

Document:-  
**A/CN.4/SR.2323**

**Summary record of the 2323rd meeting**

Topic:  
**Other 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>)*

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."

*Paragraph (19), as amended, was approved.*

## Paragraph (27) (continued)

3. Mr. BOWETT proposed that two sentences should be inserted at the end of paragraph (27), reading: "A claimant will not be entitled to recover both interest and loss of profit over the same period of time when deprived of a 'going concern'. It will be for a court to judge which is the appropriate remedy."

4. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the proposed addition would meet the point raised the previous day by Mr. Crawford. At the same time, he had reservations about referring too often to the courts because that was not the most frequent way of settling disputes involving loss of profit.

5. Mr. BOWETT said that the second sentence of his proposed text could simply be left out.

6. Mr. ROSENSTOCK said that he did not favour the proposed amendment. It was not consistent with the Commission's general approach to the issue of interest and loss of profit, illustrated by paragraphs (26) and (38), in which it had simply made reference to the complexity of the issue and left the decision to the judge or other third party involved.

7. The proposed amendment basically asserted that the same loss should not be compensated twice. That was true of all forms of reparation, not only loss of profit. He preferred the original, albeit highly complex, formulation suggested by Mr. Bowett the previous day. The text just proposed was misleading and might give rise to unfortunate and unjust results by ruling out one solution or the other.

8. In his view, the Commission was making a mistake: thus far, it had chosen not to provide specific rules for third parties and to let them determine the remedy, whereas in the amendment under consideration, the Commission had suddenly taken the opposite tack and provided guidelines for one particular form of reparation.

9. However, he said that he would have no objection to the second sentence if the first sentence were acceptable, which it was not.

10. Mr. BOWETT said that Mr. Rosenstock had raised an important general question which pertained to that entire section of the report. As it stood, that section gave no guidance on the extremely important practical matter of loss of profit. Three questions, in particular, needed to be answered: the kind of claim for which loss of profit was recoverable; the period of time for which loss of profit was recoverable; and how loss of profit was to be calculated. The Commission had failed to answer any of those questions.

11. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he shared Mr. Bowett's views. However, the Drafting Committee had not wished to incorporate such details in the draft articles. Perhaps the commentary could provide the needed precision and he suggested that an informal working group should be appointed to redraft the proposed amendment to paragraph (27).

12. Mr. de SARAM said that he fully agreed with Mr. Bowett. The question under consideration was actually

quite general in scope. Accordingly, the proposed working group should be open-ended.

13. Mr. YANKOV said that, while endorsing Mr. Bowett's views, he also appreciated the merits of Mr. Rosenstock's argument. Practice varied greatly among States and it would be very difficult to arrive at a set of rules that would be universally acceptable. The Commission should not attempt to establish rules to cover all cases; rather it should stress that decisions should be arrived at through third-party settlement procedures.

14. The CHAIRMAN designated Mr. Arangio-Ruiz (Special Rapporteur), Mr. Bowett, Mr. Crawford, Mr. Rosenstock and, if they so wished, Mr. de Saram and Mr. Yankov, to form an open-ended working group to redraft the proposed amendment to paragraph (27).

## Paragraphs (28) to (37)

*Paragraphs (28) to (37) were approved.*

## Paragraph (38)

15. Mr. YANKOV said that the words "to state the general principle in quite flexible terms and" should be inserted after "It has therefore felt it preferable" in the second sentence. His proposal was based on views expressed in the Drafting Committee at the previous session.

16. Mr. BOWETT said that the solution did not lie in letting judges determine whether compensation for loss of profit should be paid. Without guidelines, they were not able to make informed and consistent decisions. It was incumbent on the Commission to clarify the law and provide guidance on that matter.

17. Mr. VILLAGRÁN KRAMER said that it would indeed be useful to clarify the law relating to compensation. He pointed out that paragraph (38) would have to be amended in the light of the final drafting of paragraph (27), which was to be completed by the newly established open-ended working group.

18. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the amendment to paragraph (38) proposed by Mr. Yankov could also be considered by the open-ended working group. He agreed with Mr. Bowett that compensation for loss of profit was an area in which clarification was needed. However, since practice provided no real guidance, the Commission would be engaged in progressive development rather than codification of the law.

19. Mr. YANKOV said that he appreciated the merit of Mr. Bowett's argument. In his view, paragraph 2 of article 8 did set forth a general principle that could serve as a guideline for the settlement of disputes relating to compensation. His intention in making the amendment had been to insert an implicit reference to that general principle in paragraph (38) of the commentary.

20. Mr. PELLET said he had a general reservation to make. As he saw it, the present debate was quite pointless. The Drafting Committee had decided not to enter into details in the text of the article. He himself did not approve of that course because he thought the Commission was called upon to do much more than that. However, that decision had been taken. The general formula-

tion adopted by the Drafting Committee could not now be supplemented by way of the commentaries.

21. Again, he said he was shocked at the frequent references in the commentary to the judge or other third party involved in the settlement of the dispute. Surely it was primarily for the parties concerned to arrive at a settlement: the Commission should provide them with guidance and should not simply be thinking of the possibility of judges or arbitrators.

22. Mr. ARANGIO-RUIZ (Special Rapporteur) pointed out that practically all the cases available from State practice involved decisions by third-party bodies. The point raised by Mr. Pellet was a valid one and the working group would no doubt take it into consideration.

23. Mr. TOMUSCHAT said that practically all the examples given in the commentary dealt with losses which affected capital assets. Actually, the rule in article 8 applied equally well to loss of working capacity. The commentary should include examples of compensation of individuals for loss of earnings.

24. Mr. ROSENSTOCK said he had no objection to the inclusion of further examples, but Mr. Tomuschat's point could be regarded as covered by paragraphs (22) and (23) of the commentary. The working group should not be asked to undo decisions taken at the previous session by the Drafting Committee, nor could it remedy any gaps left by those decisions.

25. Mr. ARANGIO-RUIZ (Special Rapporteur) pointed out that paragraphs (22) and (23) mentioned the case of the death of a private individual who was a national of the State concerned. If Mr. Tomuschat had any other examples in mind, he could perhaps make a specific suggestion.

26. There could certainly be no question of undoing what the Drafting Committee had done at the previous session, nor of filling gaps left by the Committee. He was confident that, in their wisdom, the members of the working group could avoid both pitfalls.

27. Mr. VILLAGRÁN KRAMER suggested that Mr. Tomuschat should indicate a few specific examples of loss of working capacity. Cases of expulsion obviously came to mind.

28. Mr. SHI pointed out that article 8 laid down the general rule in the matter of compensation. In his opinion, the text of the article was sufficient and it was neither practicable nor desirable to try to supplement it by means of commentaries. A commentary could not fill a gap in the text of the article.

29. The whole subject of compensation was very complex. All the examples given in the commentary related to cases settled by arbitral tribunals or by mixed commissions. None were taken from the very rich practice of bilateral settlements. He was thinking, among others, of the settlement agreements after the Second World War, most of which had been bilateral in character, especially the lump sum agreements of that time. Under those agreements, it had been left to each party's internal commission to handle the question of distribution among its nationals. Such examples were worth mentioning.

30. He saw no need for a working group and urged that the commentary should be left as it stood. In any case, if the working group were to produce a text, he was certain

that it would lead to a further lengthy and unprofitable discussion.

31. The CHAIRMAN invited Mr. Tomuschat to submit a text for incorporation in the commentary in order to cover the point raised by him.

32. Mr. TOMUSCHAT said that he would submit a few sentences to deal with the cases he had in mind. The examples to be mentioned would include treaties signed by Germany with a number of countries immediately after the Second World War, dealing with compensation to persons persecuted on racial grounds.

33. The CHAIRMAN said that, while waiting for the issue to be reported on by the open-ended working group, he invited the Commission to consider, paragraph by paragraph, chapter IV, sections A and B.

#### A. Introduction (A/CN.4/L.484)

Paragraphs 1 to 8

*Paragraphs 1 to 8 were adopted.*

*Section A was adopted.*

#### B. Consideration of the topic at the present session (A/CN.4/L.484 and Add.1)

Paragraphs 9 to 87 (A/CN.4/L.484)

*Paragraphs 9 to 87 were adopted.*

Paragraphs 1 to 51 (A/CN.4/L.484/Add.1)

*Paragraphs 1 to 51 were adopted.*

*Section B was adopted.*

*The meeting rose at 11.15 a.m.*

## 2324th MEETING

*Wednesday, 21 July 1993, at 10.05 a.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. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.*