

Document:-
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Summary record of the 1807th meeting

Topic:
**Status of the diplomatic courier and the diplomatic bag not accompanied by the
diplomatic courier**

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Dollfus Mieg et Cie S.A. v. Bank of England (1950).²⁶ Paragraph 2 of article 15 therefore provided that in such a situation the State was at liberty to intervene in the proceedings to assert its immunity: if the State could not have invoked immunity, then the proceedings could continue; conversely, if it could have invoked immunity, then that immunity had to be upheld. The latter part of the paragraph merely indicated that a State could not automatically assert that it had a claim to or interest in property and that there must be at least some indication that the claim or interest was justified. That explained the reference to prima facie evidence.

84. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee), referring to the comments of Sir Ian Sinclair, confirmed that the condition set forth in the last part of paragraph 2 applied equally to subparagraph (a) and subparagraph (b).

85. Mr. USHAKOV, referring to article 15, paragraph 2, drew attention to two possible cases. In the first, the State was not able to invoke immunity from jurisdiction. It would then be of little importance whether the proceeding was instituted against the State itself or against a person other than the State. In those circumstances, it was strange to provide that a proceeding could be brought against a person other than a State when the State concerned could not have invoked immunity from jurisdiction if the proceeding had been brought against it. In the second case, the right or interest claimed by the State was neither admitted nor supported by prima facie evidence. The latter case therefore came under paragraph 1: the court first had to proceed to the determination of the right or interest in question. If the existence of that right or interest was established, a proceeding could not be brought against a person other than the State. In the contrary case, the question did not arise, since no right or interest existed.

86. Mr. SUCHARITKUL (Special Rapporteur) said that there were certain peculiarities in the common law system of dealing with the property of a foreign Government, and a closer examination of decided cases might help to shed light on the matter. He continued to think that article 15 was both useful and necessary and that, if it were omitted, paragraph 3 of article 7 would be unnecessary too.

87. The CHAIRMAN said that, in the absence of further comments, he would take it that the Commission agreed, subject to the reservations entered by Mr. Mahiou and Mr. Ushakov, to adopt article 15 as proposed by the Drafting Committee.²⁷

It was so agreed.

Article 15 was adopted.

The meeting rose at 6.15 p.m.

²⁶ United Kingdom, *The Law Reports, Chancery Division, 1950*, p. 333.

²⁷ For the text, see 1805th meeting, para. 69.

1807th MEETING

Tuesday, 19 July 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (concluded) (A/CN.4/L.365 and Add.1, ILC(XXXV)/Conf.Room Doc.7)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (concluded)

CONSIDERATION BY THE COMMISSION

ARTICLE 1 (Scope of the present articles)

1. Mr. McCAFFREY said that he wished to reserve his position on article 1 since, in his view, the uniform approach which it embodied did not reflect customary international law. That was apparent from the fact that the 1969 Convention on Special Missions had not yet entered into force and that treatment of the diplomatic bag under the 1961 Vienna Convention on Diplomatic Relations and under the 1963 Vienna Convention on Consular Relations differed. He had agreed to the text of the article as formulated on the express understanding that, at a later stage, an article would be incorporated in the draft whereby States could declare that they accepted the draft articles only in so far as they applied to certain kinds of couriers and bags. He trusted that that would be made clear in the commentary to articles 1 and 3.

2. The CHAIRMAN suggested that, subject to Mr. McCaffrey's reservation, the Commission should adopt article 1 as proposed by the Drafting Committee.¹

It was so agreed.

Article 1 was adopted.

ARTICLE 2 (Couriers and bags not within the scope of the present articles)

3. Mr. MAHIOU said that article 2 raised the question as to whether the draft articles should be extended to couriers and bags used by international organizations and national liberation movements. The Drafting Committee had finally decided to adopt the article, rather than place it between brackets as it had at one time envisaged, and to include in the commentary an explanation of the

¹ For the text, see 1806th meeting, para. 2.

problems involved. Perhaps it would be advisable to add an asterisk after the title of article 2 in reference to a note indicating that the problem would have to be re-examined.

4. Mr. FLITAN said that he agreed entirely with Mr. Mahiou regarding both international organizations and national liberation movements.

5. Mr. BALANDA said he, too, considered that the problem had still to be settled and that guidelines from the General Assembly would be needed before the draft articles could be extended to international organizations and national liberation movements.

6. Mr. NJENGA said he agreed that an asterisk should be added to the title of the article so as to direct attention to the problem. Alternatively, members' views should be reflected in detail in the commentary as an indication of the widespread support for extending the articles to international organizations and liberation movements. The Chairman could also be asked to stress the point when he introduced the report of the Commission to the Sixth Committee of the General Assembly.

7. Mr. THIAM said that, from the time when the Special Rapporteur's first report had been considered, some members had underlined the need to deal with the couriers and bags of international organizations and national liberation movements; he had himself raised the question in 1981 in the Sixth Committee. He therefore supported Mr. Mahiou's suggestion.

8. Mr. MALEK said that he agreed with those who considered that the draft should apply to the couriers and bags of international organizations and national liberation movements.

9. Mr. RAZAFINDRALAMBO said he trusted that the Commission would agree to draw the General Assembly's attention to the problem in a footnote to the article. Alternatively, the Chairman could at least raise the matter in his report to the General Assembly.

10. Mr. KOROMA said that, as he had already made clear (1781st meeting), he considered that the draft should cover entities other than States. It was a matter not merely of reciprocity but of confidentiality: if the draft were extended to both international organizations and national liberation movements, so that their communications then enjoyed the privilege of confidentiality, it would enhance the product of the Commission's work. It would also make the draft articles more comprehensive and thus obviate the need to take up the matter again at a later date.

11. Mr. McCAFFREY said that any decision reached by the Commission at the current stage should be without prejudice to its reconsideration of the scope of the draft upon completion of the first reading. In the light of the discussion that had taken place in the Drafting Committee, he would suggest that the article should be retained in its existing form and that the conditions on which the Commission adopted it should be noted in its report to the General Assembly.

12. The CHAIRMAN said that, on the understanding that the various statements made would be reflected in the

report, he would take it that the Commission agreed to adopt article 2 as proposed by the Drafting Committee.²

It was so agreed.

Article 2 was adopted.

ARTICLE 3 (Use of terms)

13. Mr. RIPHAGEN noted that, in subparagraph (2) of paragraph 1, the term "diplomatic bag" was defined as meaning "the packages containing official correspondence, documents or articles intended exclusively for official use". However, there were cases in which a diplomatic bag contained material other than official correspondence and he wondered whether, in that event, a package would lose its status as a diplomatic bag within the meaning of the articles. That was certainly not the intent, but the point should be clarified.

14. Mr. McCAFFREY said that he wished to reserve his position on article 3 for the reasons he had given in connection with article 1.

15. Mr. BALANDA, referring to paragraph 1 (1), proposed that the expression *de façon régulière* ("on a regular basis") should be replaced by *de façon habituelle* ("habitually"). The term *de façon régulière* might suggest that a diplomatic courier could be authorized in an irregular manner to carry out certain functions.

16. Mr. DÍAZ GONZÁLEZ, also referring to paragraph 1 (1), said that he wondered why the word "authorized" rather than "accredited" had been used. The latter term would be in keeping with article 27, paragraph 5, of the Vienna Convention on Diplomatic Relations and article 35, paragraph 5, of the Vienna Convention on Consular Relations, as well as with draft articles 7 and 8: a person could be authorized without being accredited.

17. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) pointed out that, under article 27, paragraph 5, of the Vienna Convention on Diplomatic Relations, the concept of accreditation applied not to the diplomatic courier but to the mission. Rather than the courier being accredited, the receiving State accredited a mission. The nature of the diplomatic courier's functions meant that it was not possible to regard him as being accredited.

18. Mr. DÍAZ GONZÁLEZ said that the texts of the provisions of the two Vienna Conventions in question formed the grounds for asserting that the diplomatic courier was in fact accredited and not authorized.

19. Mr. RAZAFINDRALAMBO said that, for the reasons stated by Mr. Balanda, he supported the proposal that the expression *de façon régulière* should be replaced by *de façon habituelle* ("habitually"), although the term *de façon normale* ("normally") might be even better.

20. Mr. MAHIOU said that the expression *de façon régulière* gave an idea either of normality or of conformity with the law. Since, in the case in question, the intent was to convey the first of those meanings, the expression should be modified in the manner suggested.

² *Idem*, para. 4.

21. Although Mr. Díaz González was justifiably concerned to depart as little as possible from existing instruments, the situation for which the Vienna Conventions on Diplomatic Relations and on Consular Relations provided had to be distinguished from that for which the draft articles provided. In the first case, the persons involved were appointed to represent a State on a permanent basis, which explained why, in French, the terms *Etat accréditant* and *Etat accréditaire* were used. In the second case, the person was not appointed to represent a State on a permanent basis, which was why the terms *Etat d'envoi* and *Etat de réception* were used. For that reason, the diplomatic courier was to be regarded as an "authorized" (*habilitée*) rather than an "accredited" person. Furthermore, as proof of status, the diplomatic courier had to produce, in addition to his passport, an official document that differed somewhat from that which diplomatic and consular officials had to produce.

22. Mr. YANKOV (Special Rapporteur) said that, in his view, the word "authorized" would be more appropriate than "accredited", since "authorized" did not imply any kind of permanent status *vis-à-vis* the receiving State.

23. As to Mr. Balanda's proposal, he pointed out that it was a question of a regular courier as opposed to an *ad hoc* courier. While he had no objection to the term *de façon habituelle* in French, he would point out that, for most countries, what was habitual was the *ad hoc* courier. Fewer than 10 per cent of 160 States used permanent couriers on a professional basis. He would be only too pleased if another, more appropriate term could be found but, failing that, it could be made clear in the commentary that the terms "regular" or "on a regular basis" were meant to refer to an institutionalized service of a foreign office.

24. Mr. DÍAZ GONZÁLEZ said that he agreed in general with the views expressed by Mr. Mahiou but would stress the need to harmonize the English, Spanish and French versions of the expressions "person duly authorized" and "on a regular basis". In the case of the latter, the Spanish version seemed to be the best.

25. Mr. BARBOZA observed that only the French version of the latter expression seemed to be unsatisfactory.

26. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) said that, in his view, the content of the three versions was, in effect, the same. The Spanish wording did not give rise to any difficulty, corresponding exactly to the English, which implied an idea of either permanence or conformity with the rules. The corresponding expression in French surely embraced the same two ideas as the English expression.

27. Mr. THIAM, supported by Mr. FLITAN, said that he favoured the use of the expression *de façon permanente* in the French text.

28. Mr. MAHIOU said it would be possible either to use that term or to retain the expression *de façon régulière* and to give an explanation in the commentary.

29. Sir Ian SINCLAIR said that the English text was

quite satisfactory since, read in context, the words "on a regular basis" meant "on a continuing basis". He would object to the expression "on a permanent basis", which would convey the idea that all professional couriers were full-time employees, whereas some were in fact employed on short-term contracts. In his view, therefore, the article should be retained as drafted and an explanation of the meaning of the phrase should be included in the commentary.

30. Mr. KOROMA said it seemed to him that, in paragraph 1, the particular was being used to define the general, since "diplomatic courier" was meant to cover both a diplomatic courier and a consular courier. There were, moreover, differences in terms of the privileges and immunities accorded to the diplomatic courier and the consular courier, respectively. In his view, those differences had not been sufficiently brought out.

31. The CHAIRMAN said that, on the understanding that the various statements made would be reflected in the report, he would take it that the Commission agreed to adopt article 3 as proposed by the Drafting Committee.³

It was so agreed.

Article 3 was adopted.

ARTICLE 4 (Freedom of official communications) and

ARTICLE 5 (Duties of the sending State and its diplomatic courier)

32. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to adopt articles 4 and 5 as proposed by the Drafting Committee.⁴

Articles 4 and 5 were adopted.

ARTICLE 6 (Non-discrimination and reciprocity)

33. In reply to a point raised by Mr. MAHIOU, Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) explained that, in the French text of paragraph 2 (a), the words *ou l'Etat de transit* should be added after *l'Etat de réception*.

34. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to adopt article 6 as proposed by the Drafting Committee.⁵

Article 6 was adopted.

ARTICLE 7 (Documentation of the diplomatic courier)

35. Mr. MAHIOU, referring to the French text, pointed out that the word *documents* appeared in the title to the article whereas, in the body of the article, the term *un document officiel* was used.

36. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed,

³ *Idem*, para. 6.

⁴ *Idem*, paras. 19 and 21, respectively.

⁵ *Idem*, para. 23.

subject to the comment made by Mr. Mahiou, to adopt article 7 as proposed by the Drafting Committee.⁶

It was so agreed.

Article 7 was adopted.

ARTICLE 8 (Appointment of a diplomatic courier)

37. Sir Ian SINCLAIR said that, as pointed out by Mr. Calero Rodrigues in the Drafting Committee, article 7 marked the start of a new part of the draft; logically, since it dealt with documentation, it should not come before article 8, which dealt with the appointment of a diplomatic courier. He therefore suggested that an asterisk should be added after "article 8" to indicate that the numbering of the article was provisional.

It was so agreed.

38. Mr. McCAFFREY proposed that the title of article 8 should be amended to read "Appointment of the diplomatic courier", use of the definite article rather than the indefinite being in line with the practice followed throughout the draft.

It was so agreed.

39. Mr. KOROMA said that he found the phrase "is freely appointed", in the English text, somewhat unusual.

40. Mr. MAHIOU, referring to the French text, said that the expression *à son choix* was unsuitable since it appeared to refer to the diplomatic courier. It should be replaced either by the expression *à leur choix*, in which case the second part of the article would be reworded to read *l'Etat d'envoi, ses missions, ses postes consulaires ou ses délégations nomment à leur choix le courrier diplomatique*, or simply by the word *librement*.

41. Following an exchange of views in which Mr. BARBOZA, Mr. FLITAN, Mr. CALERO RODRIGUES, Mr. THIAM and Mr. MAHIOU took part, the CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to adopt article 8 as proposed by the Drafting Committee⁷ on the understanding that, in the French text, the second part of the article would be amended to read: *le courrier diplomatique est nommé à leur choix par l'Etat d'envoi, ses missions, ses postes consulaires ou ses délégations*.

It was so agreed.

Article 8 was adopted.

The meeting rose at 11.25 a.m.

⁶ *Idem.* para. 25.

⁷ *Idem.* para. 27.

1808th MEETING

Wednesday, 20 July 1983, at 10.05 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

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

CHAPTER III. Jurisdictional immunities of States and their property (A/CN.4/L.356 and Corr.1, A/CN.4/L.356/Add.1-3 and Add.3/Corr.1)

A. Introduction (A/CN.4/L.356)

Paragraphs 1 to 13

Paragraphs 1 to 13 were adopted.

Paragraph 14

1. Mr. McCAFFREY said that he wished to reserve his position regarding the statement in the first sentence of paragraph 14 to the effect that draft article 13 "dealt with a completely new area".

Paragraph 14 was adopted.

Paragraph 15

2. Sir Ian SINCLAIR proposed that the phrase "before the local courts" should be inserted in the first sentence, after the words "proceedings being instituted", and that the phrase "in the local courts" should be inserted in the second sentence, after the words "where no jurisdiction existed".

It was so agreed.

Paragraph 15, as amended, was adopted.

Paragraph 16

Paragraph 16 was adopted.

Paragraph 17

Paragraph 17 was adopted, subject to some drafting changes.

Paragraph 18

3. Sir Ian SINCLAIR proposed that the words "in such cases" in the third sentence should be replaced by the words "at least in some jurisdictions", since in some jurisdictions an action had to be brought against the State, which in turn was indemnified by the insurer.

It was so agreed.

Paragraph 18, as amended, was adopted.

* Resumed from the 1805th meeting.