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Summary record of the 2246th meeting

Topic:
Other topics

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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. MAHIOU 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. Roucouas, 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

third sentences, and the word “Secondly” at the beginning of the fourth sentence, should be deleted.

2. Mr. OGISO (Special Rapporteur) said that the statement in the second sentence that a proceeding must be concerned with a commercial transaction engaged in by a State enterprise or other entity on its own behalf was the basis for article 10, paragraph 3. To meet Mr. Shi’s point, however, he was prepared to agree to the deletion of the words that followed, namely, “and not on behalf of the parent State”. As to the third sentence, it seemed perfectly reasonable to state that if the State enterprise acted merely as the *alter ego* of the State, the commercial transaction in question would be regarded as having been conducted by that State.

3. Mr. GRAEFRATH said that he supported Mr. Shi’s proposal, since a new element which did not appear in article 10, paragraph 3, was being introduced in the commentary—namely, whether or not an enterprise was to be deemed to be acting on behalf of the State—whereas the point at issue was only the commercial activity of the State enterprise. He therefore proposed that the words “on its own behalf and not on behalf of the parent State”, in the second sentence, and the whole of the third sentence should be deleted.

4. Mr. OGISO (Special Rapporteur) and Mr. SHI expressed their agreement with that proposal.

5. Mr. McCAFFREY said that he would be sorry to see the third sentence of paragraph 10 deleted, since, in his view, it reflected existing law.

6. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to approve paragraph (10) as amended by Mr. Graefrath.

Paragraph (10), as amended, was approved.

Paragraph (11)

7. Mr. PELLET said that, during the lengthy discussion that had been held on article 10, paragraph 3, it had been emphasized in particular that the last part of that paragraph was redundant and added nothing to the idea of legal personality. The commentary did not, however, reflect that point. He therefore proposed that one or two sentences should be added to explain that article 10, paragraphs 3 (a) and (b), had been included merely to spell out what was meant by legal personality and in no way affected the opening clause of the paragraph.

Paragraph (11) was approved on that understanding.

Paragraph (12)

8. Mr. SHI, supported by Mr. BARSEGOV, proposed that, in order to reflect more clearly the debate on the deletion of the article on fiscal matters, the last part of the paragraph, starting with the words “should not be interpreted” in the penultimate sentence, should be replaced by the words “is without prejudice to the law with respect to fiscal matters”.

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

Paragraph (13)

9. Mr. SHI proposed that paragraphs (13) to (35) of the commentary to article 10 should be deleted in their entirety. In the first place, the articles in part III reflected a compromise and the second sentence of paragraph (13) of the commentary was therefore particularly unacceptable to him. The paragraphs in question contained a doctrinal discourse which had no place in the commentaries, the purpose being to prove that the restrictive doctrine was predominant: that proposition was totally unacceptable to him. He did, however, accept the compromise as reflected in the articles and, in fact, had even withdrawn his reservation to the article on contracts of employment. Such a lengthy doctrinal discourse would, moreover, be merely counterproductive, for States were more likely to take a pragmatic approach and adopt the draft articles if they did not become enmeshed in doctrinal polemics. It must be remembered that there were certain theoretical concepts that were unacceptable to some nations and could not just be imposed on them.

10. Secondly, a number of examples had been given in the report that were not relevant. For example, the first footnote to paragraph (24) of the commentary quoted article VII of the Sino-Australian Investment Agreement. That Agreement was concerned not with investments by one State party in another State party, but with investments by nationals of the two Contracting Parties. Article VII of that Agreement therefore had to be read in the light of the article on the definition of the term “national”, which was not, however, quoted in the footnote, so that a proper understanding of the intent of article VII would not be possible. The Chinese State corporations which had made sizeable investments in Australian iron-ore mining industries, for example, were ordinary legal persons under Chinese law; they were totally unconnected with the State and could therefore not claim immunity. Accordingly, article VII of the Agreement provided that, where any question arose in relation to an investment by a national of either Contracting Party, the matter should be resolved in accordance with the law of the Contracting Party which had admitted the investment. Article VII was therefore not an example of a restrictive doctrine.

11. Another example given in the commentary was the 1958 Sino-Soviet Treaty of Trade and Navigation, which was referred to in paragraph (25). Once again, that Treaty should not be regarded as an illustration of the restrictive doctrine, but, rather, as an example of a waiver of immunity, at least on China’s part, by explicit consent in the form of a bilateral agreement.

12. Thirdly, and lastly, the entire commentary to article 10 was unduly long and disproportionate in comparison with the commentary to other articles. Every effort should therefore be made to shorten it by deleting paragraphs that were not relevant.

13. Mr. EIRIKSSON said that it might be advisable to place paragraphs (13) to (35) in the introduction to part III.

14. As a general rule, doctrine should be explicated and some precedents should be cited in the commentary. However, he was not at all sure that the survey of State

practice contained in paragraphs (13) to (35) demonstrated that one particular doctrine prevailed over another. What it did demonstrate was that some countries had changed their attitude, while others had not. In the final analysis, it was the Commission's conclusion on the matter that was relevant.

15. Mr. McCAFFREY said that he agreed with Mr. Eiriksson's comments. The Commission should be cautious about any wholesale deletion, especially since the material in question had been included in the commentary to the articles as adopted on first reading. Moreover, it was important to demonstrate that article 10, which was the first substantive article in part III, did indeed have a basis in State practice. The length of the commentary was not without precedent and the cases and examples cited were extremely useful as research and reference sources. It might be possible to delete certain examples which were inappropriate.

16. He proposed that Mr. Shi and the Special Rapporteur should consult in order to arrive at a concrete proposal on the commentary under consideration.

17. Mr. PELLET said that Mr. Shi had brought up the very important question of the exact form the commentary should take. In the commentary, the Commission was called upon to justify and explain the decisions it had taken. The commentary was not the place to review precedents or State practice. In view of those considerations, the part of the text that Mr. Shi had called into question was perhaps not suitable for inclusion in the commentary. At the same time, some parts of the text might be of value and should be retained.

18. Mr. BARSEGOV said that the Commission's aim in drafting its commentary was to explain the reasons for its decisions. The length of the commentary to article 10 might give the impression that the Commission was endorsing a particular doctrine and that was to be avoided. A new and more objective text was therefore in order.

19. Mr. CALERO RODRIGUES said he agreed that paragraphs (13) to (35) could be deleted. It was not necessary to go into such detail in the commentaries to the articles; that information was available elsewhere. The length of the commentary might even make it more difficult for States to accept certain articles.

20. Prince AJIBOLA said that Mr. Shi's proposal had to be considered with caution. The paragraphs in question presented a wealth of material which would clearly be valuable to scholars and researchers. However, the commentary was not intended to be merely an academic exercise. The question remained whether such detailed explanations were advisable. The solution might be to keep some of the most relevant material and to delete those paragraphs which implied a doctrinal orientation and which might be damaging to the article.

21. Mr. ARANGIO-RUIZ, supported by Mr. MAHIU, said that the procedural solution would be to entrust a small working group with the task of reviewing the commentary to article 10 and proposing appropriate changes.

22. Mr. TOMUSCHAT proposed that the words "as an exception to State immunity" contained in the heading preceding paragraph (13) should be deleted.

23. Mr. PAWLAK said that he agreed with the procedural solution proposed by Mr. Arangio-Ruiz. While much of the material in question could be deleted, paragraphs (24) to (28) and paragraph (35) should be retained. They represented a survey of State practice relating to the question of the precise limits of jurisdictional immunities in the area of commercial transactions. It would be very valuable for participants in the proposed plenipotentiary conference to have all the information on that issue available in one document.

24. Mr. GRAEFRATH said he endorsed the idea of a working group. At the same time, he saw the merit of Mr. Shi's proposal. He therefore proposed that the first sentence of paragraph (13) should be retained up to the footnote. The footnote would then provide specific references to the earlier reports which contained most of the material that was currently covered in paragraphs (13) to (35).

25. Mr. BENNOUNA said that, since the survey of State practice contained in the paragraphs (13) to (35) could be found in the Commission's previous reports, he endorsed Mr. Graefrath's proposal.

26. Mr. NJENGA said that he could not accept Mr. Graefrath's proposal. He suggested that the matter should be referred to a working group. He was not certain that all of the paragraphs should be deleted. For example, some of the footnotes were important and could be useful to Governments, which might not have access to the earlier reference material.

27. The CHAIRMAN, speaking as a member of the Commission, said that he endorsed the idea of a small working group. It was not really necessary to cite so much material in the commentary to article 10. Much of that material had already been mentioned when the articles were being drafted. Furthermore, he agreed that, as it stood, the text implied that one particular doctrine had prevailed within the Commission.

28. Mr. OGISO (Special Rapporteur) said that, in preparing the text, he had taken into account the request of one member that specific cases should be cited in the commentary to article 10. Furthermore, the commentary was intended as an aid to participants in the proposed plenipotentiary conference, making available to them in one document all the relevant information relating to the draft articles on jurisdictional immunities of States.

29. It was unfortunate that some members had misunderstood his intentions and had interpreted the commentary as endorsing a particular doctrine. Mr. Shi had criticized the fact that the commentary included references to the 1958 Sino-Soviet Treaty of Trade and Navigation; however, reference had been made to that treaty in the text adopted on first reading. In addition, he had explained in the commentary that some members had held the view that treaty practices were examples of consent and did not necessarily represent acceptance of a particular doctrine.

30. He would be disappointed if the examples cited had to be deleted. He would be willing to delete references to certain treaties. However, he would not be willing to delete the case material presented. It was on that

understanding that he would participate in the working group.

31. The CHAIRMAN suggested that the proposed working group should consist of Mr. Ogiso, as Special Rapporteur, Mr. Shi, Mr. Eiriksson, Mr. Graefrath, Mr. McCaffrey, Mr. Njenga and Mr. Al-Baharna, as General Rapporteur. It would consider shortening paragraphs (13) to (35) of the commentary to article 10, in particular with regard to the examples given and the cases cited.

32. Mr. SHI recalled that he had proposed that the second sentence of paragraph (13) and paragraphs (14) to (35) of the commentary should be deleted.

33. Mr. RAZAFINDRALAMBO said that Mr. Njenga's suggestion was a good one and he supported it. He was certain that the proposed working group would give careful consideration to the paragraphs in question and make a positive proposal.

34. Mr. DÍAZ GONZÁLEZ said that he fully agreed with Mr. Shi. It was necessary to adopt a realistic approach. Governments had already taken a position on the draft articles which had been adopted on first reading and had been accompanied by supporting material. The articles adopted on second reading took account of the opinions expressed by Governments, particularly in the Sixth Committee.

35. In the circumstances, he agreed with Mr. Pellet that there was no need for so much documentation. The General Assembly did not need any justification for the articles from the Commission. It needed conclusions to explain the compromise solutions reflected in the articles adopted on second reading. It was not necessary to add anything else.

36. If a plenipotentiary conference was held, it would necessarily receive all the relevant documentation and, in particular, the Special Rapporteur's reports and the summary records of the Commission's discussions.

37. Mr. ARANGIO-RUIZ said it was not realistic to think that the working group could complete its work in a few minutes. It would require the rest of the morning.

38. Mr. PELLET said that the working group should not confine its work to the deletion of certain paragraphs. Some members would want compromise solutions on some of them.

39. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to set up a working group which would consist of the members he had mentioned and would report back to the Commission.

It was so agreed.

*The meeting was suspended at 11.20 a.m.
and resumed at 12.15 p.m.*

40. Mr. OGISO (Special Rapporteur), reporting on the recommendations of the working group, said it was proposed that, in paragraph (13), the second sentence would be deleted; paragraphs (14), (15), (17), (19), and (25)

would be deleted; the word "comparable" from the first sentence of paragraph 26; the last four sentences of paragraph (28); and paragraphs (29) to (33) would also be deleted and the references in the headings would be incorporated in a footnote; in paragraph (34), the words "the present article" would be followed by the words "finds precedent in the sources reviewed above". Some of the footnotes relating to the paragraphs which would be deleted could be included in appropriate places in the text.

41. Mr. TOMUSCHAT proposed that the heading before paragraph (13), namely, "(b) Legal basis of 'commercial transactions' as an exception to State immunity" should be amended to read: "(b) Legal basis of 'commercial transactions' within the context of State immunity".

42. Mr. PELLET said that he was in favour of Mr. Tomuschat's proposal, but its wording in French would be unintelligible.

43. The CHAIRMAN proposed that the heading should be amended to read: "Commercial transactions in the context of State immunity".

It was so agreed.

44. The CHAIRMAN invited the Commission to consider the recommendations of the working group in respect of paragraphs (13) to (35).

Paragraph (13)

Paragraph (13), as amended, was approved.

Paragraphs (14) and (15)

Paragraphs (14) and (15) were deleted.

Paragraph (16)

Paragraph (16) was approved.

Paragraph (17)

Paragraph (17) was deleted.

Paragraph (18)

45. Mr. PELLET said that the example of the case of the *United States Diplomatic and Consular Staff in Tehran* had nothing to do with commercial transactions and was not instructive in the present context. He therefore suggested that the second and third sentences of paragraph (18) should be deleted.

46. Mr. OGISO (Special Rapporteur) said that he had no objection to Mr. Pellet's suggestion.

47. The CHAIRMAN said that the example referred to by Mr. Pellet might be relevant because ICJ had had to consider the lawfulness of the action taken to freeze the assets of one of the parties. In view of Mr. Pellet's objection, however, he suggested that the second and third sentences of paragraph (18), together with the footnote, should be deleted.

It was so agreed.

Paragraph (18), as amended, was approved.

Paragraph (19)

Paragraph (19) was deleted.

Paragraph (20)

48. Mr. TOMUSCHAT proposed that, since paragraph (19) had been deleted, the word "Thus" at the beginning of paragraph (20) should also be deleted.

It was so agreed.

Paragraph (20), as amended, was approved.

Paragraphs (21) and (22)

Paragraphs (21) and (22) were approved.

Paragraphs (23) and (24)

49. Mr. PELLET, referring to the first footnote to paragraph (23), said that the draft report did not have to contain the full text of all the instruments cited. He hoped that, when the Special Rapporteur rearranged the reference material, he would eliminate the footnotes for the paragraphs which had been deleted and shorten those for the paragraphs which had been retained.

50. Mr. OGISO (Special Rapporteur) said that his intention was to retain only the references to sources. Relevant case material contained in the deleted paragraphs would be reproduced in footnotes elsewhere in the commentary.

51. The CHAIRMAN said that, as the basis of that approach, the first to sixth footnotes would be shortened.

52. Mr. PELLET said that the footnotes were intended only as references and should not contain quotations or additional comments. He also hoped that the Special Rapporteur and the secretariat would eliminate references which were merely of academic interest.

53. The CHAIRMAN said he was confident that the Special Rapporteur would treat the reference material appropriately. He agreed that footnotes which were not directly relevant to the text should be deleted.

54. Mr. EIRIKSSON said that in addition to those footnotes that related to parts of the text which had now been deleted, the working group also recommended that the three footnotes to paragraph (24) should be deleted, as they referred to controversial aspects of the text.

Paragraphs (23) and (24) were approved.

Paragraph (25)

55. Mr. EIRIKSSON said that the working group had decided to recommend that paragraph (25), together with the footnote, should be deleted.

56. The CHAIRMAN said that the retention or deletion of footnotes should be left to the Special Rapporteur to decide.

It was so agreed.

Paragraph (25) was deleted.

Paragraph (26)

57. The CHAIRMAN said that the working group recommended that the word "comparable" should be deleted.

Paragraph (26), as amended, was approved.

Paragraph (27)

Paragraph (27) was approved.

Paragraph (28)

58. The CHAIRMAN said that the working group recommended that the last four sentences should be deleted.

Paragraph (28), as thus amended, was approved.

Paragraphs (29) to (33)

59. The CHAIRMAN said that the working group recommended that paragraphs (29) to (33) should be deleted and that the references in the headings to the Institute of International Law, the International Law Association, the Harvard Research Institute and the International Bar Association should be incorporated in a footnote.

Paragraphs (29) to (33) were deleted on that understanding.

Paragraph (34)

60. The CHAIRMAN said that the working group recommended that the words "the present article" should be followed by the words "finds precedent in the sources reviewed above".

Paragraph (34), as amended, was approved.

Paragraph (35)

Paragraph (35) was approved.

The meeting rose at 1 p.m.

2247th MEETING

Wednesday, 17 July 1991, at 3.15 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.
