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Summary record of the 1357th meeting

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*Paragraphs (79)-(82)**Paragraphs (79)-(82) were approved.**Paragraph (85)*

31. Mr. KEARNEY suggested that, in accordance with the Commission's usual practice, the name of the member who had proposed the text quoted in paragraph (83) be replaced by the words "one member".

*Paragraph (83) was approved with that amendment.**Paragraph (84)**Paragraph (84) was approved.*

The commentary to article 8 bis [15], as amended, was approved.

The meeting rose at 6.10 p.m.

1357th MEETING

Thursday, 24 July 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Castañeda, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tsu-ruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Draft report of the Commission on the work of its twenty-seventh session

(A/CN.4/L.235/Add.7 and 8; A/CN.4/236 and Add.1 and Add.1/Corr.1 and 2, and Add.2)

(continued)

Chapter V

QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

1. The CHAIRMAN invited the Commission to consider chapter V of the draft report, paragraph by paragraph, starting with the introduction (A/CN.4/L.236).

A. INTRODUCTION

*Paragraph 1**Paragraph 1 was approved.**Paragraph 2*

2. Mr. REUTER (Special Rapporteur) said that there were two corrections to be made to paragraph 2. In the penultimate sentence, the words "and *Reservations*" should be deleted, since the Commission had not yet adopted any articles on the subject of reservations. In the last sentence, the phrase "at the next session" should read: "at its next session".

*Paragraph 2 was approved with those changes.**Paragraph 3*

3. Sir Francis VALLAT suggested that the adjective "nice" which qualified the word "balance" in the single sentence of paragraph 3 be deleted.

4. Mr. REUTER (Special Rapporteur) said he could accept that amendment.

*Paragraph 3, as amended, was approved.**Paragraph 4**Paragraph 4 was approved.**Paragraph 5*

5. Mr. KEARNEY said he was not clear about the meaning of the first part of the second sentence, which read: "For while all States are the expression of a natural society which everywhere presents qualitatively the same essential characteristics". That phrase seemed to express a belief in a tenet of natural law. He would welcome a clarification from the Special Rapporteur.

6. Mr. REUTER (Special Rapporteur) suggested that the passage in question be replaced by the words "While all States are equal before international law".

*Paragraph 5 was approved with that amendment.**Paragraphs 6 and 7**Paragraphs 6 and 7 were approved.**Paragraph 8*

7. In response to an observation by Mr. KEARNEY, Mr. REUTER (Special Rapporteur) proposed that the French version of the end of the paragraph be amended to read: "*munis de pouvoirs, tout en apportant à cette règle tous les tempéraments requis par la pratique*". The English version could be adjusted later.

*Paragraph 8 was approved with that amendment.**Paragraph 9**Paragraph 9 was approved with a minor drafting change in the French version.**Paragraph 10*

8. Mr. REUTER (Special Rapporteur) proposed that the concluding phrase of the paragraph, "customs unions could be invited because their competence would extend to questions of nomenclature", be replaced by the phrase "customs unions, whose competence would extend to questions of nomenclature, could be invited in order that they might participate in the drafting of the text of a treaty and in its adoption, and become parties to a treaty relating to the object of the conference". As certain members of the Commission had observed, it was not just a question of inviting international organizations to participate in a conference; they must be able to participate in the drafting and adoption of the text of the treaty and to become parties to the treaty.

*It was so agreed.**Paragraph 10, as amended, was approved.**Paragraphs 11 and 12**Paragraphs 11 and 12 were approved.**Paragraphs 13*

9. Mr. KEARNEY suggested that the second part of the last sentence, beginning with the words "it is for the Governments of the States participating in a conference . . ." be reworded so as not to exclude the possibility

that international organizations participating in a conference might also participate in determining the feasibility and advisability of the course of action in question.

10. Mr. REUTER (Special Rapporteur) suggested that the passage in question be replaced by the words "it is for the States and international organizations participating in a conference".

Paragraph 13 was approved with that amendment.

Paragraph 14

11. Mr. REUTER (Special Rapporteur) proposed that, in order to define the precise scope of article 9, paragraph 2, of the Vienna Convention on the Law of Treaties, the proviso "unless by the same majority it should be decided to apply a different rule" be inserted after the words "two-thirds majority", and that the word "rule", after the words "paragraph 2," be replaced by the word "principle". It was clearly understood that the participants in a conference were free to adopt any rule on the subject that they wished, but their decision must be taken by a specified majority.

It was so agreed.

Paragraph 14, as amended, was approved.

Paragraph 15

12. Mr. REUTER (Special Rapporteur) proposed that a full stop be placed after the words "specific solution" in the first sentence of paragraph 15. The remainder of the original sentence, and the whole of the second and third sentences, down to the words "general respects", would be replaced by a passage reading:

"As a general rule, international organizations are individualist entities, each having its own special characteristics. The treaties in which they participate are concluded with special regard to the organizations destined to become participants to them; in that sense they are instruments *intuitu personae*. Thus, except in the case described in paragraph 13 above, the only rule applicable, for such treaties, to the adoption of the text is that of the unanimous consent of the participants. A similar rule will probably apply to the authorization of reservations, a question which the Commission was unable to consider during the present session except in certain general aspects."

Apart from the substitution of the words "a similar rule" for the words "the same rule", his new wording involved no change in the substance.

The Special Rapporteur's proposal was adopted.

13. Mr. PINTO suggested that, in the penultimate sentence, the words "it is only right that" be replaced by the words "it may seem reasonable to assume that". The view expressed in that sentence was not a unanimous one. Many, including himself, thought that some provision ought to be made for the rules of procedure of the conference.

14. Mr. USHAKOV said that, at its previous session, the Commission had decided to simplify the title of the draft articles, as compared with the title of the question under consideration, by wording it as follows: "Draft articles on treaties concluded between States and international organizations or between international organ-

izations". Consequently, it would not seem necessary, at least in the commentary, to use each time such an unwieldy formula as "treaties concluded between organizations, or between one or more States and one or more international organizations".

15. Mr. REUTER (Special Rapporteur) said that he would bear in mind the observations made during the discussion and amend the paragraph accordingly.

Paragraph 15, as amended, was approved on that understanding.

Paragraph 16

16. Sir Francis VALLAT suggested that, in the penultimate sentence, the concluding words "the specific character of the treaties to which international organizations become parties" be amended to read: "the specific character of international organizations participating in treaties". That rewording would indicate that it was the character of the organizations themselves and not that of the treaties which constituted the major factor.

17. In the last sentence, the concluding words "has endeavoured to leave room for future developments" should be made clearer. As it now stood, the sentence could be taken to mean that the Commission had left blanks in its draft which would be covered by future provisions. The intended meaning was rather that the rules embodied in the articles were flexible enough to cover future developments. The provisions of the 1969 Vienna Convention, on which those rules were based, were in fact sufficiently flexible to cover situations as they developed.

18. For those reasons, he proposed that the concluding words "but has endeavoured to leave room . . ." be replaced by some such wording as: "and has endeavoured to draft the articles in a sufficiently flexible manner so as to meet the needs of future developments".

19. Mr. REUTER (Special Rapporteur) said he could accept the amendments suggested by Sir Francis Vallat.

Paragraph 16, as amended, was approved.

Paragraph 17

Paragraph 17 was approved.

Section A, as amended, was approved.

B. DRAFT ARTICLES ON TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN INTERNATIONAL ORGANIZATIONS

20. The CHAIRMAN said that section B of chapter V included the text of the draft articles on treaties concluded between States and international organizations or between international organizations which the Commission had adopted at the 1353rd meeting, and the commentaries to those articles.

Commentary to article 7

(Full powers and powers)

(A/CN.4/L.236/Add.1 and Corr.1)

Paragraphs (1)-(5)

Paragraphs (1)-(5) were approved.

Paragraph (6)

21. Sir Francis VALLAT said that he was not satisfied with the concluding words of the first sentence “which contain the most recent rule adopted by States in the 1975 Vienna Convention should more properly be described as rules embodied in the text of a multilateral treaty. They had not necessarily been adopted by States.

22. Mr. SETTE CÂMARA suggested that the phrase in question be reworded to read: “which contain the most recent rule drafted by representatives of States in the matter”.

It was so agreed.

Paragraph (6), as amended, was approved.

23. Mr. AGO said he wished to make an observation which, properly speaking, related not to paragraphs (5) and (6) but to the rule referred to in those paragraphs. It would seem that delegations of States to an organ of an international organization were considered to possess full powers to conclude a convention between certain States and that international organization. But while that might be the case for permanent representatives, it was not the case for delegation to an organ of an international organization. For instance, delegations to the International Labour Conference did not need to produce full powers in order to conclude general conventions between States members of the International Labour Organisation. On other hand, they would have no right to represent States in the conclusion of a treaty with that organization. Hence the rule in question did not reflect practice; it was bound to provoke a sharp reaction from the international organizations and he wished to enter the most serious reservations on the point.

24. The CHAIRMAN said that the text of article 7 had already been adopted on first reading, but the Commission would be able to return to the point raised by Mr. Ago on second reading.

Paragraph (7)

25. Mr. REUTER (Special Rapporteur) proposed that, in the third sentence, the words “it cannot be argued, the case being quite the contrary, that” be deleted, and that the word “not” be inserted after the word “organizations”.

Paragraph (7) was approved with that amendment.

Paragraphs (8)-(11)

Paragraphs (8)-(11) were approved.

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

Commentary to article 2

(Use of terms), paragraphs 1 (c) and 1 (c bis)

(A/CN.4/L.236/Add.1)

The commentary to article 2, paragraphs 1 (c) and 1 (c bis), was approved.

Commentary to article 8

(Subsequent confirmation of an act performed without authorization (A/CN.4/L.236/Add.1)

26. In response to an observation by Mr. USHAKOV, Mr. REUTER (Special Rapporteur) proposed that the

word “drafting” be deleted, since the changes referred to were changes *mutatis mutandis* rather than drafting changes.

It was so agreed.

27. Mr. ŠAHOVIĆ said he hoped that, at the second reading, the Commission would say exactly what those changes *mutatis mutandis* were.

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

Commentary to article 9

(Adoption of the text) (A/CN.4/L.236/Add.1)

Paragraphs (1)-(4)

Paragraphs (1)-(4) were approved.

Paragraph (5)

28. Mr. REUTER (Special Rapporteur) proposed that, in order to avoid any erroneous interpretation of article 9, paragraph 2, of the Vienna Convention on the Law of Treaties, the passage in the fourth sentence, following the words “would be inapplicable”, be amended to read: “which would leave no alternative to the application of a rule of unanimous consent, possibly for the adoption of the text of a treaty and in any case for the adoption of the rule according to which the text of the treaty is to be adopted.”

It was so agreed.

29. Mr. PINTO suggested that, in the second sentence, the words “it would be proper that” be replaced by the words “it would seem reasonable to assume that”. He also suggested the insertion, before the penultimate sentence, of an additional sentence reading: “Nor was it the intention of the Commission that the provisions of paragraph 2 should be interpreted as impairing the autonomy of international conferences in the adoption of their own rules of procedure which might prescribe a different rule for the adoption of the text of a treaty or in filling any gaps in their procedure on this subject.”

30. Mr. REUTER (Special Rapporteur) said he could accept those suggestions.

Paragraph (5), as amended, was approved.

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

Commentary to article 10

(Authentication of the text)

(A/CN.4/L.236/Add.1 and Corr.2)

31. Mr. REUTER (Special Rapporteur) said an important change, the subject of a corrigendum (A/CN.4/L.236/Add.1/Corr.2) had been made to the commentary to article 10. It involved replacing the third sentence, beginning with the word “Furthermore”, by the following sentence: “In paragraph 2 (a), the expression ‘the international organizations participating in its drawing up’ [i.e. the drawing up of the treaty referred to in paragraph 2] eliminates doubts where an international organization assists and co-operates in preparing the text of a convention to which it is not to be a party”. That correction followed from the change in the text of article 10, where the words “participating in the negotiation

of the treaty" had been replaced by the words "participating in its drawing up", taken from the Vienna Convention.

The commentary to article 10 was approved with that amendment.

Commentary to article 11

(Means of establishing consent to be bound by a treaty)
(A/CN.4/L.236/Add.1)

The commentary to article 11 was approved.

Commentary to article 2 (Use of terms), paragraphs 1 (b), 1 (b bis) and 1 (b ter) (A/CN.4/L.236/Add.1)

The commentary to article 2, paragraphs 1 (b), 1 (b bis) and 1 (b ter) was approved.

Commentary to article 12

(Signature as a means of establishing consent to be bound by a treaty) (A/CN.4/L.236/Add.1)

The commentary to article 12 was approved.

Commentary to article 13

(An exchange of instruments constituting a treaty as a means of establishing consent to be bound by a treaty) (A/CN.4/L.236/Add.1)

32. Mr. REUTER (Special Rapporteur) proposed that the word "drafting" should be deleted.

33. Sir Francis Vallat had suggested that reference should be made in the commentary to the fact that the wording of article 13 permitted the conclusion of a treaty by an exchange of instruments, even when there were more than two contracting parties. In order to take account of that observation, he proposed that the following sentence be added at the end of the commentary: "The wording of this draft article reflects the fact, although cases of the kind are now rare, that a treaty may also be constituted by an exchange of instruments when there are more than two contracting parties".

It was so agreed.

The commentary to article 13, as amended, was approved.

Commentary to article 14

(Ratification, act of formal confirmation, acceptance or approval as a means of establishing consent to be bound by a treaty) (A/CN.4/L.236/Add.2)

34. Sir Francis VALLAT said that the word "denomination" had no particular legal significance in English. He suggested that the words "... not a 'denomination' but ...", in the last sentence of the commentary, be deleted.

35. Mr. REUTER (Special Rapporteur) proposed that the passage in question be altered to read: "... is a verbal expression describing an operation which has not so far had any generally accepted term bestowed on it in international practice".

It was so agreed.

The commentary to article 14, as amended, was approved.

Commentary to article 15

(Accession as a means of establishing consent to be bound by a treaty) (A/CN.4/L.236/Add.2)

The commentary to article 15 was approved.

Commentary to article 2, (Use of terms), paragraph 1 (g) (A/CN.4/L.236/Add.2)

The commentary to article 2, paragraph 1 (g), was approved.

Commentary to article 16

(Exchange, deposit or notification of instruments of ratification, formal confirmation, acceptance, approval or accession) (A/CN.4/L.236/Add.2)

36. Mr. ŠAHOVIĆ suggested that, in the second sentence of the commentary, the word "denomination" be replaced by the word "term", in accordance with the change made in the commentary to article 14.

The commentary to article 16 was approved with that amendment.

Commentary to article 17

(Consent to be bound by part of a treaty and choice of differing provisions) (A/CN.4/L.236/Add.2)

The commentary to article 17 was approved.

Commentary to article 18

(Obligation not to defeat the object and purpose of a treaty prior to its entry into force) (A/CN.4/L.236/Add.2)

The commentary to article 18 was approved.

Section B, as amended, was approved.

Chapter V of the draft report, as a whole, as amended, was approved.

Chapter IV

THE MOST-FAVOURLED-NATION CLAUSE
(*resumed from the previous meeting*)

B. DRAFT ARTICLES ON THE MOST-FAVOURLED-NATION CLAUSE (*continued*)

37. The CHAIRMAN invited the Commission to resume consideration of chapter IV, section B, of its draft report, starting with the commentary to article 13 [16].

Commentary to article 13 [16]¹

(Right to national treatment under a most-favoured-nation clause) (A/CN.4/L.235/Add.7)

Paragraphs (1)-(7)

Paragraphs (1)-(7) were approved.

Paragraph (8)

38. Mr. KEARNEY suggested that, in the penultimate sentence of the paragraph, the words "to be taken even if" be replaced by the word "that".

Paragraph 8 was approved with that amendment.

¹ The figures in square brackets represent the numbers of the articles as they appear in the report.

*Paragraph (9)**Paragraph (9) was approved.**The commentary to article 13 [16], as amended, was approved.**Commentary to article 14 [17]**(Most-favoured-nation treatment, national [or other] treatment with respect to the same subject-matter) (A/CN.4/L.235/Add.7)**The commentary to article 14 [17] was approved.**Commentary to article 15 [18]**(Commencement of enjoyment of rights under a most-favoured-nation clause) (A/CN.4/L.235/Add.8)**Paragraphs (1) and (2)**Paragraphs (1) and (2) were approved.**Paragraph (3)*

39. Mr. KEARNEY said that he could accept the paragraph on the understanding that the Special Rapporteur would make clearer the connexion between the treaty concluded between Belgium and Italy on 2 December 1882 and the court decision quoted.

*Paragraph (3) was approved on that understanding.**Paragraph (4)**Paragraph (4) was approved.**Paragraph (5)*

40. Mr. HAMBRO said that he wished to place on record his view that the Commission did not show sufficient discrimination with regard to the authority of the authors it quoted in its reports and the frequency with which they were quoted.

*Paragraph (5) was approved.**The commentary to article 15 [18] was approved.**Commentary to article 16 [19]**(Termination or suspension of enjoyment of rights under a most-favoured-nation clause) (A/CN.4/L.235/Add.8)*

41. Mr. KEARNEY said he did not believe that the process of communication referred to in paragraph 2 of the article was the only means by which the operation of a most-favoured-nation clause subject to material reciprocity could be terminated or suspended. The beneficiary State might simply cease to accord material reciprocity to the granting State without informing the latter of its action.

42. Mr. USTOR (Special Rapporteur) said that means of terminating the operation of a most-favoured-nation clause other than communication were mentioned in paragraph (10). The view prevailing in the Drafting Committee had been that termination or suspension of material reciprocity by a beneficiary State would constitute a breach of obligation and would, as such, entail consequences differing from those described in article 16, paragraph 2.

43. Mr. KEARNEY said that, unlike the possibility to which he had referred, the events mentioned in the second

sentence of paragraph (10) were extraneous to the operation of the most-favoured-nation clause. In his opinion, the Drafting Committee's view concerning the termination or suspension of material reciprocity without communication was incorrect.

44. Mr. AGO said he considered that, at any rate in the French version, the second sentence of paragraph (1) was incorrect.

45. Sir Francis VALLAT said he wished to place on record that the view that termination of reciprocal treatment necessarily constituted a breach of obligation had not been accepted by all the members of the Drafting Committee.

46. Mr. USTOR (Special Rapporteur) proposed that, in order to clarify the second sentence of paragraph (10), a semicolon be inserted after the word "clause", and that the words "as to termination;" be inserted after the words "the beneficiary State".

47. In order to take account of the comments made by Mr. Kearney and Sir Francis Vallat, he further suggested the addition at the end of paragraph (10) of a sentence reading "Some members of the Commission were of the view that the termination or suspension of material reciprocity without communication would also have the effect of terminating or suspending the enjoyment of the rights of the beneficiary State".

*It was so agreed.**The commentary to article 16 [19], as amended, was approved.*

The meeting rose at 1.10 p.m.

1358th MEETING*Thursday, 24 July 1975, at 4.10 p.m.**Chairman: Mr. Abdul Hakim TABIBI**Members present: Mr. Ago, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.***Draft report of the Commission on the work of its twenty-seventh session****(A/CN.4/L.232/Add.1; A/CN.4/L.235/Add.9 and Corr.1; A/CN.4/L.239 and Corr.1 and Add.1)***(continued)***Chapter IV****THE MOST-FAVOURLED-NATION CLAUSE***(continued)***B. DRAFT ARTICLES ON THE MOST-FAVOURLED-NATION CLAUSE (continued)**

1. The CHAIRMAN invited the Commission to continue consideration of section B of chapter IV of the draft report.