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Summary record of the 2245th meeting

Topic:
Other topics

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The commentary to article 2, as amended, was approved.

Commentary to article 3 (Privileges and immunities not affected by the present articles)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

91. Mr. MAHIU said that the words “Drafting Committee” in the fifth sentence should be replaced by “Commission”.

Paragraph (3), as amended, was approved.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were approved.

The commentary to article 3, as amended, was approved.

Commentary to article 4 (Non-retroactivity of the present articles)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved

The commentary to article 4 was approved.

Commentary to article 5 (State immunity)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraphs (3) and (4)

92. Mr. EIRIKSSON said that paragraphs (3) and (4) overlapped and could be combined. A new paragraph should be drafted whereby the first sentence would be the first sentence of paragraph (3), followed by the entire text of paragraph (4), to which the words “and would not prejudice the future development of State practice” would be added after the phrase “would have no effect on general international law”. That formulation would then be followed by the last sentence of paragraph (3).

93. Mr. CALERO RODRIGUES endorsed Mr. Eiriksson’s suggestion. The proposed arrangement did not imply any substantive changes and was an improvement on the original text.

Paragraphs (3) and (4), as amended, were approved.

The commentary to article 5, as amended, was approved.

Commentary to article 6 (Modalities for giving effect to State immunity)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

94. Mr. TOMUSCHAT said that the words “and only then”, in the second sentence, should be deleted in order to give more flexibility to the meaning of the paragraph. The words “the court is”, in the last sentence, should be replaced by “courts are”.

It was so agreed

Paragraph (3), as amended, was approved.

Paragraphs (4) to (11)

Paragraphs (4) to (11) were approved.

Paragraph (12)

95. Mr. TOMUSCHAT said that the words “so much” should be inserted after the words “the practice of States not” in the first sentence.

It was so agreed

Paragraph (12), as amended, was approved.

Paragraph (13)

96. Mr. EIRIKSSON proposed that the end of the first sentence, beginning with the words “or an action instituted”, should be deleted since the matter was already covered by the commentary to paragraph (10).

It was so agreed.

Paragraph (13), as amended, was approved.

The commentary to article 6, as amended, was approved.

The meeting rose at 1.05 p.m.

2245th MEETING

Tuesday, 16 July 1991, at 3.05 p.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, 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-third session (continued)

CHAPTER II. Jurisdictional immunities of States and their property (continued) (A/CN.4/L.462 and Add.1 and Corr.2 and 3, Add.2 and Corr.1, Add.3 and Corr.1)

D. Draft articles on jurisdictional immunities of States and their property (continued) (A/CN.4/L.462/Add.1 and Corr.2 and 3)

Commentary to article 7 (Express consent to exercise of jurisdiction)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

1. Mr. OGISO (Special Rapporteur) proposed that the last part of the sentence should read: "by a declaration before the courts or by a written communication in a specific proceeding", a formulation taken from paragraph 1 (c) of the article.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraphs (3) to (7)

Paragraphs (3) to (7) were approved.

Paragraph (8)

2. Mr. RAZAFINDRALAMBO proposed that, in the last sentence, the words "such consent" should be replaced by "the consent", since the modalities for expressing consent were set out in the following paragraphs.

It was so agreed.

3. Mr. TOMUSCHAT, supported by Mr. McCAFFREY, said it would be best to delete the penultimate sentence.

It was so agreed.

Paragraph (8), as amended, was approved.

Paragraph (9)

4. Mr. OGISO (Special Rapporteur) proposed that the terminology of the article itself should be used, as had been done for paragraph (2). The expression "specific case" in both the title and the first sentence of the paragraph would therefore be replaced by "specific proceeding".

It was so agreed.

5. Mr. RAZAFINDRALAMBO, supported by Mr. McCAFFREY and Mr. CALERO RODRIGUES, proposed that the first word, "Another", should be replaced by "An", since paragraph (9) began the enumeration of the tangible and indisputable proof of the consent of the State.

It was so agreed.

Paragraph (9), as amended, was approved.

Paragraph (10)

6. Mr. RAZAFINDRALAMBO said that the word *international* should be added, so as to bring the French version into line with the English original.

It was so agreed.

7. Mr. TOMUSCHAT said the last sentence was not correct, since individuals could normally invoke the provisions of an international treaty.

8. Mr. OGISO (Special Rapporteur) replied that it was the States parties and not individuals who could invoke the provisions of an international treaty.

9. The CHAIRMAN said that was actually the case, save for rare exceptions in the field of human rights.

10. Mr. TOMUSCHAT said it was his understanding that in many legal systems, indeed in most of them, individuals could invoke the provisions of an international treaty: it depended on the domestic legal order concerned. In fact, he had doubts as to whether the last sentence accurately reflected contemporary trends and he proposed that it should be amended to read: "On the other hand, the extent to which individuals and corporations may successfully invoke one of the provisions of the treaty or international agreement is generally dependent on the rules of the domestic legal order concerned on the implementation of treaties."

It was so agreed.

Paragraph (10), as amended, was approved.

Paragraphs (11) to (13)

Paragraphs (11) to (13) were approved.

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

Commentary to article 8 (Effect of participation in a proceeding before a court)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were approved.

Paragraph (8)

11. Mr. EIRIKSSON said that the last part of the last sentence, "and does not extend to all appearances of a State or its representatives in a foreign proceeding in the performance of the duty of affording protection to nationals of that State", gave the impression that a State which appeared in a proceeding before a foreign court in order to afford protection to its nationals thereby relinquished its immunity from jurisdiction—something which was at variance with paragraph 3 of article 8. He therefore proposed that the words "does not extend" should be replaced by "does not relate".

It was so agreed.

Paragraph (8), as amended, was approved.

Paragraph (9)

Paragraph (9) was approved.

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

Commentary to article 9 (Counter-claims)

Paragraph (1)

12. Mr. TOMUSCHAT proposed that the words “the court”, in the second sentence, should be replaced by “a court”.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

13. Mr. McCAFFREY proposed that, for the sake of clarity, the second sentence should be simplified by replacing the words “cross-claim or a cross-action” by the word “claim”, so as to define a counter-claim solely as a claim brought by a defendant in response to an original or principal claim.

14. Mr. MAHIOU proposed that, since the notion of counter-claim was the same in the English and common law systems on the one hand and in the civil law systems on the other, the first two sentences should be simplified to read: “The notion of ‘counter-claim’ presupposes the existence or preservation of a claim. A counter-claim is a claim brought by a defendant in response to an original or principal claim.” The third sentence would be deleted.

15. After an exchange of views in which Mr. EIRIKSSON, Mr. CALERO RODRIGUES, Mr. NJENGA, Mr. GRAEFRATH and Mr. BENNOUNA took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt Mr. Mahiou’s proposal.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were approved.

Paragraph (8)

16. Mr. McCAFFREY proposed, for the reasons he had already stated in connection with paragraph (3), that the words “a cross-suit or a cross-action or”, in the first sentence, should be deleted. The word “cross-actions”, in the fourth sentence, should be replaced by the word “claims”.

It was so agreed.

17. After an exchange of views in which Mr. EIRIKSSON, Mr. BENNOUNA, Mr. CALERO RODRIGUES,

Prince AJIBOLA, Mr. NJENGA, Mr. MAHIOU, Mr. BEESLEY, Mr. TOMUSCHAT and Mr. OGISO (Special Rapporteur) took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to delete the penultimate sentence and to amend the beginning of the last sentence to read: “Likewise, under article 9, paragraph 3, a State is deemed . . .”.

It was so agreed.

Paragraph (8), as amended, was approved.

Paragraph (9)

18. Mr. THIAM, supported by Prince AJIBOLA, said that paragraph (9) was obscure and the wording was extremely cumbersome; the text should be recast.

19. Mr. RAZAFINDRALAMBO said he endorsed that observation. Paragraph (9) was very complex and some of the principles it stated with regard to counter-claims were not accepted in civil law countries, France in particular.

20. Mr. BENNOUNA said that the paragraph was indeed somewhat obscure. It did no more than describe the practice of some States and he accordingly had doubts as to whether it had a place in the commentary to article 9.

21. Mr. TOMUSCHAT, supported by Mr. MAHIOU and Mr. BEESLEY, said that paragraph (9) made no useful contribution to explaining article 9. He therefore proposed that it should be deleted.

22. Mr. AL-KHASAWNEH said he favoured eliminating paragraph (9), unless it was the result of a compromise, in which case it should be kept.

23. Mr. OGISO (Special Rapporteur), in response to a query from Mr. AL-BAHARNA, said that paragraph (9) explained the tenor of a proposal which he had made to the Drafting Committee but had been rejected, as the last sentence of the paragraph indicated. The paragraph was intended not to explain article 9, as adopted, but to give the diplomatic conference an opportunity to decide whether it was desirable to include a provision based on the United States practice described in the antepenultimate and penultimate sentences of paragraph (9), which he felt could have its place in the draft. He was convinced that that possibility should be left open to the diplomatic conference, but in view of all the objections raised, he would not object to deletion of the paragraph.

24. Mr. McCAFFREY said that, in any case, the practice in question was described at the end of paragraph (4) of the commentary to article 9, in particular in the ninth and tenth sentences.

25. Mr. PAWLAK said that paragraph (9) was useful because it described a possibility which had been examined but rejected; nevertheless he would not oppose its deletion.

26. The CHAIRMAN said he would take it that the Commission agreed to delete paragraph (9).

It was so agreed.

Paragraph (9) was deleted.

The commentary to article 9, as amended, was approved.

Commentary to articles 10 to 17 as a whole (A/CN.4/L.462/Add.2 and Corr.1)

Paragraphs (1) to (7)

27. Mr. SHI, referring to the seven paragraphs of commentary introducing part III of the draft (articles 10 to 17), said that the title adopted was a compromise solution whereby the Commission had been able to put an end to an interminable doctrinal debate on absolute immunity versus restricted immunity. Actually, the commentary was drafted in such a way as to make one of the schools of thought appear to have prevailed over the other, which was not the case. For that reason, paragraph (1) should be deleted as well as the first three sentences of paragraph (2) and the whole of paragraphs (3) to (7). As a result, the draft articles would become more acceptable for States, apart from the fact that the deletions would shorten a chapter which was already too long.

28. Mr. MAHIU said he wished to avoid reopening a theoretical debate on the various concepts of immunity. Since, however, the commentary did not seem to strike a proper balance, he was in favour of deleting paragraph (1) and the part of paragraph (2) indicated by Mr. Shi.

29. Mr. GRAEFRATH, Mr. NJENGA and Prince AJIBOLA said that they were of the same view.

30. Mr. PAWLAK said that he was prepared to accept the proposed deletions, provided paragraphs (6) and (7) were retained. In the case of paragraph (7), in particular, there were a number of footnotes which referred to the Commission's earlier work and would be very useful to the conference of plenipotentiaries.

31. Mr. BENNOUNA said he too thought that paragraphs (6) and (7) should be retained but paragraph (7) could include a summary of the considerations set out in the paragraphs that were to disappear; a neutral sentence would thus be added, reading: "The Commission, however, decided to operate on a pragmatic basis, taking into account the situations involved and the practice of States".

32. Mr. TOMUSCHAT said he supported that solution.

33. The CHAIRMAN, speaking as a member of the Commission, said he also supported it.

34. Mr. PAWLAK proposed that the words "On the whole, what", in paragraph (6), should be replaced by "It".

35. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to delete paragraph (1), the first three sentences of paragraph (2), and paragraphs (3), (4) and (5), and to adopt paragraph (6), as amended by Mr. Pawlak, and paragraph (7), as amended by Mr. Bennouna.

Paragraphs (1) and (3) to (5) were deleted.

Paragraphs (2), (6) and (7), as amended, were approved.

Commentary to article 10 (Commercial transactions)

Paragraphs (1) to (9)

Paragraphs (1) to (9) were approved.

Paragraph (10)

36. Mr. SHI proposed that the second and third sentences, together with the word "Secondly" at the beginning of the next sentence should be deleted. The passage seemed illogical. It laid down the condition that the enterprise should act "on its own behalf", and then went on to say that the enterprise "must have an independent legal personality". It was difficult to see the connection between those two conditions. Moreover, the expression "on behalf of the State", which appeared in the passage in question, was imprecise and dangerous. It had been successfully avoided in the draft of paragraph 3 of article 10 but had now reappeared surreptitiously in the commentary.

The meeting rose at 6.15 p.m.

2246th MEETING

Wednesday, 17 July 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, 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-third session (*continued*)

CHAPTER II. *Jurisdictional immunities of States and their property (continued)* (A/CN.4/L.462 and Add.1 and Corr.2 and 3, Add.2 and Corr.1, Add.3 and Corr.1)

D. *Draft articles on jurisdictional immunities of States and their property (continued)* (A/CN.4/L.462/Add.2 and Corr.1)

Commentary to article 10 (Commercial transactions) (continued)

Paragraph (10) (*concluded*)

1. The CHAIRMAN reminded members that Mr. Shi had proposed at the previous meeting that the second and