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**Summary record of the 1936th meeting**

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## 1936th MEETING

Thursday, 25 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

*Present:* Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov

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

**CHAPTER V. Jurisdictional immunities of States and their property** (*continued*) (A/CN.4/L.389 and Add.1 and Add.1/Corr.1 and Add.2 and 3)

**B. Draft articles on jurisdictional immunities of States and their property** (*continued*) (A/CN.4/L.389/Add.2 and 3)

**SUBSECTION 2 (TEXTS OF ARTICLES 19 AND 20, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS THIRTY-SEVENTH SESSION)** (*continued*) (A/CN.4/L.389/Add.3)

*Commentary to article 19 (State-owned or State-operated ships engaged in commercial service)* (*continued*)

Paragraph (7)

1. Mr. CALERO RODRIGUES said that the last part of the second sentence, namely “and considered treating ‘commercial’ and ‘non-governmental’ as cumulative”, was not clear. In order to reflect more accurately the views of the members of the Commission referred to in the first part of the sentence, the last part of the sentence should be amended to read: “... and considered that ‘commercial’ and ‘non-governmental’ should be taken cumulatively”.

2. After a discussion in which Mr. SUCHARITKUL (Special Rapporteur), Mr. USHAKOV and Mr. MAHIOU took part, Mr. RAZAFINDRALAMBO proposed that the word “should”, in the amendment proposed by Mr. Calero Rodrigues, be replaced by “could”.

*It was so agreed.*

*The amendment was adopted.*

3. Mr. CALERO RODRIGUES said that he failed to see what purpose was served by the statement, in the third sentence, that some members of the Commission had explained that “States, and particularly developing countries, might trade between themselves” without submitting to the jurisdiction of national courts.

4. After a discussion in which Mr. MAHIOU, the CHAIRMAN and Sir Ian SINCLAIR took part, Mr. MAHIOU proposed that the third sentence should be redrafted along the following lines: “Others again added that States, particularly developing countries, and other public entities could

engage in activities of a commercial and governmental nature without submitting to the jurisdiction of national courts.”

5. Mr. USHAKOV observed that States could engage in commercial activities not only with other States but also with foreign private persons.

6. Mr. BALANDA said that that was particularly true in developing countries.

7. Chief AKINJIDE pointed out that the real problems for a developing country arose in connection with trade with private persons or firms, including multinational companies, which accounted for the bulk of total external trade. Trade between the developing countries themselves was on a very modest scale. He therefore agreed with Mr. Ushakov and Mr. Balanda.

8. Mr. CALERO RODRIGUES supported Mr. Mahiou’s amendment, which clarified the meaning of the third sentence, and proposed its adoption.

*It was so agreed.*

9. Mr. REUTER said that he was in full agreement with the principle thus laid down, but would point out that the decision could have serious consequences, since it recognized the possibility of engaging in international trade while avoiding the jurisdiction of any national court.

10. Mr. USHAKOV said that, because the third sentence had been amended, the fourth sentence no longer followed logically upon it.

11. After a discussion in which Mr. SUCHARITKUL (Special Rapporteur), Sir Ian SINCLAIR, Mr. BALANDA and Mr. KOROMA took part, Mr. RAZAFINDRALAMBO proposed that the word “Thus”, at the beginning of the fourth sentence, should be replaced by “Furthermore”.

*It was so agreed.*

12. Mr. SUCHARITKUL (Special Rapporteur) drew attention to the fact that the expression “government-to-government”, in the fourth sentence, was a technical term, which covered State agencies as well as Governments proper.

*Paragraph (7), as amended, was approved.*

New paragraph (7 *bis*) and paragraph (8)

13. Mr. OGISO proposed the insertion, at the beginning of paragraph (8), of the following sentence: “Some members opposed the inclusion of the expression ‘non-governmental’ in square brackets.”

14. Mr. LACLETA MUÑOZ, supporting Mr. Ogiso’s proposal, said it should be made clearer that, while some members had been in favour of retaining the expression “non-governmental”, others had taken the opposite view, and that the expression had been placed between square brackets as a compromise.

15. Mr. BALANDA said that the reason given in paragraph (8) for retaining the expression “non-governmental” was the one he himself had advanced when draft article 19, as proposed by the Drafting

Committee, had been adopted by the Commission (1932nd meeting). Care should be taken not to modify that part of paragraph (8).

16. Sir Ian SINCLAIR proposed, in order to reflect the views of Mr. Ogiso and others, including himself, the insertion of a new paragraph (7 bis) along the following lines: "Some members opposed the retention of the expression 'non-governmental' in square brackets in paragraphs 1 and 4."

17. Mr. USHAKOV pointed out that the members in question had been altogether opposed to the retention of the expression "non-governmental" in square brackets. The wording in the proposed sentence should perhaps be "... even in square brackets".

18. After a discussion in which Mr. SUCHARITKUL (Special Rapporteur), Mr. USHAKOV and Mr. LACLETA MUÑOZ took part, Mr. CALERO RODRIGUES proposed the insertion in a new paragraph (7 bis) of the words "which appeared", so as to read: "... the expression 'non-governmental' which appeared in square brackets in paragraphs 1 and 4".

19. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt Sir Ian Sinclair's proposal for a new paragraph (7 bis), as amended by Mr. Calero Rodrigues.

*It was so agreed.*

20. Mr. MAHIU pointed out that the new paragraph could well take the form of a new sentence to be added at the end of paragraph (7).

21. Sir Ian SINCLAIR said that, as a consequential change following the addition of paragraph (7 bis), the opening words of paragraph (8), "While some members", should be amended to read "While some other members".

*It was so agreed.*

22. Mr. USHAKOV proposed that, in the opening phrase of paragraph (8), the words "retention of the words [non-governmental] in square brackets in paragraphs 1 and 4" should be replaced by "retention of that expression".

*It was so agreed.*

*New paragraph (7 bis) and paragraph (8), as amended, were approved.*

Paragraph (9)

23. Mr. REUTER said that the expression "in the light of", in the first sentence, was unsatisfactory, particularly in French. It should be altered to "in the framework of".

24. Chief AKINJIDE proposed that the words "in the light of" should be replaced by "against the background of".

*It was so agreed.*

25. Mr. DÍAZ GONZÁLEZ said that it would be preferable, stylistically, to say "transport of goods and passengers by sea", in the last part of the second sentence.

*It was so agreed.*

26. Mr. McCAFFREY proposed that the words "a wide field of maritime transport", in the fifth sentence, should be amended to "a wide field of maritime activities". The items listed immediately after those words included many activities outside the field of transport.

*It was so agreed.*

27. Mr. TOMUSCHAT suggested that the fourth, fifth and sixth sentences of paragraph (9) might be deleted, since they went into detail about the legal aspects of the carriage of goods by sea and did not really constitute a commentary to the provisions of article 19.

28. Mr. McCAFFREY urged that those sentences be retained. They were most important in explaining what was covered by the term "operator". In the Drafting Committee, he had insisted on the inclusion of such a full explanation in the commentary, so that he could accept the article.

29. Mr. YANKOV said that he, too, strongly favoured retaining those three sentences. Paragraph 3 of article 19 referred to the liabilities of carriers by sea, and hence the content of the sentences in question was pertinent to article 19. He proposed that the expression "dangerous products", in the sixth sentence, should be altered to "dangerous goods", so as to conform with the terminology in the relevant treaties.

*It was so agreed.*

30. Mr. LACLETA MUÑOZ said that it was inappropriate to say, in the penultimate sentence, that "The operation" of certain ships "is given some clarification" by the illustrations in paragraph 3 of the article. What was meant was that those illustrations shed light on the concept of such operation. The opening words of the sentence should be amended to: "The concept of the operation of ...".

*It was so agreed.*

31. In reply to a question by Mr. USHAKOV, Mr. SUCHARITKUL (Special Rapporteur) said that the purpose of the last sentence of the paragraph was to indicate that the term "State-operated", in article 19, was intended to cover ships in the possession or under the control of the State, bearing in mind that article 19 did not specifically refer to ships in State possession or under State control. A ship that was not owned but was merely requisitioned by the State would thus be covered by the terms of the article.

32. Sir Ian SINCLAIR said that the sentence was important in order to make it clear that "operation" covered "charter" in all forms.

33. The CHAIRMAN suggested that the last sentence should be reworded to read: "The expression 'State-operated ships' covers also the 'possession', 'control', 'management' and 'charter' of ships by a State, whether the charter is for a time or voyage, bare-boat or otherwise."

*It was so agreed.*

Paragraph (9), as amended, was approved.

Paragraph (10)

34. Sir Ian SINCLAIR proposed that, in the third sentence, the phrase “and which invariably entailed proceedings *in personam* against the owner and master or captain of the ship” should be replaced by “and which were directed to all persons having an interest in the ship or cargo”. In the sixth sentence, the words “against the operation” should be replaced by “relating to the operation”.

35. Mr. MAHIOU, referring to the first sentence, said that, as one of the members who had expressed a reservation, he would propose that the words “One member” should be replaced by “Some members”.

36. Mr. BALANDA said that the words *de l'exploitation*, in the second sentence of the French text, should be replaced by *pour l'exploitation*.

37. Mr. LACLETA MUÑOZ said that Sir Ian Sinclair's remark regarding the sixth sentence also applied to the Spanish text.

38. To avoid any misunderstanding as to the intent, the words *era todavía*, in the second sentence of the Spanish text, should be replaced by *seguiría siendo* and the word *permitía* by *había transferido*. Also, the words *para el caso*, in the fourth sentence, were unnecessary.

39. In response to a question by Mr. OGISO, Mr. USHAKOV said that, unlike the common law, the Continental system of law rarely provided for the possibility of bringing an action *in rem*. It might conceivably be possible to envisage an action *in rem* against an entity separate from the State that operated a ship belonging to a State and did not enjoy immunity, but not against a State which owned but did not operate a ship, since that would give rise to legal and even political problems.

40. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (10) with the amendments proposed by Sir Ian Sinclair, Mr. Mahiou, Mr. Balanda and Mr. Lacleta Muñoz.

*It was so agreed.*

Paragraph (10), as amended, was approved.

Paragraph (11)

41. Sir Ian SINCLAIR proposed the deletion of the last sentence.

*It was so agreed.*

42. Mr. RIPHAGEN said that a comparison of paragraphs (11) and (16) of the commentary to article 19 might cause some confusion in the mind of the general reader. Possibly, therefore, some modification was required.

43. Mr. CALERO RODRIGUES suggested that the difficulty could be overcome by the insertion, in the first sentence of paragraph (11), of the words “for such purposes as to cope”, between the words “distribution but” and “to relieve”.

44. Following suggestions by Chief AKINJIDE and Mr. KOROMA, Mr. SUCHARITKUL (Special Rapporteur) said that the second part of the first sentence should be reworded to read: “even though such vessels may be employed occasionally for the carriage of cargoes for such purposes as to cope with an emergency or other natural calamities”.

45. Mr. LACLETA MUÑOZ said that it was indeed advisable to amend the first sentence with a view to simplifying it, and also to delete the last sentence. In the penultimate sentence, a comma should be added after the word “dredgers”, to make it clear that all the government ships referred to had to be owned or operated by a State and used or intended for use in government non-commercial service. In addition, the words *la inmunidad del Estado a los buques de guerra*, in the first sentence of the Spanish text, should be replaced by *la inmunidad del Estado en favor de los buques de guerra*, and the words *buques estatales*, in the second sentence, should be replaced by *buques de Estado*, which reflected a well-known concept.

*It was so agreed.*

Paragraph (11), as amended, was approved.

Paragraph (12)

46. Mr. McCAFFREY proposed that the first sentence should be reworded to read: “It is important to note that paragraphs 1 and 2 apply to both ‘use’ and ‘intention to use’. “The second sentence should be deleted; it was unnecessary because the essence of paragraph (12) was that paragraphs 1 and 2 of article 19 applied both to use and to intention to use. Lastly, the penultimate sentence of the paragraph should be reworded to read: “Such arrest or attachment would not be permitted under the test of ‘intended for use’.”

*It was so agreed.*

47. Mr. BALANDA said that he would like to know whether the word “ship” (*navire*) also applied to boats (*bateaux*): in other words, was it to be given its broad or its technical meaning? From the technical standpoint, a ship was not a boat and, in the case of carriage by inland waterways, the internal law of some countries referred to boats, not ships. International trade via inland waterways was considerable and the rules relating to ships should apply *mutatis mutandis* to boats, as he had already stated in the Drafting Committee. It should certainly be possible to indicate at some point that the word “ship” also applied to boats.

48. Mr. USHAKOV said that, in his view, the French word *navire* was a generic term and applied also to boats. River traffic, however, was governed not by general international law, but by the internal law of the States concerned. The topic under consideration was concerned solely with ocean-going vessels.

49. Mr. SUCHARITKUL (Special Rapporteur) said that he would be hesitant about departing from the régime proposed in the draft and entering into undue detail on a matter that had already been covered elsewhere.

50. Mr. LACLETA MUÑOZ, referring to the Spanish text, said that the words *puede no estar efectivamente utilizado*, in the fourth sentence, should be replaced by *puede no ser efectivamente utilizado*; in the penultimate sentence, the words *el buque* should be added after the words *está destinado*; and, in the last sentence, the words *de guerra* should be inserted after the word *fragata*.

*It was so agreed.*

51. Chief AKINJIDE said that, given the differences in the various national systems of law, it might be advisable to explain in the commentary that the word "ships" included boats.

52. Mr. FRANCIS suggested that a footnote might be added to the effect that the term "ships" included non-ocean-going vessels.

53. Sir Ian SINCLAIR said that such a footnote would broaden the scope of the article considerably. He proposed instead that a new sentence should be inserted after the second sentence of paragraph (1) of the commentary, which had already been adopted (1935th meeting), reading: "The expression 'ship' in this context should be interpreted as covering all types of seagoing vessels, whatever their nomenclature and even if they are engaged only partially in sea-traffic."

*It was so agreed.*

54. Mr. TOMUSCHAT said that, if river boats were to be covered, the text would have to be revised, since paragraph (1) of the commentary referred expressly to maritime law. It was a very important matter, particularly for countries such as his own, and he wondered whether the issue could in fact be excluded from the scope of the draft.

55. The CHAIRMAN said that the question of scope could be taken up on second reading.

*Paragraph (12), as amended, was approved.*

*The meeting rose at 1.05 p.m.*

## 1937th MEETING

*Thursday, 25 July 1985, at 3.05 p.m.*

*Chairman: Mr. Satya Pal JAGOTA*

*Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitikul, Mr. Thiam, Mr. Ushakov, Mr. Yankov*

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

CHAPTER V. *Jurisdictional immunities of States and their property* (concluded) (A/CN.4/L.389 and Add.1 and Add.1/Corr.1 and Add.2 and 3)

B. *Draft articles on jurisdictional immunities of States and their property* (concluded) (A/CN.4/L.389/Add.2 and 3)

SUBSECTION 2 (TEXTS OF ARTICLES 19 AND 20, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS THIRTY-SEVENTH SESSION) (concluded) (A/CN.4/L.389/Add.3)

*Commentary to article 19* (State-owned or State-operated ships engaged in commercial service) (concluded)

Paragraph (13)

*Paragraph (13) was approved.*

Paragraph (14)

1. Sir Ian SINCLAIR proposed that the words "merchant fleet", at the end of the second sentence, should be replaced by the word "owner", in order to bring the text into line with that of paragraph (4) of the commentary to article 19.

*It was so agreed.*

2. Mr. OGISO proposed that the word "could", before "be released", in the third sentence, should be replaced by "would". Moreover, in view of the reference to actions to enforce a maritime lien or to foreclose a mortgage, the words "or otherwise" should be inserted after the word "admiralty" in the fourth sentence.

*It was so agreed.*

3. Mr. BALANDA, referring to the French text, said that the word *caution*, in the third sentence, should be replaced by *cautionnement*.

*It was so agreed.*

*Paragraph (14), as amended, was approved.*

Paragraph (15)

4. Mr. USHAKOV said that the second sentence, which presumably referred to the view he himself had expressed, should read: "... it was difficult to see how property such as a ship or cargo could be State-owned and used by the State for non-governmental purposes".

*It was so agreed.*

*Paragraph (15), as amended, was approved.*

Paragraph (16)

5. Mr. SUCHARITKUL (Special Rapporteur) said that the words "commercial or non-commercial" should be inserted between commas between the words "cargo" and "carried" in the first part of the first sentence.

*Paragraph (16), as amended, was approved.*

Paragraph (17)

6. Chief AKINJIDE pointed out that the word "may", between the words "concerned" and "serve", in the penultimate sentence, should be replaced by "shall", so as to bring the text into line with paragraph 7 of article 19.

*It was so agreed.*