

Document:-
A/CN.4/SR.2322

Summary record of the 2322nd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1993, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

in the first sentence. As he recalled the second sentence had been included specifically to make the first sentence more flexible. In his view, therefore, paragraph 23 not only reflected what had already been approved but its substance should go some way to meeting Mr. Pambou-Tchivounda's point of view—which also happened to be his own.

82. Mr. KOROMA suggested that the paragraph should be amended to provide that a decision on the outcome of the study would be taken at a later stage. That would give everybody more time to reflect on the matter.

83. The CHAIRMAN suggested that, to enable the Commission to proceed with its work, it should agree to Mr. Razafindralambo's proposal.

It was so agreed.

Paragraph 23, as amended, was adopted.

Paragraphs 24 to 36

Paragraphs 24 to 36 were adopted.

Section A, as amended, was adopted.

B. Cooperation with other bodies

Paragraphs 37 to 39

Paragraphs 37 to 39 were adopted.

Section B was adopted.

C. Date and place of the forty-sixth session

Paragraph 40

Paragraph 40 was adopted.

Section C was adopted.

D. Representation at the forty-eighth session of the General Assembly

Paragraph 41

Paragraph 41 was adopted.

Section D was adopted.

E. International Law Seminar

Paragraphs 42 to 48

Paragraphs 42 to 48 were adopted.

Paragraph 49

84. Mr. PELLET said he much regretted that France was not among the donors listed in the second sentence. He would endeavour to remedy that situation.

Paragraph 49 was adopted.

Paragraph 50

Paragraph 50 was adopted.

Paragraph 51

85. Mr. PELLET said that the French authorities had rightly been very shocked that interpretation had not

been systematically provided at the International Law Seminar. It was apparent from the list of participants that French-speaking candidates were gradually being discouraged by the complete domination of English in the Seminar. Obviously, if interpretation were to be eliminated, all French-speaking candidates would eventually be discouraged. That applied not only to France but also to many African countries.

Paragraph 51 was adopted.

Section E was adopted.

F. Gilberto Amado Memorial Lecture

Paragraphs 52 to 54

Paragraphs 52 to 54 were adopted.

Chapter VI, as a whole, as amended, was adopted.

The meeting rose at 1.15 p.m.

2322nd MEETING

Monday, 19 July 1993, at 3.10 p.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Mahiou, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

The law of the non-navigational uses of international watercourses (concluded)* (A/CN.4/446, sect. E, A/CN.4/447 and Add.1-3,¹ A/CN.4/451,² A/CN.4/L.489)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING³

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the report of the Drafting Committee (A/CN.4/L.489) containing the titles and texts of the draft articles adopted by the Committee on second reading.

* Resumed from the 2316th meeting.

¹ Reproduced in *Yearbook* . . . 1993, vol. II (Part One).

² Ibid.

³ The draft articles provisionally adopted by the Commission on first reading are reproduced in *Yearbook* . . . 1991, vol. II (Part Two), pp. 66-70.

2. Mr. MIKULKA (Chairman of the Drafting Committee) said that the Committee had held a total of 37 meetings from 4 May to 13 July 1993. The membership of the Committee for consideration of the draft articles on State responsibility had been different from that for consideration of the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law and the law of the non-navigational uses of international watercourses. The Committee had held two meetings, on 12 and 13 July, on the last mentioned topic and had adopted nine articles, which were reproduced in its report.

3. He recalled that, at the current session, the Commission had referred articles 1 to 10 to the Drafting Committee for second reading. The Committee had taken note of the views expressed by the Special Rapporteur and by many members of the Commission to the effect that the articles adopted on first reading had largely been found acceptable by Governments and that the main function of the second reading should therefore be one of "fine tuning". The Committee had therefore introduced changes in the articles only when it had been found necessary for clarity. There were also two matters which concerned the articles as a whole and called for preliminary explanations.

4. First, in accordance with the Special Rapporteur's recommendation, supported by many members of the Commission, the Committee had replaced the word "appreciable" by "significant" throughout the draft articles. The Drafting Committee held the view that the word "significant" had the same meaning with regard to watercourses as in the articles on international liability for injurious consequences arising out of acts not prohibited by international law, namely, that it meant something more than "measurable", but less than "serious" or "substantial". The second matter concerned the possible inclusion of confined groundwater in the scope of the articles. The Commission had requested the Special Rapporteur, Mr. Rosenstock, to undertake a feasibility study of that question and he had indicated that he would submit such a study in 1994. Consequently, the Drafting Committee recommended the nine articles it had adopted on the understanding that, should the Commission decide at its following session to include confined groundwater in the scope of the draft articles and it thus became necessary to amend the nine articles, the Drafting Committee would reconsider them.

5. The titles and texts of articles 1 to 6 and 8 to 10, as adopted by the Drafting Committee on second reading, read:

PART I

INTRODUCTION

Article 1. Scope of the present articles

1. The present articles apply to uses of international watercourses and of their waters for purposes other than navigation and to measures of conservation and management related to the uses of those watercourses and their waters.

2. The use of international watercourses for navigation is not within the scope of the present articles except in so far as other uses affect navigation or are affected by navigation.

Article 2. Use of terms

For the purposes of the present articles:

- (a) "international watercourse" means a watercourse, parts of which are situated in different States;
- (b) "watercourse" means a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus;
- (c) "watercourse State" means a State in whose territory part of an international watercourse is situated.

Article 3. Watercourse agreements

1. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse or part thereof.

2. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to a significant extent, the use by one or more other watercourse States of the waters of the watercourse.

3. Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics and uses of a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements.

Article 4. Parties to watercourse agreements

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations.

2. A watercourse State whose use of an international watercourse may be affected to a significant extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.

PART II

GENERAL PRINCIPLES

Article 5. Equitable and reasonable utilization and participation

1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse.

2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles.

Article 6. Factors relevant to equitable and reasonable utilization

1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:

- (a) geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
- (b) the social and economic needs of the watercourse States concerned;
- (c) the effects of the use or uses of the watercourse in one watercourse State on other watercourse States;
- (d) existing and potential uses of the watercourse;
- (e) conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
- (f) the availability of alternatives, of corresponding value, to a particular planned or existing use.
2. In the application of article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.

...
Article 8. General obligation to cooperate

Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse.

Article 9. Regular exchange of data and information

1. Pursuant to article 8, watercourse States shall on a regular basis exchange readily available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.
2. If a watercourse State is requested by another watercourse State to provide data or information that is not readily available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.
3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

Article 10. Relationship between different kinds of uses

1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.
2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to the principles and factors set out in articles 5 to 7, with special regard being given to the requirements of vital human needs.
6. Article 1 (Scope of the present articles) had been found acceptable both by Governments and by the Commission, and the only comment made in plenary had been that the concept of "management" developed in chapter 18 of Agenda 21,⁴ dealing with the protection of the quality and supply of freshwater resources, should be incorporated in the article. The Drafting Committee had felt that the inclusion of that concept in article 1 was useful, particularly as the question of management was dealt with in article 26.⁵ Its inclusion did not affect the scope of the articles, but defined it more clearly and

comprehensively. Accordingly, the only change made to article 1 was that the words "and management" had been added after the word "conservation" in paragraph 1.

7. With regard to article 2 (Use of terms) the Drafting Committee had felt that no changes were necessary. It had taken note of the fact that the definition of "pollution" currently contained in article 21, paragraph 2,⁶ would be moved to article 2, but had found it unnecessary to make that change in the immediate future, as article 21 had not yet been referred to the Committee.

8. In article 3 (Watercourse agreements), the Drafting Committee had replaced the word "appreciable" by "significant" in the English text, but had made no other change, as some members of the Commission had indicated that they preferred the existing text of paragraph 2 to the wording proposed by the Special Rapporteur in his first report (A/CN.4/451).

9. As no changes to article 4 (Parties to watercourse agreements) had been recommended in plenary, the Committee had again simply replaced "appreciable" by "significant" in paragraph 2 of the English text. As no changes had been suggested to the first two articles of part II, "General Principles", of the draft, namely, article 5 (Equitable and reasonable utilization and participation) and article 6 (Factors relevant to equitable and reasonable utilization), the Drafting Committee had left them as they stood.

10. The Committee had deferred consideration of article 7 to the following session. It was one of the most important articles of the draft and had been the subject of considerable discussion in plenary, with the Special Rapporteur raising four issues with respect to it. He had wondered, first, whether it would be appropriate to include an explicit reference to the concept of due diligence; secondly, whether it was justifiable to treat the problem of harm caused by pollution separately from harm resulting from other causes; thirdly, if it was decided to treat the problem of harm caused by pollution separately, whether there were any special circumstances which might allow for continued utilization, even though it caused pollution; and, fourthly, whether article 7 as it stood undermined the effective implementation of article 5. The Drafting Committee had discussed some of those issues, but, given the lack of time and considering the importance of article 7, it had decided to defer consideration of the article to the following session.

11. With regard to article 8 (General obligation to cooperate) the Drafting Committee had recommended no changes, since both Governments and members of the Commission had indicated that they approved of the wording.

12. Article 9 (Regular exchange of data and information) had also been favourably received by Governments and members of the Commission. However, during the Committee's consideration of the various language versions of the text of the article, it had become clear that the translation of the words "reasonably available", which had been taken from article 29, paragraph 1, of

⁴ A/CONF.151/26/Rev.1 (Vol. I) (United Nations publication, Sales No. E.93.I.8 and corrigendum), pp. 9 *et seq.*

⁵ See footnote 3 above.

⁶ *Ibid.*

the Helsinki Rules,⁷ presented a problem. The Committee had therefore replaced them by “readily available”, which had equivalents in the other languages and in no way affected the meaning of article 9 as it was intended purely to ensure consistency in the various language versions.

13. The last article in part II, article 10 (Relationship between uses), had been considered acceptable by both Governments and the Commission. However, the Drafting Committee had felt that the title could be improved. Some members of the Committee took the view that the title might be misleading as it seemed to suggest that the article dealt with the question of proportionality between different uses, which was not the case. To avoid any ambiguity, the Drafting Committee had replaced it by “Relationship between different kinds of uses”. Needless to say, that change in no way affected the content of the article.

14. The CHAIRMAN said he would take it that the Commission wished to take note of the articles adopted on second reading by the Drafting Committee as contained in its report and to defer adopting them until the relevant commentaries had been submitted.

It was so agreed.

15. Mr. VILLAGRÁN KRAMER asked how the Sixth Committee would be informed of the work done by the Drafting Committee.

16. The CHAIRMAN said that the document containing the articles adopted by the Drafting Committee would of course be made available to the Sixth Committee when it considered the Commission’s report.

17. Mr. VERESHCHETIN said that, in view of the wealth of material contained in the oral report of the Chairman of the Drafting Committee on the Committee’s work, the report should be made available to the members of the Commission. He asked whether the secretariat could make the necessary arrangements.

18. The CHAIRMAN said that, if the Chairman of the Drafting Committee agreed, his report to the Commission could be circulated to members, but in English only.

19. Mr. PAMBOU-TCHIVOUNDA expressed regret that the report could not be made available in French as well.

20. The CHAIRMAN said that, for a French version of the report, members could refer to the summary record of the meeting at which it had been presented.

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

CHAPTER III. International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.483)

21. The CHAIRMAN invited the members of the Commission to consider chapter III of the Commission’s draft report on the work of its forty-fifth session (A/CN.4/L.483) paragraph by paragraph.

Paragraphs 1 to 8

Paragraphs 1 to 8 were adopted.

Paragraph 9

22. Mr. KOROMA said that the view recorded in paragraph 9 was that of the members referred to in paragraph 8 and proposed that the words “It was noted that” should be replaced by “Those members noted that”.

It was so agreed.

Paragraph 9, as amended, was adopted.

Paragraphs 10 and 11

Paragraphs 10 and 11 were adopted.

Paragraph 12

23. Mr. PELLET proposed that, in the interest of accuracy, the words “relatively large” and “starting with” in the third sentence of the paragraph should be replaced respectively by “well established” and “illustrated by”.

It was so agreed.

Paragraph 12, as amended, was adopted.

Paragraphs 13 to 81

Paragraphs 13 to 81 were adopted.

Paragraph 82

24. Mr. PELLET said that, in the first sentence of the French text, the word *pas* should be inserted between *qui n’avaient* and *été consultés*.

It was so agreed.

Paragraph 82, as amended, was adopted.

Paragraphs 83 to 93

Paragraphs 83 to 93 were adopted.

Chapter III, as a whole, as amended, was adopted.

25. Mr. VERESHCHETIN said that, while he understood that the Commission could not adopt draft articles which were not accompanied by commentaries, he would like the report to show that the Drafting Committee had done a great deal of work during the session on the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

26. The CHAIRMAN noted that paragraph 6 of chapter III of the draft report provided a fairly detailed account of the work of the Drafting Committee. The Committee’s work would also be mentioned in the Chairman’s report, as he was also of the view that the Sixth Committee should be informed of the progress it had made. Furthermore, the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law would be made available to the members of the Sixth Committee for their information.

27. Mr. KOROMA wondered whether it might not be premature to transmit the articles to the Sixth Committee.

⁷ See 2312th meeting, footnote 14.

28. The CHAIRMAN recalled that that practice had already been adopted the preceding year in the case of articles which could not be adopted because they were not accompanied by commentaries.

29. Mr. GÜNEY asked whether the membership of the Drafting Committee had been specified.

30. The CHAIRMAN said that the membership was given in chapter I of the report.

31. Mr. CALERO RODRIGUES said that the question raised by Mr. Vereshchetin demonstrated that persons who were not members of the Commission might find it difficult to understand the internal structure of the report. He wondered, therefore, whether it might not be advisable to add in the second sentence of paragraph 6, after the words "at the conclusion of the discussion", something along the lines of "as summarized below in paragraphs 8 to 93", which would give an idea of the amount of work done by the Drafting Committee. Alternatively, a footnote could serve the same purpose.

32. The CHAIRMAN said that, if he heard no objection, he would take it that that suggestion was adopted. The Commission would leave it to the secretariat to decide on an appropriate wording.

It was so agreed.

CHAPTER IV. State responsibility (continued) (A/CN.4/L.484 and Corr.1 and Add.1-7)

C. Draft articles of part 2 of the draft on State responsibility (continued)

2. TEXTS OF DRAFT ARTICLE 1, PARAGRAPH 2, AND DRAFT ARTICLES 6, 6 *bis*, 7, 8, 10 AND 10 *bis* WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-FIFTH SESSION (continued) (A/CN.4/L.484/Add.2-7)

Commentary to article 8 (Compensation) (continued) (A/CN.4/L.484/Add.5)

Paragraphs (16) and (17) (continued)

33. The CHAIRMAN recalled that the consideration of paragraphs (16) and (17) of the commentary to article 8 had been left pending at the preceding meeting, as Mr. Pellet and Mr. Vereshchetin had found unclear the words "moral damage to the persons of nationals or agents of the injured State", in the penultimate sentence of paragraph (16).

34. Mr. PELLET said that it should be made clear that it was the damage suffered by the persons of nationals or agents of the State as individuals that was meant.

35. Mr. ARANGIO-RUIZ (Special Rapporteur) proposed adding the words *en tant que particuliers* after *agents de l'Etat lésé* at the end of the sentence in the French text.

36. Mr. VERESHCHETIN asked whether the Special Rapporteur could also formulate his proposal in English.

37. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in the English version, the words "as private parties" or "as private persons" should be added after the words "injured State".

38. Mr. PELLET said that he would prefer the words *en tant qu'êtres humains* in the French text.

39. Mr. ARANGIO-RUIZ (Special Rapporteur) said that that wording would apply to natural, but not to juridical persons.

40. Mr. CRAWFORD said that, in the English text, the word "persons" might be moved to the end of the sentence, which would then read "moral damage to nationals or agents of the injured State as persons".

41. The CHAIRMAN recalled that plenary meetings of the Commission were not the proper forum for drafting. He suggested, therefore, that Mr. Crawford, Mr. Pellet and Mr. Vereshchetin should agree on an appropriate wording with the Special Rapporteur. He also suggested that, as the problem also arose in paragraph (17), paragraphs (16) and (17) should be left pending.

It was so agreed.

Paragraph (18)

42. Mr. PELLET said that he was completely opposed to the concept of "personal injury" referred to in the second part of the paragraph. To his knowledge, the only two categories of injury were material and moral injury. He noted that the same problem arose in paragraph (21).

43. Mr. ARANGIO-RUIZ (Special Rapporteur) explained that, as he saw it, personal injury covered both material and moral injury inflicted on an individual, as opposed to patrimonial losses.

44. Mr. VILLAGRÁN KRAMER noted that, in the internal law of some countries, personal injury was synonymous with material injury suffered by an individual, as opposed to moral injury.

45. Mr. PELLET said that, while he understood the explanations of the Special Rapporteur, he did not see the need to include the concept of personal injury in paragraph (18). It would be quite easy to delete the words "Apart from the umpire's considerations regarding the damages under points (a) and (b), which are relevant with regard to the broader concept of 'personal injury'" after the indented quotation, so that the sentence would then begin "It is of interest".

46. Mr. VERESHCHETIN also took the view that the concept of "personal injury" would give rise to problems in paragraph (21), where it referred both to natural and to juridical persons. The idea that it expressed seemed in any event to be covered by the concept of moral damage. It would therefore be preferable to delete it from paragraph (18).

47. Mr. de SARAM said that he also supported Mr. Pellet's suggestion, which would eliminate the ambiguity in paragraph (18) and avoid further problems when paragraph (21) was taken up.

48. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to approve paragraph (18) as amended by Mr. Pellet.

Paragraph (18), as amended, was approved.⁸

Paragraph (19)

49. Mr. PELLET said that he was categorically opposed to the last sentence of the paragraph. If the Com-

⁸ Subsequently, paragraph (18) was amended along with paragraphs (16), (17) and (21); see 2324th meeting, para. 1.

mission had refrained from expressly providing in article 8 for compensation of moral damage to nationals of the injured State, it had, in his opinion, made a mistake and he by no means shared that view.

50. Mr. ARANGIO-RUIZ (Special Rapporteur) said that at least the last line of the sentence was unclear and should be recast with the help of the small ad hoc working group that had been set up.

51. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to postpone the adoption of paragraph (19) the last sentence of which was to be redrafted by the Special Rapporteur.

It was so agreed.

Paragraph (20)

Paragraph (20) was approved.

Paragraph (21)

52. Mr. VERESHCHETIN said that, if the Commission decided to retain the reference to “personal” damage in paragraph (21), he did not see how such personal damage could be applied to juridical persons. Such damage was described as being “caused to the said private parties”, and the first sentence clearly stated that it was “persons, physical or juridical” that were referred to. However, it was debatable whether the types of damage mentioned in the last sentence could be inflicted on juridical persons.

53. Mr. PELLET said that, in that respect, there had been no inconsistency on the part of the Special Rapporteur. If there was agreement on the premises that he had stated, that is, if personal damage was taken to cover all damage caused to private persons—and not “parties”—whether physical or juridical, and if such damage could be either material or moral, it might be quite easy to amend the paragraph. The most important thing was to get rid of the idea that personal damage could be anything other than material or moral damage.

54. Mr. ARANGIO-RUIZ (Special Rapporteur) proposed that that point should be added to the three others already referred to the small ad hoc working group.

55. Mr. RAZAFINDRALAMBO said that the paragraph could be corrected without wholesale rewriting simply by deleting the words between dashes.

56. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission decided to leave paragraph (21) pending and to ask the small ad hoc working group to revise the wording.

It was so agreed.

Paragraphs (22) and (23)

Paragraphs (22) and (23) were approved.

Paragraph (24)

57. Mr. VERESHCHETIN said that the words “will normally require the awarding of interest” in the third sentence of the paragraph were too categorical, in view of the text of article 8, paragraph 2, which stipulated that compensation “may” include interest, and of the first

footnote of the paragraph, which rightly stated that doctrinal views on the point were divided. He proposed either deleting the third sentence entirely or taking up the idea expressed in the footnote and saying that some members of the Commission supported the conclusion in question, while others thought that it was premature at the current stage.

58. Mr. VILLAGRÁN KRAMER supported the proposal as it would get rid of the conflict between article 8, paragraph 2, and the commentary.

59. Mr. CRAWFORD said that, while the commentary should of course not appear to contradict the text of the article, at least the basic idea of the second half of the sentence should be kept, namely, that the payment of interest was a method often used in cases of damage arising out of the temporary immobilization of capital, since that was a fact. If the first half of the sentence was to be amended or deleted, it might be necessary to move the reference to the first footnote of the paragraph, or even to mention in the text of the paragraph that doctrine was divided on the point and quote writers in the footnote.

60. Mr. YANKOV supported the view expressed by Mr. Vereshchetin, but thought that it would be better, rather than simply deleting the third sentence, to recast the text so as to stress the non-automatic nature of the payment of interest.

61. Mr. ROSENSTOCK said that, regardless of doctrinal differences, the Commission must recognize the existence of a predominant State practice. However, the statement might be made less categorical by replacing the word “normally” by “often”.

62. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the simplest solution would be to move the reference to the first footnote from the third sentence to the end of the second sentence and to amend the third sentence to read: “The Commission, however, recognizes that the awarding of interest seems to be the most frequently used method for compensating the type of loss stemming from the temporary non-availability of capital”.

63. Mr. BOWETT said that he feared that too many reservations might dilute the substance of the commentary itself. The important point, which was not brought out clearly, was that interest could not be awarded in addition to compensation for losses in the case of a going concern, short of accepting that the same funds could be simultaneously in a bank, where they earned interest, and in the enterprise, where they produced profits.

64. Mr. de SARAM said that the point raised by Mr. Bowett was not brought out clearly in the wording of article 8, paragraph 2, and should therefore be included in the commentary.

65. Mr. ROSENSTOCK said that the wording of article 8, paragraph 2, stated explicitly that the awarding of both interest and compensation for losses was not a requirement in all cases, but remained a possibility. The compromise wording, which involved adding the words “where appropriate” to paragraph 2, had been adopted to take account of the time factor and of other considerations which had been discussed at length in the Drafting Committee. He could not accept a commentary which was nothing short of a rejection of the wording adopted in the draft article.

66. Mr. CRAWFORD said that paragraph (24) was linked with paragraphs (25) and (26), which dealt with a number of points raised during the discussion. With regard to the point raised by Mr. Bowett, it might be better dealt with in the discussion on paragraph (27).

67. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to approve paragraph (24), as amended by the Special Rapporteur.

Paragraph (24), as amended, was approved.

Paragraph (25)

Paragraph (25) was approved.

Paragraph (26)

68. Mr. VERESHCHETIN said that the reasons advanced for amending the text of paragraph (24) could also be used to justify amending paragraph (26), by deleting the words "although normally justified".

69. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to approve paragraph (26), as amended by Mr. Vereshchetin.

Paragraph (26), as amended, was approved.

Paragraph (27)

70. Mr. BOWETT, taking up the argument he had developed in the discussion on paragraph (24), proposed adding the following sentence to paragraph (27): "When loss of profits is awarded in relation to a capital investment in a 'going concern', it would not seem appropriate to award interest on the capital value of that investment over the same period of time for which loss of profits is awarded".

71. Mr. KUSUMA-ATMADJA said that Mr. Bowett's proposal seemed to place interest and loss of profits on the same plane, whereas paragraph (27) explained clearly that compensation for loss of profits was not as widely accepted as the payment of interest. It would be preferable to state simply that the two could not be cumulative, without affecting the order of precedence established in the paragraph.

72. Mr. VILLAGRÁN KRAMER said that it might be wiser not to go into the interpretation of article 8, paragraph 2, and not to focus on one method of compensation rather than another. The text of the draft articles used the words "may include" so as to leave it to the arbitrator or judge to decide on the appropriate method of compensation.

73. Mr. CRAWFORD said that the Commission appeared to be placing on Mr. Bowett's proposal a positive connotation which it did not have, since it was intended simply to rule out the cumulative application of the two methods of compensation.

74. Mr. BOWETT proposed that a simpler wording might be: "A claimant will not be entitled to recover both interest and loss of profits when deprived of a going concern. It will be for a tribunal to judge which is the appropriate remedy".

75. Mr. ROSENSTOCK said that that wording completely contradicted what was stated in article 8, para-

graph 2, and disregarded such considerations as the time factor, among others.

76. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the new wording proposed by Mr. Bowett did not stipulate that the simultaneous application of both methods was impossible in the case of the same object and the same time period, which would cover the point raised by Mr. Rosenstock.

77. The CHAIRMAN suggested that Mr. Bowett and Mr. Crawford should together prepare a new version of the sentence which Mr. Bowett proposed adding to paragraph (27).

The meeting rose at 6 p.m.

2323rd MEETING

Tuesday, 20 July 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

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

CHAPTER IV. State responsibility (continued) (A/CN.4/L.484 and Corr.1 and Add.1-7)

C. Draft articles of part 2 of the draft on State responsibility (continued)

2. TEXTS OF DRAFT ARTICLE 1, PARAGRAPH 2, AND DRAFT ARTICLES 6, 6 bis, 7, 8, 10 AND 10 bis WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-FIFTH SESSION (continued) (A/CN.4/L.484/Add.2-7)

Commentary to article 8 (Compensation) (continued) (A/CN.4/L.484/Add.5)

Paragraphs (16) and (17) (continued)

1. The CHAIRMAN said that certain points concerning paragraphs (16) and (17) were still pending and the Commission would revert to them later.

Paragraph (19) (concluded)

2. Mr. ARANGIO-RUIZ (Special Rapporteur) proposed that the words "the relationship between the State and its nationals is a primary rule which has no place in the present context", in the last sentence, should be replaced by "this is part of the material damage to the State."