

Document:-
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Summary record of the 2788th meeting

Topic:
Adoption of the report

Extract from the Yearbook of the International Law Commission:-
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2788th MEETING

Wednesday, 6 August 2003, at 10.05 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

Draft report of the Commission on the work of its fifty-fifth session (*continued*)

CHAPTER VI. *International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities)* (concluded) (A/CN.4/L.638)

B. Consideration of the topic at the present session (*concluded*)

Paragraph 40

1. Mr. Sreenivasa RAO (Special Rapporteur) suggested that the words “made comments” in the first sentence of the English text should be replaced by the word “commented”. He also suggested that the word “general” in the second sentence should be replaced by “wide” and that the phrase “detailed comprehensive regimes that would cover” in the last sentence should be replaced by “detailed comprehensive regimes with wide scope covering”.

2. Mr. PELLET suggested that the words “The Commission” should be replaced by “The members of the Commission”.

Paragraph 40, as amended, was adopted.

Paragraph 41

Paragraph 41 was adopted.

Paragraph 42

3. Mr. Sreenivasa RAO (Special Rapporteur) suggested that the phrase “offered their comments with hesitancy” in the first sentence should be replaced by “made tentative comments”, and that the words “arising from” in the English text of the penultimate sentence should be replaced by “indicating”.

4. Mr. MANSFIELD, Mr. GAJA and Ms. ESCARAMEIA wondered what exactly was meant by the second sentence, which appeared to be saying that the Commission had to await the reaction of the Commission.

5. Mr. GAJA suggested that the end of that sentence, starting with the words “before first receiving”, should be deleted.

Paragraph 42, as amended, was adopted.

Paragraphs 43 and 44

Paragraphs 43 and 44 were adopted.

Paragraph 45

6. Mr. PELLET pointed out that the correct name of the court mentioned in the footnote was “Court of Justice of the European Communities”.

Paragraph 45, as amended, was adopted.

Paragraph 46

7. Ms. ESCARAMEIA said that the last sentence of the paragraph was confusing, as it gave the impression that some considerations were not legitimate.

8. Mr. MANSFIELD (Rapporteur) suggested rewording the sentence to read: “Accordingly, even if the question of strict or fault liability was to be set aside, the basis of State liability would arise, as would the question whether or not compensation would in such cases be full or limited.”

9. Mr. PELLET pointed out that the second sentence introduced a false opposition between absolute liability and strict liability, when in fact the former was the ultimate stage of the latter.

10. Mr. ECONOMIDES suggested that the words “and not strict” should be deleted from the sentence.

Paragraph 46, as amended, was adopted.

Paragraph 47

11. Mr. MANSFIELD (Rapporteur) said that the last sentence in the paragraph was unclear.

12. Mr. BROWNIE said that declarations of acceptance of the compulsory jurisdiction of ICJ often mentioned other methods of settlement. The last sentence of paragraph 47 was intended to make it clear that the system which the Commission wished to develop would be just one of those other methods. He therefore suggested clarifying that point by putting the phrase “another available means of settlement” in quotation marks.

13. Mr. GAJA suggested deleting the words “or regimes regarding reservations”.

14. Mr. PAMBOU-TCHIVOUNDA noted that the second sentence did not specify the purpose for which the general principle “would probably not be sufficient”.

15. Mr. PELLET wondered what the precise nature of that general principle was.

16. Mr. MANSFIELD (Rapporteur) suggested that the phrase “the general principle alone would probably not be sufficient in practice” should be replaced by “a statement

to that effect would not be sufficient for that purpose”, the purpose in question being the one expressed in the previous sentence, namely, not to prejudice the work on State responsibility.

Paragraph 47, as amended, was adopted.

Paragraph 48

17. Mr. MOMTAZ, supported by Mr. Sreenivasa RAO (Special Rapporteur), said that, in order to faithfully reflect the discussion and for the sake of logic, the order of the second and third sentences in paragraph 48 should be reversed.

18. The CHAIR said he took it that the Commission agreed to that proposal.

It was so decided.

Paragraph 48, as amended, was adopted.

Paragraph 49

19. Mr. PELLET said that the phrase “within the same territory” in the first sentence made little sense.

20. Mr. GAJA said that the sentence in question was intended to reflect a comment he had made during the discussion, namely, that the harm caused within the territory of the State of origin itself should not be ignored. He therefore suggested replacing the words “within the same territory” by “within the territory of the State of origin”.

21. The CHAIR said he took it that the Commission agreed to Mr. Gaja’s proposal.

It was so decided.

Paragraph 49, as amended, was adopted.

Paragraph 50

22. Ms. ESCARAMEIA recalled that during the discussion she had said that for the purposes of compensation she would prefer to retain a lower threshold, such as that of “appreciable harm”, as was in fact mentioned in paragraph 36. It therefore seemed contradictory to say in paragraph 50 that the Commission had agreed with the principle of retaining the same threshold. She would like to have the beginning of the first sentence changed.

23. Mr. Sreenivasa RAO (Special Rapporteur) said that the first sentence of paragraph 50 could not be deleted, as it reported a view expressed about a specific provision, whereas paragraph 36 dealt with general comments. He therefore suggested, in order to take account of Ms. Escarameia’s comment, that paragraph 36 should be reproduced at the beginning of paragraph 50, but with the words “general support” replaced by “wide support”. The remainder of the paragraph would then read: “The suggestion was made that, in the context of liability, the term ‘significant harm’ could be changed to ‘significant damage’. The importance of reaching agreement on a meaning of ‘significant harm’ that would be understood in all legal systems was emphasized.”

24. The CHAIR said he took it that the Commission agreed to the Special Rapporteur’s proposal.

It was so decided.

Paragraph 50, as amended, was adopted.

Paragraph 51

25. Mr. PELLET drew attention to a mistake in the French translation of the third sentence of the paragraph and suggested that the words *l’appui de la Sixième Commission* should be replaced by *un certain appui de la Sixième Commission*.

26. Ms. ESCARAMEIA said that it was an opinion that she had expressed that was reported in the sentence in question; she suggested, for the sake of completeness, that the words “and was covered in several instruments, including the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment” should be added.

27. The CHAIR said he took it that the Commission agreed to the proposals made by Mr. Pellet and Ms. Escarameia.

It was so decided.

Paragraph 51, as amended, was adopted.

Paragraph 52

28. Mr. GALICKI suggested that the terminology used in the paragraph and in the footnote should be made consistent, since one spoke of “a European Union Directive” while the other referred to “a Directive of the European Parliament and of the Council”.

29. The CHAIR said that the Secretariat would attend to the matter.

30. Mr. MANSFIELD (Rapporteur) suggested that the word “Conversely” at the beginning of the fourth sentence in paragraph 52 should be deleted, as there was no logical contrast between the sentence it introduced and the one that preceded it.

It was so decided.

Paragraph 52, as amended, was adopted.

Paragraph 53

31. Mr. GAJA said that the paragraph reported a view that had been expressed by him, and he suggested that, in the interest of accuracy, it should be reworded to read:

“Further, it was observed that this proposition should be reviewed from the perspective of the need to secure assets in the event of loss. It was essentially for that reason that ship-owners rather than charterers were held liable in the relevant conventions for harm caused by ships. Those who owned assets such as ships could insure such assets against risks and could easily pass on the costs to others if necessary.”

32. The CHAIR said he took it that the Commission agreed to Mr. Gaja's proposal.

It was so decided.

Paragraph 53, as amended, was adopted.

Paragraph 54

33. Mr. MANSFIELD (Rapporteur) said that the third sentence of the paragraph was not clear.

34. Mr. PELLET said that it referred to an opinion he had expressed during the discussion in response to a passage in the report of the Special Rapporteur in which the latter had contrasted the causal link with reasonableness. He proposed that the sentence should be amended to read: "According to this view, 'causality' was a criterion for establishing 'reasonableness'."

35. The CHAIR said he took it that the Commission agreed to Mr. Pellet's proposal.

It was so decided.

Paragraph 54, as amended, was adopted.

Paragraph 55

Paragraph 55 was adopted.

Paragraph 56

36. Mr. BROWNLIE said that "would" should be changed to "could" at the end of the second sentence.

37. The CHAIR said he took it that the Commission agreed to Mr. Brownlie's proposal.

It was so decided.

Paragraph 56, as amended, was adopted.

Paragraph 57

Paragraph 57 was adopted.

Paragraph 58

38. Ms. ESCARAMEIA said that the paragraph was intended to reflect an opinion that she had expressed and that, in order to report accurately what she had said, the word "would" in the second sentence of the English text should be replaced by "should".

Paragraph 58, as amended, was adopted.

Paragraphs 59 to 65

Paragraphs 59 to 65 were adopted.

Paragraphs 66 and 67

39. Mr. MANSFIELD (Rapporteur) said that the paragraphs appeared to introduce some confusion in the concepts involved, namely, on the one hand, the idea that damage to the environment could be caused within the

jurisdiction of the State or in an area beyond national jurisdiction and, on the other hand, the issue of whether it was possible to compensate for damage to the environment which it was not possible to quantify in monetary terms. He therefore proposed that paragraphs 66 and 67 should be combined into a single paragraph which would read:

"The submission that damage to the environment *per se* should not be considered compensable for the purposes of the topic received some support. In that regard, it was noted that there was a distinction between damage to the environment which could be quantified and damage to the environment which it was not possible to quantify in monetary terms. It was pointed out that in some liability regimes, such as the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment and the proposal for a Directive of the European Parliament and of the Council on environmental liability, damage to the environment or natural resources would be directly compensable. The work of the United Nations Compensation Commission was also considered helpful in this area. A separate issue was whether, in view of global interconnectedness, the inclusion of damage to the environment beyond national jurisdiction should be considered."

40. The CHAIR said he took it that the Commission agreed to the Special Rapporteur's proposal for paragraphs 66 and 67 and to the subsequent renumbering of the following paragraphs.

It was so decided.

The new paragraph 66, which was based on a combination of paragraphs 66 and 67, was adopted.

Paragraphs 68 to 77

Paragraphs 68 to 77 were adopted.

Paragraph 78

41. Mr. Sreenivasa RAO (Special Rapporteur) said that the words "cannot be traced" in the English version should be replaced by "could not be traced" and that the words "with the jurisdiction" should be replaced by "within the jurisdiction".

42. Mr. MOMTAZ wondered what was meant by the phrase *la dimension équitable du degré subsidiaire faisant intervenir l'État* in the French text.

43. Mr. ECONOMIDES proposed that the phrase should be simplified to read: *la dimension équitable de la charge subsidiaire qui devrait être assumée par l'État*.

44. Mr. Sreenivasa RAO (Special Rapporteur) supported Mr. Economides' proposal and said that the English version should also be improved.

45. Mr. MANSFIELD (Rapporteur) suggested the following wording for the English version: "equity for involving the State as a subsidiary tier".

Paragraph 78, as amended, was adopted.

Paragraph 79

46. Mr. Sreenivasa RAO (Special Rapporteur) suggested that the paragraph should be simplified to read: “He noted that there was a need for further work and reflection on the various issues raised and, if possible, to produce concrete formulations in the next report.”

Paragraph 79, as amended, was adopted.

Section B, as amended, was adopted.

Chapter VI of the report, as amended, was adopted.

CHAPTER VII. Unilateral acts of States (A/CN.4/L.639 and Add.1)

47. The CHAIR invited members of the Commission to consider section A and the first part of section B of chapter VII of the draft report, on unilateral acts of States, as contained in document A/CN.4/L.639.

A. Introduction (A/CN.4/L.639)

Paragraphs 1 to 12

Paragraphs 1 to 12 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.639 and Add.1)

Paragraph 13 (A/CN.4/L.639)

Paragraph 13 was adopted.

Paragraph 14

48. The CHAIR said that the following text should be added at the end of the sentence: “chaired by Mr. Alain Pellet. At its 2783rd meeting, on 31 July 2003, the Commission considered and adopted the recommendations contained in parts 1 and 2 of the report of the Working Group (A/CN.4/L.646) [see sect. C below].” A section C containing parts 1 and 2 of document A/CN.4/L.646 would therefore be added to the chapter.

Paragraph 14, as amended, was adopted.

Paragraphs 15 to 40

Paragraphs 15 to 40 were adopted.

49. The CHAIR invited members of the Commission to consider the continuation of section B of chapter VII of the draft report, contained in document A/CN.4/L.639/Add.1.

Paragraphs 1 and 2 (A/CN.4/L.639/Add.1)

Paragraphs 1 and 2 were adopted.

Paragraph 3

50. Mr. MOMTAZ suggested replacing the words “on grounds of absence of coherence and lack of legal quality” with “on grounds of absence of coherence and lack of legal character”.

Paragraph 3, as amended, was adopted.

Paragraph 4

Paragraph 4 was adopted.

Paragraph 5

51. Mr. GAJA suggested that the words “and acts” in the second sentence should be deleted.

Paragraph 5, as amended, was adopted.

Paragraph 6

52. Mr. GAJA suggested that the word “very” in the third sentence should be deleted and that the fifth sentence should be amended to read: “The analysis should focus on relevant State practice for each unilateral act, with regard to its legal effects...”. He suggested replacing the verb “constitute” with the phrase “provide the basis for”. Finally, he thought that it would be better to delete the sentence that read: “Furthermore, the examination of the basis for the obligatory nature of recognition could not be dealt with under the heading of the legal effects of recognition.”

Paragraph 6, as amended, was adopted.

Paragraphs 7 to 14

Paragraphs 7 to 14 were adopted.

Paragraph 15

53. Mr. MOMTAZ suggested that the word “perilously” in the first sentence should be deleted.

Paragraph 15, as amended, was adopted.

Paragraphs 16 and 17

Paragraphs 16 and 17 were adopted.

Paragraph 18

54. Mr. PELLET suggested that the words “given in paragraphs 42 to 45 of the report” should be replaced by “given in the report”.

Paragraph 18, as amended, was adopted.

Paragraph 19

55. Mr. ECONOMIDES said that the word *constitutive* in the French version should read *déclarative*.

56. Mr. BROWNLIE said that, in the second sentence of the English version, it would be preferable to insert the words “to be” between “recognition” and “declaratory”.

Paragraph 19, as amended, was adopted.

Paragraphs 20 to 28

Paragraphs 20 to 28 were adopted.

Paragraph 29

57. Mr. PELLET suggested that, as the last sentence of the paragraph made little sense, it should be replaced with the following sentence: “The main purpose of the sixth report was to show that the definition of recognition corresponded to the draft definition of unilateral act, *stricto sensu*, analysed by the Commission in previous years.”

58. Mr. RODRÍGUEZ CEDEÑO supported that proposal but said that it should refer to “the definition of the act of recognition”.

Paragraph 29, as amended, was adopted.

Paragraphs 30 and 31

Paragraphs 30 and 31 were adopted.

Section B, as amended, was adopted.

Chapter VII of the report, as amended, was adopted.

CHAPTER X. *The fragmentation of international law: difficulties arising from the diversification and expansion of international law (A/CN.4/L.642)*

A. Introduction

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraph 6

59. Mr. PELLET said that, for the sake of coherence, the words “following his election to ICJ” should be added at the end of the paragraph.

Paragraph 6, as amended, was adopted.

Paragraphs 7 and 8

Paragraphs 7 and 8 were adopted.

Section B, as amended, was adopted.

C. Report of the Study Group

Paragraphs 9 to 11

Paragraphs 9 to 11 were adopted.

Paragraph 12

Paragraph 12 was adopted with minor drafting changes.

Paragraphs 13 to 22

Paragraphs 13 to 22 were adopted.

Paragraph 23

60. Mr. PELLET asked if there were any plans to publish the outline prepared by Mr. Koskenniemi, Chair of the Study Group on the Fragmentation of International Law, which was an extremely interesting, enlightening and fundamental work that would benefit from exposure to a wider readership in volume II (Part One) of the *Yearbook of the International Law Commission, 2003*.

61. Ms. ESCARAMEIA said that the Study Group had made such a proposal; however, if that was not feasible, the outline should at least be posted on the Commission’s web site. According to the secretariat, the outline could not be published, as it was not an official document.

62. Mr. MIKULKA (Secretary to the Commission) said that documents for limited distribution were not made public, as that was the Commission’s policy. Of course, the Commission was free to decide otherwise, but it should be borne in mind that the Chair of the Study Group had indicated that he considered his outline to be still at a preliminary stage, and it was thus understood that it should not be published in the *Yearbook of the International Law Commission*.

63. Mr. PELLET said that outlines by chairs of study groups were similar to the reports of special rapporteurs. Of course, if the author concerned did not wish the document to be included in the *Yearbook of the International Law Commission*, he could not be forced to agree to it. However, as a rule, the suggestion should be put to him, and the Commission should perhaps issue a guideline on the matter.

64. The CHAIR said that the author’s opinion had to be taken into account; if the author did not think that his document was in final form, the Commission should wait until the next session for a completed version.

65. Mr. BROWNLIE said that it was of course desirable to consult the author, who was perhaps not expecting his work to be published; however, the Commission was certainly able to reclassify the document, which should pose no problem unless Mr. Koskenniemi had some objection.

66. Mr. GAJA said he did not think that Mr. Koskenniemi would have objected, but the latter had not written the document with publication in mind, and it should not be forgotten that the Commission was considering a report by the Study Group which was actually a very detailed summary of what Mr. Koskenniemi had said, with a few changes. Moreover, the final product would be available to the Commission at its next session. If the document

was to be published, it would be preferable, as with all other documents of that kind, to do so on the Commission's website rather than in the *Yearbook of the International Law Commission*.

67. Mr. MIKULKA (Secretary to the Commission) pointed out that as soon as the final version of the Study Group's report was available, it would be dealt with in the same way as the reports by special rapporteurs and thus would be published in volume II (Part One) of the *Yearbook of the International Law Commission, 2003*. To insist on having the outline published there would serve little practical purpose, as volume II was scheduled to appear in just six years, five years after the final version of the Study Group's report would have been published as a document for general distribution. Posting the document on the Commission's website after consulting the author was therefore a solution that the Commission might wish to consider.

68. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed to post on its website, after consultation with Mr. Koskeniemi, the outline of the study concerning the function and scope of the *lex specialis* rule and the question of "self-contained regimes".

It was so decided.

Paragraphs 23 to 25

Paragraphs 23 to 25 were adopted.

Paragraph 26

Paragraph 26 was adopted with minor drafting changes to the English version.

Paragraph 27

69. Mr. PELLET suggested that the words "self-contained regimes" should be inserted in parentheses after the words *régimes autonomes* in the French text, as the English term was commonly used in French, whereas the term *régime autonome* was never used.

Paragraph 27, as amended, was adopted.

Paragraphs 28 and 29

Paragraphs 28 and 29 were adopted.

Section C, as amended, was adopted.

Chapter X of the report, as amended, was adopted.

The meeting rose at 1 p.m.

2789th MEETING

Thursday, 7 August 2003, at 10.10 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Yamada.

Draft report of the Commission on the work of its fifty-fifth session (*continued*)

CHAPTER VIII. *Reservations to treaties (continued)** (A/CN.4/L.640 and Add.1–3)

B. *Consideration of the topic at the present session (continued)*** (A/CN.4/L.640/Add.1–3)

Paragraphs 1 to 8 (A/CN.4/L.640/Add.2)

Paragraphs 1 to 8 were adopted.

CHAPTER IX. *Shared natural resources* (A/CN.4/L.641)

A. *Introduction*

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Section A was adopted.

B. *Consideration of the topic at the present session*

Paragraph 4

Paragraph 4 was adopted.

Paragraph 5

1. Mr. YAMADA (Special Rapporteur) asked whether it would be against the rules to list the names of the experts from FAO and UNESCO and of the representatives of ILA who had briefed the Commission. He proposed that the second sentence of the paragraph should read: "The Commission also had an informal briefing by experts on groundwaters from FAO and the International Association of Hydrogeologists on 30 July 2003. Their presence was arranged by UNESCO."

2. Mr. MIKULKA (Secretary of the Commission) explained that the exchanges with the representatives of ILA had not formed part of the discussion of the topic, but had taken place within the framework of cooperation with

* Resumed from the 2786th meeting.

** Resumed from the 2785th meeting.