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Chairman: Mr. Mochochoko . . . . . (Lesotho)
later: Ms. Hallum (Vice-Chairman) . . . . . (New Zealand)

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99-81947 (E)

The meeting was called to order at 3.15 p.m.

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*) (A/54/10 and Corr.1 and 2)

1. **Mr. Galicki** (Chairman of the International Law Commission), introducing Chapter VII of the report of the Commission (A/54/10 and Corr.1 and 2), on jurisdictional immunities of States and their property, said that the General Assembly, in its resolution 53/98 of 8 December 1998, had decided to establish at its fifty-fourth session a working group of the Sixth Committee to consider outstanding substantive issues related to the draft articles on jurisdictional immunities of States and their property. The report of the Working Group was annexed to the report of the Commission, which had adopted the suggestions contained in it; consequently, the suggestions should be regarded as the Commission's own suggestions.

2. Paragraphs 10 to 30 of the Working Group's report referred to the "concept of State for purpose of immunity", and paragraphs 22 to 30 contained the Commission's suggestions on that subject. As explained in paragraph 11, under paragraph 1 (b) (ii) of article 2 of the draft adopted on second reading by the Commission "constituent units of federal States" fell within the definition of a "State" for the purposes of the draft articles. That provision had been the subject of controversy between federal States and non-federal States, particularly with regard to the problem resulting from the potential dual capacity of constituent units to exercise governmental authority on behalf of the State or on their own behalf, pursuant to the distribution of public power between the State and its constituent units according to the relevant constitution. The discussions had focused on whether constituent units of federal States should, through their inclusion in the notion of "State", be entitled to the immunity of the State without any additional requirement, when they were acting on their own behalf and in their own name.

3. When examining that issue, some members of the Working Group had felt that there should be a parallelism between the provision concerning the "concept of State for purpose of immunity" in the draft articles on jurisdictional immunity of States and the draft articles on State responsibility. Although some members had felt that it was not necessary to establish a full consistency between the two sets of draft articles, it was considered desirable to bring that draft article into line with the draft on State responsibility.

4. The Commission suggested the deletion of paragraph 1 (b) (ii) of draft article 2 so that the element "constituent units of a federal State" would join "political subdivisions of the State" in current paragraph 1 (b) (iii). Furthermore, the Commission suggested that the qualifier phrase "which are entitled to perform acts in the exercise of the sovereign authority of the State" could apply both to "constituent units of a federal State" and to "political subdivisions of the State". The Commission also suggested that the phrase "provided that it was established that that entity was acting in that capacity" should be added to the paragraph, between brackets for the time being.

5. A final suggestion by the Commission concerning article 2 was that the expression "sovereign authority" in the qualifier should be replaced by the expression "governmental authority", to align it with contemporary usage and the terminology used in the draft articles on State responsibility. Such suggestions allowed for the immunity of constituent units, while at the same time addressing the concern of States that found the difference in treatment between the constituent units of Federal States and political subdivisions of the State confusing. Paragraph 30 of the Working Group's report showed how a reformulation of paragraph 1 (b) of article 2 would read if the Commission's suggestions were to be adopted.

6. Paragraphs 31 to 60 of the Working Group's report dealt with criteria for determining the commercial character of a contract or transaction, and paragraphs 56 to 60 contained the Commission's suggestions on that issue. As explained in paragraph 32 of the Working Group's report, paragraphs 1 (c), 2 and 3 of article 2 of the Commission's draft took the view that a State enjoyed restricted immunity, namely that jurisdictional immunity should not be enjoyed by a State undertaking a commercial activity. That restrictive approach raised as one of the main issues that of the definition of "commercial transaction" for the purpose of State immunity. In that respect, while some States considered that only the nature of the activity should be taken into account in determining whether it was commercial or not, other States considered that the "nature" criterion alone did not always permit a court to reach a conclusion on whether an activity was commercial or not. Therefore, recourse must sometimes be made to the "purpose" criterion, which examined whether the act had been undertaken with a commercial or a governmental purpose. Although several different proposals had been made as to how to integrate the two tests, no common solution had emerged from that practice. Paragraph 1 (c) and paragraph 2 of article 2 constituted an attempt to

integrate the two criteria but it had so far met with some resistance on the part of States.

7. In its suggestions, the Commission made it clear that the issue of which criteria to apply in order to determine the commercial character of a contract or transaction arose only if the parties had not agreed on the application of a specific criterion and the applicable legislation did not require otherwise. The Commission further indicated that the criteria contemplated in national legislation or applied by national courts offered some variety, including, *inter alia*, the nature of the act and its purpose or motive, as well as some other complementary criteria such as the location of the activity and the circumstances of the act.

8. The Commission had indicated all the possible alternatives examined by the Working Group when considering the issue, namely: (a) the nature test as the sole criterion; (b) the nature test as a primary criterion (in which case the second half of article 2, paragraph 2, would be deleted); (c) the nature test supplemented by the purpose test with a declaration by each State about the internal legal rules or policy it would apply in that area; (d) the nature test supplemented by the purpose test; (e) the nature test supplemented by the purpose test with some restrictions on the extent of "purpose" or with some enumeration of "purposes". Such restrictions or enumeration should be broader than a mere reference to some humanitarian grounds; (f) reference in article 2 only to "commercial contracts or transactions", without further explication; and (g) adoption of the approach followed by the Institut de Droit International in its 1991 recommendations, which were based on an enumeration of criteria and a balancing of principles, in order to define the competence of the court in relation to jurisdictional immunity in a given case. The text of the Institut de Droit International was to be found in a note appended to the Working Group's report.

9. After considering the matter, and in view of the differences of the facts in each case and different legal traditions, the Commission had decided that alternative (f), namely, the deletion of paragraph 2, was the most acceptable, since the distinction between the nature and purpose tests might be less significant in practice than the long debate on that subject might imply. It had also decided that some of the criteria contained in the draft article proposed by the Institut de Droit International could offer useful guidance to national courts and tribunals in determining whether immunity should be granted in specific instances.

10. Paragraphs 61 to 83 of the Working Group's report dealt with the concept of a State enterprise or other entity in relation to commercial transactions, and paragraphs 78 to 83 contained the Commission's suggestions on that issue. Paragraph 3 of article 10 of the draft adopted by the Commission in 1991 provided that the immunity from jurisdiction enjoyed by a State should not be affected with regard to a proceeding which related to a commercial transaction engaged in by a State enterprise or other entity established by the State which had an independent legal personality and was capable of: (a) suing or being sued, and (b) acquiring, owning or possessing and disposing of property, including property which the State had authorized it to operate or manage.

11. That provision had caused some reaction in the Sixth Committee in previous years. It had been felt that, in exceptional cases, it might be appropriate to disregard the separate legal personality of a State enterprise or other entity. For instance, a State enterprise might conclude a commercial transaction on behalf of the Government or execute it as the authorized agent of the State. In such cases, the contract might be regarded as a transaction between the State and the private party, and the State should not be able to invoke immunity. It had also been argued that a State should not be able to invoke immunity in cases where it was acting as a guarantor of an entity, and that it should also be held accountable when a State entity had deliberately misrepresented its financial position or had subsequently reduced its assets to avoid satisfying a claim.

12. The Chairman of the informal consultations held in 1994 had suggested, as a possible basis for compromise, that article 10, paragraph 3, could be clarified by indicating that the immunity of a State would not apply to liability claims in relation to a commercial transaction engaged in by a State enterprise or other entity established by that State where: (a) the State enterprise or other entity engaged in a commercial transaction as an authorized agent of the State; (b) the State was acting as a guarantor of the liability of the enterprise; or (c) the State entity had deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim. That clarification could be achieved either by characterizing the acts referred to under (a) and (b) as commercial acts or by a common understanding to that effect at the time of the adoption of article 10.

13. The Commission had also considered the third ground for State liability suggested in the basis for compromise, namely, "where the State entity has deliberately misrepresented its financial position or

subsequently reduced its assets to avoid satisfying a claim". The Commission had judged that the suggestion went beyond the scope of article 10 and addressed a number of questions: immunity from jurisdiction, immunity from execution and the question of the propriety of piercing the corporate veil of State entities in certain cases. Moreover, it did not take into account the question of whether the State entity, in so acting, acted on its own or on instruction from the State. The Commission had noted that the idea of piercing the corporate veil raised questions of a substantive nature and questions of immunity, but had not considered it appropriate to deal with them in the framework of its current mandate.

14. Paragraphs 84 to 107 of the Working Group's report referred to contracts of employment, and paragraphs 103 to 107 contained the Working Group's and the Commission's suggestions on that issue. Article 11, paragraph 1, of the draft adopted by the Commission in 1991 laid down the general principle that, unless otherwise agreed between the States concerned, a State could not invoke immunity from jurisdiction before a court of another State which was otherwise competent in a proceeding which related to a contract of employment. Paragraph 2 listed the exceptions to that principle, including the exception in subparagraph (a) concerning an employee who had been recruited to perform functions closely related to the exercise of governmental authority and that in subparagraph (c) concerning an employee who was neither a national nor a habitual resident of the State of the forum at the time when the contract had been concluded.

15. Those two exceptions to the principle had elicited divergent views in the Sixth Committee in previous years and, in particular, in the informal consultations in 1994. Paragraph 87 of the Working Group's report recalled that, with regard to subparagraph (a), there had been a question as to whether the phrase "closely related to the exercise of governmental authority" was sufficiently clear to facilitate its application by courts. With regard to subparagraph (c), it had been suggested that the provision could not be reconciled with the principle of non-discrimination based on nationality. The Chairman of the 1994 informal consultations had proposed clarifying the phrase contained in subparagraph (a) and deleting subparagraph (c) in the light of the principle of non-discrimination.

16. After careful consideration, the Commission had made a number of suggestions. In subparagraph (a) of paragraph 2, the Commission had suggested that in the phrase "perform functions closely related to the exercise of governmental authority" the words "closely related to" could be deleted in order to restrict the scope of the subparagraph to "persons performing functions in the exercise of governmental authority". It had also been agreed that the subparagraph could be further clarified by stating clearly that paragraph 1 of article 11 would not apply if the employee had been recruited to perform functions in the exercise of governmental authority; that meant in particular: (i) diplomatic staff and consular officers, as defined in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations; (ii) diplomatic staff of special missions and permanent missions to international organizations; and (iii) persons enjoying diplomatic immunity, such as persons recruited to represent a State in international conferences.

17. With regard to article 11, paragraph 2 (c), the Commission had recommended that it should be deleted, as it could not be reconciled with the principle of non-discrimination based on nationality. Such deletion, however, should not prejudge on the possible inadmissibility of the claim on grounds other than State immunity, such as the lack of jurisdiction of the forum State. In that regard, the Commission had noted a possible uncertainty in paragraph 1 of article 11, concerning the meaning of the words "in part". The Commission believed that it might be desirable to reflect explicitly in article 11 the distinction between the rights and duties of individual employees and questions of the general policy of employment, which essentially concerned management issues of the employing State.

18. Paragraphs 108 to 129 of the Working Group's report referred to the issue of "measures of constraint against State property", and paragraphs 125 to 129 contained the suggestions of the Group and the Commission on that issue. The draft articles adopted in 1991 made a clear distinction between immunity from jurisdiction and immunity from measures of constraint. With regard to the latter, article 18 established the general principle that no measures of constraint, such as attachment, arrest and execution, against property of a State might be taken in connection with a proceeding before a court of another State unless: (a) the State had consented; (b) the State had allocated or earmarked property for the satisfaction of the claim which was the object of the proceeding; or (c) the property which was the object of a measure of constraint was specifically in use or intended for use by the State for other than government non-commercial purposes and was in the territory of the State of the forum and had a connection with the claim which was the object of the proceeding or with the agency or instrumentality against which the proceeding was directed. For its part, article 19

listed the categories of property of a State which should not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes.

19. The consideration by the Sixth Committee of those provisions had raised a number of problems in recent years. There were different views as to whether the exercise of jurisdiction by a court in proceedings to determine the merits of a claim against a foreign State implied the power to take measures of constraint against the property of that State with a view to satisfying a valid judgement confirming the claim. Even if such a power was recognized, there were also different views as to which property might be subject to measures of constraint. Any attempt to reconcile the different views on those issues would need to take into account the interests of a State in minimizing the interference with its activities resulting from coercive measures taken against its property as well as the interests of a private party in obtaining satisfaction of a claim against a foreign State that had been confirmed by an authoritative judicial pronouncement.

20. Paragraph 118 of the Working Group's report set out the possible basis for a compromise. For its part, the Commission was of the view that a distinction between prejudgement and post-judgement measures of constraint might help sort out the difficulties inherent in that issue, even though both types of measures were subject to the conditions of article 19 concerning property for government non-commercial purposes.

21. With regard to prejudgement measures of constraint, the Commission was of the view that they should be possible only in the following cases: (a) measures on which the State had expressly consented either ad hoc or in advance; (b) measures on property designated to satisfy the claim; (c) measures available under internationally accepted provisions (*leges specialis*), such as, for instance, ship arrest, under the Brussels International Convention relating to the arrest of seagoing ships; and (d) measures involving property of an agency enjoying separate legal personality, if it was the respondent of the claim. The Commission believed that the above list might not be exhaustive.

22. With regard to post-judgement measures of constraint, the Commission was of the view that they should be possible only in the following cases: (a) measures on which the State had expressly consented either ad hoc or in advance; and (b) measures on designated property to satisfy the claim. That list, too, might not be exhaustive. Moreover, the Commission had explored three alternatives which the Assembly might decide to follow. The first alternative might consist of granting to the State a grace period of two to three months to comply with the judgement as well as freedom to determine property for execution. If no compliance occurred during the grace period, property of the State could be the object of execution, subject to article 19. The first element of the second alternative was the same as that of the first alternative. If, however, no compliance occurred during the grace period, the claim would be brought into the field of inter-State dispute settlement; that would imply the initiation of dispute settlement procedures in connection with the specific issue of execution of the claim. Lastly, the Assembly might decide not to deal with that aspect of the draft, because of the complex and delicate aspects of the issues involved. The matter would then be left to State practice. The title of the topic and of the draft would be amended accordingly.

23. Lastly, the report contained in an appendix a short background paper on another issue which might be relevant for the topic of jurisdictional immunities. It concerned the question of the existence or non-existence of jurisdictional immunity in actions arising, *inter alia*, out of violations of *jus cogens* norms; rather than taking up the question directly, the Working Group had decided to bring it to the attention of the Sixth Committee.

24. **Ms. Hallum** (New Zealand), Vice-Chairman, took the Chair.

25. **Mr. Sepulveda** (Mexico) said that he would consider first the draft articles on nationality of natural persons in relation to the succession of States and then the draft articles on jurisdictional immunities of States. With regard to the first topic, he welcomed the fact that the Commission had completed the second reading in such a short time, but regretted that it had omitted the study of nationality of legal persons in relation to the succession of States; it believed that guidelines were needed on the subject. It was to be hoped, therefore, that the Commission would return to the question in due course.

26. Stressing that it was particularly important to guarantee to individuals the right to a nationality and to prevent statelessness in the case of a succession of States, his delegation fully supported the draft articles, to the extent that they preserved the rights of States in matters of nationality, while specifying their responsibilities under international law. His delegation also believed that the proposed form of the draft articles, a declaration, was consistent with the will of States.

27. His delegation noted that in the case of a succession of States a person could, under certain circumstances, be entitled to more than one nationality; like the Commission, however, it believed that the draft articles should not be understood as being intended to encourage multiple nationality.

28. Article 3, which provided that the draft articles applied only to the effects of a succession of States occurring in conformity with international law, embodied the fundamental principle of international law, namely, that unlawful acts should not produce legal effects. Paragraph 3 of the commentary on that article, in which the Commission stressed that article 3 was without prejudice to the right of everyone to a nationality in accordance with article 15 of the Universal Declaration of Human Rights, seemed therefore to be pointless, and could even give the impression that a succession of States not in conformity with international law would compel recognition of the nationality of the persons affected by an unlawful act of that nature.

29. With regard to article 5 (Presumption of nationality), his delegation believed that, while the criterion of habitual residence was extremely useful, the Commission might have chosen, in addition, the principle of effective nationality, which was based on the existence of an effective link between the individual and the State.

30. The principle of respect for the will of persons concerned was satisfactory, for, while it took into account the importance of attribution of nationality for an individual, it left the final decision to the States concerned, which were obliged to take all appropriate measures, based on the links between them and the persons concerned, to prevent statelessness. In that connection, his delegation stressed that article 19 protected the right of other States not to recognize the nationality of a person who had no effective link with a State concerned. As his delegation had stated on several earlier occasions, effective link was one of the main criteria applied in resolving nationality questions in the context of succession of States. A third State could not, therefore, be obliged to accept an attribution of nationality that was not in conformity with the general principles of international law; moreover, the right of option enabled the person concerned to choose the nationality of the State with which he or she believed an effective link existed.

31. With regard to article 7, his delegation shared the view of the Commission that in the particular case of a succession of States, it was useful to be able to give retroactive effect to attribution of nationality. Such a derogation from the general principle of non-retroactivity of legislation, which was justified only by the risk of statelessness, even if only temporary, of persons concerned, should nonetheless retain its exceptional character.

32. Among the other positive aspects of the draft articles, his delegation stressed the reaffirmation of the principle of non-discrimination, the right to a nationality of a child born after the succession of States, the prohibition of arbitrary decisions concerning nationality issues and the need to preserve family unity. Lastly, his delegation believed that Part Two of the draft articles made it possible for those provisions to be applied in a flexible manner.

33. The Mexican delegation welcomed the progress made on the draft articles by the Working Group on Jurisdictional Immunities of States and their property, which should enable the Working Group of the Sixth Committee to resume consideration of pending issues. As the topic was to be considered separately by the Committee, his delegation would confine itself to a few general remarks. With regard to the concept of the State for the purposes of immunity, his delegation believed that the Working Group's proposals constituted a good basis for discussion. It would be desirable, nonetheless, to combine "constituent units of a federal State" and "political subdivisions of the State", and to retain only acts performed "in the exercise of the sovereign authority of the State". In that connection, the phrase currently appearing in brackets in the draft articles, namely, "provided that it was established that such entities were acting in that capacity", raised more problems than it solved. The criterion of "in the exercise of the sovereign authority of the State" seemed sufficient for the purposes of State immunity.

34. With regard to the criteria for determining the commercial character of a contract or transaction, the determining factor should be the character of the contract or transaction. Since, however, in accordance with the practice and jurisprudence of some States, the purpose of the contract or transaction was an important criterion, his delegation was willing to consider any formulation that would make it possible to include that concept in the draft, while promoting the objective of legal certainty. In that connection, the Working Group's proposal to delete article 2, paragraph 2, of the draft articles hardly seemed appropriate. If the possibility of determining the commercial character of a contract or transaction was left to the courts, the result in practice would be a multiplicity of regimes. His delegation believed that the question merited thorough consideration.

35. With regard to the concept of a State enterprise or other entity in relation to commercial transactions, his delegation believed that the Working Group's proposal was on the right track and deserved to be studied carefully. The State should not be able to invoke immunity in liability proceedings relating to a commercial transaction carried out by a State enterprise or other entity established by it if that entity had acted as an agent of the State, the transaction had a commercial character and the State had served as guarantor of the performance of the relevant obligation.

36. The Mexican delegation took note of the appendix to the report of the Working Group concerning recent developments related to immunities, especially insofar as peremptory norms of international law were concerned. Like the Commission, it believed that such questions were not dealt with directly in the draft articles on jurisdictional immunities of States and their property, but that the evolution of the principles referred to would have a major impact on the international legal order and relations between States.

37. **Mr. Rebagliati** (Argentina) drew the attention of the Commission to three aspects of the topic of jurisdictional immunities of States and their property. In his view, the first issue dealt with by the Working Group, namely, the concept of a State for the purposes of immunity, raised problems of formulation rather than substance. As his delegation had stated on earlier occasions, the concepts of "constituent units of a federal State" and "political subdivisions of the State" were not clearly differentiated and appeared to overlap. His delegation therefore proposed the following wording, based on the Working Group's proposal: "constituent units of a federal State or other political subdivisions of the State called upon to exercise sovereign authority".

38. With regard to the sensitive question of the criteria to be applied in determining whether an activity was commercial or not, his delegation agreed with the Working Group that the distinction between the nature test and the purpose test was surely less problematic and controversial in practice than it was in theory. That was why his delegation believed, like the Working Group, that eliminating any reference to nature or purpose was the most acceptable solution. That had in fact been the solution adopted by Argentine legislation in 1994.

39. Lastly, his delegation wished to draw attention to the issue of immunity from execution. The draft articles should include provisions specifying the cases in which measures of constraint could be taken, in the context of judicial proceedings, against the property of a State. Without such provisions, the draft articles would have little impact. There was indeed little point in listing the cases in which a State could not oppose jurisdictional immunity if there were no provisions for enforcing the judgement. The number of cases should, of course, be limited, but they must be clearly identified. In that connection, his delegation found the distinction made by the Working Group between prejudgement and post-judgement measures of constraint to be useful and considered the proposed cases of exclusion from immunity from execution to be satisfactory. The contribution of the Working Group should facilitate the debate which would soon take place in the Sixth Committee and help to bring viewpoints together, thereby accelerating the holding of a conference for the drafting of a general convention on that important question.

40. **Mr. Lammers** (Netherlands) said that his country was aware of the problematic nature of the topic of jurisdictional immunities of States and their property, on which there was a considerable divergence of views among States. Sincere efforts should nevertheless be made to harmonize the rules of international law governing that topic as far as possible without jeopardizing the right of private parties to legal protection in their transactions with foreign States. It was in that spirit that his delegation wished to present its comments on the draft articles adopted in 1991, taking into account the work of the Working Groups established by the General Assembly in 1992 and 1993, and by the Commission in May 1999.

41. His delegation had taken note of the observation in paragraph 2 of the Commission's commentary on article 2 that the draft articles did not cover criminal proceedings. Perhaps it would be better to include that provision in article 1, which dealt with the scope of the articles. His delegation further wondered to what extent the draft articles would apply to civil law claims presented in connection with criminal proceedings.

42. In general, his delegation agreed with the definition of the concept of State for the purposes of immunity formulated by the Working Group in paragraph 30 of its July 1999 report. However, the bracketed text in article 2, paragraph 1 (b) (ii), should be replaced by the words "whenever performing such acts", and the same words should be added in paragraph 1 (b) (iii). His delegation also preferred a reference to "sovereign authority" to the term "governmental authority", which might be given too broad an interpretation.

43. The concept of "commercial transaction" appearing in article 2, paragraph 1 (c), and the criteria for

determining whether a contract or transaction was a "commercial transaction" remained problematic. His delegation preferred the definition proposed by the Chairman of the 1993 Working Group, contained in paragraph 35 of document A/C.6/48/L.4, as it was more logical. The description of the criteria used to determine whether or not a transaction was commercial was even more problematic. In his country, case law hardly took into consideration the purpose of a transaction, and the text proposed in article 2, paragraph 2, of the draft articles would be a step back in comparison with existing Netherlands case law. Moreover, the reference to the practice of the State which was a party to the transaction would lead to the application of a double standard by the Netherlands courts, which would be difficult to explain to a private party. His delegation had taken note of the proposal made by the Working Group, given the existing diversity of State practice, to abstain from defining any criteria for determining whether or not a transaction was commercial.

44. With regard to proceedings in which State immunity could not be invoked (arts. 10 ff.), his delegation had difficulty understanding the purpose and meaning of article 10, paragraph 3, which stated that a State's immunity from jurisdiction would not be affected with regard to a proceeding which related to a commercial transaction engaged in by a State enterprise or other entity established by the State to carry out exclusively commercial transactions which had an independent legal personality and met certain conditions. The paragraph should be deleted, as it stated the obvious and might lead to confusion.

45. With regard to article 11, concerning employment contracts, his delegation proposed deleting paragraph 2 (c) in order to avoid discrimination in treatment between non-nationals of the employer State who were not nationals or habitual residents of the forum State and non-nationals of the employer State who were nationals or habitual residents of the forum State. With regard to article 12, which dealt with proceedings for redress for injury or damage sustained in the territory of the forum State and caused by the activities of a State in the territory of the forum State, he noted that, according to paragraph 10 of the Commission's commentary, that article did not apply to situations of armed conflict. His delegation believed that that was an extremely important limitation and that it should be made explicit in article 12 or elsewhere in the draft articles. Attention might also be drawn in that connection to article 31 of the European Convention on State Immunity, which explicitly provided that nothing in that Convention should affect any State immunity in respect of acts of its armed forces when on the territory of another State. As currently worded, article 12 did not appear to cover cases of transboundary environmental damage, and he wondered why that was the case.

46. His delegation was basically satisfied with the current text of article 16, concerning ships owned or operated by a State, but believed that similar provisions should be added to cover aircraft owned or operated by a State. As to article 17, dealing with the effect of an arbitration agreement, there was no reason why its operation should be limited to differences relating solely to commercial transactions.

47. With regard to State immunity from measures of constraint, article 18 was much more restrictive than current case law of the Netherlands courts, and he hoped that the Commission would take a less restrictive approach. In particular, it should delete the requirement in paragraph 1 (c) that there must always be a connection between the property subject to a measure of constraint and the claim which was the object of the proceeding or with the agency or instrumentality against which the proceeding was directed. Article 19, defining specific categories of property which remained immune from measures of constraint, was useful. However the words "held by it for central banking purposes" should be added at the end of paragraph 1 (c).

48. His delegation had taken note with interest of the observations made by the Working Group on developments in the area of immunity from jurisdiction, in which immunity was denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*, particularly the prohibition of torture. Recent developments which would also affect the scope of the present article 12 should be taken fully into account in further work on the draft articles.

49. **Mr. Berman** (United Kingdom) welcomed the fact that the Commission had completed its work on the topic of nationality in relation to the succession of States while avoiding its earlier excessive concentration on the problems of nationality raised by decolonization. He wondered, however, why the Commission had decided to recommend that the General Assembly should adopt the draft articles in the form of a declaration, when they were unmistakably normative and not declarative in their wording, and hoped that the Assembly would specify in its resolution why it was adopting the declaration. There seemed to be a lack of consistency between article 6, which

required States to adopt legislation on nationality and related issues, and subsequent draft articles in which States were called upon to fulfil a variety of obligations; he wondered whether those obligations were supposed to be incorporated in national legislation or were to be fulfilled regardless of what the legislation provided. That aspect of the draft, in his view, required clarification. It would also be wise to clarify whether the provision in article 17 requiring effective review of decisions on nationality applied also to arbitrary deprivation of nationality, contemplated in article 16, and discrimination in matters of nationality, which was covered by article 15. Lastly, he agreed with the Commission that the silence on the part of Governments meant that they concurred that work on the topic of nationality in relation to the succession of States could be considered concluded, although the possibility of reopening the issue in the event that States expressed the desire to do so was not excluded. However, the humanitarian concerns which had guided the elaboration of the draft articles would not be applicable to the debate on the nationality of companies and commercial entities.

50. With regard to the jurisdictional immunities of States and their property, the Commission was still far from completing its work, despite the desire of lawyers for agreement on a code that would cover all aspects of the problem. In view of the rapid changes occurring in the system of international trade, it was appropriate to ask whether the Commission should continue its work along the same lines and codify that important branch of international trade law at the risk of freezing it and limiting its scope to certain issues, thereby creating a gap between reality and law, or whether the Commission should instead be realistic, recognizing that State immunity was closely linked to the development of a modern system of international trade, and turn to the elaboration of a model law, which, without being binding, would allow States that wished to modernize their legislation to do so and would leave room for practice to develop. A model law would preserve the invaluable work that the Commission and the Sixth Committee had achieved in that area and would be an attractive way of completing the work on the topic.

51. **Mr. Kanehara** (Japan) said that although many years had passed since the General Assembly had first turned its attention to the draft articles on the jurisdictional immunities of States and their property submitted to it by the International Law Commission, the topic of State immunity had lost none of its importance for international law and continued to divide opinion among Member States, with some advocating more restrictive rules and others espousing absolute immunity. During the cold war era those differences had been understandable, but on the threshold of the twenty-first century they no longer had a rationale. The fading of the system of State-controlled economies, rather than limiting the scope of State activities, had in fact coincided with an extension of the public sphere to many branches of the private sector as a result of changes in the nature of the State. Those changes had undermined the doctrine of absolute immunity. It was the task of the Sixth Committee to follow up on the work done by the Commission, particularly the Working Group on the topic, and to give legal expression to the new forms the conduct of the State might take in the future by formulating a universally acceptable, restricted doctrine of immunity. It was regrettable that the Sixth Committee had allocated only three days to the topic, whereas at least one week of debate would be necessary to consider it properly. If the Sixth Committee did not have enough time, it might wish to consider sending the issue back to the Commission.

52. One of the thorniest issues in the debate on State immunity was the criteria for determining the commercial character of a contract or transaction under article 2, with the debate centring on whether the nature test or the purpose test should prevail. His delegation doubted whether that debate was actually useful to the judges who would render decisions in that area; in view of the diversity of State practice, it might be wiser to recognize that international law in that area was still evolving, without trying to decide which practices were too radical or too conservative. The aim of the Sixth Committee should be to offer guidance, not to freeze the development of that branch of law. There were two possible solutions. The first was to end the debate on the nature and purpose tests and to delete article 2, paragraph 2, as the Commission's Working Group had suggested. In that case it would be appropriate to add a provision reducing the scope of paragraph 1 (c) (iii) to reflect the rule of international law that the determining factor in the attribution by national judges of immunity to foreign States should be the commercial character of a contract or transaction. In that connection, the approach taken by the Institut de Droit International in its 1991 recommendations, which contained a list of criteria and balanced various principles, could offer useful guidance. The second solution would be to accord primary status to the nature test and supplementary status to the purpose test, depending on the legal tradition or policy of each State.

53. Measures of constraint was another difficult issue which the Commission must examine in depth, since there

was no established rule of law in that area. While it was possible to bring proceedings against a foreign State in a national court, it was not easy to enforce judgements against it. Great prudence must be exercised in enforcing judgements against a State: efforts must be made to convince the State to execute the judgement voluntarily, and it should be given a period within which to comply before any measures of constraint were contemplated, although at present no national legal system seemed to have such a provision. Moreover, as the Working Group had noted, even greater caution was required when a national court dealt with prejudgement measures, since they were taken before any ruling on the merits of the case was made.

54. With regard to the concept of a State enterprise in relation to commercial transactions, he noted it was true that some State enterprises were financially independent and legally separate from the State and that denying them immunity did not imply a denial of State immunity; however, there were cases, as the Working Group had rightly noted, in which the State could not invoke immunity, such as when a State enterprise engaged in a commercial transaction as an authorized agent of the State or when the State was acting as guarantor of an enterprise.

55. With regard to contracts of employment, inasmuch as article 11 of the draft articles attempted to reconcile the interests of the foreign State and those of the forum State, his delegation appreciated the Commission's efforts to clarify paragraph 1 (a). It concurred with the Working Group that paragraphs 1 (c) and 1 (d) were contrary to the principle of non-discrimination based on nationality and should therefore be deleted. Nationality did not provide grounds for denying legal protection or the right to bring a claim against a State, particularly when the interested party was a permanent resident of the forum State.

The meeting rose at 5.10 p.m.