paragraph (3)

63. Mr. USHAKOV said that paragraph (3) was totally unacceptable. First, it was difficult to grasp what was meant by the words "not unmindful of the limited capacity of human imagination", in the second sentence. Secondly, the paragraph was not satisfactory in that, far from explaining the various positions, it was drafted as if the entire Commission was of the same opinion. In fact, views regarding the phrase contained in square brackets in article 6 were divided. The statement in the third sentence of paragraph (3) that "Some members of the Commission felt that there should be explicit language ..." merely reflected the standpoint of a certain number of members of the Commission, while the penultimate sentence, beginning "This phrase, however, was thought unnecessary but tolerable by some ...", failed to explain the position of those members who did not concur.

64. Mr. MAHIOU proposed that the second sentence of paragraph (3) should be deleted.

*It was so agreed.*

65. He also suggested setting out more explicitly the position of members who were opposed to the one described in paragraph (3) and also the intermediate position of other members.

66. The CHAIRMAN proposed that Mr. Ushakov should draft a sentence setting forth his point of view and that Mr. Mahiou should draft another sentence indicating the intermediate position to which he had referred.

*It was so agreed.*

*Paragraph (3), as amended, was approved on that understanding.*

*The commentary to article 6, as amended, was approved.*

*Commentary to part III ([Limitations on] [Exceptions to] State immunity)*

67. Mr. USHAKOV, supported by Mr. TOMUSCHAT, suggested that the second sentence should be deleted, in view of the divergent views to which it had given rise.

68. Sir Ian SINCLAIR said that it would be best to delete both the first and the second sentence.

*It was so agreed.*

69. Mr. McCAFFREY said that the penultimate sentence of the paragraph should be reworded.

70. Mr. SUCHARITKUL (Special Rapporteur) proposed that that sentence might read: "The Commission was, however, of the view that, whatever title was eventually adopted, 'limitations on' or 'exceptions to' State immunity constituted an integral feature of a unitary principle of State immunity rather than a rule or series of rules independent of the principle."

71. Mr. KOROMA said that immunity was an autonomous rule and exceptions to or limitations on it could not constitute an integral part of it.

72. Sir Ian SINCLAIR proposed that, to take account of the view expressed by Mr. Koroma, the beginning of the penultimate sentence as proposed by the Special Rapporteur should be amended to read: "Some members of the Commission were, however, ..."; that sentence should then be followed by one stating: "Other members took a different view."

*It was so agreed.*

*The commentary to part III, as amended, was approved.*

*Commentary to article 20 (Cases of nationalization)*

73. Mr. USHAKOV said that he could not accept the expression "broad application", in the first sentence, and pointed out that article 20 was simply a typical safeguard clause.

74. Sir Ian SINCLAIR said that he shared the view expressed by Mr. Ushakov. In addition, he proposed that,

in the second sentence, the word "possible" should be inserted after "regarding".

*It was so agreed.*

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

*Commentary to part IV (State immunity in respect of property from measures of constraint)*

*Paragraph (1)*

*Paragraph (1) was approved.*

*Paragraph (2)*

75. Sir Ian SINCLAIR proposed that the second sentence should be amended to read: "Part IV provides in general, but subject to certain limitations, for the immunity of a State from all such measures of constraint in respect of the use of its property or property in its possession or control."

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

*Paragraph (3)*

76. Sir Ian SINCLAIR said that the words "multinational corporations", in the second sentence, should be replaced by "private litigants", in order to reflect the fact that not all such cases involved multinational corporations.

77. Mr. KOROMA said that the reference to multinational corporations was important and reflected current trends in that it was only developed countries and multinational corporations which enjoyed absolute immunity.

78. Mr. McCAFFREY said that the main problems regarding attachment were the result not of suits brought by multinational corporations, but of private litigation. He strongly objected to the reference to multinational corporations. If it was to be retained, he would insist on the addition of a sentence reading: "One member believed that the problem was not due to suits brought by multinational corporations."

79. Mr. KOROMA pointed out that, even in the literature in the United States of America, multinational corporations were singled out as bringing suits against States.

80. Sir Ian SINCLAIR associated himself with Mr. McCaffrey's views and suggested that the sentence proposed by Mr. McCaffrey should begin with the words "Some members".

81. Mr. TOMUSCHAT said that the commentary to the draft articles should reflect only the discussion which had taken place in the Commission.

82. Mr. SUCHARITKUL (Special Rapporteur) proposed that, as a compromise solution, the words "private litigants, including" should be inserted before "multinational corporations", in the second sentence, and that the sentence proposed by Mr. McCaffrey, as

amended by Sir Ian Sinclair, should be added at the end of the paragraph.

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

Paragraph (4)

83. The CHAIRMAN drew attention to the deletion of paragraph (4) of the commentary to part IV (A/CN.4/L.403/Add.2/Corr.1).

*The commentary to part IV, as amended, was approved.*

*Commentary to article 21* (State immunity from measures of constraint)

Paragraph (1)

*Paragraph (1) was approved.*

Paragraph (2)

84. Mr. ROUKOUNAS, speaking also on behalf of Mr. MAHIOU, said that, rather than refer in footnotes to various cases, it would be better to refer to the cases cited in the Special Rapporteur's seventh report (A/CN.4/388, paras. 73 *et seq.*).

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

Paragraph (3)

85. Sir Ian SINCLAIR proposed that the words "in the hands of the defendant" should be added at the end of the first sentence and that the word "conservation" should be replaced by "conservatory".

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

Paragraphs (4) to (6)

*Paragraphs (4) to (6) were approved.*

Paragraph (7)

86. Mr. USHAKOV proposed that the paragraph should be deleted.

*It was so agreed.*

Paragraphs (8) and (9) (new paragraphs (7) and (8))

*Paragraphs (8) and (9) (new paragraphs (7) and (8)) were approved.*

Paragraph (10) (new paragraph (9))

87. Sir Ian SINCLAIR said that subparagraph (b) of article 21 did not necessarily imply that there was a connection between the claim and the property. He proposed that the first part of the paragraph should be reworded as follows: "Under subparagraph (b), the property can be subject to measures of constraint only if it has been allocated or earmarked for the satisfaction of the claim or debt which is the object of the proceeding."

*It was so agreed.*

88. That text would be followed by the sentence: "This should have the effect of preventing extraneous or unprotected claimants from frustrating the intention of the State to satisfy specific claims or to make payment for an admitted liability."

*It was so agreed.*

*Paragraph (10) (new paragraph (9)), as amended, was approved.*

Paragraph (11) (new paragraph (10))

*Paragraph (11) (new paragraph (10)) was approved.*

*The commentary to article 21, as amended, was approved.*

*Commentary to article 22* (Consent to measures of constraint)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were approved.*

*The commentary to article 22 was approved.*

*Commentary to article 23* (Specific categories of property)

Paragraph (1)

*Paragraph (1) was approved.*

Paragraph (2)

89. Sir Ian SINCLAIR proposed that the second sentence should be amended to read: "Each of these specific categories of property cannot be presumed to be in use or intended for use for commercial [non-governmental] purposes, since, by its very nature, such property must be taken to be in use or intended for use for governmental purposes removed from any commercial considerations."

*It was so agreed.*

90. Mr. ARANGIO-RUIZ said that the term *instrumenti legati*, in the first sentence, should be amended to read *instrumenta legati*.

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

Paragraph (3)

91. Sir Ian SINCLAIR proposed the addition of the following text after the second sentence: "It also excludes property which may have been, but is no longer, in use or intended for use for diplomatic or cognate purposes." It might also be helpful to refer to a number of such cases.

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

Paragraphs (4) to (7)

*Paragraphs (4) to (7) were approved.*

*The commentary to article 23, as amended, was approved.*

*Commentary to article 24 (Service of process)*

## Paragraph (1)

92. Sir Ian SINCLAIR proposed that the second sentence should be shortened to read: "This is an approximate equivalent rather than a literal translation."

*It was so agreed.*

*Paragraph (1), as amended, was approved.*

## Paragraphs (2) to (4)

*Paragraphs (2) to (4) were approved.*

## Paragraph (5)

93. Sir Ian SINCLAIR proposed that the second sentence should be replaced by the following text: "The reason for the rule is self-evident. By entering an appearance on the merits, the defendant State effectively concedes that it has had timely notice of the proceeding instituted against it." The last sentence would then begin: "The defendant State is, of course, entitled at the outset ..."

*It was so agreed.*

*Paragraph (5), as amended, was approved.*

*The commentary to article 24, as amended, was approved.*

*Commentary to article 25 (Default judgment)*

## Paragraph (1)

94. Mr. TOMUSCHAT proposed that the words "if the domestic law so permits" should be added at the end of the paragraph.

*It was so agreed.*

*Paragraph (1), as amended, was approved.*

## Paragraph (2)

*Paragraph (2) was approved.*

*The commentary to article 25, as amended, was approved.*

*Commentary to article 26 (Immunity from measures of coercion)*

## Paragraph (1)

*Paragraph (1) was approved.*

## Paragraph (2)

95. Sir Ian SINCLAIR, supported by Mr. TOMUSCHAT, said that the paragraph was unclear and should be deleted.

*It was so agreed.*

*The commentary to article 26, as amended, was approved.*

*Commentary to article 27 (Procedural immunities)*

## Paragraphs (1) to (3)

*Paragraphs (1) to (3) were approved.*

## Paragraph (4)

96. Sir Ian SINCLAIR proposed that the beginning of the second sentence should be amended to read: "Some reservations were made regarding the application ..."

*It was so agreed.*

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

*The commentary to article 27, as amended, was approved.*

*Commentary to article 28 (Non-discrimination)*

## Paragraph (1)

97. Mr. USHAKOV proposed that the words "and other corresponding conventions" should be added at the end of the first sentence.

*It was so agreed.*

98. Sir Ian SINCLAIR proposed that the word "notion", in the first sentence, should be replaced by "analogy".

*It was so agreed.*

99. He also proposed that the first part of the second sentence should be amended to read: "A certain degree of flexibility was considered desirable for those marginal instances where a restrictive application of the present articles might be adopted by the State of the forum ..."

*It was so agreed.*

*Paragraph (1), as amended, was approved.*

## Paragraph (2)

100. Sir Ian SINCLAIR proposed that the second part of the first sentence should be amended to read: "which, with regard to immunities, may have adopted or may adopt treatment different from that provided for in the present articles".

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

## Paragraph (3)

101. The CHAIRMAN drew attention to the deletion of paragraph (3) of the commentary to article 28 (A/CN.4/L.403/Add.2/Corr.1).

*The commentary to article 28, as amended, was approved.*

*Section D.2, as amended, was adopted.*

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

*The meeting rose at 1.10 p.m.*