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Summary record of the 1931st meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1985, vol. I

50. The CHAIRMAN drew attention, as the Chairman of the Drafting Committee had done (paragraph 39 above), to the Committee's recommendation concerning the decision the Commission had to take, following the adoption of article 23, on articles 28 and 29 as proposed by the Committee (A/CN.4/L.396, note).

51. If there were no objections, he would take it that the Commission agreed, in accordance with the Committee's recommendation, to adopt without change paragraph 3 of article 28 [21] and paragraphs 3, 4 and 5 of article 29 [22].

Article 28 [21] was adopted.

Article 29 [22] was adopted.

The meeting rose at 5.30 p.m.

1931st MEETING

Friday, 19 July 1985, at 12.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Malek, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Co-operation with other bodies (*concluded*)*

[Agenda item 11]

STATEMENT BY THE OBSERVER FOR THE ARAB COMMISSION FOR INTERNATIONAL LAW

1. The CHAIRMAN welcomed Mr. Ennaifer, Observer for the Arab Commission for International Law, and invited him to address the Commission.

2. Mr. ENNAIFER (Observer for the Arab Commission for International Law) said that many years of co-operation had strengthened relations between the International Law Commission and the Arab Commission for International Law, which hoped to see such co-operation develop still further. Such was also the wish of the Council of Ministers of the League of Arab States.

3. The International Law Commission had now begun the final stage of its work at the present session, having made good progress in the consideration of most items on its agenda. Such progress always had repercussions on the work of the Arab Commission for International Law, whose agenda had for the past three years included some of the topics before the International Law Commission: jurisdictional immunities of States and their property; the draft Code of Offences against the Peace and Security of Mankind; the law of the non-navigational uses of international watercourses; and relations between States and international organizations. The Arab Commission had adopted a procedure similar to that of the International Law Commission. It appointed a special rapporteur for each topic; the special rapporteur then submitted his conclusions for consideration by the Arab Commission; and the final report was eventually submitted to the Council of Ministers of the League of Arab States for adoption. The Arab Commission was endeavouring, with some success, to define a common approach which might be adopted by Arab countries during the consideration of those topics by the Sixth Committee of the General Assembly and at plenipotentiary conferences.

4. The law of the sea was, however, still the main topic of concern to the Arab Commission for International Law, which was trying to bring the regulations in force in the Arab States into line with the provisions of the 1982 United Nations Convention on the Law of the Sea, and in particular those relating to the delimitation of maritime zones, by formulating a set of standard rules which the Arab States would undertake to incorporate in their internal law.

5. Speaking also on behalf of the Chairman of the Arab Commission for International Law, he wished the International Law Commission every success in its work.

6. Mr. USHAKOV, speaking also on behalf of Mr. Flitan and Mr. Yankov, thanked the Observer for his account of the activities of the Arab Commission for International Law. He noted with pleasure that the agenda of the Arab Commission included some of the same items as that of the International Law Commission and he wished the Arab Commission success in its work.

7. Mr. EL RASHEED MOHAMED AHMED said that the Arab heritage in the human sciences, the natural sciences and international law, which had very ancient origins, had been inherited from Greek and Persian civilization and had then been passed on to Europe. The Arabs had thus made their own distinctive contribution to humanity in the form of the establishment of regular co-operation and contacts which would promote better understanding, the harmonization of all points of view and the unification of the world for the peace, happiness and development of all mankind.

8. Mr. MALEK, speaking on behalf of the members of the Commission from the Asian region and as a national of a country which was a member of the League of Arab States, congratulated the Observer on his interesting account of the work done by the Arab Commission for International Law on a wide variety of topics and in many fields of international law. He also welcomed the close relations and

* Resumed from the 1915th meeting.

co-operation between the International Law Commission and the Arab Commission and expressed the hope that those relations would become still closer. It would be very useful if the two bodies regularly took an active part in each other's work.

9. Mr. REUTER thanked the Observer for the Arab Commission for International Law for his statement. It was a well-known fact that Europe and the world in general were particularly indebted to the Arab countries for their contribution to the sciences, algebra, medicine, navigation, chemistry and even linguistics. He was happy to see that the Arab countries, old and young alike, attached so much importance to international law and were making regional efforts to unify it. The Arab countries did, of course, have their problems, just as the European countries had had for so many centuries. The Arab countries were therefore wise to try to settle their legal disputes first through negotiation and then by submitting them to the ICJ, from which they had long been absent. The example they were setting was most welcome. He was, moreover, sure that the International Law Commission could learn a great deal from the activities of the Arab Commission for International Law.

10. Mr. CALERO RODRIGUES, speaking also on behalf of the members of the Commission from the Latin American region, thanked the Observer for the Arab Commission for International Law for his statement and associated himself with the other members who had stressed the importance of co-operation between the two bodies, one working at a regional level and the other at the international level on some of the same topics. Increasingly deeper understanding between the two bodies would help to strengthen their co-operation.

Programme, procedures and working methods of the Commission, and its documentation (*concluded*)*

[Agenda item 10]

Recommendations by the Planning Group

11. The CHAIRMAN informed members of the Commission that the Enlarged Bureau had held a meeting that morning to consider two recommendations by the Planning Group, the first relating to documentation and the organization of the Commission's work and the second to the use by the Commission of conference services. The Chairman of the Planning Group had suggested that the Chairman of the Commission might wish to address a letter to the Chairman of the Committee on Conferences explaining that any underutilization of conference services at the beginning of the session had been due to the fact that informal meetings had been held in connection with the election of new members. A reference to both recommendations would be included, for approval, in the Commission's draft report.

* Resumed from the 1893rd meeting.

Jurisdictional immunities of States and their property (*continued*)* (A/CN.4/376 and Add.1 and 2,[1] A/CN.4/388,[2] A/CN.4/L.382, sect. D, A/CN.4/L.397)

[Agenda item 4]

Draft articles proposed by the Drafting Committee

Article 19 (Ships engaged in commercial service) *and*

Article 20 (Effect of an arbitration agreement)

12. The CHAIRMAN invited the Chairman of the Drafting Committee to present articles 19 and 20 as proposed by the Drafting Committee (A/CN.4/L.397), which read:

Article 19. Ships engaged in commercial service

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship engaged in commercial [non-governmental] service cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the operation of that ship provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

2. Paragraph 1 does not apply to warships and naval auxiliaries nor to other ships owned or operated by a State and used or intended for use in government non-commercial service.

3. For the purposes of this article, the expression "proceeding relating to the operation of that ship" shall mean, *inter alia*, any proceeding involving the determination of:

(*a*) a claim in respect of collision or other accidents of navigation;

(*b*) a claim in respect of assistance, salvage and general average;

(*c*) a claim in respect of repairs, supplies, or other contracts relating to the ship.

4. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the carriage of cargo on board a ship owned or operated by that State and engaged in commercial [non-governmental] service provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

5. Paragraph 4 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor to any cargo belonging to a State and used or intended for use in government non-commercial service.

6. States may plead all measures of defence, prescription and limitation of liability which are available to private ships and cargoes and their owners.

7. If in any proceedings there arises a question relating to the government and non-commercial character of the ship or cargo, a certificate signed by the diplomatic representative or other competent authority of the State to which the ship or cargo belongs and communicated to the court shall serve as evidence of the character of that ship or cargo.

Article 20. Effect of an arbitration agreement

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a [commercial contract] [civil or commercial matter], that State cannot invoke immunity from jurisdiction before a court of

* Resumed from the 1924th meeting.

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

another State which is otherwise competent in a proceeding which relates to:

(*a*) the validity or interpretation of the arbitration agreement,

(*b*) the arbitration procedure,

(*c*) the setting aside of the award,

unless the arbitration agreement otherwise provides.

13. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, with the adoption of articles 19 and 20, the Commission would have completed its consideration of all the articles submitted by the Special Rapporteur for incorporation in part III of the draft, with the exception of article 11 (Scope of the present part), which the Drafting Committee would consider at a later stage, and the title of part III. Article 6 (State immunity) would also have to be considered further by the Drafting Committee, since it had not been possible to agree on a text in the limited time available.

14. Referring to article 19,[3] he said that it had been decided to separate the treatment of cargo from that of ships, so that paragraphs 1, 2 and 3 now related to ships, paragraphs 4 and 5 to cargo and paragraphs 6 and 7 to both. A number of drafting changes had been made in order to bring the article into line with articles already adopted and also for the sake of clarity. That explained, for example, why the words "which is otherwise competent" had been added in paragraphs 1 and 4.

15. Paragraph 1 provided for the case in which a State could not invoke immunity from jurisdiction before a court of another State which was otherwise competent. The Drafting Committee had decided that the expression "owns or operates" was sufficiently broad and that it was unnecessary to burden the text with additional expressions such as "possesses or employs". A full explanation would be given in the commentary. The expression "non-governmental" in paragraphs 1 and 4 had been placed in square brackets to indicate that the Drafting Committee had been unable to agree on what type of service by a ship would result in non-immunity. While some members considered that the term "commercial service" reflected the practice of States, others held that the expression "non-governmental" should be inserted to take account of the interests of developing countries that might own or operate ships engaged in service which, though of a commercial nature, should be regarded as governmental by virtue of its governmental purpose. The words "in any proceeding" were intended to cover all kinds of proceedings, including actions against the owner or operator of a ship, admiralty actions *in rem* and actions *in personam*. In the concluding phrase, the time factor had been retained and the words "intended exclusively for use" had been added to provide a safeguard against possible abuse: the intended use of a ship could be difficult to assess and it would be easier to ascertain an intent to use a ship exclusively for commercial [non-governmental] purposes. Some members considered, however, that the addition of the word "exclusively" would be contrary to State practice and would allow States far too much latitude to claim immunity.

16. Paragraph 2 conferred immunity from jurisdiction on certain categories of ships, such as warships and naval auxiliaries. The latter term, which had been introduced to cover ships such as supply ships and hospital ships, would be explained in the commentary. Further precision had been introduced with the phrase "used or intended for use in government non-commercial service", which was based on the concluding phrase of article 19, paragraph 1, and on the relevant articles of the 1926 Brussels Convention[4] and of the 1982 United Nations Convention on the Law of the Sea.[5]

17. Paragraph 3 provided examples of a "proceeding relating to the operation of that ship", as referred to in paragraph 1. It was based on article 3, paragraph 1, of the 1926 Brussels Convention, which had been cited by the Special Rapporteur in his sixth report (A/CN.4/376 and Add.1 and 2, para. 204), and which, in the Drafting Committee's view, provided a useful indication of the types of action for which there would be no immunity from jurisdiction under paragraph 1. The technical aspects of maritime law, which were readily apparent from paragraph 3, would be explained in the commentary. The words "operation of that ship" were to be understood not in the sense of the actual physical operation of a ship, but more in the maritime law sense, since a claim in respect of repairs, supplies or other contracts relating to the ship, as provided for in paragraph 3 (*c*), could well arise even before the ship embarked upon its actual physical operation. Maritime liens and mortgages, for example, were thus not excluded.

18. Paragraph 4 dealt with the non-immunity of a State in certain proceedings relating to the carriage of cargo on board a ship owned or operated by that State. It was modelled on paragraph 1 and his earlier remarks pertaining to terminology and the use of square brackets applied.

19. Paragraph 5 conferred immunity on "any cargo carried on board the ships referred to in paragraph 2" and on "any cargo belonging to a State and used or intended for use in government non-commercial service". It was an important provision in that it maintained immunity, *inter alia*, for cargo intended for emergency operations, such as food relief and medical supplies.

20. Paragraphs 6 and 7, which were new, represented an attempt to strike a balance between the non-immunity of a State under paragraphs 1 and 4 and certain types of protection to be afforded to the State. Those paragraphs were based on articles 4 and 5 of the 1926 Brussels Convention and related both to ships and to cargo. Under paragraph 6, the State could plead the same measures of defence, prescription and limitation of liability as were available to

[3] For the revised text of draft article 19 submitted by the Special Rapporteur, see 1915th meeting, para. 2, and for the Commission's consideration thereof, see 1915th meeting (paras. 5-30) and 1916th to 1918th meetings.

Draft article 19 as originally submitted by the Special Rapporteur was considered by the Commission at its thirty-sixth session, see *Yearbook ... 1984*, vol. I, pp. 145 *et seq.*, 1838th meeting (paras. 25 *et seq.*) and 1839th to 1841st meetings.

[4] See 1915th meeting, footnote 7.

[5] See 1924th meeting, footnote 11.

private ships and cargoes and their owners. Paragraph 7 provided that a certificate as to the character of the ship or cargo should be communicated to the court if any question in that regard arose in any proceedings. The certificate, which would serve as evidence of the character of the ship or cargo, should be communicated by the diplomatic representative or any other competent authority—such as a consul—of the State to which the ship or cargo belonged. Such a communication would, of course, be governed by the applicable rules of procedure of the forum State. Those points would be elaborated on in the commentary.

21. The title of the article had been amended to read "Ships engaged in commercial service", in keeping with the changes introduced in the body of the text.

22. One member had expressed reservations, in particular, with regard to those elements in the article which implied that the activities of the State could be divided between governmental activities and commercial activities.

23. Turning to article 20, he noted that the text proposed by the Drafting Committee was somewhat shorter than that originally submitted by the Special Rapporteur.[6] A number of changes had been made to introduce greater precision and bring the text into line with the wording of articles already adopted. The article thus revised consisted of a single paragraph dealing with the non-immunity of one State in a proceeding before a court of another State which related to certain aspects of an arbitration agreement which the former State had entered into, in writing, with a foreign natural or juridical person. The phrase "an agreement in writing with a foreign natural or juridical person to submit to arbitration differences ..." was intended to cover not only specific agreements on arbitration, but also clauses in agreements or *ad hoc* agreements providing for arbitration. In accordance with the wording of article 12 (Commercial contracts), the Drafting Committee had used the expression "differences relating to a [commercial contract] [civil or commercial matter]" rather than the longer formulation proposed by the Special Rapporteur.

24. As to the subject-matter of the differences which the parties agreed to submit to arbitration, the Drafting Committee had proposed two alternatives, both in square brackets. The second, namely a "civil or commercial matter", was supported by those members who considered that it covered not only differences relating to commercial contracts *per se*, but also differences relating to civil matters such as personal injury claims and assessment of damages. In the view of those members, since the State was free to agree to submit differences to arbitration, that freedom should not be restricted, even by implication, by limiting the article to differences that related to a commercial contract only. Other members, however, took the view that it was advisable to confine the subject-matter to a "commercial contract", as already defined in the draft. They contended that arbitration proceedings involved such contracts and that the use of the broader term "civil or commercial matter" could open the door to a wide interpretation by domestic courts that went well beyond what the State intended when it entered into the arbitration agreement; the article would be more acceptable, particularly to developing countries, if it were limited to differences relating to a commercial contract. Since the Drafting Committee had been unable to agree which formula to use, both had been placed in square brackets.

25. The operative part of the article, to the effect that a "State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent", avoided the more complicated language of the original text. The phrase "which is otherwise competent" had been included to ensure that it would be for the court of the forum State to satisfy itself that it was otherwise competent to entertain the proceeding in question.

26. Subparagraphs (*a*), (*b*) and (*c*) were virtually identical with those submitted by the Special Rapporteur, apart from minor drafting changes. The concluding phrase "unless the arbitration agreement otherwise provides" had been included to enable the parties to the agreement to incorporate provisions other than those specified in the article. Some members had, however, expressed reservations, since, under the law of some States, it was not certain whether the parties to such an agreement could waive the provisions of domestic law relating to the subject-matter jurisdiction of domestic courts or could purport to limit the jurisdiction of such courts.

27. It had been decided not to include a proviso to the effect that the article did not apply to arbitration agreements between States or between States and international organizations. It had been considered self-evident that such agreements fell outside the scope of the article, since the opening phrase referred expressly to a State which entered into an agreement "with a foreign natural or juridical person". That point would be emphasized in the commentary.

28. The title of article 20 had been couched in more specific terms to read: "Effect of an arbitration agreement".

29. One member had voiced his opposition to the article because, in his view, it dealt not with public international law matters but with matters of private international law and internal civil law, and the Commission was therefore not in a position to consider the question.

30. Mr. USHAKOV said that he could accept the text of article 19 as proposed by the Drafting Committee, even though he had some reservations concerning, in particular, paragraph 1. A ship operated by a State was, in his view, always engaged in government service and could therefore invoke immunity. If, as in the USSR and other countries, the State was the owner of the ship but authorized an entity distinct from it to use and operate the ship on a provisional basis, it still retained ownership of the ship under the law. He failed to see why an action could be brought against a State which owned a ship operated by an entity which was distinct from the

[6] For the text, see 1915th meeting, para. 3, and for the Commission's consideration thereof, see 1915th meeting (paras. 5-30) and 1916th to 1918th meetings.

State and did not enjoy immunity. That problem was not covered by paragraph 1 and he wished his reservation to be taken into consideration.

31. With regard to the words "nor to any cargo belonging to a State and used or intended for use in government non-commercial service" in paragraph 5 of article 19, he reaffirmed the principle that a cargo could not be divided into two parts, one in commercial service and the other not. In the case referred to in paragraph 5, cargo would always be regarded as being intended for use in government service.

32. He also had a reservation with regard to the wording of article 20, which suggested that a commercial arbitration award might be reviewed by certain courts. That was, in fact, not always so and he would therefore be grateful if the Special Rapporteur would explain, at least in the commentary, that such a possibility would depend on internal law.

The meeting rose at 1.05 p.m.

1932nd MEETING

Monday, 22 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (*concluded*) (A/CN.4/376 and Add.1 and 2,[1] A/CN.4/L.382, sect. D, A/CN.4/L.397)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)

ARTICLE 19 (Ships engaged in commercial service) *and*

ARTICLE 20 (Effect of an arbitration agreement)[2] (*concluded*)

1. Mr. OGISO, referring to article 19, said that he was opposed to the inclusion of the expression "non-governmental", which appeared in square brackets in paragraphs 1 and 4 and could be interpreted to mean that a ship owned by a State and used in commercial service enjoyed immunity from the jurisdiction of the courts of another State. As a result, all commercial ships in service under a State trading system might claim immunity—and that would be quite unacceptable to him, particularly in the event of a collision for which a State-owned ship was responsible. In such a case, a merchant ship operating under the free-market system would, of course, be subject to local jurisdiction. The inclusion of the expression "non-governmental" could, moreover, give rise to an interpretation that was inconsistent with existing State practice and with international agreements such as the 1926 Brussels Convention.[3] In his view, therefore, that expression should be deleted from article 19.

2. Mr. ILLUECA said that, in his view, the Spanish text of article 19 had to be brought more closely into line with the English text. In paragraph 1, the words *o que lo explote* should therefore be replaced by the words *o que lo utilice con tal propósito* or by the words *o que lo emplee con tal propósito*. The words *procedimiento concerniente a la explotación de ese buque* in paragraphs 1 and 3 should be replaced by the words *procedimiento concerniente al funcionamiento de ese buque* and, in paragraphs 2 and 4, the words *explotados* and *explotado* should be replaced by the words *utilizados* and *utilizado*, respectively.

3. The Spanish wording of the proposed title of article 19, namely *Buques destinados a un servicio comercial*, differed both in form and in substance from the title originally submitted by the Special Rapporteur in his sixth report (A/CN.4/376 and Add.1 and 2, paras. 232-233), which referred to *Buques utilizados en servicio comercial*. As it now stood, the proposed title failed to make it clear that article 19 applied not to all ships, but only to ships engaged in commercial service and owned or operated by a State, in accordance with the classification presented by the Special Rapporteur in his sixth report (*ibid.*, paras. 128-131), which distinguished between "public vessels" and "private vessels". The title should therefore be amended to read: *Buques del Estado o buques que el Estado utiliza en servicio comercial* ("State-owned or State-operated ships in commercial service").

4. As an example of a situation where it was practically impossible to distinguish between a ship used by a State for governmental purposes and a ship used by that State for commercial purposes, he referred to a case which had occurred in 1973. At the time of the events leading to the overthrow of the Allende Government in Chile, two ships, one Cuban and the other Soviet, had been unloading in a Chilean port. Their captains had immediately decided to return to their home ports via the Panama Canal. When passing through the Canal, the two ships had been arrested and attached by order of a federal court of the United States of America in the former Canal Zone following a complaint by a Chilean agency. The Government of Panama had protested, claiming that, as a sovereign State, it recognized the jurisdictional immunity of the two ships, which were in the service of the Governments of two sovereign States, and that their attachment was contrary to the Canal's legal régime. Shortly thereafter, the federal court in question had received a note from the Department of State and the two ships had been released and allowed to proceed on their way.

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[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[2] For the texts, see 1931st meeting, para. 12.

[3] See 1915th meeting, footnote 7.