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Summary record of the 1297th meeting

Topic:
<multiple topics>

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100. Mr. QUENTIN-BAXTER welcomed the fact that the question of a clause on the settlement of disputes had been raised. The Commission would be doing less than its duty if it failed to indicate that serious consideration needed to be given to the question of including such a clause in the draft. It was, however, clearly beyond the capacity of the Commission to deal with the matter at the present session. That fact should be reflected in its report, so as to draw the attention of the General Assembly to the matter and elicit the views of Governments on the course which the Commission should follow.

101. Mr. SETTE CÂMARA supported the suggestion made by Mr. Elias. It was desirable to cover the question of machinery for the settlement of disputes, but that machinery would clearly not be an integral part of the future convention.

102. It was necessary to respect the desire of Governments to be free to choose methods for the settlement of disputes. That point had been appreciated by Mr. Kearney; for after proposing, in document A/CN.4/L.212, arbitration machinery based on alternative B for article 12 of the Commission's 1972 draft articles on the prevention and punishment of crimes against diplomatic agents (A/8710/Rev.1, chapter III, section B), he was now proposing a totally different system, based on the conciliation procedure set out in the annex to the Vienna Convention on the Law of Treaties.

103. The procedure proposed by Mr. Elias would show Governments that the Commission had not overlooked the problem of settlement of disputes, but would not impair the flexibility which States obviously desired.

104. Mr. KEARNEY said he did not favour the course suggested by Mr. Elias, which would amount to a failure on the part of the Commission to deal with an essential problem. If no clause on the settlement of disputes was included in the draft articles, the General Assembly would certainly not ask the Commission to study the problem, but would refer the draft to a diplomatic conference without such a clause, so that no action would be taken in the matter. He therefore urged that his proposed article 32, which was based on the relevant provisions of the Vienna Convention, should be included in the draft, so that a future conference of plenipotentiaries could deal with the question.

105. He was not impressed by the argument that the settlement of disputes belonged in the final clauses of a convention; the Commission had just approved an article 6bis on non-retroactivity, which was also regarded as a subject for final clauses.

106. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to include in its report a paragraph stating that many members considered that a clause on the settlement of disputes should be included in the future convention on succession of States in respect of treaties. That paragraph would reflect the feeling of those members that, in view of the close affinity of the draft with the Vienna Convention on the Law of Treaties, the proposed conciliation system should be given serious consideration.

It was so agreed.

Organization of future work

[Item 9 of the agenda]

107. The CHAIRMAN drew attention to the recommendation by the General Assembly in paragraph 3(c) of its resolution 3071 (XXVIII) that the Commission should undertake at an appropriate time a separate study of the topic of international liability for injurious consequences arising out of the performance of activities other than internationally wrongful acts. The enlarged Bureau had examined the matter and recommended that the Commission should decide to include that topic in its general programme of work. If there were no comments, he would take it that the Commission agreed to adopt that recommendation.

It was so agreed.

108. The CHAIRMAN reminded the Commission that it had agreed to give priority at its next session to the topic of State responsibility, which would take up four weeks. Bearing in mind that one week was required for consideration of the Commission's report on the session, that would leave only five weeks for the remaining topics. Those topics included succession of States in respect of matters other than treaties, for which the Special Rapporteur had strongly urged absolute priority, the question of treaties concluded between States and international organizations or between two or more international organizations, and the most-favoured-nation clause. Five weeks would obviously not be sufficient to deal with all those topics and the situation would be even more difficult if the General Assembly requested the Commission to study the problem of a clause on the settlement of disputes for inclusion in the draft articles on succession of States in respect of treaties.

109. The enlarged Bureau had not taken any decision on the allocation of time to the various topics at the next session, but it had unanimously agreed that ten weeks would not be sufficient to deal with all the work in hand. It had therefore agreed to recommend that the Commission should include a paragraph on the duration of forthcoming sessions in its report. The paragraph would state that, in order to carry out its programme satisfactorily, the Commission considered it necessary to request that the practice of holding a twelve-week session, which had been introduced in 1974, should be continued for the next and subsequent sessions.

110. If there were no comments, he would take it that the Commission agreed to adopt that recommendation.

It was so agreed.

The meeting rose at 6 p.m.

1297th MEETING

Monday, 22 July 1974, at 3.15 p.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney,

Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Yasseen.

Long-term programme of work

(a) Consideration of recommendation concerning commencement of the work on the law of non-navigational uses of international watercourses

(A/CN.4/283)

[Item 8(a) of the agenda]

REPORT OF THE SUB-COMMITTEE ON THE LAW OF NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

1. The CHAIRMAN invited the Chairman of the Sub-Committee on the Law of Non-Navigational Uses of International Watercourses¹ to introduce the Sub-Committee's report (A/CN.4/283).

2. Mr. KEARNEY (Chairman of the Sub-Committee on the Law of Non-Navigational Uses of International Watercourses) said that the Sub-Committee had held three meetings. At the first meeting, held on 23 May, there had been a general discussion, mainly on the scope of the study, and the Sub-Committee had decided that each of its members should prepare a memorandum of his views on the issues involved. At the second meeting, held on 1 July, the Sub-Committee had discussed the five memoranda submitted and had reached the conclusion that the views expressed in them reflected a sufficient measure of uniformity to enable it to prepare an agreed report. At the third meeting, held on 15 July, the Sub-Committee had discussed and adopted the report he was now introducing.

3. The report, which contained a number of recommendations, was divided into five sections, those from II to V each being devoted to one of the major issues involved. Section II dealt with the nature of international watercourses, a question which presented a problem of definition. The Sub-Committee had noted that a wide variety of terms was used both in State practice and in legal literature. In recent years there had been a tendency to use the term "basin" either by itself or in the phrases "river basin" or "drainage basin". It had been noted that the usage of the term "basin" varied according to the nature of the subject-matter. There was some practice to show that the wider term "drainage basin" was used in connexion with pollution in preference to other and narrower terms. But since there was no settled practice in the matter, the Sub-Committee recommended that three questions should be put to States, the first relating to the scope of the definition of an international watercourse and the other two to the geographical concept of an international drainage basin.

4. The second basic issue, dealt with in section III, was that of determining at least the major non-navigational uses of international watercourses, and the Sub-Committee had considered that those uses should be divided into three categories: agricultural; commercial and in-

dustrial; social and domestic. The Sub-Committee pointed out that the limitation of the study to non-navigational uses caused certain difficulties, since those uses could have an effect on navigation. For instance, in the absence of strict control, timber floating and navigation were not compatible uses. Moreover, most of the non-navigational uses involved waste disposal, and thus raised the issue of pollution. The Sub-Committee accordingly recommended that States should be asked whether the Commission should adopt, as the basis of its studies, the outline of fresh water uses set forth at the end of section II or whether other uses should be included. It further recommended that States should be asked whether flood control and erosion problems, which were not problems of use but were closely connected with water uses, should also be examined in order to present a balanced study.

5. Section IV dealt with the organization of the work. The Sub-Committee had reached the conclusion that it would not be wise to accord priority to any specific use, because the interaction among the various uses was too great. The report went on to consider whether it was advisable to deal first with the question of the quality of water, in other words pollution problems, or with the question of the quantity of water available. There was a clear interaction between the two questions and the Sub-Committee recommended that States should be requested to say whether they were in favour of the Commission's taking up the problem of pollution of international watercourses at the initial stage of its study.

6. Section V, the concluding section of the report, dealt with the problem of co-operation with other agencies, which had done an enormous amount of work on the subject. The Sub-Committee recommended that the Secretary-General should be requested to advise all the organizations concerned of the legal work being carried on by the Commission and to ask for their co-operation, in particular by designating an officer or officers to serve as the channel for information and co-operation. Lastly, in view of the technical, scientific and economic aspects of the study, the Sub-Committee suggested that the views of States should be sought on the desirability of setting up a committee of experts similar to the one set up in 1953 to assist the Commission in dealing with certain aspects of the law of the sea.

7. The CHAIRMAN thanked the Chairman and members of the Sub-Committee for their thorough and painstaking work and expressed his regret that, at that late stage of the session, it would not be possible to hold a full discussion on the Sub-Committee's valuable report.

8. Mr. EL-ERIAN expressing appreciation of the work done by the Chairman and members of the Sub-Committee, said that the Sub-Committee had carefully weighed all aspects of the question and he did not think the Commission need examine its report in detail. He was in full agreement with the approach adopted by the Sub-Committee and with the manner in which it had singled out the various issues. The questionnaire which would be prepared by the Secretariat on the basis of the Sub-Committee's recommendations would make it pos-

¹ See 1256th meeting, para. 1.

sible for the Commission to obtain from Governments, international organizations and other bodies, the necessary information and views to form a basis for its own conclusions.

9. He himself interpreted the term “uses” in its broad sense, taking recent developments into account. Some thirty or forty years previously, the uses of watercourses had been studied almost exclusively in terms of navigation. The Danube Commission, which had perhaps been the first international organization of its kind, had been concerned with navigation. Later, problems of the quantitative distribution of water had received greater attention. Still more recently, other aspects of water uses had come to the fore. As the Chairman of the Sub-Committee had pointed out, the problem of water quality and that of the quantity of water available were closely interrelated. Those considerations argued in favour of a broad interpretation of the term “uses”.

10. Lastly, he fully supported the idea of appointing a committee of experts to advise the Commission on the scientific and technical aspects of the matter, as had been done in the past in connexion with the law of the sea.

11. Mr. HAMBRO associated himself with the tributes paid to the work of the Sub-Committee and its Chairman.

12. He considered it very important to deal with the problem of pollution, but at the same time, the Commission should make it clear that it did not intend any aspect of its work on non-navigational uses of international watercourses to overlap with that of other organizations.

13. It was essential that the Commission should have the help of a group of technical experts in dealing with the topic.

14. Mr. USHAKOV joined in congratulating the Chairman and members of the Sub-Committee on the excellent work they had done during a particularly busy session of the Commission. The Sub-Committee’s report clearly showed the course to be followed. The Commission should approve the question the Sub-Committee suggested should be put to Governments, and request the Secretary-General to transmit them.

15. Mr. AGO expressed his admiration at the number of questions the Sub-Committee had succeeded in dealing with in its excellent report. The new topic under discussion was clearly related to that of liability for the consequences of internationally lawful acts and the best way of obtaining an over-all view of the latter topic might perhaps be to study it in the different contexts in which it arose.

16. The CHAIRMAN suggested that the Commission should endorse the recommendations of the Sub-Committee, and that Mr. Kearney should be appointed Special Rapporteur for the topic of the law of non-navigational uses of international watercourses. If there were no comments, he would take it that the Commission agreed to adopt those suggestions.

It was so agreed.

Draft report of the Commission on the work of its twenty-sixth session

(A/CN.4/L.216; A/CN.4/L.218 and Add.1-3)

(resumed from the 1294th meeting)

Chapter I

ORGANIZATION OF THE SESSION

17. The CHAIRMAN invited the Commission to consider chapter I of its draft report (A/CN.4/L.216) paragraph by paragraph.

Paragraphs 1-10

Paragraphs 1-10 were approved.

Paragraph 11

18. After a brief discussion in which Mr. REUTER, Mr. YASSEEN and Mr. AGO took part, the CHAIRMAN suggested that paragraph 11 should be expanded to cover various other aspects of the work of the Commission. The revised text would be submitted to the Commission at a later stage.

It was so agreed.

Paragraphs 12-14 (section G)

19. After a brief exchange of views between Mr. YASSEEN and Mr. EL-ERIAN, Mr. SETTE CÂMARA proposed that the title of section G should be amended to read “Visit by the Secretary-General”.

It was so agreed.

Paragraphs 12-14 were approved with that change in the title of section G.

Paragraph 15

20. Mr. AGO said he thought that paragraph 15 should be completely recast to give greater prominence to the Commission’s achievements during its 25 years of existence. During that period, a large part of international law had passed from unwritten and customary form into written form. Whole chapters of international law had been codified, and the Commission could be proud of that achievement. Furthermore, the addresses made by Mr. Suy on behalf of the Secretary-General, and by Sir Humphrey Waldock on behalf of the International Court of Justice, both contained passages of such importance that they deserved to be reproduced in the report.

21. The CHAIRMAN said that, if there were no further comments, he would take it that the revision of paragraph 15 suggested by Mr. Ago was acceptable to the Commission.

It was so agreed.²

Chapter III

STATE RESPONSIBILITY

22. The CHAIRMAN invited the Commission to consider chapter III of its draft report (A/CN.4/L.218 and Add.1-3) paragraph by paragraph.

² For resumption of the discussion see 1301st meeting, para. 1.

A. INTRODUCTION

Paragraphs 1-14

Paragraphs 1-14 were approved, with a minor drafting change in paragraph 2.

Paragraph 15

23. Mr. SETTE CÂMARA said it was his recollection that in 1971 and 1972 the Commission had dealt with one or two other topics, in addition to those mentioned in paragraph 15.

24. The CHAIRMAN suggested that paragraph 15 should be approved on the understanding that if other topics had been dealt with in those years, references to them would be included.

It was so agreed.

Paragraphs 16-34

Paragraphs 16-34 were approved, with a minor drafting change in paragraph 33.

Paragraph 35

25. Mr. ELIAS proposed the deletion of the words "of conduct", in the sentence ending with the words "successive acts of conduct".

26. Mr. AGO (Special Rapporteur) pointed out that a remarkable English translation of the French original had been produced very quickly by the competent service. The point mentioned by Mr. Elias, and other points of that kind, would be dealt with in the process of final editing of the various language versions of the report.

Paragraph 35 was approved on that understanding.

Paragraphs 36 and 37

Paragraphs 36 and 37 were approved.

B. DRAFT ARTICLES ON STATE RESPONSIBILITY

Paragraph 38

Paragraph 38 was approved.

Commentary to article 7

(Attribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority) (A/CN.4/L.218/Add.1)

Paragraph (1)

27. Mr. KEARNEY suggested that the word "purely" in the last sentence of paragraph (1) should be deleted.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

28. Mr. KEARNEY suggested that the word "municipalities" should be inserted in the phrase in brackets in the third sentence.

29. Mr. HAMBRO suggested that the point could be met by translating the French word "*communes*" as "municipalities".

It was so agreed.

30. Mr. ELIAS pointed out that the same change should be made in the first sentence of paragraph (4) and in subsequent paragraphs.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved without comment.

Paragraphs (4)-(7)

Paragraphs (4)-(7) were approved without comment.

Paragraph (8)

31. Mr. KEARNEY observed that various terms seemed to be used to refer to federal States. In particular, he wondered whether a "composite" State was the same as a "component" state.

32. The CHAIRMAN, speaking as a member of the Commission, said that a component state referred to a member state of a federation, whereas a composite State referred to a federal State. He suggested that the present wording should be retained.

It was so agreed.

Paragraph (8) was approved.

Paragraph (9)

33. Mr. KEARNEY said that, in his opinion, the third sentence of paragraph (9) was too broad a statement for international law in general, especially in areas where aspects of private international law were involved.

34. After a brief discussion in which the CHAIRMAN, Mr. KEARNEY and Mr. AGO (Special Rapporteur) took part, Mr. ELIAS proposed that the words "at the international level" should be replaced by the words "in public international law".

It was so agreed.

Paragraph (9), as amended, was approved.

Paragraph (10)

Paragraph (10) was approved without comment.

Paragraph (11)

35. Mr. KEARNEY proposed that the word "wondered" in the first sentence should be replaced by the word "discussed".

It was so agreed.

36. Mr. KEARNEY said that the penultimate sentence of paragraph (11) seemed to him to be somewhat obscure. Should there not, perhaps, be some reference to the nature of the theory behind the attribution?

37. Mr. AGO (Special Rapporteur) said that the meaning of the sentence could be clarified by the following example: the Republic of Geneva might have a limited capacity in international law to conclude a treaty with France on a matter such as the passage of seasonal workers. If the Republic of Geneva committed a breach of its obligations under such a treaty, the act would be attributable to the Republic of Geneva. That did not mean, however, that the Government of France could make a claim against the Republic of Geneva on the grounds of its responsibility; the claim would proba-

bly have to be addressed to the authorities at Berne. The attribution of the act and its consequences with respect to responsibility were thus two different questions. The case could perhaps be described as involving the indirect or vicarious responsibility of one subject of international law for an act attributed to another subject of international law.

38. Mr. KEARNEY said that Mr. Ago's explanation seemed to be of a procedural rather than a substantive nature; in other words, France would approach Switzerland because that was the appropriate international channel, not because it regarded Switzerland as responsible for the act of the Republic of Geneva.

39. Mr. AGO (Special Rapporteur) said that, in his view, it was a substantive question. In the paragraph under discussion, however, he had been concerned only with the attribution of the act. He intended to deal with the consequences of the act as to responsibility in a later chapter.

40. Mr. KEARNEY said he feared that anyone looking at the earlier articles on the requirements for bringing State responsibility into play would be confused, since those articles made attribution an essential part of State responsibility.

41. Mr. AGO (Special Rapporteur) said that in the example he had given the act would not be attributed to the federal State. As he had already said, however, the case would be dealt with in a later chapter.

Paragraph (11), as amended, was approved.

Paragraphs (12)-(16)

Paragraphs (12)-(16) were approved without comment.

Paragraph (17)

42. Mr. KEARNEY said he wondered whether the distinction made in the first sentence between decentralization *ratione loci* and *ratione materiae* was satisfactory, since decentralization *ratione materiae* had to be understood in a broader context than the special aspect with which the Commission was now concerned. It might, for example, be interpreted as referring to the basic purpose of particular organizations, such as the operation of an airline or the manufacture of certain products. But the Commission was trying to avoid so broad an approach and to confine itself to the question whether the organs concerned were exercising governmental authority. He feared that by contrasting *ratione loci* and *ratione materiae* the Commission was obscuring that point.

43. Mr. AGO (Special Rapporteur) said that Mr. Kearney was right in so far as there were municipalities on the one hand and private companies on the other, and those two types of entity could not be placed on the same footing. It was, of course, more common to make an attribution in the case of municipalities. He had not said, however, that the same phenomenon was involved in both cases.

Paragraph (17) was approved.

Paragraphs (18)-(20)

Paragraphs (18)-(20) were approved.

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

Commentary to article 8

(Attribution to the State of the conduct of persons acting in fact on behalf of the State)
(A/CN.4/L.218/Add.2)

Paragraph (1)

44. Mr. KEARNEY, referring to the third sentence in paragraph (1), said that the rule in sub-paragraph (a) of article 8 was broader than that sentence would suggest. Under sub-paragraph (a), persons or groups of persons could be acting on behalf of the State in a wide variety of circumstances: they could, for instance, be acting on the basis of a long-term contract with the State.

45. Mr. AGO (Special Rapporteur) said that Mr. Kearney's difficulty might be due to the English translation of the phrase "*sans pourtant avoir reçu à cette fin une investiture formelle de la part du système juridique étatique*" ("without, however, having been formally appointed for that purpose under the State's legal system").

46. Mr. KEARNEY said he could agree to a revision of the translation. He still believed, however, that the formulation used in sub-paragraph (a) of article 8, which had been debated at great length in the Drafting Committee, was open to a broader interpretation than that given it by Mr. Ago.

Paragraph (1) was approved subject to revision of the English text.

Paragraph (2)

47. Mr. AGO (Special Rapporteur) said he hoped that paragraph (2) would dispel the doubts expressed by Mr. Kearney.

48. Mr. KEARNEY, referring to the last sentence, said that the conduct in question could surely be *de lege* as well as *de facto*. He therefore proposed that the words "*de facto*" should be deleted.

49. Mr. AGO (Special Rapporteur) pointed out that the French text used the words "*en fait*", which would be more correctly translated as "in fact".

Paragraph (2) was approved subject to revision of the English text.

Paragraph (3)

50. Mr. KEARNEY asked whether the concluding words of paragraph (3), "certain missions which may or may not bear the light of day" was a correct translation of the French phrase "*certaines missions, avouables ou non*".

51. Mr. REUTER said that those words had a moral, rather than a legal connotation. In French they were somewhat ironical, and if the English translation was not precisely equivalent, he would suggest that they be deleted.

52. Mr. ELIAS proposed that the last clause of paragraph (3) should be amended to read "... the acts of

persons employed to carry out certain missions in foreign territory”.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

53. Mr. USHAKOV said he thought that in both paragraph (4) and paragraph (5) it would have been preferable not to quote disputes occurring in time of war, because of the difficulties such situations involved.

Paragraph (4) was approved.

Paragraphs (5)-(8)

Paragraphs (5)-(8) were approved without comment.

Paragraph (9)

Paragraph (9) was approved subject to correction of a typographical error.

Paragraph (10)

Paragraph (10) was approved.

Paragraph (11)

54. Mr. KEARNEY said he found the argument set out in the third sentence difficult to follow.

55. Mr. AGO (Special Rapporteur) said he thought that was a translation problem which could be solved in consultation with the Secretariat.

Paragraph (11) was approved.

Paragraphs (12) and (13)

Paragraphs (12) and (13) were approved without comment.

The commentary to article 8, as amended, was approved.

The meeting rose at 6.20 p.m.

1298th MEETING

Tuesday, 23 July 1974, at 3.10 p.m.

Chairman: Mr. Endre USTOR

Later: Mr. José SETTE CÂMARA

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Draft report of the Commission on the work of its twenty-sixth session

(A/CN.4/L.217, Add.1-4 and Add.7; A/CN.4/L.223; A/8710/Rev.1)

(continued)

Chapter II

SUCCESSION OF STATES IN RESPECT OF TREATIES

1. The CHAIRMAN invited the Commission to consider chapter II of the draft report on the work of its twenty-sixth session (A/CN.4/L.217 and addenda).

2. As authorized by the Commission, the Drafting Committee had carried out the final editing of the draft articles on succession of States in respect of treaties approved by the Commission during the current session. The results of its work were contained in document A/CN.4/L.223, entitled “Draft articles on succession of States in respect of treaties, as adopted in final form by the Drafting Committee”. The texts of the draft articles themselves were not reproduced in the draft of chapter II contained in document A/CN.4/L.217 and the addenda thereto.

3. He suggested that consideration of the introduction (A/CN.4/L.217) should be deferred until the Commission had examined the commentaries to the individual articles.

Commentary to article 1

(Scope of the present articles) (A/CN.4/L.217/Add.1)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraphs (3) and (4)

4. Mr. USHAKOV proposed that, in the first sentence of paragraph (3), the reference to “succession of States” should be replaced by a reference to “the effects of a succession of States” and that the same change should be made in the first sentence of paragraph (4). In the second sentence of paragraph (4), the words in quotation marks, “the effects of succession of States”, should be amended to read: “succession of States”.

5. Sir Francis VALLAT (Special Rapporteur) said that the foot-note referring to the title of the article should be deleted, since a title had now been adopted.

6. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve paragraphs (3) and (4) with the changes indicated by Mr. Ushakov and the Special Rapporteur.

It was so agreed.

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

Commentary to article 3

(Cases not within the scope of the present articles) (A/CN.4/L.217/Add.1)

The commentary to article 3 was approved.

Commentary to article 4

(Treaties constituting international organizations and treaties adopted within an international organization) (A/CN.4/L.217/Add.1)

Paragraphs (1)-(7)

Paragraphs (1)-(7) were approved.

Paragraph (8)