

Document:-
A/CN.4/SR.1358

Summary record of the 1358th meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
1975, vol. I

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

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.

*Commentary to article 0 [21]*¹

(Most-favoured-nation clauses in relation to treatment under a generalized system of preferences) (A/CN.4/L.235/Add.9 and Corr.1)

Paragraphs (1)-(4)

Paragraphs (1)-(4) were approved.

Paragraph (5)

2. Mr. KEARNEY said that paragraph (5) reproduced lengthy extracts from the "agreed conclusions" on a generalized system of preferences adopted by the Trade and Development Board in October 1970 by its decision 75 (S-IV).² As he understood it, those extracts had been included in order to indicate areas of possible interest for the International Law Commission in its future work; but it was doubtful whether some of that material, particularly section VII, on rules of origin, was relevant when viewed in that light.

3. Mr. USTOR (Special Rapporteur) suggested that the extract from section VII be deleted; the title "Rules of origin" would remain, followed by suspension points, in order to indicate the break in continuity of the quotation.

Paragraph (5) was approved with that amendment

Paragraphs (6)-(11)

Paragraphs (6)-(11) were approved.

Paragraph (12)

4. Mr. USTOR (Special Rapporteur) suggested that, in the first sentence, the reference to General Assembly resolution 3281 (XXIX) be completed by inserting the title: "Charter of Economic Rights and Duties of States".

Paragraph (12) was approved with that amendment.

Paragraph (13)

5. Mr. PINTO said that the first sentence of paragraph (13) was much too strongly worded; it suggested that the international community represented in the United Nations organs had "unanimously agreed" to adopt the generalized system of preferences outlined earlier in the commentary. He proposed that the sentence should be reworded to read: "There appears to be general agreement in principle, expressed within United Nations organs, that States should adopt a generalized system of preferences, the characteristics of which are outlined above".

6. Mr. HAMBRO said he supported that proposal.

7. Mr. USTOR (Special Rapporteur) said he could accept that amendment.

Paragraph (13), as amended, was approved.

Paragraph (14)

Paragraph (14) was approved, subject to a drafting change in the first sentence.

Paragraph (15)

8. Mr. HAMBRO suggested that, in accordance with the Commission's usual practice, the name of the member

who had made the proposal referred to at the end of the paragraph should not be mentioned.

It was so agreed.

Paragraph (15), as amended, was approved.

9. Mr. PINTO proposed that an additional paragraph be inserted at that point to reflect his statement in connexion with the proposal referred to in paragraph (15), which he had supported.³ The proposed text would read:

"One member felt that article 0 did little to protect, let alone enhance, the position of the developing countries. Most-favoured-nation clauses were often concluded without an appreciation of their full implications for States, and what was needed were provisions that might assist developing countries to avoid any adverse effects that could result from the rigid application of the articles as drafted. Provisions which precluded the operation of the articles with regard to certain treaties entered into with developing countries, such as those contemplated under the proposal in the preceding paragraph, or at the very least which expressly reaffirmed a State's right to make specific exceptions and exclusions when concluding a clause, might go some way in this direction."

10. Mr. TSURUOKA said that he had some sympathy for Mr. Pinto's proposed additional paragraph but he doubted whether the individual opinion of a member of the Commission should be cited in the report, since it was already recorded in the summary record for the meeting at which it had been expressed. The Commission had always been very prudent in that respect and had mentioned in its reports the individual opinion of one of its members only when that opinion reflected a general trend, which was not the case in the present instance. The statement made by Mr. Pinto expressed a view which raised a serious problem touching on the very substance of international law and the application of the *pacta sunt servanda* rule. He therefore did not favour the inclusion of the paragraph as proposed, since its insertion would run counter to the practice so far followed by the Commission.

11. Mr. USTOR (Special Rapporteur) said that he would not object to the inclusion of a paragraph to reflect Mr. Pinto's special point of view, but he thought that the proposed language was much too strong. It would be going too far to say that article 0 "did little to protect, let alone enhance, the position of the developing countries". As he understood it, Mr. Pinto's position had been that the effect of article 0 was somewhat limited.

12. Mr. HAMBRO said that he had doubts about the propriety of including the proposed paragraph. A mention in the report of the opinion of "one member" would seem to imply that the opinion in question had had no support from other members, which was not the case.

13. Mr. PINTO said that, in order to meet the point raised by the Special Rapporteur, he would reword the first sentences of his proposed paragraph as follows: "One member felt that article 0 was of limited effect. Most-favoured-nation clauses had far-reaching implica-

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

² Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 15 (A/8015/Rev.1), pp. 265 et seq.

³ See 1353rd meeting, paras. 105 and 106.

tions that were not always apparent. What was needed. . . .”

14. Mr. ŠAHOVIĆ said that, with those changes, the proposed additional paragraph would no longer simply represent the individual opinion of Mr. Pinto; it would reflect the view of several members, who concurred with the statement contained in the reworded text.

15. Mr. KEARNEY suggested that the opening words of the proposed new paragraph “One member felt that . . .” be replaced by the following wording: “The view was also expressed that . . .”. That wording was in keeping with the Commission’s tradition of not citing individual opinions.

16. Secondly, in what was now the third sentence of the proposed additional paragraph, he suggested that the words “rigid application” be replaced by the words “mechanical application”.

17. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved the proposed additional paragraph as amended by Mr. Pinto and Mr. Kearney.

It was so agreed.

Paragraph (16) (A/CN.4/L.235/Add.9/Corr.1)

Paragraph (16) was approved

Section B was approved

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

Chapter II

STATE RESPONSIBILITY

(resumed from the 1355th meeting)

B. DRAFT ARTICLES ON STATE RESPONSIBILITY *(continued)*

18. The CHAIRMAN invited the Commission to consider the commentary to article 10 paragraph by paragraph.

Commentary to article 10

(Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity) (A/CN.4/L.232/Add.1)

Paragraphs (1)-(15)

Paragraphs (1)-(15) were approved.

Paragraph (16)

19. Mr. KEARNEY suggested that, for the sake of clarity, the phrase “the first draft”, in foot-note 37, be amended to read “the Japanese draft”.

It was so agreed.

Paragraph (16), as amended, was approved.

Paragraphs (17) and (18)

Paragraphs (17) and (18) were approved.

Paragraph (19)

20. Mr. KEARNEY said that the phrase “were not on an equal footing with other States” in the second sentence cast doubts on the sovereign equality of States. He could

accept the paragraph on the understanding that that phrase would be replaced by less ambiguous language.

Paragraph (19) was approved on that understanding

Paragraphs (20)-(22)

Paragraphs (20)-(22) were approved.

Paragraph (23)

Paragraph (23) was approved, subject to drafting changes in the final sentence.

Paragraphs (24) and (25)

Paragraphs (24) and (25) were approved.

Paragraph (26)

21. Mr. AGO (Special Rapporteur), replying to a comment by Mr. PINTO, proposed that the phrase in the ninth sentence, “individuals, acting as organs, in a private capacity”, be replaced by the phrase “individuals having the status of organs, acting in a private capacity”.

It was so agreed.

Paragraph (26), as amended, was approved.

Paragraphs (27)-(29)

Paragraphs (27)-(29) were approved.

The commentary to article 10, as amended, was approved.

Chapter VI

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

22. The CHAIRMAN invited the Commission to consider chapter VI of its draft report (A/CN.4/L.239 and Corr.1 and Add.1) section by section.

A. THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

Section A was approved.

B. LONG-TERM PROGRAMME OF WORK AND

C. ORGANIZATION OF FUTURE WORK

23. After a discussion in which Mr. ŠAHOVIĆ, Mr. SETTE CÂMARA, Mr. USHAKOV, Mr. HAMBRO and Mr. KEARNEY took part, the CHAIRMAN suggested that the Chairman of the Planning Group be requested to prepare, in the light of the discussion, a text for inclusion in the draft report covering both the long-term programme of work and the organization of future work.

It was so agreed.

D. CO-OPERATION WITH OTHER BODIES

Section D was approved.

E. DATE AND PLACE OF THE TWENTY-EIGHTH SESSION

24. The CHAIRMAN proposed that the Commission hold its twenty-eighth session at Geneva from 3 May to 23 July 1976.

It was so agreed.

Section E was approved.

F. REPRESENTATION AT THE THIRTIETH SESSION OF THE GENERAL ASSEMBLY

G. GILBERTO AMADO MEMORIAL LECTURE and

H. INTERNATIONAL LAW SEMINAR

Sections F, G and H were approved.

The meeting rose at 6 p.m.

1359th MEETING

Friday, 25 July 1975, at 10.25 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Raman-gasoavina, 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.2)

(continued)

Chapter II

STATE RESPONSIBILITY

(resumed from the previous meeting)

B. DRAFT ARTICLES ON STATE RESPONSIBILITY *(continued)*

1. The CHAIRMAN invited the Commission to consider the commentary to article 11 paragraph by paragraph.

Commentary to article 11

(Conduct of persons not acting on behalf of the State) (A/CN.4/L.232/Add.2)

Paragraph (1)

2. Mr. KEARNEY suggested that the word "indication" in the first sentence be replaced by the word "presentation".

It was so agreed.

3. Mr. AGO (Special Rapporteur), replying to a comment by Mr. KEARNEY, suggested that the phrase "and whose exclusion from attribution to the State is still implicit" be deleted from the last sentence.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

4. Sir Francis VALLAT said that it would not be clear to the majority of common lawyers that words such as "natural persons who have the status of organs of the State", which appeared in the last sentence, referred to persons such as soldiers, policemen and the like.

5. Mr. AGO (Special Rapporteur) suggested that he include a foot-note explaining the meaning of the phrase mentioned by Sir Francis Vallat.

It was so agreed.

6. Mr. KEARNEY suggested that the words "or quasi-public" be inserted after the word "parastatal".

It was so agreed.

7. Sir Francis VALLAT said that he had supported Mr. Kearney's suggestion because he believed that the Commission's report should be written in language which would be clear to persons other than experts in international law.

8. Mr. KEARNEY said that the phrase "have nothing to do with their belonging to the machinery of the State" in the last sentence seemed too sweeping.

9. Mr. AGO (Special Rapporteur) proposed that it be replaced by the phrase "and have no connexion with the machinery of the State".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

10. Mr. KEARNEY, referring to the sixth sentence of the paragraph, said that, despite the presence of a saving clause, it was unrealistic to impose on States the obligation to afford "effective" protection to "ordinary nationals" of a foreign State. He suggested that the word "effective" be deleted.

It was so agreed.

11. Mr. KEARNEY said that the language of the ninth sentence was too strong.

12. Sir Francis VALLAT suggested that the word "would" in the second part of the sentence be replaced by the word "might". He further suggested that the words "of one of the other" be deleted from the tenth sentence.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraphs (5)-(8)

Paragraphs (5)-(8) were approved.

Paragraph (9)

Paragraph (9) was approved, subject to redrafting of the fourth sentence.

Paragraph (10)

13. Mr. KEARNEY said that he did not find the fifth sentence of the paragraph very clear.

14. Sir Francis VALLAT said he was concerned that the paragraph seemed to deal with both primary and what might be called "tertiary" rules, concerning methods of reparation for breach. He wondered whether the passages on remedy for breach were really necessary.

15. Mr. AGO (Special Rapporteur) said that the passages in question were extremely important. A number of writers believed that the wrongful act attributed to