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Summary record of the 2139th meeting

Topic:
Other topics

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2139th MEETING

Monday, 17 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-first session (*continued*)

CHAPTER VI. *Jurisdictional immunities of States and their property* (concluded) (A/CN.4/L.439 and Add.1 and 2)

B. *Consideration of the topic at the present session* (concluded) (A/CN.4/L.439 and Add.1 and 2)

Paragraph 101 (*concluded*) (A/CN.4/L.439/Add.1)

1. Mr. FRANCIS said that the second sentence of paragraph 101 was meant to record the opinion expressed by himself and Mr. Njenga. He proposed, with the agreement of the latter, that it be replaced by the following text:

“Some other members felt that such an exemption was also important to developing countries. In that connection, it was said that there had been many instances in which judicial process had been instituted against a State with respect to commercial contracts of a State enterprise having separate and distinct juridical status under national law for the execution of its functions. Such proceedings should, in the view of those members, be confined to such enterprises not only on the basis of legal principles, but also taking into account the limited economic resources of developing countries and the very high cost of litigation in certain other countries.”

It was so agreed.

Paragraph 101, as amended, was adopted.

Paragraph 175 (*concluded*) (A/CN.4/L.439/Add.2)

2. Mr. SHI, reverting to paragraph 175, which had been amended by the Special Rapporteur at the previous meeting (para. 65), proposed that, in order to render more faithfully his own remarks concerning article 21, the first sentence should be further amended to read:

“One member was of the view that article 21 should explicitly spell out the principle of State immunity in respect of property from measures of constraint, along the lines of article 23 of the 1972 European Convention on State Immunity, incorporating some of the elements of article 22 of the present draft.”

It was so agreed.

Paragraphs 179 to 211 (A/CN.4/L.439/Add.2)

Paragraph 179

Paragraph 179 was adopted subject to a correction.

Paragraphs 180 to 186

Paragraphs 180 to 186 were adopted.

Paragraph 187

3. Mr. SHI proposed that, in order to reflect the discussion more accurately, the following sentence should be added at the end of the paragraph: “A few members favoured its deletion.”

It was so agreed.

Paragraph 187, as amended, was adopted.

Paragraphs 188 and 189

Paragraphs 188 and 189 were adopted.

Paragraph 190

4. Mr. OGISO (Special Rapporteur) said that, in the second sentence, the words “he said” should be deleted.

Paragraph 190, as amended, was adopted.

Paragraph 191

Paragraph 191 was adopted.

Paragraph 192

5. Mr. McCAFFREY proposed that, in the first sentence, the words “his proposal” should be replaced by “that proposal”. In the second sentence, the word “as”, before the words “in paragraph 3”, should be deleted.

It was so agreed.

Paragraph 192, as amended, was adopted.

Paragraph 193

Paragraph 193 was adopted.

Paragraph 194

6. Mr. CALERO RODRIGUES suggested that the words “due process”, in the first sentence, should be replaced by “due service of process”.

It was so agreed.

Paragraph 194, as amended, was adopted.

Paragraph 195

Paragraph 195 was adopted.

Paragraph 196

7. Mr. McCAFFREY, observing that normally the receipt of documents instituting a proceeding was presumed when they had been served in due form, proposed that the word “due”, before the words “service of process” in the second sentence, should be deleted.

It was so agreed.

Paragraph 196, as amended, was adopted.

Paragraph 197

8. After an exchange of views in which Mr. McCAFFREY and Mr. AL-QAYSI took part, the CHAIRMAN suggested that the words “as they did” should be replaced by “a change which they had also proposed”.

It was so agreed.

Paragraph 197, as amended, was adopted.

Paragraphs 198 to 203

Paragraphs 198 to 203 were adopted.

Paragraph 204

9. Mr. McCAFFREY asked what was the purpose of the second sentence: did it reflect a comment made by members

other than those who had “expressed doubts about the proposed reformulation” of paragraph 2 of article 27?

10. Mr. OGISO (Special Rapporteur) said that the sentence was intended to give the reasons for the doubts expressed. To make it clearer, he proposed that the word “indiscriminately” be deleted.

It was so agreed.

Paragraph 204, as amended, was adopted.

Paragraphs 205 and 206

Paragraphs 205 and 206 were adopted.

Paragraph 207

11. Mr. BENNOUNA, noting that the third sentence summarized his comments, proposed that the last part of it should be amended to read: “. . . require national courts to defer to the injunctions of the executive in order to abide by the principle of reciprocity”.

It was so agreed.

Paragraph 207, as amended, was adopted.

Paragraph 208

Paragraph 208 was adopted.

Heading preceding paragraph 209

The heading preceding paragraph 209 was adopted.

Paragraph 209

12. The CHAIRMAN proposed that the words “and adopted” be deleted: if the draft articles and annex in question had not been discussed, it was obvious they could not have been adopted.

It was so agreed.

Paragraph 209, as amended, was adopted.

13. The CHAIRMAN said that the secretariat would ensure that the texts of Part VI of the draft articles and the annex, on the settlement of disputes, reproduced in the report were the correct ones.

Paragraph 210

14. The CHAIRMAN, noting that two members of the Commission had spoken on the proposals in question, suggested that the words “in detail”, in the first sentence, should be deleted.

It was so agreed.

Paragraph 210, as amended, was adopted.

Paragraph 211

15. Mr. BENNOUNA (Rapporteur) said that it would be advisable to consult the General Assembly on the question whether the provisions relating to the settlement of disputes should form part of the draft articles or be a separate optional protocol, or whether the matter should be left to a diplomatic conference.

16. After an exchange of views in which Mr. NJENGA, Mr. CALERO RODRIGUES, Mr. BARBOZA, Mr. FRANCIS, Mr. BARSEGOV, Mr. McCAFFREY, Mr. JACOVIDES and Mr. OGISO (Special Rapporteur) took part, the CHAIRMAN proposed that the following sentence be added at the end of paragraph 211: “Before the matter is considered further, an indication of the preference of the General Assembly would be useful to the Commission.”

It was so agreed.

Paragraph 211, as amended, was adopted.

Section B, as amended, was adopted.

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

CHAPTER V. International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.438)

A. Introduction

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 5 to 7

Paragraphs 5 to 7 were adopted.

Paragraph 8

17. Mr. McCAFFREY questioned whether the word “areas”, used twice in the penultimate sentence, was really appropriate, and whether the word “issues”, which appeared in the next sentence, would not be preferable.

18. Mr. BARBOZA (Special Rapporteur) said that, in the first case, the word “issues” was indeed preferable. In the second case, however, the word “areas” should be retained, since it designated zones beyond national jurisdiction.

19. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to replace the word “areas”, at the beginning of the penultimate sentence of paragraph 8, by “issues”.

It was so agreed.

Paragraph 8, as amended, was adopted.

Paragraph 9

20. Mr. BARSEGOV said that the words “strongly supported”, in the second sentence, did not reflect the discussions in the Commission or in the Sixth Committee of the General Assembly, where many States—including the USSR, which he had represented—had taken the opposite view. He would revert to the matter later in the consideration of chapter V of the draft report.

Paragraph 9 was adopted.

Paragraphs 10 to 12

Paragraphs 10 to 12 were adopted.

Paragraph 13

21. Mr. BARBOZA (Special Rapporteur) said that, to be more precise, the words “such as those” should be added after the word “activities”, in the second sentence.

Paragraph 13, as amended, was adopted.

Paragraph 14

Paragraph 14 was adopted.

Paragraph 15

22. Mr. MAHIOU and Mr. BENNOUNA said that they were not satisfied with the French translation of the concepts of “liability” and “responsibility”.

23. Mr. McCAFFREY said that the expression “causal liability”, in the second sentence, was obscure.

24. Mr. BARSEGOV said that the Russian text was equally vague.

25. The CHAIRMAN proposed that the Commission should revert to those linguistic problems after taking time for reflection and consultation.

It was so agreed.

Paragraphs 16 and 17

Paragraphs 16 and 17 were adopted.

Paragraph 18

26. Mr. McCAFFREY proposed that the word "matter", in the fourth sentence, should be replaced by "subject-matter". The next two sentences should also be amended to refer to "balance of interests", since the plural was more correct than the singular.

It was so agreed.

27. Lastly, the concluding sentence of the paragraph was not clear: one could not tell whether the expression "affected by harm" referred to the "parties" or the "balance of interests".

28. Mr. BEESLEY proposed that the words "which was affected by harm", in the last sentence, should be deleted so as to remove the ambiguity.

It was so agreed.

Paragraph 18, as amended, was adopted.

Paragraph 19

Paragraph 19 was adopted.

Paragraph 20

29. Mr. BARBOZA (Special Rapporteur) said that the beginning of the first sentence should be amended so as to state that the principle of co-operation was "one of the bases" for the procedural obligations of States.

Paragraph 20, as amended, was adopted.

Paragraphs 21 to 26

Paragraphs 21 to 26 were adopted.

Paragraph 27

30. Mr. BARBOZA (Special Rapporteur) said that, in order to make the penultimate sentence more precise, the words "in the absence of such a régime" should be inserted before the words "to negotiate reparation for the harm".

Paragraph 27, as amended, was adopted.

Paragraphs 28 to 31

Paragraphs 28 to 31 were adopted.

Paragraph 32

31. Mr. BARSEGOV, noting that the section beginning with paragraph 32 was placed under the heading "Comments on . . . articles 1 to 9", said that the word "comments" was not appropriate, since the Commission had had a real exchange of views on those articles.

32. Mr. BENNOUNA (Rapporteur) said that he had already had occasion to deplore the fact that special rapporteurs and the Rapporteur of the Commission did not decide on a uniform structure for the different chapters of the report. As to the headings and subheadings, it was true that the Commission had decided to delete them from section B of chapter VI of its report, but in the present instance they seemed indispensable for an understanding of the text.

33. After a discussion in which Mr. EIRIKSSON, Mr. McCAFFREY and Mr. BARBOZA (Special Rapporteur) took part, the CHAIRMAN suggested that the structure of chapter V of the draft report be amended as follows: paragraph 7 would be replaced by the heading "1. Introduction of the fifth report by the Special Rapporteur"; and paragraph 32 would be preceded by the heading "2. Consideration of draft articles 1 to 9 by the Commission".

It was so agreed.

34. Mr. BARBOZA (Special Rapporteur) said that the words "or creating a risk of causing harm" should be inserted after the words "activities causing harm", in the second sentence of paragraph 32.

Paragraph 32, as amended, was adopted.

Paragraph 33

35. Mr. BARSEGOV observed that, in the fourth sentence, it was stated that the title of the topic "did not refer to 'licit' or 'illicit' acts but to acts 'not prohibited by international law'". The Special Rapporteur appeared to be answering a question which had not been asked or to be upholding a certain point of view without recording the opinion of members of the Commission who were not in agreement with it. He himself had always maintained that what was not prohibited was permitted, and that the distinction between "licit" and "illicit" was irrelevant in the present context. He therefore proposed that the considerations expressed in the sentence in question be deleted or that the view supported by other members of the Commission be presented.

36. Mr. BARBOZA (Special Rapporteur) pointed out that paragraph 33 did not reflect the opinion of the Special Rapporteur, but that of some members of the Commission. The contrary view had been presented at the previous session and it seemed difficult to record it in the Commission's report on its forty-first session.

37. Mr. BEESLEY noted that the sentence quoted by Mr. Barsegov summarized what he himself had said during the discussion. He was willing to reconsider that sentence or even to delete it if, at the end of the Commission's consideration of chapter V of its report, Mr. Barsegov thought that the summary of its work was not balanced.

38. Mr. BARSEGOV said that he was satisfied with the explanations given and would not press for the amendment of paragraph 33 in that respect.

39. He was doubtful, however, about the adjective "eclectic" in the seventh sentence. It seemed inappropriate to say that the Commission "must also be eclectic in seeking precedents for its work", since that would not be in conformity with its usual methods of work.

40. Mr. BEESLEY proposed that the word "eclectic" be replaced by "flexible".

It was so agreed.

41. Mr. McCAFFREY noted that the sequence of tenses was rather erratic in paragraphs 33 *et seq.*

42. The CHAIRMAN said that the secretariat would revise the text in that respect.

Paragraph 33, as amended, was adopted.

Paragraph 34

Paragraph 34 was adopted.

Paragraph 35

43. Mr. BARSEGOV proposed that the second sentence be replaced by the following text:

“In the view of one member, invocation of analogous principles selectively taken from individual decisions of domestic courts was not always justified, since the decisions of domestic courts and domestic law were not sources of international law.”

44. Mr. ARANGIO-RUIZ said he doubted whether that text adequately reflected Mr. Barsegov’s opinion, since he had denied the possibility of deriving principles of international law by proceeding by analogy with internal law.

45. Mr. BARSEGOV said that the word “analogous” in his amendment could be deleted.

Mr. Barsegov’s amendment was adopted.

Paragraph 35, as amended, was adopted.

Paragraph 36

46. Mr. BARSEGOV said he doubted whether the phrase “the articles may be drafted in a way that was appropriate for a residual convention”, in the fifth sentence, accurately reflected the discussion, since the preference of several members of the Commission was for a list enumerating the activities to which the articles applied. He therefore proposed the addition of the following sentence to summarize what he had said about the list of activities:

“Another member remarked that no member of the Commission had been able to indicate which types of activity entailing no risk could be the cause of transboundary harm considered as the sole source of liability.”

47. Mr. EIRIKSSON said he was not sure how the words “considered as the sole source of liability” in that amendment should be understood.

48. Mr. BARSEGOV said that, according to the dualist approach, liability could be considered to derive either from activities involving risk or from activities involving no obvious risk; but could anyone give an example of an activity which, although it involved no intrinsic risk, could nevertheless cause harm?

49. Mr. BARBOZA (Special Rapporteur) said that Mr. Barsegov’s view was reflected in paragraph 41.

50. Mr. EIRIKSSON said he thought that the amendment proposed by Mr. Barsegov should apply to paragraph 41.

51. Mr. CALERO RODRIGUES said that proposals made by a member of the Commission with a view to recording in the Commission’s report an opinion he had expressed should not give rise to a discussion.

52. Mr. BARSEGOV said that he had no objection to the sentence he had proposed being added to paragraph 41 rather than to paragraph 36; he had raised the matter in connection with paragraph 36 only because the list of activities was mentioned there.

53. The CHAIRMAN said that the Commission would revert to Mr. Barsegov’s proposal when it considered paragraph 41.

54. In the eighth sentence of paragraph 36, he suggested that the words “another member” be replaced by “some members”.

It was so agreed.

Paragraph 36, as amended, was adopted.

Paragraph 37

55. Mr. BARSEGOV said that he had indeed expressed the opinion summarized in the first sentence, but from a different viewpoint. In his view, the different types of responsibility were not interchangeable: to confuse them introduced a dualist approach into the study of the topic.

56. Mr. BEESLEY said he recognized that it was difficult to record the opinions of members of the Commission in the report, but added that, at the present stage, concrete proposals would be preferable.

57. Mr. BARBOZA (Special Rapporteur) observed that the sentence called in question by Mr. Barsegov in fact reflected the opinion of Mr. Thiam. He suggested that the words “In the view of a member” should be replaced by “In the view of two members of the Commission”.

58. After an exchange of views in which Mr. BENNOUNA (Rapporteur), Mr. BARSEGOV, Mr. McCAFFREY and Mr. BARBOZA (Special Rapporteur) took part, Mr. BARSEGOV proposed the addition of the following sentence: “According to one member of the Commission, the different types of responsibility could not be combined, and unfortunately the dualist approach would lead to that eventuality.”

59. Mr. BEESLEY said he agreed with the Special Rapporteur that there could be two bases of no-fault liability, which could be reflected in one and the same text. If the draft report, which was balanced and fair, was to be called in question again by additions and amendments intended to record what he must regretfully qualify as a minority view, he would have to do what was required to restore the balance or even reopen the debate if necessary.

60. The CHAIRMAN said he understood that, according to Mr. Barsegov, the Commission’s position could be a source of confusion. But did not the penultimate sentence of paragraph 37 reflect that concern? He invited the Commission to revert to paragraph 37 at the next meeting.

The meeting rose at 1.05 p.m.

2140th MEETING

Monday, 17 July 1989, at 3 p.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Tomuschat.
