Document:-
A/CN.4/SR.2425

Summary record of the 2425th meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
1995, vol. I

Paragraph (25)

76. Mr. LUKASHUK questioned the correctness of the statement appearing in the first sentence of the paragraph, which seemed to be at variance with the quotation in the footnote which followed.

Paragraph (25) was adopted.

Paragraph (26)

Paragraph (26) was adopted.

Paragraph (27)

77. Mr. TOMUSCHAT proposed that the first sentence should be deleted.

Paragraph (27), as amended, was adopted.

Paragraphs (28) and (29)

Paragraphs (28) and (29) were adopted.

Organization of the work of the session (*concluded*)**

[Agenda item 2]

78. The CHAIRMAN, noting that the Commission still had before it the commentary to article 11 of part two and commentaries to part three of the draft articles on State responsibility and commentaries to articles A, B, C and D on international liability for injurious consequences arising out of acts not prohibited by international law, invited members to decide whether a meeting was to be held in the afternoon and, if so, what items were to be discussed and in what order.

79. Mr. AL-KHASAWNEH proposed that the Commission should meet in the afternoon, if only out of courtesy to Mr. Barboza, the Special Rapporteur on the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

80. Mr. PELLET said that he wished to place on record his strong objection to having to engage in the essential exercise of adopting commentaries to draft articles under conditions of extreme pressure of time. If the Commission decided to meet in the afternoon, he was willing to cooperate, but only under protest.

81. Following a discussion in which Mr. ROSENSTOCK, Mr. AL-BAHARNA and Mr. EIRIKSSON took part, Mr. YANKOV formally moved under rule 71 of the rules of procedure of the General Assembly that the Chairman should rule that a meeting of the Commission should be held in the afternoon and that the remainder of the present meeting should be used for substantive, rather than procedural, matters.

82. The CHAIRMAN, having ensured the presence of a quorum, made a ruling in accordance with that suggestion.

83. Mr. PELLET appealed against the Chairman's ruling.

The Chairman's ruling was upheld by 9 votes to 5, with 3 abstentions.

84. The CHAIRMAN, noting that there was no time left for further substantive discussion at the current meeting, said that at the afternoon meeting the Commission would revert to the consideration of paragraph (15) of the draft commentary to article 14 of part two of the draft on State responsibility, which had been left in abeyance. It would then proceed to consider the commentary to article 11 of part two and the commentaries to part three of the draft on State responsibility, as well as the commentaries to articles A, B, C and D of the draft on international liability for injurious consequences arising out of acts not prohibited by international law.

85. Mr. PELLET said that he was entirely opposed to the consideration of the commentary to article 11.

86. Mr. ROSENSTOCK said that the question whether the commentary to article 11 should or should not be considered would have to be decided by a vote. As for the method of dealing with part three (A/CN.4/L.520), he would recommend leaving the introduction aside and proceeding immediately to the consideration of the substantive part, beginning with the commentary to article 1.

The meeting rose at 1 p.m.

2425th MEETING

Friday, 21 July 1995, at 3.15 p.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

later: Mr. Alexander Yankov

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. de Saram, Mr. Eiriksson, Mr. Idris, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pellet, Mr. Rosenstock, Mr. Tomuschat, Mr. Villagrán Kramer.

** Resumed from the 2422nd meeting.

Draft report of the Commission on the work of its forty-seventh session (*concluded*)

CHAPTER III. *State responsibility* (concluded)

C. **Text of articles 13 and 14 of part two and of articles 1 to 7 of part three and the annex thereto, with commentaries, provisionally adopted by the Commission at its forty-seventh session (*concluded*)**

Draft commentaries to articles 13 and 14 of part two (A/CN.4/L.521) (*concluded*)

Commentary to article 14 (concluded)

1. The CHAIRMAN said that the commentaries to articles 13 and 14 of part two of the draft articles on State responsibility had been adopted with the exception of paragraph (15) of the commentary to article 14. He invited the members of the Commission to decide on the following new text proposed by Mr. Tomuschat to replace the existing second sentence of that paragraph:

> "An injured State could envisage action at three levels. To declare a diplomatic envoy *persona non grata*, the termination or suspension of diplomatic relations and the recalling of ambassadors are pure acts of retortion, not requiring any specific justification. At a second level, measures may be taken affecting diplomatic rights or privileges, not prejudicing the inviolability of diplomatic or consular agents or of premises, archives and documents. Such measures may be lawful as countermeasures if all requirements set forth in the present draft articles are met. However, the inviolability of diplomatic or consular agents as well as of premises, archives and documents is a rule which may not be departed from by way of countermeasures."

2. Mr. PELLET said that he was not entirely convinced by the last sentence of that text because it was not certain that the rule in question could never be departed from, even by way of countermeasures. He would, however, not insist that that sentence should be amended, but requested that his comment should be reflected in the summary record of the meeting.

Paragraph (15), as amended, was adopted.

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

Draft articles, with commentaries, adopted by the Commission for inclusion in part three and the annex thereto (A/CN.4/L.520)

Introduction

Paragraph (1)

3. Mr. ROSENSTOCK said that paragraph (1) contained many elements that did not belong in commentaries to draft articles. He did not want to start a lengthy debate on that point, but he hoped that the other members of the Commission would agree that that paragraph should be deleted.

4. Mr. PELLET said he wondered whether it was the usual practice to have such an introduction before the commentaries to draft articles and, in particular, whether that had been done in the case of parts one and two of the draft.

5. Mr. ARANGIO-RUIZ (Special Rapporteur) said he seemed to remember that there was an introduction to some articles of parts one and two. He also recalled that, in recent years, part three had given rise to rather sharp differences of opinion among the members of the Commission and that it was important for the Sixth Committee to be so informed.

6. Mr. TOMUSCHAT suggested that the French term "*mise en oeuvre*" in brackets in the English text of the first sentence should be deleted.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (5)

7. Mr. ROSENSTOCK said that he had the same reservations about paragraphs (2) to (5) as about paragraph (1). They did not belong in the commentary.

Paragraphs (2) to (5) were adopted.

Paragraphs (6) to (8)

8. Mr. TOMUSCHAT, supported by Mr. PELLET, said that paragraphs (6) to (8) reflected the views of the Special Rapporteur and that the Commission could therefore not adopt them. He proposed that they should be deleted.

9. Mr. AL-KHASAWNEH, supported by Mr. YANKOV, said that he did not agree with Mr. Tomuschat because those paragraphs described the background to that question in the Commission and the General Assembly was entitled to be informed of all the possibilities that existed in that regard.

10. Mr. MAHIOU said that paragraphs (6) and (7) did in fact contain both useful factual information and subjective points of view that should not be included. Perhaps those two paragraphs should be amended so that they would be as factual as possible.

11. Mr. ARANGIO-RUIZ (Special Rapporteur) recognized that the problem raised by Mr. Mikulka and Mr. Tomuschat (2420th meeting) during the consideration of part three, namely, that of compatibility and coordination between obligations in respect of the settlement of disputes covered by the draft articles and obligations of the same kind deriving from other instruments for the parties to a future convention on responsibility, was a real one and the Commission should study it carefully at its next session. In any event, it was inevitable that problems should arise, both in the field of dispute settlement and in any other field involving State responsibility, between the provisions of the future convention on the topic and any other rule of international law.

12. He nevertheless pointed out that, in the current case, the problem arose only in connection with part three of the draft articles and article 12 of part two as adopted by the Drafting Committee at the forty-fifth ses-

sion in 1993.[1] It would not have arisen in the context of the dispute settlement system that would have derived from the text that he himself[2] and his predecessor[3] had proposed for article 12, paragraph 1 (*a*), which did not set aside any dispute settlement obligations which might be binding on the parties to a convention on responsibility under other instruments prior or subsequent to the entry into force of such a convention. In other words, no problem of compatibility or coordination arose from that article 12, paragraph 1 (*a*), or from part three, as proposed in 1993, because of the clear tenure of draft article 1 of part three, which expressly stated that neither party could resort unilaterally to a settlement procedure in connection with any dispute which had arisen following the adoption of countermeasures unless the dispute had been settled by one of the means referred to in article 12, paragraph 1 (*a*), or submitted to a binding third party settlement procedure within a reasonable time-limit; full account had thus been taken of existing procedures. He had wanted to make that quite clear in the introduction to the commentaries of part three. He was not trying to defend his position, but simply wanted to make all members of the Sixth Committee understand the situation, namely, that the problem of compatibility and coordination derived from the fact that article 12 and part one had been conceived in a certain way. That did not mean that the articles already adopted had to be necessarily modified, but only that the problem had now arisen and it should be given all the attention it required. In any event, he would have no objection if all those considerations were reflected in the commentary in a different way, for example in footnotes.

13. Ms. DAUCHY (Secretary to the Commission), replying to a question by Mr. Pellet, said it was true that it was not the Commission's practice to have an introduction before commentaries to draft articles. There was definitely no introduction of that kind to the commentaries to the articles of part one of the draft articles on State responsibility. Only part two of the draft Code of Crimes against the Peace and Security of Mankind contained a general introduction which set out some substantive problems relating to the articles, but did not describe the historical background to the question.

14. Mr. PELLET, supported by Mr. TOMUSCHAT, said that, in those circumstances, the entire introduction to the commentaries to the articles of part three should be deleted, particularly as it reflected the personal opinions of the Special Rapporteur, whereas an introduction should, as Mr. Mahiou had pointed out, be purely factual and descriptive.

15. Mr. EIRIKSSON said that paragraphs (6), (7) and (8) of that introduction obviously gave rise to problems. He therefore proposed that, before those paragraphs were deleted, the members of the Commission concerned should try, in cooperation with the Special Rapporteur, to draft a more acceptable text, such as the one that he himself had suggested, and that, in the meantime, the Commission should go on to the following paragraphs.

16. Mr. LUKASHUK said that, because time was short, the Commission should stop discussing at length whether or not that text should be retained and, rather, deal with the substantive problems to which it gave rise and, in particular, the problem of the link between responsibility under the draft articles and responsibility deriving from other conventions, as referred to by Mr. Mikulka.

17. Mr. YANKOV said it was true that most of the paragraphs contained in the introduction belonged more in the Commission's report on the work of its forty-seventh session than in the commentary, the purpose of which was to explain the meaning of the articles of part three and interpret them on the basis of practice and case-law. It would therefore be better if the introduction to the commentary or at least paragraphs (1) to (8), were included in the Commission's report, since paragraphs (9) and (10) might be regarded as part of the commentary.

18. Mr. ROSENSTOCK proposed that paragraphs (9) and (10), which were acceptable, should be kept in part three as footnotes.

19. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in view of the objections to the introduction, he thought that Mr. Yankov's proposal was a good one. The entire content of the introduction could be included in the Commission's report so that it would be clear how the situation with regard to the question of the settlement of disputes had changed and so that the Sixth Committee would be able to understand the problem.

20. Mr. ROSENSTOCK said that he had no objection if the Special Rapporteur's views were reflected in the report, provided that those of other members were also reflected. He also did not think that the problem raised by Mr. Mikulka related only to part three of the draft articles. The problem was inherent to the draft as a whole.

21. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in his view, the problem raised by Mr. Mikulka related precisely to the coexistence and coordination of the dispute settlement procedures provided for in part three of the draft and the settlement procedures provided for in other instruments. It was thus in connection with part three that the problem should be referred to in the report.

22. Mr. YANKOV said he agreed with Mr. Rosenstock that the problem of the relationship between State responsibility under the draft articles and that deriving from other conventions could not be limited to part three dealing with dispute settlement. That would be too restrictive an approach. It should therefore be indicated, perhaps in a footnote, either at the beginning or at the end of the commentary, as Mr. Rosenstock had proposed, that the problem had arisen during the consideration of the question of dispute settlement, but that it could also arise in other areas dealt with in the draft articles, such as that of compensation.

23. Mr. MAHIOU recalled that, when Mr. Mikulka had raised that problem, he himself had pointed out that

[1] See 2396th meeting, footnote 7.

[2] See 2391st meeting, footnote 12.

[3] For the text, see *Yearbook... 1985*, vol. II (Part One), p. 11, document A/CN.4/389, article 10.

it also arose in connection with parts one and two of the draft articles. The Commission could nevertheless proceed on the basis of Mr. Rosenstock's proposal, on the understanding that, at the appropriate time, it would also have to consider the question of the relationship between the rules embodied in parts one and two of the draft and those contained in other conventions in force.

24. Mr. MIKULKA pointed out that the problem had arisen only during the discussion of part three of the draft quite simply because it was only then that the possibility of a convention on State responsibility had really been considered. The Commission had never decided definitely what form the draft articles would take. Mr. Rosenstock's proposal might therefore be the appropriate solution because, if the Commission adopted the idea of a convention, it would naturally have to bear that problem in mind when it considered parts one and two of the draft on second reading.

25. Mr. ARANGIO-RUIZ (Special Rapporteur) said he was surprised that doubts were suddenly being expressed about the nature of the instrument on State responsibility. In his view, it had always been clear that there would be a convention, not just a declaration of principles.

26. Mr. MIKULKA said he had, of course, never thought that there would be only a declaration. He simply wished to recall that the Commission had not yet decided what form the draft articles would ultimately take. It was clear, however, that, if it opted for a convention, the problem of the links between that convention and other existing conventions would necessarily arise.

27. The CHAIRMAN, summing up the discussion, said he thought that the Commission wanted the paragraphs constituting the introduction to the commentaries to part three of the draft articles to be transferred to the Commission's report to the General Assembly, on the understanding that, as Mr. Rosenstock had requested, all the points of view other than those of the Special Rapporteur which had been expressed during the discussion would also be reflected. For the time being, no footnote reproducing paragraphs (9) and (10) of the introduction would be included.

It was so decided.

28. The CHAIRMAN invited the members of the Commission to consider one by one the draft articles, with commentaries, proposed for part three and the annex thereto.

Commentary to article 1

Paragraph (1)

29. MR. TOMUSCHAT said that paragraph (1) did not explain what "a dispute regarding the interpretation or application of the present draft articles" was. That question was referred to in paragraph (5) of the commentary to article 5, which stated that such a dispute could include issues relating not only to secondary rules, but also to primary rules. In his view, that point should be made clear in the commentary to article 1, which was a key provision.

30. Mr. ARANGIO-RUIZ (Special Rapporteur) said there was no doubt that the dispute would relate not only to secondary rules, but also, inevitably, to primary rules, since the former could not be applied without the latter.

31. Mr. YANKOV proposed that, for the sake of clarity, the words "including the provisions relating to primary or secondary rules" should be added at the end of the second sentence of paragraph (1).

32. Mr. AL-BAHARNA said he agreed with the Special Rapporteur that it was obvious that disputes would relate both to secondary and to primary rules and that it was therefore not necessary to say so. Moreover, the wording used in article 1 was also used in all conventions on the settlement of disputes.

33. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the clarification Mr. Yankov had provided might suggest that what was meant were only the provisions of the convention which were primary rules. However, article 1 covered any dispute which related not only to the provisions of the convention on State responsibility, particularly those which were secondary rules, but also to the primary rules contained in other conventions and in the rules of general international law. It would therefore be better to keep the wording of paragraph (1) as it stood.

34. Mr. LUKASHUK said that the Special Rapporteur's explanations fully met his concerns. He interpreted article 1 as meaning that, if a dispute regarding the interpretation or application of the draft articles arose between States parties to the draft articles, those States parties would try to settle it in accordance with the procedure provided for in the draft articles, if they had not agreed on another settlement system. In other words, the possibility was not ruled out that they might use another settlement system, if they so agreed.

35. Mr. PELLET said that the Special Rapporteur's explanation of the use of the words "the interpretation or application of the present draft articles" showed to what extent he had departed from past practice in that regard. Another aspect of paragraph (1) that bothered him was the apparent opposition between the word "negotiation" and the word "consultations" in the last sentence. If the Special Rapporteur considered that the word "negotiation" also included "consultations", he should say so. If not, the last sentence should be deleted.

36. Mr. YANKOV (Chairman of the Drafting Committee) said that the Drafting Committee had discussed that point and that, on the basis of past practice, had found that, in other conventions, consultations had been regarded as one means of negotiation among many.

37. Mr. ARANGIO-RUIZ (Special Rapporteur), referring to the first point made by Mr. Pellet, said that the words "the interpretation or application of the present articles" were regularly used in arbitration clauses, in which it was clear that they referred not only to the provisions of the treaty itself, but also to any other provision which might be relevant for the purposes of the application or interpretation of that treaty, that is to say other treaties and the rules of general international law.

38. With regard to the terms "negotiation" and "consultations" he agreed with the interpretation of the latter term given by Mr. Yankov.

39. Mr. MIKULKA said that, in order to avoid spending more time on a point which did not really give rise to any problem of substance, it would be enough to explain in the commentary that the word "negotiation" was to be taken in the broad sense.

Paragraph (1) was adopted, subject to that drafting change.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

40. Mr. PELLET suggested that, in the French text, the words "*en français*" in brackets in the second line should be deleted.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

The commentary to article 1, as amended, was adopted.

Commentary to article 2

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to article 2 was adopted.

Commentary to article 3

Paragraph (1)

41. Mr. PELLET said that the word "possible" in the first sentence was not a good choice because it could create confusion. In the last sentence, moreover, the reference to the Vienna Convention on the Law of Treaties was not quite accurate. Article 66 of that Convention referred to article 65, which in turn referred to Article 33 of the Charter of the United Nations. In fact, conciliation was one of the means provided for in Article 33.

42. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he was surprised by Mr. Pellet's first comment. The word "possible" in the first sentence was the logical counterpart of the word "If" with which the article began. The reference to the Vienna Convention on the Law of Treaties was also entirely comprehensible.

43. Mr. ROSENSTOCK said that the problem could be solved if the words "the means" in the last sentence were replaced by the words "other means".

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (7)

Paragraphs (2) to (7) were adopted.

The commentary to article 3, as amended, was adopted.

Commentary to article 4

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to article 4 was adopted.

Commentary to article 5

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

44. Mr. ROSENSTOCK suggested that the words "the fourth step" in the second line should be replaced by the words "a potential step" and that the word "primarily" should be added after the word "intended" in the third line.

Paragraph (2), as amended, was adopted.

Paragraph (3)

45. Mr. PELLET suggested that, in the fourth sentence, the words "constitution of the arbitral tribunal" should be replaced by the words "constitution of an arbitral tribunal" so it would be quite clear that reference was not being made to the tribunal referred to in the annex. He also regretted that the possibility for the parties to agree to submit their dispute to another arbitral tribunal or to ICJ, which was implied, in paragraph (3) of the commentary, was not explicitly mentioned in article 5, paragraph 2.

46. Mr. ARANGIO-RUIZ (Special Rapporteur) said he was afraid that the inclusion of such a reference would remove the slight element of coercion contained in article 5, paragraph 2.

47. Mr. YANKOV (Chairman of the Drafting Committee) said that the report of the Drafting Committee stressed that the parties continued to be free to choose their course of action. However, it was clear that, if they chose the solution offered by article 5, they must also comply with the provisions of the annex. The present wording of paragraph 2 was thus more rigorous. In order to take account of Mr. Pellet's comments, the following sentence might nevertheless be added at the end of paragraph (3): "Nothing would prevent the parties to a dispute from having recourse to any other tribunal by mutual agreement, including in the case provided for in article 5, paragraph 2."

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

The commentary to article 5, as amended, was adopted.

Commentary to article 6

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to article 6 was adopted.

Commentary to article 7

Paragraph (1)

48. Mr. ROSENSTOCK suggested that, in the second sentence, the words "set forth in the present articles" should be added after the words "settlement system" and that, in the fifth sentence, the word "effective" should be deleted.

49. Mr. TOMUSCHAT suggested that, in the first sentence, the words "when one of the parties to the dispute challenges" should be replaced by the words "if one of the parties to the dispute should challenge".

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

50. Mr. ROSENSTOCK proposed that, in the third sentence, the words "as such" should be added after the words "arbitral tribunal".

51. Mr. PELLET said that the last sentence was unnecessary and could be deleted.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

The commentary to article 7, as amended, was adopted.

Annex

Commentary to article 1

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to article 1 was adopted.

Commentary to article 2

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

Paragraph (8)

52. Mr. YANKOV (Chairman of the Drafting Committee) suggested that the words "Model Rules on Arbitral Procedure" at the end of the paragraph should be followed by a reference to a footnote indicating that the Model Rules had been adopted by the Commission, but had not been endorsed by the General Assembly.

Paragraph (8), as amended, was adopted.

53. Mr. PELLET recalled that, when article 2 had been considered in the Drafting Committee and in plenary, it had been agreed that it would be explained that there was no symmetry between articles 1 and 2 because the rules of competence relating to arbitral tribunals could be regarded as having the status of customary rules and thus did not have to be repeated in the text. That explanation had not been included in the commentary. He therefore suggested that a new paragraph might be added reading:

> "(9) It was not considered necessary, in connection with the Arbitral Tribunal, to reproduce some of the procedural provisions relating to the Conciliation Commission because the corresponding rules were considered to be sufficiently well established."

New paragraph (9) was adopted.

The commentary to article 2, as amended, was adopted.

Draft commentary to article 11 of part two

54. The CHAIRMAN recalled that the Commission had before it a draft commentary to article 11 which it would be unable to consider for lack of time. That fact should be reflected in its report to the General Assembly.

55. Mr. EIRIKSSON said that he would like to know the status of article 11, which had been provisionally adopted by the Commission at its forty-sixth session,[4] with a reservation concerning its link to article 12. He was of the opinion that, in the report of the Commission on the work of its forty-seventh session, article 11 should, as it were, have the same status, with the Commission indicating in a footnote that, because of the lack of time, it had been unable to adopt the commentary to article 11 following the adoption of the commentaries to articles 13 and 14.

56. Mr. PELLET said that he wanted article 11 to be clearly distinguished from articles 13 and 14. The commentaries to articles 13 and 14 had been adopted at the current session. The Commission had adopted article 11 at its forty-sixth session with its own status and an expla-

[4] For the text of article 11 of part two, see *Yearbook ... 1994*, vol. II (Part Two), p. 151, footnote 454.

nation and, in that connection, the situation was still the same.

57. Mr. ROSENSTOCK said he did not agree that the Commission had adopted article 11 with a different status from that of articles 13 and 14. The Commission had been unable to adopt the commentary to article 11 at its forty-seventh session only because of the lack of time. Article 11 was only one of the many articles which the Commission would have to reconsider in the light of the direction its work would take in future.

58. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, like Mr. Pellet, he considered that article 11 was pending, as article 12 was, and that it would have to be considered at the next session.

59. Mr. EIRIKSSON stressed that, since the Commission was not officially submitting article 11 to the General Assembly, the status of that article was undeniably different from that of articles 13 and 14. It also differed from that of article 12, which the Commission had not adopted. In the footnote relating to article 11, the Commission should therefore recall that that article had been adopted at the preceding session and then include the last sentence of paragraph 352 of its report on the work of its forty-sixth session.[5]

60. The CHAIRMAN proposed that the Commission should use paragraph 350 of that report.[6]

61. Mr. ROSENSTOCK pointed out that articles 11 and 12 did not have the same status because a phenomenon comparable to what was called a "veto" in certain circles had so far operated for article 12, whereas article 11 had been adopted by the Commission. The most neutral way of presenting the situation would therefore be to say that the Commission had not had time to consider the commentary to article 11 and that, consequently, it would not officially transmit article 11 at the end of its forty-seventh session. The Commission had to stick to the facts and not try to rewrite history.

62. Mr. MIKULKA said that he also wished to emphasize the need not to confuse the status of article 11 and that of article 12.

63. Mr. PELLET said that, since the Commission had not dealt with article 12, it did not have to be referred to in the report. With regard to article 11, it should be indicated that, because of the lack of time, the Commission had not considered the commentary to article 11 which it had adopted at its forty-sixth session in 1994 and a footnote should reproduce what had been stated in the preceding report about the reservations to which the adoption of article 11 had given rise.

64. Mr. MAHIOU said that he supported that proposal, which safeguarded everyone's position.

65. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission adopted the proposal by Mr. Pellet.

It was so decided.

[5] See *Yearbook . . . 1994*, vol. II (Part Two), p. 151.

[6] Ibid.

CHAPTER IV. *International liability for injurious consequences arising out of acts not prohibited by international law* (concluded)*

C. Draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.519)

1. TEXT OF THE DRAFT ARTICLES PROVISIONALLY ADOPTED SO FAR BY THE COMMISSION ON FIRST READING

Section C.1 was adopted.

2. TEXT OF DRAFT ARTICLES A [6], B [8 AND 9], C [9 AND 10] AND D [7], WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-SEVENTH SESSION

Commentary to article A [6]

Paragraph (1)

66. Mr. LUKASHUK said that the reference to the Charter of the United Nations at the end of the paragraph was incorrect. Either it should be deleted or reference should be made directly to the Declaration of the United Nations Conference on the Human Environment.

67. Mr. BARBOZA (Special Rapporteur) said that he saw no reason to delete the reference to the Charter, which appeared both in Principle 21 of the Declaration of the United Nations Conference on the Human Environment and in Principle 2 of the Rio Declaration on Environment and Development.

Paragraph (1) was adopted.

Paragraphs (2) to (10)

Paragraphs (2) to (10) were adopted.

Paragraph (11)

68. Mr. TOMUSCHAT proposed that, in the second and third sentences, the words "must be" should be replaced by the word "is".

Paragraph (11), as amended, was adopted.

Paragraphs (12) and (13)

Paragraphs (12) and (13) were adopted.

The commentary to article A [6], as amended, was adopted.

Commentary to article B [8 and 9]

Paragraphs (1) and (2)

69. Mr. YANKOV (Chairman of the Drafting Committee) said that, at the end of the first sentence of the two paragraphs, the words "last year" should either be

* Resumed from the 2423rd meeting.

replaced by a precise indication of the year or should simply be deleted.

Paragraphs (1) and (2), as amended, were adopted.

Paragraphs (3) to (9)

Paragraphs (3) to (9) were adopted.

Paragraph (10)

70. Mr. PELLET said that the scope of the last sentence was quite broad since it established hard law obligations for the State that he found excessive. He would like that sentence to be deleted.

71. Mr. BARBOZA (Special Rapporteur) said that he did not agree with that point of view. The concept of "due diligence" was, rather, very flexible and the sentence in question was a kind of illustration of the general idea contained in the penultimate sentence. He therefore did not see why it should be deleted.

72. Mr. ROSENSTOCK said that the obligation of due diligence, which was flexible when considered generally, stopped being flexible when it involved an obligation to do something. He was of the opinion that, if the Commission decided to end the last sentence with the words "scientific developments", the preceding sentence could be expanded somewhat and the obligation of due diligence could be given more substance without making it too strict.

73. Mr. BARBOZA (Special Rapporteur) said that he could accept that suggestion, although he considered that it was not reasonable to claim that that sentence would have the effect of turning an obligation of conduct into an obligation of result.

74. Mr. ARANGIO-RUIZ said he objected to the idea that that sentence imposed a strict obligation on the State. However, to make the idea of flexibility more explicit, the words "aimed at ensuring safety" should be inserted between the words "due diligence" and "requires" in the last sentence.

Paragraph (10), as amended by Mr. Arangio-Ruiz, was adopted.

Paragraph (11)

Paragraph (11) was adopted.

Paragraph (12)

75. Mr. PELLET proposed that the penultimate sentence should be amended to read:

> "It is the view of the Commission that the level of economic development of States is one of the factors to be taken into account in determining whether a State has properly fulfilled its obligation of due diligence."

In the last sentence he proposed that the words "economic level" should be replaced by the words "level of economic development".

Paragraph (12), as amended, was adopted.

Paragraph (13)

76. Mr. ROSENSTOCK proposed that, in order to establish a parallel between the first and last sentences, the words "to mean reducing" should be replaced by the words "to mean that the aim is to reduce".

Paragraph (13), as amended, was adopted.

The commentary to article B [8 and 9], as amended, was adopted.

Commentary to article C [9 and 10]

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

77. Mr. ROSENSTOCK proposed that, in the penultimate line, the words "treaty-based and" should be added after the word "are".

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

78. Mr. LUKASHUK said that the word "party" was ambiguous because it could refer to States, as well as to legal persons.

79. Mr. YANKOV said that there was a language problem. The word "party" was correct because it could mean the operator, the State, and so on, but it would have to be seen whether the same was true in Russian and in French.

80. The CHAIRMAN, supported by Mr. MAHIOU, suggested that the word "party" should be replaced by the word "entity" in all languages.

81. Mr. BARBOZA (Special Rapporteur) said he still thought that, in English, the word "party" was correct because it could mean an entity, a legal person or a natural person. He would, however, not object to the proposed amendment.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (11)

Paragraphs (6) to (11) were adopted.

Paragraph (12)

82. Mr. ROSENSTOCK said that, in the last sentence of the citation, starting with the words "if the two Governments" emphasis should be added because it described a key element of the system of compensation decided on by the Tribunal.

Paragraph (12), as amended, was adopted.

Mr. Yankov took the Chair.

Paragraph (13)

83. Mr. PELLET said that the conclusion stated in paragraph (13) was entirely wrong because it did not reflect the complexity of the system of compensation decided on by the Tribunal and overlooked the fact that a failure had been the basis for compensation.

84. Mr. BARBOZA (Special Rapporteur) said that he had a radically different interpretation of the award, which was, in his opinion, a typical example of liability for risk.

85. Mr. ROSENSTOCK said that it was not for the Commission to take a stand on the interpretation of the award in the *Trail Smelter* case,[7] which had given rise to controversies ever since it had been handed down. A factual explanation should nevertheless be added, namely, that there had been a prior agreement between the parties on the payment of an indemnity.

86. Mr. MAHIOU said that, in order to reflect accurately the two possibilities taken into account by the Tribunal, the word "only" should be added between the word "not" and the word "on".

87. Mr. AL-BAHARNA said that he supported Mr. Rosenstock's proposal.

88. Mr. PELLET said that, in his view, paragraph (13) should simply be deleted.

89. Mr. TOMUSCHAT said that the amendment proposed by Mr. Rosenstock did not add anything and did not make it possible to draw any conclusion about liability. He also proposed that paragraph (13) should be deleted.

90. Mr. BARBOZA (Special Rapporteur) pointed out that it was a shame not to draw any conclusions from the precedent-setting case referred to, but, because of the lack of time, he was resigned to the deletion of paragraph (13).

Paragraph (13) was deleted.

Paragraphs (14) to (31)

Paragraphs (14) to (31) were adopted.

[7] See 2415th meeting, footnote 11.

Paragraph (32)

91. Mr. PELLET said that the last sentence was awkward and should be deleted.

Paragraph (32), as amended, was adopted.

The commentary to article C [9 and 10], as amended, was adopted.

Commentary to article D [7]

Paragraph (1)

92. Mr. LUKASHUK said that greater emphasis should be placed on the principle of cooperation, which was even more important than the principle of good faith.

93. Mr. IDRIS, noting that the words "cooperation" and "cooperate" were used in paragraphs (1) and (2), proposed that, in the first line of paragraph (1), the words "the principle of" should be inserted before the word "cooperation".

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

94. Mr. TOMUSCHAT said that the reference to the second "*Rainbow Warrior*" case[8] as an example of cooperation for the protection of the environment was rather inappropriate. He therefore proposed that the second sentence should be deleted.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (10)

Paragraphs (4) to (10) were adopted.

Paragraph (11)

95. Mr. TOMUSCHAT requested the Special Rapporteur to explain what he meant by the word "eventually" in the second sentence.

96. Mr. BARBOZA (Special Rapporteur) said that "eventually" meant "in the end" or "ultimately".

97. The CHAIRMAN said that the word "*éventuellement*" would therefore have to be deleted in the French text.

Paragraph (11), as amended in the French text, was adopted.

[8] Decision of 30 April 1990 by the France-New Zealand Arbitration Tribunal (*International Law Reports* (Cambridge), vol. 82 (1990), pp. 500 *et seq.*).

The commentary to article D [7], as amended, was adopted.

The commentaries to draft articles A, B, C and D, as a whole, as amended, were adopted.

Section C.2 was adopted.

Chapter IV, as a whole, as amended, was adopted.

The draft report of the Commission on the work of its forty-seventh session, as a whole, as amended, was adopted.

Closure of the session

98. Mr. TOMUSCHAT requested that, in view of the invaluable services she had provided to the Commission for so many years, Ms. Dauchy should be maintained in her post as Secretary to the Commission in 1996.

99. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission endorsed Mr. Tomuschat's request and would transmit it to the competent Secretariat authorities.

It was so decided.

100. After the usual exchange of courtesies, the CHAIRMAN declared the forty-seventh session of the International Law Commission closed.

The meeting rose at 6 p.m.