

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
**1978**

*Volume I*

*Summary records  
of the thirtieth session*

*8 May-28 July 1978*

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UNITED NATIONS





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New York, 1979



## INTRODUCTORY NOTE

The summary records in this volume include the corrections to the provisional summary records requested by members of the Commission and such editorial changes as were considered necessary.

The symbols appearing in the text, consisting of letters combined with figures, serve to identify United Nations documents. References to the *Yearbook of the International Law Commission* are in a shortened form consisting of the word *Yearbook* followed by suspension points, a year and a volume number, e.g. *Yearbook... 1970, vol. II*.

Volume II (Part One) of this *Yearbook* contains the Special Rapporteurs' reports discussed at the session and certain other documents; volume II (Part Two) contains the Commission's report to the General Assembly. All references to those documents in the present volume are to the versions printed in volume II.

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## MEMBERS OF THE COMMISSION

<i>Name</i>	<i>Country of nationality</i>	<i>Name</i>	<i>Country of nationality</i>
Mr. Roberto AGO	Italy	Mr. Milan ŠAHOVIĆ	Yugoslavia
Mr. Mohammed BEDJAOU	Algeria	Mr. Stephen M. SCHWEBEL	United States of America
Mr. Juan José CALLE Y CALLE	Peru	Mr. José SETTE CÂMARA	Brazil
Mr. Jorge CASTAÑEDA	Mexico	Mr. Sompong SUCHARITKUL	Thailand
Mr. Emmanuel Kodjoe DADZIE	Ghana	Mr. Abdul Hakim TABIBI	Afghanistan
Mr. Leonardo DÍAZ GONZÁLEZ	Venezuela	Mr. Doudou THIAM	Senegal
Mr. Abdullah EL-ERIAN	Egypt	Mr. Senjin TSURUOKA	Japan
Mr. Laurel B. FRANCIS	Jamaica	Mr. Nikolai A. USHAKOV	Union of Soviet Socialist Republics
Mr. S. P. JAGOTA	India	Sir Francis VALLAT	United Kingdom of Great Britain and Northern Ireland
Mr. Frank X. J. C. NJENGA	Kenya	Mr. Stephan VEROSTA	Austria
Mr. C. W. PINTO	Sri Lanka	Mr. Alexander YANKOV	Bulgaria
Mr. Robert Q. QUENTIN-BAXTER	New Zealand		
Mr. Paul REUTER	France		
Mr. Willem RIPHAGEN	Netherlands		

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### OFFICERS

<i>Chairman:</i>	Mr. José SETTE CÂMARA
<i>First Vice-Chairman:</i>	Mr. Milan ŠAHOVIĆ
<i>Second Vice-Chairman:</i>	Mr. Frank X. J. C. NJENGA
<i>Chairman of the Drafting Committee:</i>	Mr. Stephen M. SCHWEBEL
<i>Rapporteur:</i>	Mr. C. W. PINTO

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*Mr. Valentin A. Romanov, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission.*

## AGENDA

The Commission adopted the following agenda at its 1474th meeting, held on 8 May 1978:

1. The most-favoured-nation clause.
2. State responsibility.
3. Succession of States in respect of matters other than treaties.
4. Question of treaties concluded between States and international organizations or between two or more international organizations.
5. The law of the non-navigational uses of international watercourses.
6. Status of the diplomatic courier and of the diplomatic bag not accompanied by diplomatic courier.
7. Relations between States and international organizations (second part of the topic).
8. Review of the multilateral treaty-making process (para. 2 of General Assembly resolution 32/48).
9. Long-term programme of work.
10. Organization of future work.
11. Co-operation with other bodies.
12. Date and place of the thirty-first session.
13. Other business.

## ABBREVIATIONS

ACP countries	African, Caribbean and Pacific countries
ASEAN	Association of South East Asian Nations
CACM	Central American Common Market
CARICOM	Caribbean Common Market
CMEA	Council for Mutual Economic Assistance
ECAFE	Economic Commission for Asia and the Far East
ECE	Economic Commission for Europe
ECSC	European Coal and Steel Community
ECWA	Economic Commission for Western Asia
EEC	European Economic Community
EFTA	European Free Trade Association
ESCAP	Economic and Social Commission for Asia and the Pacific
EURATOM	European Atomic Energy Community
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
GSP	Generalized System of Preferences
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
I.C.J.	International Court of Justice
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
IFC	International Finance Corporation
ILO	International Labour Organisation
IMCO	International Maritime Consultative Organization
IMF	International Monetary Fund
INTELSAT	International Telecommunications Satellite Organization
LAFTA	Latin American Free Trade Association
OAS	Organization of American States
OAU	Organization of African Unity
P.C.I.J.	Permanent Court of International Justice
<i>P.C.I.J., Series A</i>	<i>P.C.I.J., Collection of Judgments</i>
<i>P.C.I.J., Series A/B</i>	<i>P.C.I.J., Judgments, Orders and Advisory Opinions</i>
<i>P.C.I.J., Series C</i>	<i>P.C.I.J., Pleadings, Oral Statements and Documents</i>
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UPU	Universal Postal Union

## CHECK LIST OF DOCUMENTS OF THE THIRTIETH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/306	Provisional agenda	Mimeographed. For the agenda as adopted, see p. xii above.
A/CN.4/307 and Add.1-2 and Add.2/Corr.1	Seventh report on State responsibility, by Mr. Roberto Ago, Special Rapporteur: the internationally wrongful act of the State, source of international responsibility ( <i>continued</i> )	Reproduced in vol. II (Part One).
A/CN.4/308 and Add.1, Add.1/Corr.1 and Add.2	Comments of Member States, organs of the United Nations, specialized agencies and other intergovernmental organizations on the draft articles on the most-favoured-nation clause adopted by the International Law Commission at its twenty-eighth session	Reproduced as an annex to A/33/10 (vol. II (Part Two)).
A/CN.4/309 and Add.1-2	Report on the most-favoured-nation clause, by Mr. Nicolai Ushakov, Special Rapporteur	Reproduced in vol. II (Part One).
A/CN.4/310	Review of the multilateral treaty-making process (para. 2 of General Assembly resolution 32/48): note by the Secretariat	<i>Idem.</i>
A/CN.4/311 and Add.1	Second report on the second part of the topic of relations between States and international organizations, by Mr. Abdullah El-Erian, Special Rapporteur	<i>Idem.</i>
A/CN.4/312	Seventh report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur: draft articles and commentary ( <i>continued</i> )	<i>Idem.</i>
A/CN.4/313	Tenth report on succession of States in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur: draft articles, with commentaries, on succession to State debts ( <i>continued</i> )	<i>Idem.</i>
A/CN.4/314	The law of the non-navigational uses of international watercourses: replies of Governments to the Commission's questionnaire	<i>Idem.</i>
A/CN.4/315	State responsibility—"Force majeure" and "fortuitous event" as circumstances precluding wrongfulness: State practice, international judicial decisions and doctrine. Survey prepared by the Secretariat	<i>Idem.</i>
A/CN.4/L.264	Draft articles on the most-favoured-nation clause: article A proposed by Mr. Reuter	Text reproduced in A/33/10, para. 55 (vol. II (Part Two)).
A/CN.4/L.265	<i>Idem</i> : article 21 <i>ter</i> proposed by Mr. Reuter	<i>Idem.</i>
A/CN.4/L.266	<i>Idem</i> : article 21 <i>bis</i> proposed by Mr. Njenga	Text reproduced in the summary record of the 1494th meeting, para. 25.
A/CN.4/L.267	<i>Idem</i> : article 23 <i>bis</i> proposed by Sir Francis Vallat	Text reproduced in A/33/10, para. 57 (vol. II (Part Two)).
A/CN.4/L.268	Most-favoured-nation clause: statement made by the representative of the UNCTAD secretariat at the 1497th meeting, at the request of the Commission	Text reproduced in A/33/10, annex, sect. B (vol. II (Part Two)).
A/CN.4/L.269	Draft articles on treaties concluded between States and international organizations or between international organizations. Texts adopted by the Drafting Committee: paragraph 1 ( <i>h</i> ) of article 2, and articles 35, 36, 36 <i>bis</i> , 37 and 38	Texts reproduced in the summary records of the 1509th, 1510th and 1512th meetings.
A/CN.4/L.270	Draft articles on the most-favoured-nation clause: article 28 proposed by Mr. Tsuruoka	Text reproduced in A/33/10, para. 68 (vol. II (Part Two)).
A/CN.4/L.271 and Add.1	Draft articles on State responsibility. Texts adopted by the Drafting Committee: articles 23-27 and title of chapter IV of the draft	Texts reproduced in the summary records of the 1513th and 1524th meetings.



<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.272	Draft articles on succession of States in respect of matters other than treaties. Texts adopted by the Drafting Committee: articles 23-25	<i>Idem</i> , 1514th and 1515th meetings.
A/CN.4/L.273	Draft report of the Commission on the work of its thirtieth session: chapter I	Mimeographed. For final text, see A/33/10 (vol. II (Part Two)).
A/CN.4/L.274 and Add.1-6	<i>Idem</i> : chapter II.	<i>Idem</i> .
A/CN.4/L.275 and Add.1-5	<i>Idem</i> : chapter III.	<i>Idem</i> .
A/CN.4/L.276 and Corr.1	<i>Idem</i> : chapter IV.	<i>Idem</i> .
A/CN.4/277	<i>Idem</i> : chapter V.	<i>Idem</i> .
A/CN.4/L.278 and Add.1, 3 and 4	<i>Idem</i> : chapter VIII.	<i>Idem</i> .
A/CN.4/L.279	Report of the Working Group on jurisdictional immunities of States and their property	Replaced by A/CN.4/L.279 Rev.1.
A/CN.4/L.279/Rev.1	<i>Idem</i> .	Section III reproduced in A/33/10, chapter VIII, section D, annex (vol. II (Part Two)).
A/CN.4/L.280	Draft articles on most-favoured-nation clauses. Texts adopted by the Drafting Committee: title of the draft and articles 1-29	Texts reproduced in the summary record of the 1521st meeting.
A/CN.4/L.281	Draft articles on the most-favoured-nation clause: text of article 23 <i>bis</i> [renumbered article 24] adopted by the Commission at its 1520th meeting	<i>Idem</i> , 1520th meeting, para. 43.
A/CN.4/L.282 and Corr.1	Draft articles on succession of States with respect to matters other than treaties: memorandum submitted by Mr. Tsuruoka regarding article 23, paragraph 2, adopted by the Commission	Reproduced in vol. II (Part One).
A/CN.4/L.283	Report of the Working Group on review of the multilateral treaty-making process	Text reproduced, as amended at the 1526th meeting in A/33/10, chapter VIII, section B (vol. II (Part Two)).
A/CN.4/L.284 and Corr.1	Report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law	Section II reproduced in A/33/10, chapter VIII, section C, annex (vol. II (Part Two)).
A/CN.4/L.285	Report of the Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier	Text reproduced in A/33/10, paras. 137-144 (vol. II Part Two)).
A/CN.4/L.286	Draft report of the Commission on the work of its thirtieth session: chapter VII	Mimeographed. For final text, see A/33/10 (vol. II (Part Two)).
A/CN.4/L.287	<i>Idem</i> : annex	<i>Idem</i> .
A/CN.4/L.288	<i>Idem</i> : chapter VI	<i>Idem</i> .
A/CN.4/SR.1474-1529	Provisional summary records of the 1474th to 1529th meetings of the Commission	Mimeographed. For final text, see present volume.



# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE THIRTIETH SESSION

*Held at Geneva from 8 May to 28 July 1978*

### 1474th MEETING

*Monday, 8 May 1978, at 3.20 p.m.*

*Chairman:* Sir Francis VALLAT  
*later:* Mr. José SETTE CÂMARA

*Members present:* Mr. Ago, Mr. Calle y Calle, Mr. Casteñeda, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tsu-ruoka, Mr. Ushakov, Mr. Yankov.

#### Opening of the session

1. The CHAIRMAN declared open the thirtieth session of the International Law Commission.

#### Statement by the outgoing Chairman

2. The CHAIRMAN wished first to extend a warm welcome to the Commission's new Secretary, Mr. Romanov, who had replaced Mr. Rybakov as head of the Codification Division. Mr. Rybakov had recently sent a letter expressing his deep appreciation of the fruitful co-operation between the Commission and the Codification Division during his period as Director of that Division and his thanks for the many personal kindnesses shown to him by the members of the Commission. In the letter, he wished the Commission every success in its difficult and important task of codifying and progressively developing international law. Perhaps the Secretary would be kind enough to convey the Commission's gratitude to Mr. Rybakov for his services as Director of the Codification Division and as Secretary to the Commission and to wish him well in his new duties at the Ministry of Foreign Affairs of the Union of Soviet Socialist Republics.

3. The Commission's endeavour at the previous session to take a fresh look at its methods and programme of work had found an echo in the Sixth Committee of the General Assembly. The general comments on the work of the Commission and the codification process, contained in the report of the Sixth Committee<sup>1</sup> gave grounds for satisfaction with the progress that had been made. Again, whether or

not members agreed with the comments contained in the report in question, in the section on "other decisions and conclusions" of the Commission,<sup>2</sup> those comments represented some reward for the efforts made at the previous session, through the Planning Group, to give a new thrust to the Commission's life and work.

4. It had been recommended in 1977 that certain new topics should be considered for inclusion in the Commission's long-term programme of work. The sixth Committee had indicated that the draft code of offences against the peace and security of mankind would not be included in the Commission's programme because it was to form a separate item for consideration by the General Assembly itself.<sup>3</sup> In all other respects, the recommendations concerning topics to be dealt with by the Commission had been broadly accepted and approved by the Assembly.

5. The Sixth Committee's observations on the Commission's methods of work<sup>4</sup> would require close attention, for they provided considerable food for thought.

6. Judge T. O. Elias of the International Court of Justice had accepted an invitation to deliver the Gilberto Amado Memorial Lecture, which happily would coincide with the commemoration of the Commission's thirtieth anniversary.

7. The Sixth Committee had also taken special note of the International Law Seminar, and it was to be hoped that there would be some response to the appeal for further scholarships. Similarly, representatives on the Sixth Committee had welcomed the Commission's continued practice of co-operating with regional juridical bodies. Mr. Riphagen had represented the Commission at a meeting of the European Committee on Legal Co-operation held in Strasbourg (France), as had Mr. El-Erian at a meeting of the Inter-American Juridical Committee in Rio de Janeiro (Brazil) and Mr. Francis at a meeting of the Asian-African Legal Consultative Committee in Doha (Qatar). Opportunities also existed for co-operation with other regional bodies, for he had received a letter from the Secretary-General of the League of Arab States concerning the possibility of allowing a representative of the League to attend the Commission's sessions as an observer, and a letter from the Executive Secretary of ESCAP concerning the question of

<sup>1</sup> See *Official Records of the General Assembly, Thirty-second Session, Annexes*, agenda item 112, doc. A/32/433, paras. 7-25.

<sup>2</sup> *Ibid.*, paras. 188-249.

<sup>3</sup> *Ibid.*, para. 219.

<sup>4</sup> *Ibid.*, paras. 222-231.

water resources in the matter of the non-navigational uses of international watercourses. Copies of his replies had been circulated informally among members. Certain of those matters would have to be considered in the course of the session.

8. General Assembly resolution 32/151 might be regarded as the best gauge of the Assembly's reaction to the work of the Commission. At the same time, he wished to draw attention to resolution 32/47, from which it would be seen that the resumed session of the United Nations Conference on Succession of States in Respect of Treaties was to be convened at Vienna from 31 July to 18 August 1978, and to decision 32/441, concerning the Draft Code of Offences against the Peace and Security of Mankind. Resolution 32/129 would require a decision as to whether the Commission should send an observer or observers to the World Conference to Combat Racism and Racial Discrimination, while resolution 32/48, concerning a review of the multilateral treaty-making process, invited the Commission to submit its observations by 31 July 1979. That invitation had given rise to a good deal of anxiety, for it had been feared that it might be against the Commission's interests. For his own part, he thought that the reverse might well be true. It was now recognized in the General Assembly that the Commission had much to offer as a result of its experience in drafting multilateral treaties. Lastly, the Commission should take note of resolution 32/158, on the United Nations Water Conference.

#### Election of officers

9. The CHAIRMAN asked for nominations for the office of Chairman.

10. Mr. AGO, speaking on behalf of all the members of the Commission, thanked the outgoing Chairman for the excellent manner in which he had represented the Commission in the Sixth Committee of the General Assembly. He now wished to propose Mr. Sette Câmara for the office of Chairman. Mr. Sette Câmara had participated for many years in the activities of the United Nations and had made an outstanding contribution to the work of the Sixth Committee. At previous sessions of the Commission, he had sometimes been required to replace the Chairman and had displayed qualities that quite clearly marked him out for that office.

11. Mr. CASTAÑEDA, Mr. EL-ERIAN, Mr. USHAKOV and Mr. TSURUOKA, after congratulating the outgoing Chairman, seconded the proposal.

*Mr. Sette Câmara was unanimously elected Chairman and took the Chair.*

12. The CHAIRMAN said that he was greatly honoured by his election to the office of Chairman. He was particularly touched because he had first become associated with the Commission at its second session, when he had served as assistant to Mr. Gilberto Amado. With but few interruptions in the interven-

ing years, he had always been connected with the work of the Commission and had shared the satisfaction of members with the results of its work.

13. The current session, which marked the thirtieth anniversary of the Commission, called for exceptionally hard work because of the heavy agenda. Nevertheless, he was optimistic about the outcome and knew that he could count on the good will of all members and the support of an admirable secretariat, under the guidance of the new Secretary, Mr. Romanov. In seeking inspiration for the task ahead, it was not necessary to look any further than to the previous Chairman, Sir Francis Vallat, who had steered the Commission through a most difficult and complex session and had displayed at all times his devotion to order, his authority and his unfailing sense of humour.

14. He called for nominations for the office of first vice-chairman.

15. Mr. USHAKOV proposed Mr. Šahović, who had served as chairman of the Sixth Committee of the General Assembly and had made an important contribution to the formulation of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

16. Mr. YANKOV and Mr. REUTER seconded the proposal.

*Mr. Šahović was unanimously elected first Vice-Chairman.*

17. Mr. ŠAHOVIĆ thanked the members of the Commission.

18. The CHAIRMAN called for nominations for the office of second vice-chairman.

19. Mr. EL-ERIAN proposed Mr. Njenga, who had served as chairman of the Sixth Committee of the General Assembly and was one of the leaders of the negotiations now taking place in the Third Conference on the Law of the Sea.

20. Sir Francis VALLAT and Mr. DÍAZ GONZÁLEZ, seconded the proposal.

*Mr. Njenga was unanimously elected second Vice-Chairman.*

21. Mr. NJENGA thanked the Commission.

22. The CHAIRMAN called for nominations for the office of chairman of the Drafting Committee.

23. Mr. AGO proposed Mr. Schwebel.

24. Mr. TSURUOKA and Mr. EL-ERIAN seconded the proposal.

*Mr. Schwebel was unanimously elected Chairman of the Drafting Committee.*

25. Mr. SCHWEBEL thanked the members of the Commission.

26. The CHAIRMAN called for nominations for the office of rapporteur.

27. Sir Francis VALLAT proposed Mr. Pinto.

28. Mr. CALLE y CALLE and Mr. SUCHARITKUL seconded the proposal.

*Mr. Pinto was unanimously elected Rapporteur.*

29. Mr. PINTO thanked the Commission.

#### Adoption of the agenda (A/CN.4/306)

*The provisional agenda (A/CN.4/306) was adopted unanimously.*

*The meeting rose at 5.40 p.m.*

### 1475th MEETING

*Tuesday, 9 May 1978, at 11.55 a.m.*

*Chairman: Mr. José SETTE CÂMARA*

*Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.*

#### Organization of work

1. The CHAIRMAN wished first to draw the Commission's attention to General Assembly resolution 32/151, which embodied most of the suggestions on the organization of work of the 1978 session made in the Commission's report on the work of its twenty-ninth session,<sup>1</sup> and to General Assembly resolution 32/48, which requested the Commission to submit, by 31 July 1979, its observations on the question of the techniques and procedures used in the elaboration of multilateral treaties.

2. As the Special Rapporteur on the topic of the law of the non-navigational uses of international water-courses would not be submitting a substantive report at the current session, the Commission now had to consider, in the order given, the following six main topics: State responsibility; the most-favoured-nation clause; succession of States in respect of matters other than treaties; the question of treaties concluded between States and international organizations or between two or more international organizations; the status of the diplomatic courier and of the diplomatic bag not accompanied by diplomatic courier; and the

second part of the topic of relations between States and international organizations.

3. If he heard no objection, he would take it that the Commission agreed to the timetable for the consideration of those topics that had been drawn up by the Enlarged Bureau and distributed to all members.

*It was so agreed.*

4. The CHAIRMAN said that the Enlarged Bureau had also decided to recommend to the Commission that a working group on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier be again established at the current session and that it be composed of the same members as at the previous session.<sup>2</sup>

5. If he heard no objection, he would take it that the Commission agreed to the establishment of that working group, under the chairmanship of Mr. El-Erian.

*It was so agreed.*

6. The CHAIRMAN said that, during the past three years, the Planning Group of the Enlarged Bureau had produced excellent results. The Enlarged Bureau was now recommending that the Planning Group be again established at the current session.

7. If he heard no objection, he would take it that the Commission agreed to the establishment by the Enlarged Bureau of the Planning Group.

*It was so agreed.*

8. The CHAIRMAN said that, although General Assembly resolution 32/48 did not require the Commission to submit observations on the subject of the techniques and procedures used in the elaboration of multilateral treaties until 1979, the Enlarged Bureau had been of the opinion that work on that subject ought to begin at the current session. The Enlarged Bureau had therefore decided that a small working group should be established to study the subject.

9. If he heard no objection, he would take it that the Commission agreed that consultations should be held in order to decide on the composition of the working group.

*It was so agreed.*

#### Co-operation with other bodies

[Item 11 of the agenda]

10. The CHAIRMAN said that another matter that had been discussed by the Enlarged Bureau was that of co-operation with other bodies. In that connexion, the Secretary-General of the United Nations had received a letter, dated 26 October 1977, from the Secretary-General of the League of Arab States transmitting a message from the Permanent Observer of

<sup>1</sup> *Yearbook... 1977*, vol. II (Part Two), p. 129, doc. A/32/10, para. 106.

<sup>2</sup> See *Yearbook... 1977*, vol. I, p. 56, 1425th meeting, para. 52.

the League to the United Nations concerning the recently established Arab Commission for International Law. The message read:

I have the honour to inform you that the Council of Ministers of the League of Arab States, in its resolution 3655 of 8 September 1977, has agreed on the establishment of a Commission for International Law on the Arab level. The Council has likewise endorsed the statutes of this Commission.

In the same resolution, the Council decided that the League of Arab States be represented in the meetings of the United Nations International Law Commission, in a similar capacity as regional organizations such as the Organization of American States and the Council of Europe are represented, in order to co-ordinate the work regarding the development and consolidation of the rules of international law on the Arab and international levels.

It would be much appreciated if you would take the necessary measures and likewise contact the Chairman of the International Law Commission to ensure the permanent presence of the League of Arab States as an observer in the meetings of the International Law Commission, commencing with the thirtieth session of the Commission to be held in Geneva on May 1978.

11. The Enlarged Bureau had considered that request and had decided to recommend to the Commission that, in accordance with article 26 of its Statute, it agree to establish relations of co-operation with the Arab Commission for International Law and to receive an observer from that Commission.

12. If he heard no objection, he would take it that the Commission agreed to follow the Enlarged Bureau's recommendation.

*It was so agreed.*

*The meeting rose at 12.10 p.m.*

## 1476th MEETING

*Wednesday, 10 May 1978, at 10.10 a.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yankov.

### Tribute to the memory of Aldo Moro

*At the invitation of the Chairman, the members of the Commission observed one minute's silence in tribute to the memory of Aldo Moro.*

1. Mr. AGO thanked the members of the Commission for their expression of sympathy, which he would convey to the Italian Government.

### State responsibility (A/CN.4/307 and Add.1)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 23 (Breach of an international obligation to prevent a given event)

2. The CHAIRMAN invited the Special Rapporteur to introduce the part of his seventh report on State responsibility (A/CN.4/307 and Add.2) dealing with the breach of an international obligation to prevent a given event, and specifically article 23, which read:

#### *Article 23. Breach of an international obligation to prevent a given event*

*There is no breach by a State of an international obligation requiring it to prevent a given event unless, following a lack of prevention on the part of the State, the event in question occurs.*

3. Mr. AGO (Special Rapporteur) suggested that, during the first two weeks it was to devote to the topic of State responsibility, the Commission should supplement chapter III of the draft on State responsibility<sup>1</sup> by adopting articles 23 and 24 which he had submitted in his seventh report (A/CN.4/307 and Add.1). The Commission had laid down some general rules in chapter I and had dealt in chapter II with the subjective element of the internationally wrongful act; it had then gone on in chapter III—perhaps the most delicate of the entire draft—to deal with the objective element of the internationally wrongful act, namely, the determination of the existence of a breach of an international obligation owed by the State.

5. Having established in article 16 the general principle concerning the existence of a breach of an international obligation, the Commission had attempted to deal in article 17 with the question whether the origin of the obligation might have an influence on the existence of a breach of the obligation—in other words, of an internationally wrongful act—a question which it had answered in the negative. In article 18 it had laid down the fundamental rule that an act of the State constituted a breach of an international obligation only if the act was committed at the time when the obligation was in force for that State. In the same article it had also dealt with the case where the breach continued over a period of time and the obligation was in force for only part of that period.

6. The Commission had then proceeded to consider whether a distinction should be drawn, as far as the existence of a breach of the obligation was concerned, according to the content or according to the nature of the obligation in question. With regard to the content of the obligation, it had considered in article 19 the question whether normal obligations in the traditional context of international law should be dis-

<sup>1</sup> For the text of the articles adopted so far by the Commission, see *Yearbook... 1977*, vol. II (Part Two), pp. 9 *et seq.*, document A/32/10, chap. II, sect. B, 1.

tinguished from obligations of exceptional importance intended to safeguard certain fundamental interests of the international community, and in the light of that consideration it had very tentatively differentiated two classes of internationally wrongful acts: international crimes and international delicts.

7. A further question considered by the Commission was whether the conditions for the existence of a breach of an international obligation were distinguishable according to the nature of the obligation breached. It had, for example, distinguished the conditions that constituted a breach of obligations requiring the State to adopt a particular course of conduct (article 20) from those of a breach of obligations requiring the State to achieve a specific result, leaving the State free to choose the means for achieving that result (article 21). It had also dealt, in article 21, with the question of the conditions that must be met in order for there to be a breach of an obligation of result when the obligation in question permitted the situation not in conformity with the result required by the international obligation, created by earlier conduct of the State, to be rectified by subsequent conduct. In article 22, it had dealt with the particular aspects of that case in the context of an international obligation regarding the treatment of aliens. It had then considered whether an additional condition must be fulfilled in order to establish the existence of a breach of an international obligation and had reached the conclusion that the obligation was breached only if the aliens concerned had, without success, exhausted the local remedies available.

8. The Commission must now consider a further type of obligations: those requiring the State to prevent a given event. That was the type of obligations dealt with at the beginning of his seventh report.

9. For a breach of an obligation of that type to occur, the event that should have been prevented must have taken place as a result of the State's negligence. There might sometimes be a direct causal link between the event and the act of the State, but in most cases the causal link was only indirect. The event might, of course, have been brought about directly by the action of certain State organs. Normally, however, the event was not the direct result of action by State organs but the indirect result of their inaction, as where an insufficiently protected embassy was attacked by private persons, or where flooding took place owing to inadequate precautions. In such cases the State's conduct was not the direct cause of the event but provided the conditions under which it was possible for the event to occur. Thus, two conditions had to be fulfilled in order that there should be a breach of an obligation: first, the event to be prevented must have occurred, and secondly, it must have occurred owing to the State's failure to prevent it. Neither of those conditions alone sufficed to prove the existence of a breach; in other words, it was not enough that there should have been negligence on the part of the State, or that the event had occurred: both conditions must have been fulfilled.

10. The Commission had considered the problem earlier, in connexion with article 3, which defined the elements of an internationally wrongful act. Having declared that the existence of conduct attributable to the State under international law and the breach by that conduct of an international obligation owed by the State were the two essential constituent elements of an internationally wrongful act, the Commission had considered whether a third distinct constituent element should not sometimes be added to the two others, namely, the occurrence of damage or of an injurious event. It had decided in the negative for obviously cases occurred where there was a breach of an obligation without its necessarily leading to any damage or injurious event. What was true was that, in many cases, the State's conduct itself did not suffice to constitute a breach of the international obligation; some external event must also occur, and that event often led to injury. The Commission had thus stressed that in cases where the very object of the international obligation was to avoid the occurrence of an injurious event, "negligent conduct of the organs of the State does not become an actual breach of the international obligation unless the conduct itself is combined with a supplementary element, an external event, one of those events which the State should specifically have endeavoured to prevent."<sup>2</sup> However, in order to remove all ambiguity regarding the weight to be attached to that event in relation to the elements constituting the internationally wrongful act, the Commission had pointed out that, if there was no internationally wrongful act as long as no external event had occurred, it was because "the occurrence of an external event is a condition for the breach of an international obligation, and not a new element which has to be combined with the breach for there to be a wrongful act".<sup>3</sup>

11. The Commission had considered the problem again in connexion with article 11, where the question was whether the conduct of private persons could be attributed to the State. It had answered that question too in the negative, but had pointed out that its answer did not imply that the conduct of private persons could never provide an occasion for the State to commit a breach of an international obligation. The reasoning was that, while the conduct of private persons did not *per se* constitute a breach by the State of an international obligation, it might provide the occasion for such a breach if the State failed to take the necessary precautions to prevent it.

12. That was the approach also adopted by the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930), by taking it as agreed, in the questionnaire circulated to States, that the event represented by the act committed by private persons to the detriment of aliens must actually have taken place for the State's responsibility for failure on the part of its organs to forestall

<sup>2</sup> *Yearbook... 1973*, vol. II, p. 182, doc. A/9010/Rev.1, chap. II, sect. B, article 3, para. 11 of the commentary.

<sup>3</sup> *Ibid.*

it to be entailed. That approach was confirmed by the answers of States to the questionnaire: failure on the part of State organs to prevent the occurrence could not give rise to international responsibility except in connexion with an act committed by a private person which harmed an alien. The Austrian Government had commented that, even in the case of persons enjoying special protection, such as diplomatic staff, foreign heads of State and the like, the failure to protect was not sufficient to involve the State's responsibility: some injurious act committed by private persons must actually have taken place because of that failure before the State's conduct could constitute a breach of the international obligation.

13. International case law and diplomatic practice confirmed that conclusion; States did not complain to international judicial or arbitral tribunals, nor did they intervene diplomatically, unless some injurious event had occurred, as was shown by the cases cited in the seventh report (A/CN.4/307 and Add.1, footnote 18).

14. Apart from the obligations he had mentioned, the direct object of which was to prevent a certain event, there were of course other obligations—obligations of conduct and not of result—whose direct object was the performance of some specific act by the State, and the breach of which was therefore constituted by the mere failure to take action, independently of the indirect object, which was to help to prevent the occurrence of certain events. An example was the obligation of the State not to tolerate in its territory terrorist organizations whose activities were aimed at another State. For a breach of that obligation to occur, it was not necessary that the terrorist organizations should have committed acts of violence in the territory of another State; it was enough that the State should have tolerated the organization in its territory.

15. Mr. CALLE y CALLE expressed his delight in finding the outstanding abilities of the Special Rapporteur reflected in the report under consideration. Following the adoption at the previous session of articles 20 to 22, which had commanded wide support in the Sixth Committee, the Commission was now dealing in draft article 23 with what might be termed the category of preventive obligations. In other words, the act attributable to the State was not the injurious act itself but the fact that, because of a lack of prevention or vigilance on the part of the State, the act had occurred. It was essential to distinguish between the primary responsibility of the State, namely, cases where the damage had been caused by organs of the State, and the secondary responsibility of the State, namely, cases where the State had failed to take the necessary preventive or protective measures at the right time and had thus created conditions in which the injurious act could take place. In the instance under consideration, the act was not committed by organs of the State or entities or persons acting in fact on behalf of the State, but by individuals acting in a private capacity. Those individuals might be nationals of the State or aliens, but the

act must be one taking place in a territory where it had been possible for the State to take appropriate preventive measures.

16. In his fourth report, the Special Rapporteur had proposed a draft article 11, on the conduct of private individuals, which stated that the conduct of a private individual or group of individuals, acting in that capacity, was not considered to be an act of the State in international law.<sup>4</sup> Obviously, the State was not in principle responsible for the conduct of a private individual or of private individuals acting in that capacity. However, the article had gone on to say that the rule was without prejudice to the attribution to the State of any omission on the part of its organs, where the latter ought to have acted to prevent or punish the conduct of the individual or group of individuals and had failed to do so. Article 11 in its original form had been supported by a brilliant and exhaustive study of legal precedents.

17. After discussion of the proposed article, however, the Commission had adopted one that no longer spoke of omission on the part of State organs or punishment of the conduct of individuals acting in a private capacity. It simply stated that the conduct of a person or group of persons not acting on behalf of the State was not to be considered as an act of the State under international law, but that that rule was without prejudice to the attribution to the State of any other conduct related to that of the persons or groups of persons in question and to be considered as an act of the State by virtue of articles 5 to 10. An example of such other conduct was that of persons or groups of persons acting in fact on behalf of the State. Naturally, if there was some degree of complicity between the private individual and the State, the responsibility of the State would be engaged.

18. The acts of individuals, in connexion with which many exaggerated claims had been submitted in the past, constituted an extremely delicate sphere. Even when States had exercised proper diligence to protect individuals, the slightest damage or harm to a foreign individual had been dramatized into a catastrophe and wildly exaggerated compensation had been claimed. At one time, the countries of Latin America, for example, had been the victims of a veritable "claims industry". Weak countries had been compelled to yield and to pay compensation for virtually unavoidable damage.

19. Consequently, it would be advisable to specify in article 23 that the preventive measures must be reasonable; otherwise, the obligation on the State to anticipate the future might prove too broad in character and the article would be opening a door that had been carefully closed in article 11. As early as 1930, the Preparatory Committee of the Codification Conference of The Hague had spoken of "reason-

<sup>4</sup> *Yearbook...* 1972, vol. II, p. 126, doc. A/CN.4/264 and Add.1, para. 146.



able” protection.<sup>5</sup> Similarly, in his seventh report, the Special Rapporteur spoke of the obligation to prevent the occurrence of the event “to the extent possible” (A/CN.5/307 and Add.1, para. 15), and mentioned measures “normally likely to prevent” private persons from committing injurious acts (*ibid.*, para. 16). Accordingly, the measures taken in every case had to be in keeping with what was being protected or prevented from occurring. Every State needed certain legal judicial and police organizations to enable it to fulfil its duties to protect both nationals and aliens and, *a fortiori*, the interests or rights of other States in its territory.

20. At the same time, it was necessary to be realistic, and realism demanded that the responsibility of the State should be engaged only when there was a manifest failure to take suitable preventive measures in the case in question. The world was now witnessing appalling acts committed by international wrongdoers, who had means available that kept them beyond the reach of many advanced States, notwithstanding the highly organized legal systems and police forces of those States. Consequently, he hoped that in the course of the discussion it would prove possible to introduce into the article the notion of manifest lack of prevention or of failure to take reasonable measures to prevent the occurrence of a particular event.

21. Mr. REUTER said that, by making the occurrence of the event one of the two essential conditions for the existence of a breach of an international obligation, article 23 introduced the notion of damage, although the Special Rapporteur had shown that it was not one of the constituent elements of responsibility. He realized that the article was based on a very thorough study of international jurisprudence, State practice and legal literature, but he wondered whether there must really have been an injurious event for a breach of the obligation to occur. For example, if an ambassador succeeded by his own means in escaping an attempt that had been made on his life owing to lack of protection, was it to be concluded that the State concerned was not responsible because there had been no damage? In his views, responsibility should not be limited to cases in which there was damage. To take the case of pollution, for example, was it necessary to wait until a disaster had occurred before it could be said that there was responsibility on the part of the State that had not taken the necessary precautions to prevent it?

22. Admittedly, the Special Rapporteur had said that in certain cases it was not necessary for damage to occur for there to be a breach of an international obligation (A/CN.4/307 and Add.1, para. 15). If that were so, however, how was article 23 to be understood? It might be taken as stating a general rule

that would apply only in the absence of a rule to the contrary. But he was not sure that that was what the Special Rapporteur intended, or that it was reasonable to adopt that interpretation, for, even in the classic cases, the rule stated might not be correct.

23. Personally, he would prefer an interpretation based on the idea that, when the risk could not be calculated in advance, it could be judged only by its effect in the light of the material damage caused. In such a case, since the risk would not have been apparent before the material damage occurred, the obligation to prevent the risk would not have been apparent either. On the other hand, when the risk could be precisely defined in advance, the State ought to take preventive measures in proportion to it. In such a case, any default on that obligation would of itself constitute a breach.

24. Mr. USHAKOV said that, while the Special Rapporteur was to be congratulated on his masterly introduction of article 23, there were a number of points that he would like to have clarified.

25. The Commission had so far considered that there were only two kinds of international obligations incumbent upon States: obligations of means and obligations of result. The proposed new article raised the question whether there was not perhaps also a third kind, namely, international obligations to prevent the occurrence of an event. If there were, it would often be very difficult to distinguish the second kind of obligation from the third. Referring to the 1961 Vienna Convention on Diplomatic Relations,<sup>6</sup> and particularly to article 22, para. 2, he wondered whether the special duty of the receiving State “to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity” was to be seen as an obligation of result or an obligation of prevention. It could be considered an obligation of result, under which the receiving State was free to take any steps it liked, providing they led to the desired result, or an obligation to prevent an event, within the meaning of the article under consideration.

26. Instead of an “event”, it might be better to speak of an “act in law”, but without attributing to the word “act” the meaning it had in article 1 of the draft. According to the general theory of law, the term “act in law” denoted an event that involved the application of a rule of law. For example, the birth of a child, which was unquestionably an event, was considered an act in law inasmuch as it might lead to an increase in the father’s salary or a reduction in his taxes. To speak of an event when what was really meant was an act in law could give rise to confusion.

27. Furthermore, the Special Rapporteur mentioned only events occurring within the jurisdiction of the State, such as attacks on embassies or consulates; he

<sup>5</sup> League of Nations, *Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, vol. III, Responsibility of States for Damage Caused in their Territory to the Person or Property of Foreigners* (C.75.M.69.1929.V), p. 93, point VII, a.

<sup>6</sup> United Nations, *Treaty Series*, vol. 500, p. 95.

wondered whether article 23 ought not to cover international relations in general.

28. Finally, article 23 took into account only obligations to prevent an event, although obligations to cause an event were also possible. For example, a State might undertake to oblige its trading establishments to sell certain products to foreign establishments. There was no apparent justification for omitting obligations of that kind from the article.

29. Sir Francis VALLAT said that Mr. Ushakov had raised some of the same questions he himself had wished to ask the Special Rapporteur. The question of the relationship between articles 20 and 21 and article 23 was of particular interest to him. He was also unsure about the relationship between article 22 and article 23 since, if article 23 followed article 22, there might be some doubts about the applicability of the latter in cases falling within the scope of article 23.

30. Mr. NJENGA said that he, too, was somewhat uncertain about the relationship between article 20 and 21 and article 23. It was his impression, however, that the doubts that had arisen in the minds of some members of the Commission might be the result of the slightly ambiguous wording of article 23. It was not entirely clear whether the obligation provided for in that article was an obligation to provide protection or an obligation to prevent the occurrence of an event. In his opinion, it was an obligation to provide protection, and the State breached that obligation when it failed to provide such protection.

31. The practice of States was particularly relevant in that connexion. For example, when an embassy, for one reason or another, was exposed to attacks by local dissidents or other private individuals, in practice the host State usually took precautionary measures in advance because of its obligation to provide the embassy with protection. However, as the Special Rapporteur had stated in his report (A/CN.4/307 and Add.1, para. 13 and footnote 17), there were cases where the embassy might be aware that an attack or hostile demonstration was being planned and the host State failed to take adequate precautionary measures. In such cases, it could be said that there had been a breach of the State's obligation to provide the embassy with protection.

32. He was therefore of the opinion that, in order to make it clear that the State had an absolute obligation to provide reasonable protection, article 23 should be worded positively, perhaps along the following lines:

“There is a breach by a State of an international obligation requiring it to prevent a given event if there is a lack of prevention on its part and if the event in question occurs.”

33. Mr. QUENTIN-BAXTER, said that the Special Rapporteur's seventh report gave the Commission an opportunity once again to reflect on many of the vital distinctions drawn and many of the important decisions reached during the formulation of the draft ar-

ticles on State responsibility. He had in mind particularly the Commission's decision that the question of damage should not be considered as an element of responsibility. He was concerned that that decision, which had determined the structure of the draft, might have been forgotten and that it might therefore not be possible to rule out the question of damage as absolutely as the Special Rapporteur would have liked. He was also concerned that the Commission might not be able fully to implement its decision to deal with acts and omissions together in all parts of the draft. It had always seemed to him that not the least excellent feature of the draft was that it made it possible to speak of acts and omissions in every context in terms that were not inappropriate to either, and, by the very sparseness of the words used, to stress the fact that omissions could be just as serious as acts.

34. Was article 23 one that would prevent the Commission from dealing with acts and omissions together and that would consequently oblige it to deal only with omissions, or even with a sub-category of omissions? Did the word “prevention” introduce a new criterion that would be difficult to apply? For example, in the *Corfu Channel* case,<sup>7</sup> an obligation had been breached not so much because there had been failure to prevent an incident causing loss of life and property as because there had been failure to give notice of danger. It was not easy to categorize that type of omission as an obligation to prevent an event. It had the characteristics of all omissions, but the result must also follow for the legal criteria to be satisfied.

35. Was the obligation provided for in article 23 perhaps a sub-category of an obligation of result? If so, concern of the kind expressed by Mr. Calle was quite justified. Or was the obligation in a separate category of its own, as suggested by Mr. Ushakov? If so, the structure of the draft might be in considerable danger.

36. In the light of those considerations, he drew the Commission's attention to the wording of article 21, paragraph 1, and ventured to suggest that the simple message of article 23 was, in fact, covered rather well by the wording of that paragraph, which read:

There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.

The non-achievement of the result required of the State appeared from the wording of that paragraph to be essential, and yet it was not given a prominence that detracted from the objective element of the obligation. He was therefore of the opinion that the problems to which article 23 gave rise could be resolved simply by strengthening the commentary to article 21, paragraph 1.

37. Mr. FRANCIS said that the basic premise of draft article 23 was that the obligation of the State to

<sup>7</sup> Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4.

prevent an event was not breached unless and until the preventive measures which the State was obliged to take had actually failed to prevent the event from occurring. Mr. Calle y Calle had rightly drawn a distinction between a wrongful act committed by a State organ and a wrongful act committed by a private individual following a lack of prevention on the part of the State. Politically, that was an important distinction because, when a State organ committed a wrongful act, the State was even more directly responsible than if the wrongful act had been committed by a private individual. Legally, the distinction was also important since, if a State organ was instrumental in breaching an obligation, the basis of responsibility was not the absence of preventive measures. Mr. Reuter had made a similar point when he had said that, if the risk was not apparent before the damage was done, then the obligation to prevent the risk was not apparent either and could hardly be invoked.

38. The questions raised by Mr. Calle y Calle and Mr. Reuter might be the direct result of the shortcomings of the wording of article 23, which made the breach of an obligation of a State to prevent an event dependent on the occurrence of the event following a lack of prevention on its part. The wording of the article also failed to take account of an essential element referred to in the penultimate sentence of paragraph 14 of the Special Rapporteur's seventh report, namely, "the necessary link between the actual conduct of the State and the event". The observations made by Mr. Njenga were particularly relevant. What article 23 should reflect was that the event in question must have been caused by a lack of prevention on the part of the State. He hoped that the Special Rapporteur would find some way of bringing out that point more clearly. Otherwise, the idea expressed by Mr. Quentin-Baxter concerning the relationship between article 3 and article 21, paragraph 1, would have to be studied in greater detail.

39. Mr. YANKOV wished to ask the Special Rapporteur whether he had considered the possibility of wording article 23 positively.

39. He also hoped the Special Rapporteur would define more clearly the relationship between article 23 and article 21.

*The meeting rose at 12.50 p.m.*

## 1477th MEETING

*Thursday, 11 May 1978, at 10.10 a.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Ago, Mr. Calle y Calle, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

### State responsibility (*continued*) (A/CN.4/307 and Add.1)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR (*continued*)

ARTICLE 23 (Breach of an international obligation to prevent a given event)<sup>1</sup> (*continued*)

1. Mr. DÍAZ GONZÁLEZ said that the wording of article 23 as it now stood had left him in doubt as to whether there were any limitations on the obligation of the State to prevent a given event from occurring. In order to be able to prevent an event from occurring, the State had to assess the risks involved, but even when it had done so it might not always be able to prevent a private individual from committing a wrongful act. Under article 23, the State could not be held responsible for the commission of a wrongful act by a private individual, but it could incur responsibility for failing to fulfil its obligation to prevent that act from being committed. As Mr. Reuter had stated at the previous meeting, the preventive measures which the State was required to take depended on whether or not the risks involved were apparent. The State's responsibility was consequently limited by the nature of the risks involved in the occurrence of a particular event.

2. To take as an example the case of pollution of the sea, it was quite obvious that the responsibility of a State to prevent ships flying its flag from polluting the sea existed even before pollution occurred. The State's obligation was to take the necessary precautions to ensure that its flagships observed the international rules designed to prevent such pollution. Another example that came to mind was that of a State that took all the necessary measures to protect a visiting head of State, but was unable to prevent the visitor from being attacked by a private individual. In such a case, the State's obligation was to apprehend and prosecute the person who had committed the wrongful act, but it could not be held responsible for the act itself.

3. Since a State could be held responsible for lack of prevention, but not necessarily for the unforeseeable, certain limitations on the obligation of the State to prevent a given event from occurring should be provided for in article 23. He agreed with Mr. Calle y Calle (1476th meeting) that the article should also contain a reference to the idea of "reasonable prevention", which had been described by the Special Rapporteur in the last sentence of paragraph 2 of his seventh report (A/CN.4/307 and Add.1).

4. Mr. AGO (Special Rapporteur), in reply to the questions to which article 23 had given rise, said first that the international obligations referred to in that article were not normally absolute obligations, and that the rule he had proposed for adoption was by no means aimed at transforming them into absolute ob-

<sup>1</sup> For text, see 1476th meeting, para. 2.

ligations, as some members of the Commission feared. If they were absolute obligations, they would require that the State prevent the occurrence of a given event in any case whatsoever; consequently, the mere occurrence of the event would constitute a breach of the obligation. However, under his proposed article 23, there was a breach of the obligation to prevent an event only if the event occurred "following a lack of prevention on the part of the State". Accordingly, two conditions had to be fulfilled: the event to be prevented must have occurred and it must have been made possible by lack of vigilance on the part of the State. Therefore the case in which the event occurred despite the State's having taken all the adequate preventive measures had to be excluded.

5. As he had explained before, the obligations of prevention referred to in article 23 normally had to be construed within the limits of what was reasonable and possible. Perhaps that point should be recalled in the commentary, but the Commission should beware of introducing the idea of reasonableness in article 23 or of describing the lack of prevention in one way or another in the article. As in the case of other articles, the Commission should not yield to the temptation of defining the subject-matter of the primary rule whose breach was being considered; if it did so, it would run into insuperable difficulties. The international obligations to prevent an event might, after all, have their origin in custom or in treaties, and their subject-matter as well as the degree of prevention required might vary considerably. It was not to be excluded that some of them might be absolute. On the other hand, it was clear that a lesser degree of prevention was required for the protection of foreign private persons than for those enjoying special protection. The Commission might include those points in the commentary, but it should not include them in the article under consideration. If it introduced any limitation in the article, moreover, the other provisions of the draft where the notions of "reasonable" and "possible" were assumed might be interpreted *a contrario* as not implying any such limitation.

6. Replying to a comment made by Mr. Reuter (1476th meeting), he pointed out that the word "damage" had a number of meanings. In taking the view that the internationally wrongful act consisted of only two constituent elements, and that "damage" was not a distinct constituent element that must accompany the breach of an international obligation for an internationally wrongful act to exist, the Commission had noted that the idea of "damage" as a distinct constituent element had been developed precisely by taking into account obligations of prevention of events. As such events generally injured somebody, certain writers and judges had come to speak of "damage" in referring to an event that did not necessarily cause injury. Mr. Reuter had cited the case of an ambassador who, by his own exertions, escaped an attack and so suffered no injury. Clearly, in such a case there would nevertheless be

responsibility on the part of the State that had failed to take the necessary preventive measures, for its obligation had been to prevent the attack and not merely to prevent an injury. That was why the event must be distinguished from the damage. The same applied to the case of demonstrations against an embassy mentioned by Mr. Njenga (1476th meeting); such demonstrations obviously engaged the responsibility of the State that had failed to take the necessary preventive measures, even if no damage were caused. The State's obligation derived from article 22 of the Vienna Convention on Diplomatic Relations,<sup>2</sup> and was one of the classes of obligations dealt with in the article under consideration.

7. Some members of the Commission had emphasized the need to take account of the subject-matter of the obligation to distinguish between obligations of prevention of events and certain obligations of conduct. It was a fact that some international obligations, developed for a particular purpose, required the adoption of specific measures by the State, whereas others required the prevention of an external event. Depending on the objective, an obligation could be modelled on one type or the other. In the case of pollution, the two types of obligations coincided. States might in some cases have the obligation to take measures—for example normative measures—and in other cases they might have to ensure the prevention of specific occurrences, such as certain discharges. It was the latter type of obligation that was referred to in article 23.

8. As far as the drafting was concerned, Mr. Reuter had suggested that the rule in article 23 should be applicable only in the absence of a different rule. While agreeing that such a proviso would be true of most of the rules, he would be hesitant to introduce it in article 23 before carefully considering its implications.

9. Echoing views expressed by Mr. Ushakov (1476th meeting), several members of the Commission had inquired whether the international obligation contemplated in article 23 was an obligation "of means" or an obligation "of result", or whether it might even be an obligation of a third kind. There was no question, however, but that when the obligation was formulated in such a way as to require that the State prevent the occurrence of a certain event, by the means of its choice, the obligation incumbent upon it was one of result. Various different ways of achieving the required result might not be available to the State, but the fact remained that it was not bound to adopt a specific course of conduct. It would be different if, with the indirect objective of avoiding certain events, the obligation required that the State adopt certain specified measures: for example, a measure prohibiting certain practices likely to lead to the pollution of the air or bodies of water. That specific obligation would be an obligation of conduct and not of result, but it would not fall into the category referred to in article 23.

<sup>2</sup> See 1476th meeting, foot-note 6.

10. That being so, it might be suggested that the content of article 23 should be included in article 21. However, the obligations dealt with in article 23, although they were obligations of result, represented a special kind of such obligations, with a characteristic distinguishing feature. The obligation referred to in article 23 was distinguished by the fact that the required result consisted in preventing the occurrence of a certain event. Whereas, in other cases, the problem of establishing whether the required result had not been achieved (and therefore whether there was a breach of the obligation) could pose practical difficulties, it went without saying that in the particular case of the breach of an obligation to prevent an event, it was when the event occurred that it was established that the result had not been achieved and that there was, therefore, a breach of the obligation. Consequently article 23 was justified as a separate provision.

11. He would nevertheless be prepared to establish a link between articles 21 and 23 by drafting the opening passage of article 23 to read: "Where the result required by an international obligation of a State consists of preventing the occurrence of a given event, there is no breach of that obligation unless..."

12. In circumstances like those of the *Corfu Channel* case, to which Mr. Quentin-Baxter had alluded (1476th meeting), everything depended, obviously, on the subject-matter of the international obligation. If there was a duty to warn other States of a potential danger, what was required was specific action, and failure to give such warning therefore entailed a breach of the obligation. If the duty was to prevent the accident, what had to be prevented was an event, and the obligation was breached only if, through lack of prevention, the event occurred.

13. In reply to Mr. Ushakov's suggestion that it might be preferable to speak of an "act in law" rather than of an "event", he pointed out that the event became an act in law by virtue of rules other than those relating to the prevention of the said event. To return to the example of the birth of a child, for the comparison to hold it would have to be assumed that a rule existed obliging certain parties to prevent the occurrence of a particular event—in the case in point, birth. The consequence of such a rule would be that couples who contravened it would be guilty of a wrongful act. From the point of view of that rule, the birth was an event and not an act in law. By contrast, it was an act in law from the point of view of other rules: those that would apply to new-born babies and would treat them as subjects of rights and obligations. The material point for the purposes of article 23 was the prevention of an act as an event, and not as an act in law. Thus it would be preferable not to speak of "act of law" in that context.

14. Mr. Ushakov had further suggested that the rule in article 23 should apply not only to events occurring within the jurisdiction of a State, but also to events belonging directly to international relations. In his own opinion, all the cases considered so far, in-

cluding that of the attack on an embassy, involved international relations. Although the most obvious cases often concerned events that had occurred within the territory under the jurisdiction of the State complained against, there were also cases, like the one he had cited, of the destruction of protected cultural property in foreign territory. The international arrangements relating to pollution likewise offered examples of events whose occurrence abroad had to be prevented. Thus there was no reason for thinking that the rule in article 23 would be limited to cases where the State acted in its own territory or within the confines of its jurisdiction.

15. On the other hand, and unlike Mr. Ushakov, he doubted that the scope of the article should be extended to international obligations whose object was to bring about the occurrence of an event. In the example cited by Mr. Ushakov, what was required of a State was not to bring about an event but to adopt certain measures. In any case, in matters of State responsibility, the traditional approach was to aim at the prevention of an undesirable event rather than the realization of a desirable event.

16. With reference to Mr. Yankov's suggestion (1476th meeting) that article 23 should be reformulated in positive language, it would not be easy to act on that suggestion since the Commission had already expressed a preference for the negative formulation, as being more incisive, in the case of the earlier articles.

17. Mr. PINTO was not convinced that the Special Rapporteur had been entirely successful in his purpose if he had intended article 23 to be a further step in a logical progression that had begun with articles 20 and 21 and was designed as a systematic exposition of the essential elements of an international obligation. Indeed, he could not agree with the Special Rapporteur that there was a close connexion between those three articles.

18. A comparison of the structure and of the way in which those three articles had been presented showed that articles 20 and 21 were consistent and logical, whereas the position of article 23 was somewhat ambiguous. Thus, in article 20, it was clear that a State breached an international obligation requiring it to adopt a particular course of conduct if its conduct was not in conformity with that required of it by the obligation. Similarly, in article 21, a State breached an international obligation requiring it to achieve a specified result if, by the conduct adopted, it did not achieve that result. Under article 23, however, a State breached an international obligation requiring it to prevent "a given event", following a lack of prevention on the part of the State, "the event in question" occurred. It seemed to him that the "given event" referred to in the first part of the sentence might not necessarily be the same as the "event in question" referred to in the second part of the sentence. The given event was the event sought to be prevented, whereas the event in question was the event which demonstrated that there had been a

breach of the obligation. The "event in question" might be part of the "given event", but was not necessarily the same as that event.

19. His difficulties with article 23 had been further increased by the fact that, although the Special Rapporteur's seventh report gave examples of the international obligation of the State to prevent a given event, it did not really specify the nature of the event that had to occur for the obligation to be breached. He was therefore not sure whether the rule enunciated in article 23 would, for example, be applicable in cases involving international obligations arising from treaty commitments. For instance, if a State wishing to encourage investments undertook bilaterally not to nationalize businesses belonging to the nationals of another State, but adopted legislation permitting nationalization in a general sense, contrary to its bilateral undertaking, the businesses of the nationals of the foreign State would be placed in some jeopardy. The responsibility of the host State might thus be entailed, even though the event it had undertaken to prevent, namely, nationalization, had not occurred. He also wondered whether the rule enunciated in article 23 would apply in a case where a State that was a party to the IBRD Convention on the Settlement of Investment Disputes between States and Nationals of Other States<sup>3</sup> had agreed to ensure that its nationals would submit disputes with nationals of other States to arbitration and where a national of that State delayed arbitration proceedings indefinitely.

20. Mr. ŠAHOVIĆ was glad to have the Special Rapporteur's explanations, which he was certain would enable members of the Commission to reach agreement on the principle laid down in article 23. He himself had studied that article from the points of view of State practice and of its place in the draft.

21. From the point of view of State practice, the need to provide against the possibility of a breach of an international obligation to prevent a particular event was indisputable. It was clear from doctrine, international jurisprudence and State practice that there could be no doubt whatsoever concerning the value of the rule stated in the article. However, its application might cause some problems, and it must therefore be stated in terms that left no room for differences of interpretation.

22. On the subject of the article's place in the draft, he agreed with the Special Rapporteur. Like some other members of the Commission, he had thought that a third category of obligation should be covered. But rather than rely merely on explanations in the commentary, perhaps the Commission should establish a link between article 23 and article 21. The wording proposed for that purpose by the Special Rapporteur<sup>4</sup> seemed satisfactory.

23. The commentary should explain in detail what was meant by failure to prevent an event and give more examples which would be of help to States.

24. Mr. SUCHARITKUL subscribed unreservedly to the proposals and explanations put forward by the Special Rapporteur, whom he congratulated on his excellent introduction of article 23. In his opinion, the obligation to which the article referred was of a special kind and merited special treatment, for it was neither exclusively an obligation of conduct, nor exclusively an obligation of result. Two conditions must be met before it could be said to have been breached: on the one hand, the conduct of the State must have been less than that required of it by the obligation, and on the other, a given event must have occurred.

25. However, like the Special Rapporteur, he believed that the obligation referred to in article 23 was one of result rather than of conduct. In his view, the article raised three vital questions, namely, the relativity of the obligation of conduct, the continuity of the obligation of result after the occurrence of the event, and the legal basis of the obligation to prevent a particular event.

26. The extent of an obligation of conduct varied according to the circumstances of each case, such as the imminence or magnitude of the foreseeable danger. It was clear that, in the case of nuclear tests, for example, the State must take greater precautions than in other cases. The relative importance of the foreign dignitaries the State received determined the extent of the protective measures it had to take. For example, a Head of State was entitled to a greater degree of protection than an ambassador or a consul. Similarly, the embassies of certain countries required greater protection than others, since they were more at risk. In the Netherlands, for example, the Indonesian Embassy merited special protection. The extent of an obligation of conduct also varied according to the means at the State's disposal. It was obvious that developing countries could not be expected to take the same security measures as the great Powers. The source of the obligation of conduct was also of importance. For example, if a State invited a foreign Head of State to visit its territory, it was obliged to ensure his safety. The accreditation of an embassy implied that the receiving State would take the measures necessary to protect the staff of that embassy within its territory. But in the case of political refugees, receiving countries of which Thailand was one could not be required to monitor the subversive activities of all the refugees within their territory. Finally, the extent of an obligation of conduct depended on the conduct of the persons injured: if it was they who had brought about the event or contributed to its occurrence, the degree of diligence required of the State would be less.

27. In his opinion, the obligation of result continued in force after the occurrence of the event, the State then being obliged to mitigate its damaging effects.

28. An obligation to prevent an event had also to be assumed by its beneficiaries, and in some cases the responsibility had to be shared.

29. Mr. USHAKOV was satisfied with most of the

<sup>3</sup> United Nations, *Treaty Series*, vol. 575, p. 159.

<sup>4</sup> Para. 11 above.

explanations given by the Special Rapporteur. Nevertheless, he continued to have doubts on certain points, particularly on the crucial question whether a third category of obligations really existed that bound the State to prevent a particular event. He doubted whether that was the case, since the existence of such a category of obligations depended, in his view, on the interpretation placed on the obligation of means and on that of result.

30. As an example of the third category of obligations, the Special Rapporteur had cited the obligation to prevent an attack on an embassy. That was not, however, an obligation of a special kind, but a simple obligation of result. Article 22, paragraph 2, of the Vienna Convention on Diplomatic Relations provided that

The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

That article made it incumbent on the State to achieve a certain result by "all appropriate steps". But that was not an obligation to prevent a particular event. Moreover, it would be quite impossible to list all the events that the State ought to prevent. Consequently the examples concerning the protection of embassies were not conclusive, for they had to be considered as examples of an obligation of result.

31. That did not mean that the question of the event should be set aside or that the role the event played in the obligation could be denied. Every rule required conduct that consisted either in preventing or in bringing about certain events. Every event covered by a rule was an act in law, because it had consequences in law.

32. The wording of article 25, the title of which was modelled on the titles of articles 20 and 21, gave the impression that the obligation to prevent a given event was a third category of obligations in addition to those of conduct (article 20) and of result (article 21). It was questionable whether it was possible to single out from among obligations of result—and so establish the existence of a subcategory—of such obligations cases in which the result was achieved through the prevention of a given event. In the case of the protection of diplomatic missions, it was clearly impossible to foresee all the events that might occur. Again, when a hospital or a historical monument was bombed, was the obligation that was breached one of result or of conduct? Personally, he considered that it was more an obligation of conduct or of means, for the State should have refrained from bombing civilian targets.

33. Whatever its content, an obligation was always either an obligation of result or an obligation of conduct. He could not conceive of a single example of an obligation that would not fall into one of those two categories. The event that might constitute a breach of an obligation was always covered by the rule establishing the obligation, whether the obligation was one of means or of result, for the object of

every obligation was either to prevent certain events or to bring them about.

#### Appointment of a Drafting Committee

34. The CHAIRMAN said that, following consultations in accordance with the usual practice, it was proposed that a Drafting Committee be appointed consisting of the following members: Mr. Schwebel as Chairman, Mr. Calle y Calle, Mr. Dadzie, Mr. El-Erian, Mr. Francis, Mr. Reuter, Mr. Riphagen, Mr. Sucharitkul, Mr. Ushakov, Sir Francis Vallat, Mr. Yankov and, *ex officio*, Mr. Pinto, the Commission's Rapporteur.

*It was so agreed.*

*The meeting rose at 12.55 p.m.*

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### 1478th MEETING

*Friday, 12 May 1978, at 10 a.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yankov.

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#### State responsibility (*continued*) (A/CN.4/307 and Add.1) [Item 2 of the agenda]

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 23 (Breach of an international obligation to prevent a given event)<sup>1</sup> (*concluded*)

1. Mr. RIPHAGEN said that there were three logical steps in the work on the topic under consideration. First, it had been established that international obligations existed and, secondly, that breaches of those obligations might occur. However, the Commission's prime interest lay in the third step, namely, the consequences of the breach of an international obligation. In dealing with the first two steps, namely, the existence of an international obligation and the breach thereof, the Commission had necessarily encountered some difficulties because of its wish to avoid determining the content of the obligation itself, having decided to deal not with primary rules but only with secondary rules of responsibility.

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<sup>1</sup> For text, see 1476th meeting, para. 2.

2. If the content of an international obligation was clear, it was relatively easy to decide whether there had been a breach of the obligation, for it was a question of establishing the facts. However, there was an infinite variety of international obligations and it was doubtful whether their classification in two or three categories served any useful purpose. That infinite variety of international obligations could be seen from the types that were usually accepted and embodied in treaties. They were rarely very clear. For example, a common obligation was to observe good faith in the performance of a treaty obligation. It related to situations and to acts that were not clearly described in the obligation as expressed in the treaty itself, but it was none the less an international obligation and it might give rise to a breach and to responsibility on the part of the State. Other cases in which the content of the international obligation was ill-defined included those of contributory negligence by the other party, which was covered to some extent by article 22 (Exhaustion of local remedies),<sup>2</sup> and those of the obligation not to defeat the object and purpose of a treaty prior to its entry into force, enunciated in article 18 of the 1969 Vienna Convention on the Law of Treaties.<sup>3</sup> Another international obligation that was set forth with increasing frequency in international treaties was the obligation to exercise effective jurisdiction over private activities. For instance, the law of the sea required the exercise of effective jurisdiction over vessels on the high seas. In all those examples, the content of the obligation could not be regarded as crystal clear.

3. Article 20, which stated that there was a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State was not in conformity with that required by the obligation, was tautological in character. The same could be said of article 21, paragraph 2, and of article 23. Consequently, they could not give rise to any great difficulty. However, he was concerned about the link between the breach and the consequences of the breach, a link that was to be found in article 24 (A/CN.4/307 and Add.1, para. 50), relating to the *tempus commissi delicti*. Until such time as the consequences of a breach were determined, it would be difficult to arrive at a definite formulation of the *tempus commissi delicti*. It had been rightly pointed out that the *tempus commissi delicti* was an important element in assessing the amount of damages and the possibility of applying other sanctions and, more particularly, in the question of the procedure applicable for the settlement of disputes.

4. At that juncture it would not be easy to divorce the provisions on the *tempus commissi delicti* from the provisions on the consequences of the breach, which

were to be considered later, and also from the primary rules, which were the international obligations themselves. The difficulty of separating those two concepts had already been encountered in article 18, which to some extent provided for a kind of retroactivity of obligations, and it would appear again in article 24, which enunciated a kind of non-retroactivity. Indeed, in all branches of the law, the concept of retroactivity was extremely difficult to deal with.

5. In short, article 23 posed no problems, precisely because it was tautological. However, it would be difficult to take decisions on the question of the time of the breach until the question of the consequences of the breach became clearer. His comments were not criticisms; they were simply intended to indicate that any attempt to go further in draft article 23 would prejudice the question of the content of the obligations themselves—a matter with which the Commission could not and would not deal.

6. Mr. REUTER said that the Special Rapporteur had shown clearly that damage was not a constituent element of the breach of the obligation referred to in article 23. He wondered, however, whether the term "event" might not be replaced by some other word, such as "situation" or "circumstance", for there was a whole category of obligations, known as obligations of due diligence, whose content it was difficult to define in advance and in the abstract: it was often necessary to wait until the situation to be prevented had arisen—in other words, until the obligation had been breached—to know exactly what the obligation entailed.

7. But was the fact that the specific substance of certain obligations could be determined only in specific cases sufficient reason for considering such obligations to be of a special kind? Clearly, there could be no question of imposing on States responsibilities that they could not assume; it was obvious that no State could guarantee that an embassy would not be attacked or that a visiting Head of State would not be the victim of an assault. However, if the State had taken absolutely no measures to prevent a given situation, was it necessary to wait until the situation actually came about before the responsibility of the State was engaged? For example, if a State were bound by a convention to take legislative measures to eliminate all forms of racial discrimination, could it not be considered, even in the absence of any practical manifestation of racial discrimination, that there was a breach of the obligation if the State took no such measures?

8. Mr. EL-ERIAN said that the treatment of responsibility, in both national and international law, traditionally took account of *faute*, *dommage* and *lien de causalité*, concepts that existed in common law countries, for example, in the theory of tort. The Special Rapporteur had not combined all the elements of responsibility in his definition of an internationally wrongful act of a State. As specified in article 3 of the draft, there was an internationally wrongful act of a State when conduct consisting of an action or omission was attributable to the State under international

<sup>2</sup> See 1476th meeting, foot-note 1.

<sup>3</sup> For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287.



law and that conduct constituted a breach of an international obligation of the State. However, after the very lucid explanations given by the Special Rapporteur, he was now satisfied that in article 23 the Commission was not dealing with damage, although the matter had caused him some difficulty at the beginning.

9. Abundant examples existed in case law of the concept of due diligence. For example, in a case in which foreign nuns had been victims of an insurrection in an African country,<sup>4</sup> the arbitral tribunal had found that the British Government had not been guilty of any negligence. The event had been viewed as unavoidable, for the Government itself had been a victim of the insurrection; it had not failed to take protective measures, and consequently it could not be held responsible. Admittedly, the State was under an obligation to protect both its own nationals and aliens in its territory, but some aliens had an especially important status. Indeed, an alien might be engaged in such a highly political matter—for instance, the settlement of a frontier dispute—that he would be in a particularly vulnerable position, and must consequently be afforded special protection. In that respect, it would be interesting to know how the Special Rapporteur intended to deal with the question of special protection, as distinct from the due diligence that every State was obliged to exercise.

10. Lastly, the Special Rapporteur had noted in his report that a State could not be alleged to have breached its obligation to prevent a given event where the event had occurred but could not be ascribed to a lack of foresight on the part of certain State organs (A/CN.4/307 and Add.1, para. 3). Personally, he thought it would be extremely difficult to introduce the element of foresight into the concept of due diligence.

11. Sir Francis VALLAT said that the Special Rapporteur had made it clear in his report that it was not a theoretically established failure of prevention that constituted the State's breach of its obligations in the hypothetical cases envisaged, but a failure of prevention made concrete by the actual occurrence of an event that more active vigilance could have prevented and that had been made possible by the lack of it (*ibid.*, para. 16). That was the essence of the point the Commission was endeavouring to cover in article 23, although it was uncertain whether the point required a separate article or not and how it was to be covered.

12. Like Mr. Pinto (1477th meeting), he believed that a systemic link with article 21 would undoubtedly help to clarify the situation. However, great care would be needed, for the link itself might create problems. The mere insertion of a reference to article 21 in article 23 would accentuate the contrast

between the positive formulation of article 21 and the negative formulation of article 23, which raised doubts about the drafting of article 21, paragraph 1.

13. In article 23, the Commission was concerned with the prevention of injury to an alien or to his property through failure by the State to take adequate protective measures. A negative formula, like that of article 23, linked into a positive formula, like that of article 21, paragraph 1, raised the question whether the latter paragraph dealt exclusively with the positive achievement of a specified result or whether it might not also include the negative aspect of the prevention of an event. Moreover, it would be useful to reflect on the meaning of the word "result", as employed in article 21, and whether article 23 might not be drafted to read:

"There is no breach by a State of an international obligation requiring it to prevent a given result, unless the result in question occurs."

In the English version of article 23, the word "following" was ambiguous, since it was difficult to determine whether the expression in question implied cause and effect or merely implied a time sequence.

14. He fully agreed with the Special Rapporteur that article 23 should not seek to express the standards of conduct underlying the rules the Commission was formulating, for those standards fell under the heading of primary rules. However, it was not easy to give meaning and content to article 23 without to some extent considering primary rules. The reason probably lay in the fact that prevention of an event was dependent on the type of conduct that the State was bound to adopt. It had to be recognized that there was an element of conduct in an obligation of result, something that could be illustrated from the report now being considered. For example, paragraph 2 of the report stated that the preventive action required of the State consisted essentially of surveillance and vigilance with a view to preventing the event, in so far as that was "materially possible". In that instance, the standard was one of material possibility. Elsewhere—in paragraph 14, for example—the standard was absence of negligence, and in paragraph 16 it was "more active vigilance". Different standards of conduct might be required in different circumstances, but the standard of conduct was so closely allied to the obligation to prevent an event that it was extremely difficult to deal with one without dealing with the other. It should be made plain that any examples cited in the commentary were given simply to illustrate how the article would apply and not for the purpose of varying the content of the article itself.

15. In conclusion, he noted the statement, in paragraph 18 of the report, that the definition of the conditions for the occurrence of the breach of an obligation of the type in question might in practice have decisive consequences for the determination of the *tempus commissi delicti*. The time element was in fact of the utmost importance, and instead of providing in article 23 that there was no breach of an ob-

<sup>4</sup> Home Frontier and Foreign Missionary Society of the United Brethren in Christ (United States) v. Great Britain (United Nations, *Reports of International Arbitral Awards*, vol. VI (United Nations publication, Sales No. 1955.V.5), p. 42).

ligation "unless" the event occurred, it might be better to say that there was no breach "until" the event occurred. Consequently, the Drafting Committee might perhaps consider article 23 not only in relation to article 21 but also in relation to article 24.

16. Mr. SCHWEBEL observed that it had been suggested, in the course of the discussion of article 23, that the distinction—made in articles 20 and 21—between obligations of conduct and obligations of result might, in practice, be difficult to maintain, in other words, that a particular international obligation might at times be one of conduct and at other times one of result, or even both simultaneously. He had been impressed by that suggestion and by what it might imply for the practical utility of the distinction between obligations of conduct and obligations of result. He had also been impressed by Mr. Riphagen's point concerning the infinite variety of international obligations.

17. The position adopted in article 23 was, for all that, no less sound. To say that there was no breach by a State of an international obligation requiring it to prevent a given event unless that event occurred was true; indeed, it was a truism. As Mr. Riphagen had put it, the article was tautological. However, it might be difficult to avoid tautology when drafting principles of a relatively abstract nature which eschewed primary rules of State responsibility.

18. If the obligation was more than one of preventing the occurrence of a given event, then the liability of the State would be correspondingly greater. Thus, if the obligation of the State was to prevent an attempt to bring about an event, as well as to prevent the event, the State would be responsible for the making of the attempt unless it had been impossible for it to take action to prevent the attempt. The obligation in question might, for instance, be one of preventing harassment of an embassy. No breach of an international obligation occurred unless, following a lack of prevention on the part of the State, harassment actually occurred. If, however, the obligation was to prevent even an attempt at harassment of an embassy, as article 22 of the Vienna Convention on Diplomatic Relations<sup>5</sup> seemed to imply, the attempt, even if unsuccessful, would result in a breach of the host State's international obligation, at least in circumstances where it had failed to prevent the making of the attempt.

19. In that connexion, he noted that one member of the Commission had suggested that a State could protest when it believed that its embassy enjoyed inadequate security, even in circumstances where there had been no assault or even attempted assault upon the embassy. Although that was quite true, he did not think that it detracted from the force of article 23 because it did not follow that in such a case the host State was in breach of an international obligation. States could make representations, raise questions,

express anxieties and even protest at the possibility of occurrences without alleging actual violations of international law. Indeed, diplomatic relations usually involved such exchanges rather than the maintenance of international claims or the invoking of State responsibility, as the Special Rapporteur had rightly pointed out in foot-note 17 to his seventh report.

20. To return to the suggestion that a given situation might entail obligations both of conduct and of result, he would take the case of a government that informed a foreign company of its decision that foreigners might no longer hold majority control in a particular sector of business activity. To the government's offer to buy the majority of the company's shares at a certain price, the company replied that it was willing to sell a majority of its shares at a price reasonably close to their value or at their value as appraised by an independent third party, but not at the price offered by the government. If the government then told the company to sell at the price it had offered to avoid expropriation, the company—it might be assumed—would conclude that it had no choice but to accept the government's offer, since it believed that diplomatic protection by its own government would not do much that would actually protect its investment. Was there a breach of an international obligation when the host government threatened what might be seen as a confiscatory expropriation? If the two governments concerned had concluded a treaty ensuring that the persons and property of their nationals would enjoy the most constant security, the mere threat of expropriation might well be a breach of an international obligation requiring the parties to adopt a particular course of conduct. Even in the absence of such a treaty, the actual consummation of such a forced sale, in the hypothetical circumstances he had described, might be tantamount to expropriation without adequate compensation and, consequently, a violation of customary international law. Such a violation would, it seemed, be a breach of an obligation to achieve the specified result—payment of adequate compensation—required by customary and conventional international law.

21. Could it also be said that such an act would be a violation of article 23? In the case he had described, the State had the obligation to produce a certain result, namely, payment of adequate compensation. Article 21 was relevant in that connexion. The other aspect of the question was that the State had an obligation to prevent a given event, namely, a forced sale. That aspect could be dealt with in a separate article, such as article 23.

23. Another example, drawn from the sphere of human rights, also came to mind, namely, that of a State acceding to the International Covenant on Civil and Political Rights<sup>6</sup> and making no reservation to article 6, paragraph 5, prohibiting the execution of minors. Under the law of the State in question, however, such matters were not dealt with at the federal

<sup>5</sup> See 1476th meeting, foot-note 6.

<sup>6</sup> General Assembly resolution 2200 A (XXI), annex.

level; the federal government was therefore unable to abolish capital punishment nationally. Was the federal government by that fact in breach of the Covenant? He was inclined to think that it was not, unless it had specifically undertaken in the Covenant to enact legislation prohibiting the execution of minors or unless a minor had actually been executed after its accession to the Covenant in other words, unless "the event in question", as article 23 put it, had actually occurred.

23. Other members of the Commission had pointed out that there was necessarily a clear and intimate connexion between articles 20 and 21 and article 23, but in his opinion that did not mean that article 23 was not useful or, as Sir Francis Vallat had rightly noted, that it was a simple matter to draft language clarifying the link between those articles.

24. He was inclined to agree with the Special Rapporteur, Mr. Riphagen and Sir Francis Vallat that words such as "manifest" or "reasonable" should not be used to characterize the "lack of prevention" referred to in article 23.

25. Mr. QUENTIN-BAXTER was not concerned about the tautological character of the draft articles, for in an area of such importance the Commission was obliged to spell out propositions which, outside legal circles, would normally be taken for granted. His concern was more about the question of the relationship of the article to earlier articles of the draft and the possibility that false inferences might be drawn from that relationship. Sir Francis Vallat's suggestion of a time sequence might perhaps prove useful and help to indicate the place of article 23 in relation to the broad propositions contained in articles 20 and 21.

26. With regard to the term "prevention", it was quite obvious that, since States were not all-powerful, they could not possibly prevent the occurrence of certain events. Consequently, rather than phrase the article in terms of a duty to prevent an event, it would be better to speak of a duty to take precautions to prevent an event.

27. The CHAIRMAN, speaking as a member of the Commission, said that, following the clarifications made by the Special Rapporteur, his doubts about the nature of the obligation covered by article 23 had been dispelled.

28. He was satisfied that the obligation to prevent an event was an obligation of result, and that it should be embodied in a separate article. It was a very particular kind of obligation of result, for it was breached only in the case of a certain type of conduct, namely, lack of prevention on the part of the State coupled with occurrence of the event. That special link, which was stressed throughout the report, had no place in article 21, which dealt with obligations of result in the strict sense of the term.

29. Some thought should be given to qualifying the obligation of the State by what Sir Francis Vallat had termed the standard of conduct. Due weight should

be attached to the arguments advanced by Mr. Calle y Calle (1476th meeting), Mr. Díaz González (1477th meeting) and Mr. Francis (1476th meeting), but he agreed with the Special Rapporteur that the Commission should not move into the realm of the primary rules of international law. Perhaps the whole matter might best be clarified in the commentary.

30. Mr. AGO (Special Rapporteur), replying to the comments made on article 23 since his statement at the previous meeting, noted first that all the members of the Commission now seemed to agree that the links between that article and articles 20 and 21 should be made clearer. It would be for the Drafting Committee to find the right formulation.

31. The example of nationalization, expropriation and other similar measures, which Mr. Pinto had been the first to mention, showed clearly the vital importance of the distinction between obligations of means and obligations of result. In the sphere of respect for foreign property, as in others, States reached among themselves the arrangements they preferred. Sometimes, albeit rarely, they took upon themselves obligations of conduct, as when they undertook to enact a law prohibiting expropriation without compensation. More often than not, however, what was required of them was not the adoption of specific measures, but the achievement of a result—to ensure that foreigners were not victims of acts of expropriation without compensation. In such a case, the State that enacted a law authorizing its administrative authorities to carry out expropriations without compensation could not already be considered as having breached its obligation by that action alone. There would be a breach only if the administrative authorities, acting under the law in question, carried out an expropriation without compensation. It was obvious that, prior to that event, there was nothing to prevent another State from drawing the attention of the State in question to the possible consequences of the application of the law it had enacted. Such action would come within the scope of normal diplomatic relations. But it was also obvious that there could be no allegation of a breach of an international obligation to prevent a particular event, and of the resulting responsibility, as long as the State that had assumed that obligation confined itself to taking measures that might make such prevention less easy, and the objectionable event had not occurred. As Mr. Pinto had pointed out, the conduct of the injured party might be taken into consideration, but only after the breach of the obligation had been established.

32. Mr. Sucharitkul (1477th meeting) had indeed emphasized an essential aspect of the breach, namely, the occurrence of the event. As Sir Francis Vallat had pointed out, it was necessary to establish the relationship between the rule stated in article 23 and the problem of *tempus commissi delicti*, which would be dealt with in the next article.

33. Many members of the Commission had spoken of the infinite variety of international obligations, and it was precisely because of that variety that so

many articles of the draft had to be separately devoted to the breach of international obligations. The Commission's task was to identify the principal kinds of obligations and to determine what were the distinctive conditions of a breach in each case. As far as obligations of conduct were concerned, a breach undoubtedly occurred if the State in question adopted a conduct not in conformity with that required of it. With regard to obligations of result, a breach occurred only if the required result was not achieved; but there was no breach if the State concerned achieved the result by means other than those that might have been expected or, in certain cases, achieved it later than expected.

34. Some members of the Commission found articles 20, 21 and 23 acceptable because they regarded them as tautological. Actually, a provision was not tautological simply because it was clear. Besides, as was shown by the inconclusive international case law and practice of States, it was not so easy to translate into practice the principle that a breach of an international obligation of result occurred only if the required result was not achieved; it had often been mooted that the obligation might have been breached even before the result had become unattainable. It was in order to settle that question that, in the current instance, the Commission had to lay down a precise rule. For example, the obligation to protect foreign embassies against attacks by private persons might perhaps be said to have been breached by the mere fact that a State had failed *in abstracto* to take appropriate action, whereas it must be clearly stated that, for the existence of a breach to be established, the regrettable event that ought to have been prevented must have occurred.

35. It seemed to him that his disagreement with Mr. Ushakov arose more from a misunderstanding with regard to terminology than from a difference of opinion. Obviously, it was impossible to draw up a catalogue of the events to be prevented without entering into the subject-matter of the primary rule. Certain primary rules, including those in article 22 of the Vienna Convention on Diplomatic Relations, were formulated in language that might leave some doubt. In each practical case it had to be determined, for example, whether the peace of a mission had been disturbed or its dignity impaired by a certain event, and for that purpose allowance also had to be made for what might reasonably be expected of the receiving State.

36. With regard to the word "event", it meant *stricto sensu* an occurrence, a happening. In the example of an attack on an embassy, the regrettable event to be prevented was really external to the State's conduct. Mr. Reuter had drawn a parallel with the obligations of due diligence. In his own opinion, great caution was necessary in drawing such comparisons, for there were obligations of due diligence that were obligations of conduct, and which might therefore be said to have been breached by the mere fact that the requisite due diligence had not been exercised. In the case the Commission was considering, where the ob-

ject was to prevent the occurrence of some event, the obligation did not require that due diligence should be exercised in a particular form, but that care should be taken to ensure that the event did not occur, which was another matter. Once the event had occurred, the law could take it into account and attach particular consequences to it. The internationally wrongful act was not an act of failure to adopt specified conduct, but of failure to prevent the occurrence of the event. If, as Mr. Reuter suggested, the word "event" were replaced by the word "situation" the language would become even more vague. The word "event" faithfully reflected the idea of something supervening independently of any action by the State. Under article 25, paragraph 1, of the 1958 Geneva Convention on the High Seas,<sup>7</sup> States pledged themselves to take measures to prevent the pollution of the seas from the dumping of radioactive waste. The event to be prevented under that provision was not the dumping of such waste; the States had pledged themselves only to take action to prevent the pollution of the seas as a result of such dumping. As long as there was no pollution, therefore, a State could not be blamed for omitting to take action against such pollution. Only when a case of pollution occurred did the omission to take appropriate action become apparent. He had already stated earlier that the event played the part of a catalyst in the conduct of the State. In the final analysis, that was the subject-matter of the article under discussion.

37. Mr. Schwebel, referring to the duty to protect diplomatic envoys, had commented, that the mere abortive attempt to attack such an envoy might constitute an event to be prevented. That was true, but, once again, the Commission should be wary of defining the subject-matter of the primary rule. The subject-matter of primary rules could not, of course, be completely ignored, as Sir Francis Vallat had remarked, since the Commission was trying to determine, on the basis of the content of the obligations, how a breach of international obligations materialized. But it should do no more than proceed case by case: it was enough to say that, if the subject-matter of an international obligation were of a certain kind, then, under specified conditions, there was a breach of the obligation. The Commission had been bolder when drawing a distinction, in the light of the content of the obligations, between international crimes and international delicts. At the same time, however, it had been careful not to define the content of the obligations in question.

38. Several members of the Commission, and in particular Sir Francis Vallat, had illustrated the connexion between the article under discussion and the future provision that would deal with the time of the breach of the international obligation. The article under discussion, like the earlier ones, was undoubtedly closely bound up with the idea of time. However, the temporal question did not arise until after the ques-

<sup>7</sup> United Nations, *Treaty Series*, vol. 450, p. 83.

tion dealt with in article 23, which logically had priority, had been settled, for only after it had been established that an international obligation had been breached would the question arise of the time of which the breach had occurred. Unlike Mr. Riphagen, he did not think it necessary at that juncture to inquire what would be the consequences of a breach of the category of international obligations under consideration.

39. In his persuasive statement, Mr. El-Erian had argued that the protection of certain persons, such as diplomatic envoys, demanded a greater degree of due diligence on the part of the State than did the protection of private persons. Although pertinent, that argument should not tempt the Commission to venture into the sphere of the content of the primary rules and to repeat the mistake of the Conference for the Codification of International Law (The Hague, 1930).

40. Mr. Quentin-Baxter had wondered whether a reference to precautions to be taken should not be introduced in article 23. Personally, however, he considered that there were scant grounds for adding a reference in the article that might give the impression that the breach of the obligation might precede the occurrence of the event to be prevented. On that point no ambiguity should be allowed to subsist. On the other hand, the commentary would obviously have to explain that the performance of any international obligation had to be seen from the point of view of its feasibility, which varied considerably from case to case. But at that point the debate reverted to the subject-matter of the primary rule.

41. The CHAIRMAN suggested that article 23 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>8</sup>

*The meeting rose at 12.50 p.m.*

<sup>8</sup> For consideration of the text proposed by the Drafting Committee, see 1513th meeting, paras. 1 to 4 and 10 to 18.

## 1479th MEETING

*Tuesday, 16 May 1978, at 3.10 p.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

### State responsibility (*continued*)

(A/CN.4/307 and Add.1)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR (*continued*)

#### ARTICLE 24 (Time of the breach of an international obligation)

1. The CHAIRMAN invited the Special Rapporteur to introduce his draft article 24, which read:

##### *Article 24. Time of the breach of an international obligation*

1. If a breach of an international obligation is constituted by an instantaneous act, the time of the breach is represented by the moment at which the act occurred, even if the effects of the act continue subsequently.

2. If a breach of an international obligation is constituted by an act having a continuing character, the time of breach extends over the entire period during which the act subsists and remains in conflict with the international obligation.

3. If a breach of an international obligation is constituted by a failure to prevent an event from occurring, although prevention would have been possible, the time of the breach is represented by the moment of the occurrence of the event.

4. If a breach of an international obligation is constituted by an aggregate act composed of a series of similar individual acts, committed in a plurality of separate cases, the time of the breach extends over the entire period between the first and the last of the individual acts constituting the series in conflict with the international obligation.

5. If a breach of an international obligation is constituted by a complex act consisting of a succession of actions or omissions by different organs of the State in respect of the same case, the time of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it.

2. Mr. AGO (Special Rapporteur) said that article 24 was the last article in chapter III devoted to the objective element in an internationally wrongful act, namely, the breach of an international obligation. The object of that article was to determine the time of the breach of an international obligation in the different cases of breaches which the Commission had considered in chapter III. It might seem that such determination was a matter of noting the acts rather than or applying legal criteria. In reality, it generally required the application of such criteria, in international law quite as much as in internal law. Moreover, it was a simple matter in only one case, which was not even the most frequent, namely, that of an instantaneous act. The perpetration of the breach of the obligation did not extend beyond the moment when it occurred: the moment and the duration coincided, as when the breach of the international obligation took place through the murder of certain persons or through the destruction of certain property. But an internationally wrongful act, such as the wrongful occupation of the territory of a State, which had begun at a given moment, might not cease to exist until much later; the breach then had a continuing character. In internal law, the receiving of goods was a continuing offence. Was the "time of perpetration" of an internationally wrongful act of

that kind only the moment when it began, or the whole period during which it continued to exist?

3. A similar question arose with regard to composite and complex acts. A "composite" State act consisted of an aggregate of individual State acts whose combined effect alone entailed the breach of a specific international obligation. Assuming for example the existence of a customary rule of international law under which a State might not expropriate the property of aliens without compensation, and assuming further the existence of an establishment treaty between two States under which State A must guarantee nationals of State B a share in the exploitation of certain resources, two cases might arise: if State A had granted a number of concessions of exploitation to nationals of State B and had then expropriated one of them without compensation, the said customary international obligation would be breached, but not the treaty obligation, because the number of other nationals of State B who continued to enjoy concessions of exploitation remained sufficient for that second obligation to be regarded as respected. For the latter obligation to be breached too, a whole series of expropriations would have to take place that virtually reduced the participation of nationals of State B in the exploitation of the given resources to nil. The series of individual acts of expropriation was thus a composite act—a different act that breached an obligation different from that which was breached by each of the individual acts of which it was composed! To cite another example, a whole series of individual acts of discrimination would have to take place to constitute that typical composite act, "discriminatory practice", which was expressly forbidden under certain recent treaty obligations. What, in such cases, was the "time of perpetration" of the breach of the obligation? Was it the time of the first act in the series, or of the last, that concretized the existence of the series, or was it the whole period from the first act to the last? Was it not necessary, in such a case, to distinguish the duration of the breach from the moment when it could be established that it had taken place? A "complex" State act, on the other hand, was an act made up of a succession of distinct State actions, combining to prevent the achievement by the State of the result required by an international obligation. There again the act was one whose perpetration extended over a period of time and presented the same problems with the regard to the determination of the *tempus commissi delicti*.

4. The question of the determination of the time during which a breach was perpetrated was of practical importance in several respects. In determining the amount of damages, for example, the basis taken was normally the injury caused. However, an act whose performance continued over a period of time could cause injury not only at the beginning of that performance but also at the end and throughout its duration, so that the calculation of the damages would depend on what was regarded as the time of the perpetration of the breach. Mr. Reuter had said, in connexion with "complex" acts, that, even if only

the final moment were considered as the time of the performance of an act of that kind, it would still be the aggregate loss that would have to be made good, on the principle of full reparation for damages (see A/CN.4/307 and Add.1, foot-note 28). For his own part, however, he thought that the application of the principle cited by Mr. Reuter was warranted only if the damages to be made good in their entirety had been caused in their entirety by the breach of an international obligation. There would indeed be no reason for the author of an internationally wrongful act to be called upon to make reparation for damages which, at the time they had occurred, had not been caused in breach of an international obligation. The principle of full reparation for damages thus indirectly confirmed the position that the duration of the breach of an international obligation created by a complex act corresponded to the entire period during which the various elements constituting that complex act succeeded each other, and was not confined to the moment when that breach was completed. The position was the same in the case of a "continuing" or "composite" act. In the case of a wrongful military occupation, it was not the damages caused at the beginning or end of the occupation for which reparation had to be made, but the whole of the damages caused during the occupation.

5. The question he had raised was also of great importance from the point of view of the jurisdiction of international tribunals. It was not uncommon for a State, when it accepted the jurisdiction of an international tribunal, to restrict its acceptance *ratione temporis*, for example to disputes relating to acts or situations subsequent to a given date. It was from that angle that the Permanent Court of International Justice had had to consider the question of its jurisdiction in the *Phosphates in Morocco* case,<sup>1</sup> and the International Court of Justice in the *Barcelona Traction* case.<sup>2</sup> Indeed, the great majority of the declarations accepting the compulsory jurisdiction of the International Court of Justice restricted such acceptance to disputes arising in connexion with situations or acts subsequent to the date of ratification of the acceptance. It even happened that a State restricted its recognition of the jurisdiction of an international court to acts and situations prior to a given date. For instance, New Zealand, which in 1930 had accepted the compulsory jurisdiction of the Permanent Court of International Justice for disputes subsequent to that year, had later excluded from such acceptance disputes subsequent to 1940, the year in which it entered the war. As to the jurisdiction of the European Commission of Human Rights, the United Kingdom and Italy had accepted it only for acts or events subsequent to the date of their acceptance.

6. It was therefore very important to determine the time of the perpetration of the breach of an obligation in order to determine whether or not an inter-

<sup>1</sup> P.C.I.J., Series A/B, No. 74, p. 10.

<sup>2</sup> *Barcelona Traction, Light and Power Company, Limited (Preliminary objections)*, Judgment: I.C.J. Reports 1964, p. 6.

national tribunal had competence to rule thereon. Some had maintained that, to do so, it was sufficient to interpret the clauses of acceptance of competence that were accompanied by a limitation *ratione temporis*. Such an interpretation, however, did not always provide a satisfactory answer to the question. Of all the declarations of acceptance of the jurisdiction of the International Court of Justice, it seemed that only that of India expressly excluded “any dispute the foundations, reasons, facts, causes, origins, definitions, allegations or bases of which” had existed prior to the date of that declaration (A/CN.4/307 and Add.1, foot-note 6). In most declarations, however, States confined themselves to mentioning situations and acts subsequent to a particular date, a clause that could be interpreted only once the question had been settled as to when, and for what duration, the breach of the obligation had occurred.

7. Determination of the “tempus” of the breach of an international obligation was also of importance in connexion with diplomatic protection. For a State to be able to exercise its diplomatic protection on behalf of a private individual, a link of nationality had in principle to exist between them from the time of the perpetration of the internationally wrongful act until the presentation of the international claim. Obviously, when the breach of an international obligation extended over a period of time, the national link between the victim of the breach and the State exercising diplomatic protection must have existed uninterruptedly from the initiation of the breach. It had frequently happened, after the Second World War, that a person who had been a national of a State that had had no arbitration or jurisdiction treaty with the State he accused of having committed an internationally wrongful act to his prejudice during the hostilities, acquired the nationality of a State that could espouse his cause. In order to establish whether the latter State was qualified to intervene on behalf of a person complaining of an act whose performance had begun at a time when he had not yet possessed the nationality of that State, but which had extended after the acquisition of that nationality, it was essential to settle the question of the time of the perpetration of the breach of the international obligation.

8. The Commission had already encountered those problems when formulating paragraphs 3, 4 and 5 of article 18.<sup>3</sup> It had then dealt separately, in respect of each type of act considered, with the question of the simultaneity required between the existence of the international obligation for a State and the performance by that State of an act not in conformity with that obligation for the act to constitute a breach of that obligation. If the act not in conformity with the obligation was of a continuing character (a case covered by paragraph 3), there was breach of the obligation if the “continuing” act had taken place, at least in part, while the obligation had been in force

for the State. If the act not in conformity with the obligation was a “composite” act (a case covered by paragraph 4), there was breach of the obligation if the act could be regarded as constituted by individual acts performed during the period when the obligation had been in force for the State. If the act not in conformity with the obligation was a “complex” act (a case covered by paragraph 5), there was breach of the obligation if the act had been initiated by an action or omission occurring in the period during which the obligation had been in force for the State, even if the act had been completed after the end of that period. In all those cases the question envisaged had been that of the existence of a breach of an international obligation. Having considered the cases in which a breach of an international obligation occurred, the Commission must now ask itself at what moment that breach took place and during what “time” it must be deemed to have been perpetrated.

9. Although separate, the two questions of the existence of a breach and of the *tempus commissi delicti* required coherent solutions. With regard to the continuing act, it had been decided that it was sufficient if some part of its duration lay within the period when the obligation had been in force for a breach of that obligation to have taken place, which meant that logically the time of the perpetration of the breach had to be considered as corresponding to the whole period of the occurrence of that act, from beginning to end. Logic also required that the time of the perpetration of a composite act should be regarded as corresponding to the whole period during which the act had taken place in breach of the obligation. Finally, with regard to a complex act, it would be contrary to paragraph 5 of article 18, for example, to assert that the time of the perpetration of the breach corresponded only to the final moment and did not include the initial moment.

10. In article 21, paragraph 2, and in article 22, the Commission had dealt with the case where a State to which an obligation of result was addressed failed initially to create a situation in conformity with the result required. The Commission had taken the view that in such a case there was no breach of the obligation unless the State also failed, by its subsequent conduct, to achieve that result. It would therefore be difficult to reconcile those articles with a solution that amounted to excluding such subsequent conduct from the time of the perpetration of that complex wrongful act.

11. In the case of an “instantaneous” act, dealt with in article 24, paragraph 1, determination of the *tempus commissi delicti* should not in principle raise any problems of verification. The breach in such a case was characterized by the instantaneous nature of the conduct constituting the breach. Examples were the murder of the representative of another State, or the sinking of a neutral ship on the high seas. There was no difficulty in determining the time of the perpetration of such acts, since they lasted no longer than the instant of their performance. Obviously the duration of a breach of that kind covered only the

<sup>3</sup> See 1476th meeting, foot-note 1. For the Commission’s commentary to article 18, see *Yearbook... 1976*, vol. II (Part Two), pp. 87 *et seq.*, doc. A/31/10, chap. III, sect. B, 2.

time of its performance in the strict sense of the term, to the exclusion of possible preparations or more or less long-term effects.

12. There were instantaneous acts with continuing effects where only the effects were continuing, and which did not lose their instantaneous character whatever the duration of such effects. In its commentary to article 18, the Commission had already had occasion to touch on that question. Thus, in the *Phosphates in Morocco* case, it could be considered that the Permanent Court of International Justice had been right in treating the decision taken in 1925 by the Mines Department of Morocco—at that time a French protectorate—under which an Italian national was to have been deprived of his acquired rights contrary to France's international undertakings, as an instantaneous act, even if its effects continued long after, and that consequently the Court had had no jurisdiction, since France had accepted its jurisdiction only as from 1932. The Court's reasoning on the subject had not always been very clear, but Judge Cheng Tien-Hai had summed up the situation very accurately in noting that the decision in question had done no new mischief after the time of its adoption, and had given rise to no new situation.<sup>4</sup>

13. It was in the cases dealt with in paragraphs 2, 3, 4 and 5 of article 24 that the question of the determination of the *tempus commissi delicti* really arose. It arose first where there was a continuing act strictly so-called (illegal detention of a foreign official personage, maintenance in force of legal provisions conflicting with a treaty, unlawful occupation of a territory, etc.). In the *Phosphates in Morocco* case, the Italian Government, in addition to formulating several complaints, had also argued that the régime instituted by the dahirs in 1920, establishing a monopoly for the working of the phosphates in Morocco for the benefit of French nationals, amounted to a continuing act. The Italian Government had contended that a State that failed to bring its internal laws into line with its treaty obligations committed a "permanent international delict".<sup>5</sup> The Court had contested the applicability of the Italian Government's argument to that specific case but had not thereby contested the merits of the concept of the existence of internationally wrongful acts that were continuing acts, the time of whose perpetration, as the Italian Government had noted, consisted of "the whole of the period comprised between its beginning and its completion".<sup>6</sup>

14. In dismissing *in toto* the two contentions of the Italian Government, namely, that concerning the 1925 decision of the Mines Department (which could be considered as an instantaneous act with continuing effect) and that concerning the contradiction between the obligations contracted by France under the General Act of Algeciras (1906) and the 1920 legislation establishing the phosphates monopoly in Mor-

occo for the benefit of French nationals, the Court had tended to confuse the two complaints, treating the second act invoked by the Italian Government as also an instantaneous act with continuing effects. It was not on that basis alone, however, that it had rejected the Italian Government's claim; it had also referred to France's declaration, in 1932, of acceptance of the Court's jurisdiction, in which it had detected a reservation nor merely with regard to acts subsequent to a particular date but also with regard to acts of which all the constituent elements might be subsequent to that date. Without wishing to express an opinion on the merits of that interpretation at that juncture, he thought it relevant to note that the Court had in no way denied the existence of internationally wrongful acts of a continuing character. On the contrary, everything suggested that, had the Court regarded the act alleged by the Italian Government as a continuing act, its decision would have been different.

15. In a separate opinion, cited by the Special Rapporteur,<sup>7</sup> Judge Cheng Tien-Hsi had emphasized the distinction to be drawn between the two complaints made by the applicant Government, showing that, in the case of the 1925 decision of the Mines Department, what had been at issue was "merely the consequences of an illicit act... completed once for all at a given moment", whereas, in the case of the monopoly, what had been at issue was a "continuing and permanent state of things" incompatible with the French Government's international obligations. However that might be, and in conclusion, in the whole decision on the *Phosphates in Morocco* case no argument was to be found contesting the existence of two categories of internationally wrongful acts: instantaneous acts and continuing acts.

16. The European Commission of Human Rights had raised the question several times, notably in the *de Courcy v. the United Kingdom* and the *Roy and Alice Fletcher v. the United Kingdom* cases, which he had cited in his report.<sup>8</sup> With respect to a continuing act that had begun before and continued after acceptance of its jurisdiction, the European Commission of Human Rights had considered itself competent for the part of the act that continued after acceptance of its jurisdiction.

17. In the case dealt with in article 23, where the international obligation was to prevent a given event, and where the internationally wrongful act resulted from the conjunction of two elements, namely, occurrence of the event to be prevented and failure to prevent it on the part of State organs that had rendered such occurrence possible, the question arose whether or not the *tempus commissi delicti* included the period prior to the occurrence of the event and during which the State had apparently shown negligence in prevention. His view was that the period preceding the event should not be taken into consid-

<sup>4</sup> See A/CN.4/307 and Add.1, para. 27.

<sup>5</sup> *Ibid.*, foot-note 46.

<sup>6</sup> *Ibid.*, para. 29.

<sup>7</sup> *Ibid.*, para. 30.

<sup>8</sup> *Ibid.*, para. 33.



eration in determining the *tempus commissi delicti*, since, as provided in article 23, the breach came into being only when the event occurred. It was the occurrence of the event that determined the breach. If the event was instantaneous, the internationally wrongful act was also, therefore, instantaneous.

18. It was true that the event itself might have a certain duration, as in the case of the occupation of an embassy by rebels. The question then arising was whether or not the duration of the event should be taken into account in determining the time of the perpetration of the breach of the obligation to prevent the occurrence of the event. The State might be required to bring to an end the event whose occurrence it had not prevented; the question remained whether that obligation was always an obligation to prevent the occurrence of the event, or a different obligation.

19. The question of the *tempus commissi delicti* also arose in the case dealt with in article 18, paragraph 4, namely, that of an act composed of a series of similar individual acts, committed in a plurality of separate cases but only the totality of which produced the conditions for a breach of a specific obligation. In the case already referred to of a State A having undertaken, by a treaty of establishment and economic cooperation, to permit nationals of a State B to participate in the exploitation of its mineral or other resources, and having granted a number of concessions to nationals of State B, it was obvious, as had been pointed out, that, if State A expropriated one of those concessions, that act of expropriation would not in itself constitute a breach of the obligation entered into by the State under the treaty; for such a breach to occur, the first expropriation would have to be followed by a series of others, the total effect of which would be to reduce the participation of State B's nationals in the exploitation of the mineral or other resources of State A to nil. That would be a composite act, consisting of a plurality of separate acts, but linked by the same intention, namely, to nullify the execution of the international obligation under the treaty. State A could of course bring about the same result by an instantaneous act, by adopting legislative measures cancelling at one blow all concessions granted to nationals of State B. Clearly, in the case envisaged, it was neither the first nor the last expropriation alone that constituted the breach of the international obligation; the duration of the breach extended over the totality of the expropriations. It was thus the whole period during which the expropriations took place that constituted the *tempus commissi delicti*—the time of the perpetration of the breach.

20. Similarly, in the case of a treaty prohibiting certain discriminatory practices, one specific act of discrimination would not be sufficient to establish the breach; there had to be a series of acts of such a kind to justify the conclusion that a discriminatory practice existed, and that consequently there was a breach of the obligation under the treaty. There again, then, the *tempus commissi delicti* would be the entire period during which the discriminatory practice was carried out, from the first act of discrimination

committed after the entry into force of the treaty for the State in question up to the last. There must be no confusion, in that connexion, between the moment when the internationally wrongful character of the practice became apparent and the moment when the practice began, since it was only when the existence of the practice was established that the breach could be alleged and that the said practice could be seen retrospectively as having taken place from the time of the act with which it had begun.

21. Lastly, the question might arise as to the *tempus commissi delicti* in the case of a complex act within the meaning of paragraph 5 of article 18, in other words, an act constituted by a series of actions or omissions by the same or different organs of the State in respect of the same case. In such a case there was a breach of an obligation of result and of an obligation under which, if the first action by a State organ was not in conformity with the result required by the obligation, such action could be corrected later by a further action of the same or some other organ of the State. The complex internationally wrongful act was thus the global outcome of all the actions or omissions of State organs at successive stages in a particular case. For example, to take the case of an attempt on the life of a foreign Head of State, if the guilty parties were successively acquitted by the various courts of the State until no further possibility of recourse remained, the breach of the obligation to punish the criminals, which had begun with the decision of the court of first instance, would be completed by the decision of the court of final instance. Obviously, it was that last decision that definitively established the existence of a breach, but it was clear that, once established, the breach included all the decisions at all levels by the different courts, from the decision of the court of first instance to the decision of the court from which there was no appeal.

22. The question of the *tempus commissi delicti* of a complex internationally wrongful act had arisen again in the *Phosphates in Morocco* case, in the third complaint formulated by the applicant Government, relating to a complex act—the “monopolization of the Moroccan phosphates”<sup>9</sup>—involving, over and above the 1925 decision of the Mines Department, denials of justice in 1931 and 1933. The Italian Department, had contended that the breach had been initiated in 1925 by the decision of the Mines Department and completed by the denial of justice in 1933. Had the Court accepted that contention, it would have been competent to hear the case, since its jurisdiction had been accepted by France in 1932. The agent of the French Government had disputed that contention by arguing that the 1933 rejection of the application for extraordinary leave to appeal had not been a denial of justice but merely a refusal to settle, in a certain manner, a dispute arising from a lack of jurisdiction, a fact which, if it might in itself be a denial of jus-

<sup>9</sup> *Ibid.*, para.30.

tice, had nevertheless antedated France's acceptance of the Court's jurisdiction. Thus the denial of justice—if such denial had occurred—had itself taken place prior to the crucial date and was not a sufficient basis for the competence of the Court. That being said, the French agent had nevertheless agreed to argue on the basis of the existence of breaches occurring "at several moments" and therefore constituting "complex" acts, the time of whose perpetration included all those different moments.

23. In the matter of determining the *tempus commissi delicti* of a complex internationally wrongful act, the European Commission of Human Rights had adopted a position in conformity with the same line of argument: it had considered that the material date for determining whether an act was prior or subsequent to the date of acceptance of its jurisdiction was not the date of the initial action or omission by the State but the date of the decision whereby the breach became definitive. Thus the conclusions to be drawn from both practice and case law confirmed those dictated by juridical logic, namely, that the time of the perpetration of the breach of an international obligation constituted by a complex act was the whole period extending from the conduct initiating the breach to that which completed it.

24. Mr. REUTER noted that the Special Rapporteur had determined the *tempus commissi delicti* in terms of a clause defining the competence of a court of law. It might be asked, however, whether there were not other cases in which the *tempus commissi delicti* had to be determined, and whether the answer to the question raised in article 24 did not vary according to the nature of the problem to be resolved. For example, in the case of prescription of an international crime constituted by a series of violations of human rights, a date would have to be fixed that would not necessarily correspond to the provisions set out in article 24. Similarly, in a case of succession of States resulting from a merger of several States, the question might arise as to the manner in which the *tempus commissi delicti* would be determined.

25. He wondered, therefore, whether in article 24 the Special Rapporteur had intended to propose a general rule for all cases, a general rule with exceptions, or a rule applicable only in the cases mentioned.

*The meeting rose at 6 p.m.*

## 1480th MEETING

*Wednesday, 17 May 1978, at 10.5 a.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr.

Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

### State responsibility (*continued*) (A/CN.4/307 and Add.1)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR (*continued*)

#### ARTICLE 24 (Time of the breach of an international obligation)<sup>1</sup> (*continued*)

1. Mr. USHAKOV said that, for the purpose of determining the *tempus commissi delicti*, what mattered was not the duration of the breach of an international obligation but the time at which the breach occurred, which was also the time when the responsibility of the State originated. In chapter III of the draft articles, the Commission was dealing with the origin of the internationally wrongful act. Accordingly, for the time being, its task was to determine in what circumstances and at what time the breach of an international obligation occurred—in other words, in what circumstances and at what time the internationally wrongful act occurred which entailed the responsibility of the State. The duration of the breach should be disregarded for the purpose of determining the origin of the State's responsibility, for under article 1<sup>2</sup> it was the internationally wrongful act that gave rise to the State's international responsibility.

2. In paragraph 24 of his report (A/CN.4/307 and Add.1), the Special Rapporteur cited three issues that might be affected by the duration of the internationally wrongful act, namely, the determination of the amount of reparation due by the perpetrator of an internationally wrongful act, the determination of the jurisdiction *ratione temporis* of the international judicial or arbitral tribunal that might eventually have to deal with the case, and the requirement of the "national character of a claim", according to which a State was authorized to intervene for the purpose of the diplomatic protection of an individual only if there was a link of nationality between the State and the individual concerned. For the moment, none of those three issues was of concern to the Commission; its sole function was to determine in what circumstances and at what time the international responsibility of the State came into being.

3. The issue of the determination of the amount of reparation payable by the perpetrator of an internationally wrongful act was irrelevant to the question of the determination of the breach. Besides, for the purpose of determining the amount of the reparation for such an act, what mattered was not the duration of the event but its seriousness. Under article 19, for example, the distinction between an international crime and an international delict was based not on

<sup>1</sup> For text, see 1497th meeting, para. 1.

<sup>2</sup> See 1476th meeting, foot-note 1.

the duration but on the gravity of the internationally wrongful act.

4. The question of the jurisdiction *ratione temporis* of the international tribunal that might be dealing with the case was likewise not germane, for that tribunal's jurisdiction and the point in time when the breach had been committed were entirely separate issues. The State might well be responsible in the absence of any judicial or arbitral body having jurisdiction to deal with the particular case. After all, it was not enough that an internationally wrongful act should have been committed for jurisdiction to be vested in an international judicial or arbitral body: its jurisdiction must in addition have been accepted by the parties to the dispute.

5. The issue of the national character of the claim was likewise wholly extraneous to the issue of the State's responsibility, for that responsibility might well exist even where no nationality link authorized another State to intervene for the purpose of giving diplomatic protection to a private individual.

6. Thus the factor to be taken into account for the purpose of determining the *tempus commissi delicti* was the time of the breach, not its duration. It was arguable that the moment of the breach had already been determined in earlier articles. For example, article 20 (Breach of an international obligation requiring the adoption of a particular course of conduct) contained the word "when", which had a twofold meaning, namely, both "if" and "at the time when". In the passage "when the conduct of that State is not in conformity with that required of it by that obligation", the word "conduct" was an unfortunate choice, for it was only in the light of the situation resulting from the State's conduct that it was possible to determine whether or not a breach of the obligation had occurred.

7. Nor was it possible to draw a sharp distinction between the obligation of conduct and the obligation of result, for the two obligations were closely linked and neither could exist without the other—an obligation of conduct necessarily implied an obligation of result. It was obviously the purpose of any obligation either to prevent or to produce a certain situation or event. For example, the duty of the State to enact legislation prohibiting racial discrimination was not merely an obligation of conduct but also an obligation of result, for its object was to eliminate racial discrimination. A State which had entered into an obligation of that kind by treaty and failed to enact anti-discriminatory legislation committed a breach even if in practice no case of discrimination occurred. But if the State had enacted the required legislation and cases of discrimination occurred, was it arguable that the State was not responsible? In his opinion, the State's responsibility would be involved in such a case, for the duty to enact anti-discriminatory legislation was aimed at eliminating discrimination, a result that had not been achieved. The State would have complied with the obligation of conduct but have failed to fulfil the obligation of result implicit in

the obligation of conduct. Accordingly, he considered that article 20 should be amended to read:

"There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct in cases where a situation exists that is not in conformity with the situation required by the obligation or where the State by its conduct prevents the attainment of the result required by that obligation."

8. In the case of a composite or complex event, the responsibility existed for all the specific events, from first to last, that constituted the composite or complex event. The actual breach, however, did not occur until the time when the composite or complex event fully materialized, in other words, at the time when the last specific act occurred that determined the existence of the composite or complex event. As the Italian Government had stated in its written observations in the *Phosphates in Morocco* case,

It is only when there is, as a final result, a failure to fulfil [these] obligations that the breach of international law is complete and that, consequently, there is a wrongful act capable of giving rise to an international dispute.<sup>3</sup>

9. In his opinion, the only material moment was that at which the breach occurred, and for the purpose of determining the origin of responsibility the duration of the breach should be disregarded. The question of the jurisdiction of the international body was a separate issue that the Commission should not touch upon for the time being.

10. Mr. FRANCIS did not disagree with the substance of article 24, since it followed logically from the preceding articles, more especially article 18, paragraphs 3, 4 and 5, and article 23. It indicated very clearly and precisely the application of the *tempus commissi delicti* rule in five specific situations.

11. One difficulty, however, was that the article did not—and indeed could not be expected to—define the circumstances in which an act was of a continuing character, as distinct from an instantaneous act that produced continuing effects. As the Special Rapporteur pointed out in paragraph 21 of his report, the problem was to determine whether the *tempus* of an internationally wrongful act having a continuing character should be defined as the time when that act began, or as the whole period during which it continued. That was a problem of interpretation, and in respect of interpretation it should be remembered that the draft articles never stood alone but must always be viewed against the background of the commentaries. Such an approach was regularly followed by the Commission itself, by the Sixth Committee of the General Assembly and by some institutions outside the United Nations system.

12. With regard to the judgment of the Permanent Court of International Justice in the *Phosphates in Morocco* case, the crux of the matter was whether the act of the respondent government, namely, the Government of France, had been completed in 1925

<sup>3</sup> *P.C.I.J.*, Series C, No. 84, p. 850.

or whether, in legal terms, it had continued beyond 25 April 1931, the date when France accepted the compulsory jurisdiction of the Court with respect to disputes arising out of acts subsequent to its ratification. The Special Rapporteur's report recognized that the 1925 decision of the Department of Mines on Mr. Tassara's claim had been an instantaneous act producing continuing effects rather than an act having a continuing character. The Special Rapporteur also stated that he very much doubted whether the same could be said of the situation invoked in the main complaint, namely, the monopoly of Moroccan phosphates established by the dahirs of 27 January and 21 August 1920, and that it was rather, a typical example of a "continuing act". That conclusion had been drawn on the basis of the fact that the dahirs in question were said to constitute "a legislative situation regarded as contrary to the international obligations of the country which created it" (A/CN.4/307 and Add.1, para. 30).

13. Nevertheless, at the previous session the Commission had discussed the question of the effect of legislation with regard to certain obligations and had concluded that, in certain circumstances, it was not the legislation in itself but the actual application of the legislation that gave rise to a breach. It seemed that, in the case in question, it had been the effect of the dahirs of 27 January and 21 August 1920, rather than their mere existence, that had occasioned the breach. The question arose as to whether determination of the *tempus commissi delicti* in specific situations should be made by reference to the characterization of the act or to the characterization of the obligation, or by reference to both those factors. In his opinion, by examining the nature of the obligation, it should be possible to determine whether a wrongful act could be characterized as an instantaneous act, as an instantaneous act producing continuing effects, as an act having a continuing character, and so on. On the other hand, it was not possible, solely, by reference to legislation purporting to cover a treaty obligation, to determine whether the obligation was an obligation of conduct or an obligation of result involving a choice of means. An important distinction had to be drawn in that respect, at least as far as legislation was concerned. Naturally, he was not suggesting that legislation or treaties constituted the exclusive source of such obligations, for an obligation might derive from a peremptory norm—for instance, the obligation not to occupy unlawfully the territory of another State.

14. In the *Phosphates in Morocco* case, it appeared that France had not been under an obligation to adopt a particular course of conduct, such as to enact or to repeal legislation. Consequently it must have been under an obligation of result, involving a choice of means. Precisely because the means had been optional, France had not been under any obligation to establish regulatory machinery of higher standing than the Department of Mines, to which the matter could have been referred for final settlement. Therefore any act alleged to have been committed in

breach of France's obligation would have been completed by 1925.

15. The Special Rapporteur stated in paragraph 30 of his report that the Court could also have added that the only injury actually caused to an Italian citizen by the legislative régime of the monopolization of the Moroccan phosphates had been that suffered by Mr. Tassara as a result of the 1925 decision of the Department of Mines, and the Commission necessarily returned to that decision and to its date, which antedated the acceptance of compulsory jurisdiction. The Court could indeed have taken a decision in keeping with that argument suggested by the Special Rapporteur. Personally, he would have been happier if, to support his position and the formulation of his draft article 24, the Special Rapporteur had invoked the principle that a wrong should not go unredressed. After all, there was no great interest in resurrecting the Court's judgment from the judicial grave so to speak. In codifying international law, the Commission must adopt a progressive attitude.

16. In the part of his report devoted to article 24, the Special Rapporteur also drew heavily on the practice of the European Commission of Human Rights and referred in particular to the United Kingdom's acceptance of the Commission's jurisdiction, which had been accompanied by a reservation *ratione temporis* in much the same way as France's acceptance of the jurisdiction of the Permanent Court of International Justice in the *Phosphates in Morocco* case. The report stated, *inter alia*: "the United Kingdom recognized the competence of the Commission with regard to individual applications alleging incompatibility with the United Kingdom's obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms of any act or decision or any fact or event occurring after 13 January 1966" (A/CN.4/307 and Add.1, para.33). He emphasized the words "any fact", which could certainly be considered to apply to the continued imprisonment of an individual after 13 January 1966, as in the *De Courcy v. the United Kingdom* case. Under United Kingdom law, therefore, such imprisonment might have been justified before that date, but certainly not, under the Convention, after that date.

17. He had studied the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>4</sup> and had not been able to find any provisions that expressly required the adoption of a specified course of conduct, such as the enactment of legislation. However, article 64, paragraph 1, of that Convention provided that:

Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision...

The question arose, therefore, whether a country which had ratified the Convention subject to a res-

<sup>4</sup> United Nations, *Treaty Series*, vol. 213, p. 221.

ervation under article 64, paragraph 1, was not thereby bound by its own domestic law to adopt a specified course of conduct. In the case involving the United Kingdom, supposing the law in question had remained in force after 13 January 1966, the fact that the individual in prison had been imprisoned before 13 January 1966 was immaterial. The situation was somewhat different from that in the *Phosphates in Morocco* case, where property rights had been granted and then withdrawn. The Special Rapporteur's argument might have been more conclusive had he taken as examples cases involving the unlawful detention of aliens in circumstances amounting to a breach of an international obligation.

18. With regard to the wording of article 24, the words "although prevention would have been possible", in paragraph 3, seemed to him superfluous, since the idea was already covered by the words "prevent an event from occurring". It might be necessary for the Drafting Committee to redraft paragraph 5, which referred to "a complex act consisting of a succession of actions or omissions by different organs of the State in respect of the same case", so as to bring it into line with article 18, paragraph 5, which referred to "a complex act constituted by actions or omissions by the same or different organs of the State in respect of the same case".

19. Mr. PINTO considered that article 24 provided guidelines for the interpretation and classification of certain events. It led to a conclusion concerning the time of the breach of an international obligation and made it possible to determine when responsibility arose.

20. He was quite satisfied that the article fitted well into the Commission's work on State responsibility. Indeed, as the Special Rapporteur had said, it was relevant to the determination of the amount of reparation payable by the State which had committed an internationally wrongful act, to the determination of the jurisdiction of an international tribunal with regard to a dispute arising out of the breach of an international obligation and to the question of the nationality of claims for the exercise of diplomatic protection.

21. However, he was not entirely sure about the practical application of article 24, which, as it now stood, was likely to create more problems than it resolved. For example, paragraph 1 referred to "an instantaneous act", while paragraph 4 referred to "an aggregate act composed of a series of similar individual acts, committed in a plurality of separate cases". The use of the word "series" might give rise to problems, for a series usually meant three or more. Accordingly it might be difficult to determine whether a particular act came under paragraph 1 or under paragraph 4 of the article. If there were more than one act, it might fall within the scope of either paragraph. Similarly, in interpreting paragraph 2, which referred to "an act having a continuing character", paragraph 4, which referred to "a series of similar individual acts" and paragraph 5, which referred to "a complex act consisting of a succession of actions or

omissions by different organs of the State in respect of the same case", there could be different interpretations as to the time when responsibility arose.

22. Mr. Ushakov had referred to another source of possible difficulties in paragraph 5. In Mr. Ushakov's opinion, the time of the last in a succession of actions or omissions constituting a complex act would determine the time when the responsibility of the State arose. In the case of a denial of justice, he could agree with Mr. Ushakov that it would be the last act that would, in fact, complete the complex act, but he wondered whether there might not be circumstances in which the last act completing the complex act had to have some kind of retroactive effect on the first act for justice to be done. For example, in cases of "creeping nationalization", account must be taken of the fact that, when the final act—expropriation—occurred, a great deal of damage had already been caused over a certain period of time.

23. Another problem that gave him concern and might be considered by the Drafting Committee was the difficulty of determining the time of an omission. Paragraph 1 of article 24 referred only to "an instantaneous act". He wondered whether it might not also be possible to refer explicitly in the same paragraph to an omission.

24. With regard to the point raised by Mr. Frances concerning the use, in paragraph 3, of the words "although prevention would have been possible", his own reaction had been to suggest that, for the sake of clarity, those words should also have been included in article 23.

25. Lastly, he noted that the Special Rapporteur had used the word "concessions" more than once in paragraph 39 of his seventh report. Since the word "concessions" might have some unfortunate connotations, he thought the use of a synonym might be advisable.

26. Mr. VEROSTA pointed out that the last few articles of chapter III, from article 20 onwards, concerned the breach of international obligations in the light of the nature of those obligations. Articles 20 and 21 dealt respectively with obligations of conduct and obligations of result. The enumeration was broken by article 22, which dealt with the exhaustion of local remedies, and was resumed in article 23, which dealt with obligations requiring the State to prevent a given event. Accordingly, he considered that the order of articles 22 and 23 should be reversed.

27. With regard to article 24, paragraph 3 should logically become paragraph 2. In the final analysis, paragraph 1 dealt with the breach of an obligation of conduct. If the issue of the *tempus commissi delicti* was to be clarified, an appropriate provision should appear in article 20. Similarly, the provision in paragraph 3 concerning the obligation to prevent a certain event might be transferred to article 23. If those suggestions were followed, all that would be left of article 24 would be its paragraphs 2, 4 and 5, which dealt respectively with the breach of an international obligation by a continuing act, a breach by an aggre-

gate or composite act and a breach by a complex act. The common characteristic of those three classes of breach was the duration of the act in question. It might not, therefore, be necessary to devote a separate article to the *tempus commissi delicti*. It would be enough to supplement the enumeration begun in article 20 by one or two articles dealing with the breach of international obligations by a continuing, composite or complex act. In that way it would be possible to avoid some of the drawbacks, noted by Mr. Reuter (1419th meeting), Mr. Ushakov and Mr. Pinto, that would be inherent in an article dealing specifically with the time of the breach of an international obligation.

28. In conclusion, he thought that the expression "succession of actions or omissions" in the English version of paragraph 5 was a mistranslation of the French "une succession de comportements".

29. Mr. SCHWEBEL fully agreed with the Special Rapporteur that the time of the breach of an international obligation was of particular importance in deciding the amount of reparation to be paid, determining the jurisdiction of an international tribunal with regard to a dispute arising out of such a breach and dealing with questions of the continuity of nationality in the maintenance of international claims. Indeed, he hoped that, later in the draft, an article would be devoted to the rule of continuity in the nationality of claims, which was frequently applied in an unpalatable and inequitable manner and might therefore be an appropriate subject for the progressive development of international law.

30. In paragraph 23 of his report, the Special Rapporteur had referred to the breach of an international obligation resulting not from a single act, but from a "practice" consisting of similar individual acts committed in a number of separate cases. Examples of such acts could, of course, be found, particularly now that the United Nations was concerned about situations revealing a pattern of constant and flagrant violations of human rights and fundamental freedoms. On the whole, however, he thought that treaty prohibitions of a practice rather than of an act were exceptional. For example, the rights embodied in treaties of establishment, friendship, commerce and navigation usually provided guarantees for individuals, and there did not have to be a pattern of violations for the individuals concerned to claim that their rights under the treaty in question had been infringed.

31. Although he had no difficulties with paragraphs 1, 2 and 3 of the article under consideration, he could see the advantage of reversing the order of paragraphs 2 and 3. With regard to paragraph 4, he noted that Mr. Ushakov had said that a breach of an international obligation occurred only at the time of the last of the individual acts constituting the series in conflict with the international obligation, if the discrete acts themselves were not in conflict with that obligation. His own opinion was that, in most cases, the discrete acts would also be in conflict with

the international obligation. If, however, in exceptional cases, they were not and only the aggregate act constituted the breach of the international obligation, would it be correct to say that the time of the breach extended over the entire period between the first and the last of the individual acts constituting the series in conflict with the international obligation? He would be grateful to the Special Rapporteur for a clarification of that point.

32. He confessed to a certain amount of confusion with regard to paragraph 5, for he was not sure that it was consistent with article 22. Paragraph 5 stated that the time of the breach of an international obligation constituted by a complex act consisting of a succession of actions or omissions by different organs of the State in respect of the same case extended over the entire period between the action or omission which initiated the breach and that which completed it. If that reasoning were transposed to the context of article 22, the logical conclusion would be that the time of the breach was not the time of the exhaustion of local remedies, but rather the entire period between the action or omission which initiated the breach and that which completed it. To take the example of a breach of a treaty obligation, supposing a national of State A claimed that State B had breached an international treaty obligation of which he was the beneficiary and carried his claim to the courts of State B, it could be said that he had exhausted local remedies only when the courts of State B rejected his claim; yet he would probably maintain that the time of the breach of the international obligation that he could invoke, and thus the amount of damages payable to him should be calculated not from the time of the exhaustion of local remedies but from the time of the act or omission by State B constituting the breach. It seemed to him that paragraph 5 in fact supported such a sensible conclusion; but if it did, it might not be consistent with article 22. He would be grateful to the Special Rapporteur for a clarification of that point also.

#### Gilbert Amado Memorial Lecture

33. The CHAIRMAN announced that the 1978 Gilberto Amado Memorial Lecture would be given by Judge T.O. Elias of the International Court of Justice on 7 June, at 5.30 p.m.

*The meeting rose at 1 p.m.*

### 1481st MEETING

*Thursday, 18 May 1978, at 10.10 a.m.*

*Chairman* : Mr. José SETTE CÂMARA

*Members present* : Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Quentin-

Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Sir Francis Vallat, Mr. Verosta.

**State responsibility (continued)**  
**(A/CN.4/307 and Add.1)**  
[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR (continued)

ARTICLE 24 (Time of the breach of an international obligation)<sup>1</sup> (continued)

1. Mr. ŠAHOVIĆ said that it was beyond doubt that the Commission must now study the question of the *tempus commissi delicti*, not only because it had put off doing so several times when considering the earlier articles in the draft, but also for practical reasons that had been clearly demonstrated by the Special Rapporteur. Moreover, several members of the Sixth Committee had stressed the need for the Commission to take a decision on the question.

2. To judge from various passages in his report (A/CN.4/307 and Add.1), the Special Rapporteur seemed inclined to consider article 24 as an interpretation clause. In the opinion of Mr. Pinto (1480th meeting), that was indeed how the article should be seen, since it was designed to make possible the practical definition in certain cases of the competence of international tribunals. Personally, he considered that that was only one aspect of the problem, the notion of time being one of the constituent elements of the breach of the international obligation, and therefore of international responsibility. As it stood, article 24 did not stress that point sufficiently. Perhaps an effort should be made to bring out clearly, in the first paragraph of the article, the importance of the time element for the entire section on the objective element of the internationally wrongful act. To that end, emphasis would have to be placed on three main aspects of the problem: the breach of an international obligation, the internationally wrongful act and the duration of the international obligation whose breach, through an internationally wrongful act, engendered international responsibility.

3. In article 24, the Special Rapporteur dealt with the question of time according to the specific character of different types of internationally wrongful acts. He contrasted the notion of the "moment", in paragraphs 1 and 3 of the article, with that of the "period", in paragraphs 2, 4 and 5. It ought to be possible to place at the head of article 24 a general definition of the notion of the time of the breach of an international obligation. Admittedly, such a definition might also be given in the article on the use of terms, but its inclusion in the article under study would be in keeping with the practice of the Com-

mission, which had already given definitions in the body of the draft, notably in article 3.<sup>3</sup>

4. There was a certain formal parallelism between articles 18 and 24, and he wondered what would be the implications for article 24 of paragraph 2 of article 18, which dealt with the case of an act of the State which, at the time when it was performed, had not been in conformity with an international obligation of that State, and had subsequently ceased to be considered an internationally wrongful act. Another matter on which clarification was necessary was that of the links between article 18 and article 21, paragraph 2.

5. With regard to the structure of article 24, the order of paragraphs 2 and 3 would probably have to be reversed. Despite the distinction based on the nature of the obligations which the Special Rapporteur made between the acts referred to in paragraphs 1 and 3, it was the principle of instantaneity that applied in all the cases concerned, and the paragraphs might therefore be combined. As for continuing, aggregate and complex acts, they all entailed the application of the same principle, namely, that of the duration of the breach. In view of the general requirement for contemporaneity between the "force" of an international obligation and any commission of a breach thereof through an aggregate or complex act, it would probably be useful to specify the criteria that should be applied in establishing the existence of such a breach. In one way or another, the notion of time always entered into the establishment of the breach of an international obligation engaging the international responsibility of the State.

6. With regard to the wording of article 24, the fact that there had been no systematic reproduction of the expressions employed in article 18 might be a source of misunderstanding. In paragraphs 2 and 4, it was stated that the time of the breach extended over the entire period during which the act or acts in question remained in conflict with the international obligation; perhaps a reference to that fact should also be added in paragraph 5. Finally, as in other articles, it might be made clear that the acts referred to in the various paragraphs of article 24 were internationally wrongful acts, or at least acts of the State.

7. His comments and reservations notwithstanding, he could accept article 24, which constituted an essential part of the draft.

8. Mr. SUCHARITKUL said that for a lawyer who, like himself, came from a Buddhist country, the time element was of vital importance. According to Buddha, there was nothing permanent in the world: everything changed with the passage of time. The same was true of the rule of law, which existed only in time and could not exist outside it. It followed that the temporal dimension was a constituent element of international law, and therefore of the very notion of the international responsibility of a State. For that

<sup>1</sup> For text, see 1479th meeting, para. 1.

<sup>2</sup> See 1476th meeting, foot-note 1.

reason, he believed that it was impossible to study the question of State responsibility without examining its temporal aspect.

9. Time could be defined only by reference to a measurable concept of duration.<sup>3</sup> To speak of a "depth of time", in the phrase of Mr. Reuter, cited by the Special Rapporteur,<sup>3</sup> necessarily implied a measurement that could be made only with the help of a straight line, which was itself but the protraction of two points. In the final analysis, what counted were the two instants marking the beginning and the end of the given period. He therefore agreed with the Special Rapporteur that cases in which those two instants coincided, thereby giving rise to an instantaneous act, might be placed in a first category. In such cases, the concept of time was purely academic. All other cases, by contrast, involved a measurement of time. The determination of the time of the breach of an international obligation was important not only from the theoretical but also from the practical point of view. Since time was a constituent element of the breach of an obligation, it was important, particularly for engendering the right of action, to establish precisely the moment at which the breach occurred. The examples given by the Special Rapporteur regarding the competence of international tribunals showed that both the starting point and the finishing point must be taken into account.

10. The clause "although prevention would have been possible" should be retained in paragraph 3 of article, because it marked the difference between the case to which that paragraph referred and the case covered in paragraph 1. Under paragraph 3, it was necessary, for a breach of the international obligation to have occurred, not only that a given event should have taken place but also that prevention of that event should have been possible. It should be noted that the obligation of true diligence on the part of the State persisted even after the occurrence of the event which the State had been required to prevent. An example of what he meant was the case of the occupation of the Embassy of Israel in Thailand by Palestinians. On the very day of the occupation, which had been the Inauguration Day of the Crown Prince of Thailand, the Government had managed to persuade the occupants that their action was inauspicious in view of the feelings expressed by the Thai people in celebrating the occasion, and promptly to ensure their safe conduct to Egypt. In that way, any material damage had been avoided.

11. On the whole, he approved article 24, which could now be referred to the Drafting Committee.

12. Mr. TABIBI agreed with other members of the Commission that article 24 was of great significance and occupied an important place in the draft articles on State responsibility. Its purpose was to provide guidelines for the determination of the time of the breach of an international obligation, and hence for

the moment when State responsibility arose. Once the *tempus commissi delicti* had been determined, it was immaterial whether the act constituting the breach was instantaneous or extended over a period of time. However, since the acts determining breach of an international obligation took different forms, the Special Rapporteur had rightly divided them into five categories corresponding to the five paragraphs of the text under consideration.

13. Although he had no objection to Mr Šahović's suggestion that a new general paragraph should be added at the beginning of the article, he thought it should be left to the Special Rapporteur to take a decision on that matter in the light of the Commission's discussion and of the content of articles 18, 21 and 23.

14. With regard to section 9 of the Special Rapporteur's seventh report, it would have been more useful had it been submitted in condensed form and had it included a broader range of specific examples.

15. Mr. DADZIE noted that the Special Rapporteur had divided the problem of the time of the breach of an international obligation into five categories, which were dealt with in the five paragraphs of article 24. Paragraph 1, which called for no particular comment, stated that the time of a breach of an international obligation constituted by an instantaneous act was represented by the moment when the act occurred.

16. Paragraph 3 contained a similar provision relating to the case of a failure to prevent an event from occurring. Like Mr. Francis (1480th meeting), however, he had some doubts about the need for the words "although prevention would have been possible", used in paragraph 3. He noted that, in the *Laura M. B. Janes et al. (United States of America) v. United Mexican States* case, in which the United States had received damages for Mexico's failure for eight years to take steps to arrest the murderer of a United States citizen, the General Claims Commission had stated that:

At times international awards have held that, if a State shows serious lack of diligence in apprehending and/or punishing culprits, its liability is a derivative liability, assuming the character of some kind of complicity with the perpetrator himself and rendering the State responsible for the very consequences of the individual's misdemeanour... The reasons upon which such finding of complicity is usually based in cases in which a Government could not possibly have prevented the crime, is that nonpunishment must be deemed to disclose some kind of approval of what has occurred...<sup>4</sup>

Although he found that statement an acceptable basis for the use, in paragraph 3, of the words "although prevention would have been possible", he was not convinced that the words were necessary. The paragraph could probably stand equally well without them, since failure to prevent an event from

<sup>3</sup> See A/CN.4/307 and Add.1, foot-note 33.

<sup>4</sup> United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No. 1951.V.1), pp. 86 and 87.



occurring occasioned the liability of the State whether prevention were possible or not.

17. In paragraphs 2, 4 and 5, an element of duration had been introduced in the determination of the *tempus commissi delicti*. Despite the convincing arguments offered by the Special Rapporteur, his own opinion was that the interests of the progressive development of international law would be better served if, in each case, the moment of the breach of an international obligation were taken as the time at which a particular act or omission occurred. Under paragraph 2, where the act had a continuing character, the time of the breach could be any moment when the breach actually occurred during the period in which the act subsisted. Under paragraph 4, which referred to an aggregate act composed of a series of similar individual acts, committed in a plurality of separate cases, the time of the breach could be the time of the first act, the time of an intermediate act, or the time of the last act constituting the series in conflict with the international obligation. With regard to paragraph 5, which referred to a complex act consisting of a succession of actions or omissions by different organs of the State in respect of the same case, he suggested that the time of the breach should be that of the last in the succession of actions or omissions. Thus, in all those cases, there would be a moment when the responsibility of the State arose. The question of the duration of the act or omission constituting the breach and the problem of determining the amount of reparation payable would then be matters to be decided by the competent court or adjudicating body.

18. Mr. QUENTIN-BAXTER said that a sign that a new article probably had its proper place in the set of draft articles on State responsibility was that it caused the Commission to reassess the strength of the structure of the draft articles as a whole. He had seen such a sign at the previous meeting, when many of the questions raised by members of the Commission had related more to the text of previous articles than to that of article 24. Mr. Ushakov had even gone so far as to suggest that article 24 might be more appropriate in a later set of draft articles, dealing with the content of international obligations. In his own view, however, there was no doubt that article 24 belonged in the set of draft articles under consideration.

19. Although the Special Rapporteur had explained the significance of article 24 in terms of a jurisdictional bond, of the continuous nationality of claims and of the determination of the amount of reparation payable, he himself thought that the draft article went still further and concerned the very existence of the breach of the international obligation. Indeed, in considering obligations of a conventional or contractual nature, the same kind of texts used to determine whether a matter was justiciable, or whether a court was competent to deal with a dispute, had to be applied to the question whether there was a breach of an international obligation at all. Thus, in a very fundamental sense, article 24 was a complement to

article 18. He considered that the Commission must take the greatest care to achieve complementarity and to avoid conflict and circularity.

20. Like Mr. Ushakov and other members of the Commission, he had been compelled by article 24 to think back to decisions that had already been adopted. For example, at the time the Commission had dealt with articles 20 and 21,<sup>5</sup> Mr. Ushakov had said that obligations of conduct were frequently accompanied by obligations of result. During that discussion, he himself had asked whether it was not necessary to consider those two articles not as watertight divisions, but rather as different aspects of a same subject. The Special Rapporteur had answered that question by saying that the Commission was concerned with the anatomy, the bare bones, of international obligations, not with the many forms they could assume. In fact, any set of circumstances that was likely to become the subject of an international dispute could take a variety of forms. It would therefore be unreasonable to expect article 24, or the articles preceding it, to resolve the many problems that could arise when attempts were made to determine the way in which a particular breach of an international obligation occurred.

21. In the case, for example, of a State that reserved part of the high seas for a certain period of time in order to conduct gunnery exercises, it could immediately be seen that a dispute arising out of damage to a foreign vessel which had entered the test area could be characterized in many ways. For instance, the State's action might be open to challenge on the grounds that it had had no right to reserve an area of the high seas for test purposes, that it had failed to maintain the standard of care due to other users of the sea, that it had failed to give adequate warning, or that it had failed to exercise proper vigilance. Its action could also be characterized as particularly hazardous. Indeed, if the Commission had been right in the way it had expressed the rule embodied in article 23, the action of the State conducting the gunnery exercises could also be regarded as a failure to prevent an event, although prevention would have been possible. There were thus many ways in which the rules now being formulated could be applied to particular situations. Their main purpose, however, was to provide a foundation of correct thinking for the building of future structures that would deal more practically with particular problems.

22. If he was right in thinking that article 24 was a necessary extension of article 18, it must be tested in simple ways. Unlike some members of the Commission, he was of the opinion that paragraphs 1 and 2 of the article belonged together, because they both related to the essential distinction between an act and its effects. He also thought that the Commission should avoid the use of the word "instantaneous", which detracted from the simple and direct message of paragraphs 1 and 2, where it might be enough simply to say that a breach of an international obli-

<sup>5</sup> *Yearbook... 1977*, vol. 1, pp. 213 *et seq.*, 1454th-1457th, 1460th and 1461st meetings.

gation occurred when the act constituting it took place and that, if the act had a continuing character, it continued throughout the period of the breach. On that point he agreed with Mr. Sucharitkul that, scientifically and philosophically, it must be assumed that every act had some duration and that there was no such thing as an act that finished at the same moment as it began.

23. In studying paragraph 3 of article 24, he had encountered the same difficulties to which he had referred when the Commission had dealt with article 23. He was very attracted to the view expressed by Sir Francis Vallat (1478th meeting) that the essential need in article 23 was one of meeting a time consideration. Thus, it should be asked whether the simple rules of paragraphs 1 and 2 of article 24 were adequate in all circumstances, or whether the justification for paragraph 3 was that there were certain circumstances in which the jurisdictional bond, or the existence of the breach, which were determined by time considerations, could be measured only by the occurrence of the event, in other words, by the effect of the act, not by the act itself. Normally, a duty of prevention—if it was correct to use such an absolute term—was a duty whose breach constituted a continuing act of omission and which, as such, was amply covered by the basic rules already formulated by the Commission. In certain cases, however, the effect might be the result of an instantaneous act, rather than of an act having a continuing character. For example, if a State caused radioactive fallout that was carried by the winds to another area, where it was detected by scientific equipment, and if later, other scientists detected further harmful consequences of such fallout, could it be said, in terms of justiciability, that in such a case only the moment at which the act causing the damage had occurred should be taken into account? He thought that it was on that kind of question that the Commission must base its view concerning the need for paragraph 3 of article 24.

24. He was not sure that the type of case dealt with in paragraph 4 was as rare as Mr. Schwebel (1480th meeting) had suggested, for the many ways in which a breach of an international obligation could be characterized must be taken into consideration in that paragraph as well. Indeed, in cases in which there was, for example, an obligation not to discriminate against the nationals of a particular State, there might be the greatest difficulty in establishing that a certain standard of conduct had not been maintained even after a number of cases of discrimination had occurred.

25. He noted that paragraph 5 of article 24 referred to a complex act consisting of a succession of actions or omissions "by different organs of the State in respect of the same case", whereas paragraph 5 of article 18 referred to a complex act constituted by actions or omissions "by the same or different organs of the State in respect of the same case". In his opinion, the wording of paragraph 5 of article 18 was preferable, since it took account of the requirement of the

exhaustion of local remedies, whether the rehearing of a case by the same tribunal or an appeal against the decision of a lower court to a higher court.

26. Mr. EL-ERIAN said that the Special Rapporteur, in his report, had established beyond doubt that the time of the breach of an international obligation was a matter of practical importance, more particularly in determining the amount of any reparation payable and in determining jurisdiction *ratione temporis*.

27. Article 24 followed smoothly and logically from the preceding articles of the draft. While article 19 drew an important distinction between internationally wrongful acts according to the importance of the norm violated in order to determine their degree of gravity and their characterization as international crimes or international delicts, article 24 differentiated between wrongful acts according to their duration or their repetition in time. No one could fail to notice that the repetition or persistence of a wrongful act could introduce the element of gravity. In internal law, for example, it was not a single act of lending money at interest above the legal rate but a repetition of such acts that constituted the crime of usury. Many examples could be given of crimes for which the punishment was more severe when there was a repetition of the wrongful act. Indeed, it had been pointed out, and rightly, that a Member of the United Nations could be expelled for persistent breaches of its obligations under the Charter. Again, a fine but accurate distinction had been made between an instantaneous act producing continuing effects and an act having a continuing character, in other words, an act which, because it was continued, could be considered as repeated, and thus occasioned different legal consequences. To draw once again on internal law, building a house in violation of zoning regulations was a continuous or continuing contravention until the house was removed. It was very useful to emphasize the difference between those two types of wrongful act, especially when an act having a continuing character fell within the serious category of an international crime. Plainly, the gravity of an act derived not only from the nature but also from the continuing character of the act.

28. Unquestionably, the Special Rapporteur had proved in his report that, for the purpose of determining jurisdiction, a distinction must be made between acts producing continuing effects and acts having a continuing character, and that there were good grounds for such a distinction in international law, as could be seen from the decision of the Permanent Court of International Justice in the *Phosphates in Morocco* case and from the decisions of the European Commission of Human Rights.

29. The articles of the draft, with the exception of articles 18 and 19, were relatively short. Perhaps the Special Rapporteur and the Drafting Committee could consider the possibility of breaking down article 24 into a number of separate articles that would come under a single heading and require only one commentary to cover them all.

30. Mr. CALLE y CALLE wondered whether, in

considering the time element, the Commission was speaking in terms of the duration of the material act or of the duration of the conduct of the State. It should be remembered that there were courses of conduct which became the conduct of the State only after a certain period; at the time at which they occurred—in the case of the conduct of individuals, for example—they were not yet the conduct of the State, but they could constitute the initiation of the breach of the obligation. Consequently, it was possible to speak of the duration of the act, the duration of the conduct and the duration of the breach.

31. The Special Rapporteur had rightly noted, in paragraph 49 of his report (A/CN.4/307 and Add.1), “the scant material of relevance provided by international judicial decisions”, and there was little in State practice to indicate what positions might be adopted by governments with regard to the duration of a breach attributed to them. Nor, again, could it be said that the literature, except perhaps that on criminal law, dealt with the matter at all extensively. The Commission would therefore have to call on the Special Rapporteur to look for and include in the commentary a number of examples, even hypothetical examples, to justify the formulation of a norm concerning the duration of the breach of an international obligation.

32. Personally, he found logical justification for article 24 in its consistency with the rest of the draft, and practical justification for it in its handling of the questions of the jurisdiction of international tribunals, the determination of the amount of reparation payable, and the continuity of nationality for the diplomatic maintenance of international claims. Furthermore, the Sixth Committee had already referred to the question of *tempus commissi delicti* and would certainly wish to see an article dealing with that matter included in the draft. Many States would consider it necessary to examine the time problems relating to the validity of the obligation, in other words, the existence of the obligation at the time of the commission of the wrongful act. Article 18 already included a retroactive provision whereby an act ceased to be considered as internationally wrongful if, subsequently, it became compulsory by virtue of a norm of *jus cogens*.

33. In article 24, the Commission was considering the time element in terms not of the validity of the obligation but of the duration of an internationally wrongful act. Such an act was made up of two elements, since article 3 specified that an internationally wrongful act was conduct consisting of an act or omission attributable to the State and conduct constituting a breach of an international obligation of the State. With regard to conduct, however, it was not appropriate to make a distinction in article 24 between obligations of conduct and obligations of result. As Mr. Ushakov had noted (1480th meeting), all legal rules called for a particular course of conduct, and that course of conduct must produce a particular result. It was the function of every legal norm to guide the conduct of the subject of the norm.

34. At the previous meeting, Mr. Verosta had suggested a change in the order of the articles under consideration. He himself thought that article 24 should retain its existing place in the draft and not precede article 22. Paragraph 3 might well be placed after paragraph 1, for it dealt with failure to prevent the occurrence of an event, and therefore involved the element of instantaneity rather than that of duration. On the other hand, he was somewhat concerned about the use of the term “instantaneous”. Sinking a ship by gun-fire might be regarded as an “instantaneous” act, but in fact the ship might take several hours to sink. Perhaps paragraph 1 might be formulated to read:

“If a breach of an international obligation is constituted by an act which takes place at a single moment in time, the time of the breach is represented by that moment, even if the effects of the act continue subsequently.”

In paragraph 3, the phrase “although prevention would have been possible” should be retained, for it related in fact to the time element; the event had to occur during the period of time in which it had been possible for the State to prevent the event from occurring. Finally, in the Spanish version of the article, the word “emanados”, in paragraph 5, was not appropriate and should be deleted. The paragraph should follow the formulation of article 18, paragraph 5, which spoke of actions or omissions “by the same or different organs of the State”.

35. Sir Francis VALLAT said that, following the Special Rapporteur’s completely convincing written and oral presentations, he experienced no difficulties with regard to the concept, or indeed the content, of article 24. Admittedly, there were some points of drafting, but they were inevitable in such a delicate and important matter as the time element. Clearly, the article must be in keeping with the previous articles and, at least as the English text was concerned, paragraphs 4 and 5 should be brought into line with paragraphs 4 and 5 of article 18.

36. The presentation of the article in the Commission’s report was of special importance. Three basic questions were involved: the justification for inclusion of the article in the draft, the actual content of the article, and its structure. In his opinion, it would be desirable to make the commentary very digestible, for the subject was by its very nature somewhat indigestible. In the matter of the justification for the article, it should be remembered that numerous factors were involved in the time element, such as the terms of the treaty in question or the date of the State’s accession to independence. Therefore, in illustrating the need to deal with the time element in the draft, the commentary should not give the impression that the examples given in any way constituted an exhaustive list. Similarly, it would be advisable to adopt a selective approach.

37. In the course of the discussion, many references had been made to nationalization, but he doubted whether it was one of the best illustrations for the

purposes of presentation of the Commission's report to the General Assembly. It was a highly controversial subject and not everybody would accept the right to full compensation as being axiomatic. At the same time, it would be a pity if the whole of the argument were based on the *Phosphates in Morocco* case. The Permanent Court of International Justice had considered the time element and the exception *ratione temporis* in the *Mavrommatis Palestine Concessions* case and the *Electricity Company of Sofia and Bulgaria* case, and the International Court of Justice had done the same in the *Interhandel* case and the *Rights of Passage over Indian Territory* case. After all, as the report indicated, the question of the *tempus commissi delicti* really arose only indirectly, for normally the exceptions dealt not with the commission of the breach, but with the date on which the dispute occurred, or the date of the facts or acts concerning the dispute. Reference to the more recent jurisprudence of the Court would help to restore the balance; for the purpose of achieving a rather wider perspective, reference could also be made to arbitral awards, in which the time element was frequently very important.

38. Great care should be taken in defining a single act which constituted a breach. Mr. Calle y Calle had referred to the sinking of a ship by gun-fire. A more obvious example was a case of murder, where death might occur a considerable time after the act had been committed. Indeed, in some cases, a charge of grievous bodily harm might not become a charge of murder until some weeks after the act in question. In that case, it was not the act itself that determined the time, but the date of death. He mentioned that example simply to illustrate the great care that would be required in the entire drafting of article 24.

*The meeting rose at 1.10 p.m.*

## 1482nd MEETING

*Friday, 19 May 1978, at 10.10 a.m.*

*Chairman:* Mr. José SETTE CÁMARA

*Members present:* Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

**State responsibility (continued)**  
(A/CN.4/307 and Add.1)  
[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR (continued)

ARTICLE 24 (Time of the breach of an international obligation)<sup>1</sup> (concluded)

<sup>1</sup> For text, see 1479th meeting, para. 1.

1. Mr. TSURUOKA thought article 24 was in its proper place in the general economy of the draft. However, the debate clearly showed that it dealt with very sensitive questions and that its practical application might prove difficult. In order to be useful, the rule to be established must not be too flexible, because it had to define a precise time or moment; at the same time, however, it must take account of the various possible types of obligations, because the *tempus commissi delicti* varied according to the actual nature of the obligation and according to the circumstances that had provoked the breach. What was needed, therefore, was a rule that was precise, but easy to apply in international practice.

2. Mr. RIPHAGEN wished first to express his admiration for the Special Rapporteur's report and oral introduction, which had brought such clarity to a difficult subject.

3. As he had said in connexion with article 23 (1478th meeting), if the content of an obligation was clear, the question of a breach of the obligation did not present any great problem. The time of the occurrence or period of duration of the breach usually involved straightforward fact-finding, for that moment or period was simply part of the facts of the case. However, the legal relevance of that moment or period for the purposes of the application of rules other than those that established the obligation was quite another matter. Even in respect of the relationship between articles 18<sup>2</sup> and 24 of the draft articles, some members had already referred to article 28 of the Vienna Convention on the Law of Treaties,<sup>3</sup> which made provision for the possible retroactive effect of a treaty obligation. At the same time, it could be claimed that the performance in good faith of a treaty obligation might imply that a party to the treaty remained bound by provisions of the treaty concerning facts or situations existing even after the treaty was no longer in force for the party in question. In other words, article 28 of the Convention provided not only for the retroactive but also for what might be called the "prospective" effect of a treaty.

4. Consequently, the text of draft article 24 should make it clear that the article did not prejudice the possibility that a treaty might be binding on a party "in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party", to use the terminology of article 28 of the Convention on the Law of Treaties, and that it did not prejudice the possibility that a treaty might be binding on a party in relation to any act or fact that took place or any situation that existed after the date of the expiry of the treaty with respect to that party.

5. Article 18, paragraph 2, of the draft expressly provided for the retroactive effect of an international obligation—admittedly, not on the basis of a treaty

<sup>2</sup> See 1476th meeting, foot-note 1.

<sup>3</sup> See 1478th meeting, foot-note 3.

but on the basis of a peremptory norm of general international law, and presumably one that was intended to have a retroactive effect. Article 18, paragraph 1, stated the general rule that an act of the State constituted a breach of an international obligation only if it were performed at the time when the obligation had been in force for that State. Article 24 in its existing formulation flowed directly from that provision. However, the time or period of an act or omission might be important for other rules, such as those concerning the nationality of claims, those concerning the competence of an international tribunal and, it might be added, those concerning the exhaustion of local remedies.

6. He was not fully convinced that the moment or period of the breach was relevant to the question of the amount of compensation payable, although it might be relevant to the question of other sanctions applicable in connexion with the breach. There again, it should be made quite clear that article 24 did not prejudge the relevance of the moment or period of the breach to those three types of rules—the rules on the nationality of claims, on the exhaustion of local remedies and on the competence of an international tribunal—for they involved considerations different from those determining the relevance of the moment or period of the breach to the rules concerning the obligation itself. Indeed, the rules relating to the competence of an international tribunal frequently dealt with facts or situations before or after a given date, rather than with acts, let alone breaches of obligations as such.

7. Even if the Commission confined itself to the question of the application of article 24 in relation to article 18, it still encountered the perennial difficulty of having to avoid prejudging the content of the primary rules. One way of overcoming that difficulty was to impart a certain tautological character to the provisions of article 24. Fortunately, a more or less tautological character was already apparent in the existing formulation, since the concepts employed in the text—the concepts of an instantaneous act, an act having a continuing character, and so on—were nowhere defined. Paragraphs 1 and 3 of the article specified that the time of the breach was the moment at which an act or event occurred, while paragraphs 2, 3 and 5 related to a longer period. If it was the Special Rapporteur's intention that the longer periods involved in the cases covered by paragraphs 2, 4 and 5 should fall within the period during which the obligation was in force for the State concerned, he had some hesitation in view of the possible retroactive and "prospective" effect of the treaty obligation. The moment of a so-called "instantaneous" act and the moment of the occurrence of an event were relevant if the obligation specifically related to such acts and events, as individualized elements in a continuous chain of facts. In the cases covered by paragraphs 2, 4 and 5, however, the nature of the obligation, and therefore the nature of the breach, meant that the acts and facts could not be broken down into separate elements. For instance, paragraph 2 spoke of an

act that subsisted, thereby pointing to a continuous chain of facts.

8. In order to retain the tautological character of article 24, any reference to substantive legal evaluations should be avoided. Consequently, the phrases "and remains in conflict with the international obligation" (paragraph 2), "although prevention would have been possible" (paragraph 3) and "in conflict with the international obligation" (paragraph 4) should be deleted, so as to avoid introducing substantive elements that fell within the realm of primary rules into the determination of the moment or period of a breach.

9. The CHAIRMAN, speaking as a member of the Commission, agreed that article 24 was necessary and well placed. It obviously had an intimate relationship with article 18, since both dealt with the problems of intertemporal law involved in the breach of an international obligation. Indeed, it could be said that article 24 was based on the principle embodied in article 18, paragraph 1, namely, that an act of the State contrary to an international obligation constituted a breach if it was committed at a time when the obligation had been in force for that State. The crucial point was the validity of the obligation at the time when the act was committed. The contemporaneity of the perpetration of the act and of what the Special Rapporteur had called the "force" of the obligation was thus the decisive factor for the genesis of the breach. That illustrated the importance of the time element, which was relevant not only to such practical problems as the determination of the amount of reparation payable, the establishment of jurisdiction and the ascertainment of the national character of claims, but also in determining the existence of the breach of the international obligation. The provisions of article 18 and of article 24 reflected the proposals contained in paragraphs 1 and 2 (*f*) of the resolution on "The intertemporal problem in public international law", adopted by the Institute of International Law in 1975, to which the Special Rapporteur had referred in his fifth report.<sup>4</sup> Thus, in all the intricate situations arising from the various applications of the rules of intertemporal law, the underlying principle was that any act must be assessed in the light of the rules of law which generated obligations and which were contemporaneous with it.

10. The Commission should therefore endeavour, as other members had suggested, to maintain the parallelism between the wording of article 18 and that of article 24. Although he would not go as far as Mr. Verosta, who had said (1480th meeting) that the set of draft articles under consideration should be entirely rearranged, he thought there were a number of problems for the Drafting Committee to consider. For example, paragraphs 3, 4 and 5 of article 18 did not refer to the case of an obligation to prevent an event, which had rightly been included in the list of

<sup>4</sup> *Yearbook... 1976*, vol. II (Part One), p. 21, doc. A/CN.4/291 and Add.1 and 2, para. 60.

situations covered in article 24. In addition, since article 24 related to problems of the *tempus commissi delicti*, it might be advisable for it to deal with the question of a peremptory norm of international law excluding the wrongful character of an act or, indeed, making it compulsory.

11. With regard to article 24 itself, he agreed with Mr. Pinto (1480th meeting) regarding the problem of omissions. According to article 3, the wrongful conduct of a State might consist either of an action or of an omission. In other articles, however, the word "act" was understood to cover the concept of an omission. In the situations referred to in article 24, it was obvious that wrongful conduct might consist either of an action or of an omission, not only under paragraph 5, where explicit reference was made to "the action or omission which initiated the breach and that which completed it", but also under paragraphs 1, 2 and 4, relating to instantaneous, continuing and aggregate acts, and under paragraph 3, relating to failure to prevent an event from occurring, where omissions were of paramount importance. The Drafting Committee should take account of that comment and see whether it would be possible to include a reference to the concept of actions and omissions in all the paragraphs of the article.

12. With regard to the arrangement of the article, he disagreed with some other members of the Commission who thought that the positions of paragraphs 2 and 3 should be reversed. He saw a necessary link between paragraph 1, which referred to "an instantaneous act", and paragraph 2, which referred to "an act having a continuing character"; that contrast of situations should be preserved.

13. Much had been said about the use of the word "instantaneous", in paragraph 1. His own view was that it might be misleading and should be deleted, since very few international acts had the duration of a flash of lightning. When the Special Rapporteur had described "instantaneous acts" during his 1939 course on "le délit international", he had said that:

Most writers divide delicts into two possible categories: those made up of offences which, once committed, cease *ipso facto* to exist and cannot continue subsequently; and those made up of offences which, after their first commission, are of such a nature that they continue in exactly the same way for some time.<sup>5</sup>

In keeping with that view, the Commission might well consider the following wording for the beginning of paragraph 1: "If a breach of an international obligation is constituted by an act which, once committed, ceases to exist...". Such wording would eliminate the idea of instantaneousness, which some members of the Commission had rejected on sound philosophical grounds.

14. As to the words "even if the effects of the act continue subsequently", at the end of paragraph 1, he was of the opinion that, if they were retained in

paragraph 1, they would also have to be added in the other paragraphs of the article. The easiest solution would be simply to delete them from paragraph 1, because every act constituting a breach, whether instantaneous, continuing, composite or complex, had a duration, but there came a tie when the act ceased to exist, even though its consequences or effects might continue.

15. Mr. AGO (Special Rapporteur), replying to the comments on article 24, said that the content of that article in no way called into question that of the preceding articles, despite the links that existed between some of them and the article under consideration. It was true that article 18 contained a list of situations similar to those referred to in article 24, but the purpose of the two articles was not the same. Article 18 was intended to establish the consequences, in those situations, of the basic principle that the "force" of an international obligation and the conduct of a certain State must be contemporaneous for such conduct to be considered as entailing a breach of that obligation. It sometimes happened, indeed, that the breach of an international obligation occupied a certain "depth of time", to quote the expression used by Mr. Reuter.<sup>6</sup> How, then, was the coincidence between the "force" of the obligation and the perpetration of the action or omission, or actions or omissions, of the State, to be understood? As he had already pointed out, that was a separate question from the one dealt with in article 24. Nevertheless, mutually compatible solutions must be found for both. The application of the criteria set out in article 18 was obviously not sufficient to resolve the problems raised by article 24, but those criteria must be taken into account in the solution of those problems. Since, for example, the draft provided, in article 18, that a continuing act constituted a breach of an international obligation if that obligation had been in force at any time during the performance of that act, it could not now decide that the breach was perpetrated only at the initiation of that act. Similarly, after expressing the opinion that, in the case of a complex act, there was breach of an international obligation only if that obligation had been in force from the beginning of the performance of that act, the Commission could not now say that, in the event of a denial of justice, for example, the decisions of the courts of first and second instance were not included in the time of the perpetration of the breach, and that only the decision of the Supreme Court was so included.

16. Some members of the Commission had also expressed concern about the relationship between article 24 and articles 20 and 21. In articles 20 and 21, the Commission had drawn a distinction between a breach of obligations of conduct and that of obligations of result. The distinction between those two categories of obligations had been clearly established, and the conditions for the existence of a breach had been specified in relation to both the former and the latter. The two articles thus answered the question

<sup>5</sup> R. Ago, "Le délit international", *Recueil des cours de l'Académie de droit international de La Haye*, 1939-II (Paris, Sirey, 1947), vol. 68, p. 519.

<sup>6</sup> See A/CN.4/307 and Add.1, foot-note 33.

whether or not there had been a breach. The article under discussion, on the other hand, had to answer the question as to when the breach took place. In that connexion, Mr. Ushakov had rightly pointed out (1480th meeting) that international law could endeavour to attain a certain goal—non-discrimination, for example—in different ways. A State might be specifically required, to that end, to introduce certain legislative provisions in its legal order; an obligation of conduct then arose, and, if the State did not adopt such provisions, that fact alone constituted a breach of its international obligation. If it were required only to ensure that no discrimination took place within its borders, the obligation was one of result, and there was no breach of its obligation if it achieved the required result, namely, non-discrimination, whatever the means—legislative, administrative or judicial—it employed. Some members had wondered whether the adoption of a law that made acts of discrimination possible did not already constitute a breach of the latter obligation. However, the Commission had rightly answered that question in the negative. Even a law creating an obvious obstacle to the achievement of the required result would not suffice to entail a breach of the obligation, provided acts of discrimination did not in fact take place. A preparatory act alone was not sufficient; it was necessary to wait until it could be stated with certainty that the result had not been achieved.

17. Articles 20 and 21 were complementary. In paragraph 1 of article 21, relating to obligations of result, the Commission had used the conjunction “if” in preference to “when”, since the latter term could have a temporal sense that should be avoided in that provision. As he had said before, the purpose of that provision was to establish whether a breach of an obligation existed, not when the breach occurred. Paragraph 2 of article 21 introduced another element, but which also concerned the existence of the breach. The case envisaged was that of an obligation that allowed a State to carry out its duty by ensuring, by subsequent conduct, the result that it might have failed to ensure by its previous conduct, or even by ensuring an equivalent result. As for article 22, it related to obligations of result whose breach entailed, in addition, lack of co-operation on the part of individual beneficiaries of the obligation. In the absence of such lack, the breach of the obligation could not be established. Since the provisions followed logically upon one another, there would be no reason to modify their sequence. Article 22 defined the content of paragraph 2 of article 21 more precisely by reference to a special case. In any event, not until it had examined the observations of governments could the Commission possibly consider changing the order of those articles.

18. In particular, he would not favour the introduction in the text of article 21 of the concept of a “situation... that is not in conformity with the situation required by the obligation” to define the situation in which the required result was not achieved. In the case of a complex act, for example, the decision of

the court of first instance created a situation that was not in conformity with the required result, but it could not be said at that early stage that the State would not ultimately achieve that result.

19. Recalling that Mr. Verosta had raised the question (1480th meeting) of the advisability of providing, in each of the articles relating to the various categories of breaches of international obligations, that account be taken of the temporal element, rather than devoting a separate article to that element, he feared that that solution would create many difficulties. There was no reason at all for the temporal aspect to be differently characterized according to the characteristics of the obligation that was breached. The breach of an obligation of conduct, like that of an obligation of result, could depend on a continuing act as much as on an instantaneous act. The breach of an obligation of result, in turn, could be accomplished by an act occupying a “depth of time”, but also, perhaps more seldom, by an act that was not of that nature. Article 21 should therefore deal solely with the existence of a breach of an obligation of result, and not with the time of the perpetration of that breach. The situation would become even more complicated if it were necessary to cover in that rule the case of composite acts and complex acts. In the final analysis, the solution suggested, far from simplifying matters, would only create difficulties. Moreover, the temporal element was so important, and the Sixth Committee had been so insistent that the Commission should study it, that it deserved an article to itself instead of brief additions to other articles.

20. On the question of a possible definition of the temporal element, he thought the Commission would be well advised not to embark on that task, of which he did not see the utility—at least at that juncture.

21. It was not easy to translate the expression *tempus commissi delicti* into French. Since the term “commission” was now little used in French as a substantive derived from the verb “commettre”, and since the term “perpétration” generally had a pejorative connotation, he had opted for the time being for the expression “time of the breach of an international obligation”, by which he meant the time during which the internationally wrongful act had been committed or perpetrated. It was quite true, as Mr. Ushakov had noted, that he had sometimes used the word “moment” and sometimes the word “duration” in his report. In fact, he had been looking for a term that would cover both those concepts, although in certain cases it was necessary to distinguish between “moment” and “duration”. In some cases the two concepts coincided; in others there was no such coincidence. However that might be, his object, in that article, was the determination of the *tempus commissi delicti*—the time during which the internationally wrongful act was perpetrated—rather than of the time at which the breach of the obligation was established and responsibility was therefore created. In the case of a complex act, for example, the breach was established and responsibility origi-

nated only at the time when the conclusive element of that act completed the breach. But the time of the perpetration of the internationally wrongful act was the whole of the period during which the various elements constituting the complex act occurred. In the case of a continuing act, responsibility originated at the very beginning of the act. If a State illegally occupied the territory of another State, for example, there was a breach, and responsibility originated immediately, but that did not mean that the duration of the internationally wrongful act did not extend beyond that initial time. Moreover, the wrongful situation could terminate in some other way than through the cessation of the act in question. A treaty might be concluded under which the State that had been the victim of the occupation accepted a situation that had originally been wrongful. It was therefore necessary to distinguish clearly between the time at which responsibility originated and the time of the perpetration of the internationally wrongful act, which could be a point in time or a period of time. The wording of the article could of course be adjusted to allow those two aspects to stand out more clearly.

22. Sir Francis Vallat (1481st meeting) had rightly singled out three aspects of the problem under consideration: the justification for inclusion of the rule in the draft, the actual content of the article, and its structure. With regard to the first point, the Sixth Committee had placed such great emphasis on the need to study that rule that that in itself might be regarded as sufficient justification. Obviously, however, the Commission should not underestimate the importance of the question. With regard to the nature of the rule, Mr. Pinto had spoken (1480th meeting) of a rule of interpretation, whereas he personally had always regarded it as a substantive rule. On the other hand, the examples he had given in his report made no claim to be exhaustive, and the only reason he had given them was to show that the question was by no means a theoretical one. But it should not be inferred from that, as Mr. Ushakov had feared, that the Commission would have to deal with the scope of declarations of acceptance of the jurisdiction of international tribunals accompanied by a reservation *ratione temporis*, with the national character of international claims, or with the amount of reparation.

23. Mr. Reuter had also referred (1479th meeting) to prescription. The *tempus* of an internationally wrongful act could indeed be important from the standpoint of prescription although it was necessary to make it clear what prescription was at issue. There could be prescription for the consequences of an internationally wrongful act, and in particular for the possibility of invoking responsibility. In that case, the potential period of time of prescription could not begin until after the wrongful act had ceased. In some cases, prescription could serve to make lawful a situation that had originally been unlawful. That was why he had avoided entering upon a subject that was still very controversial in international law. The ex-

amples he had provided came within the ambit of international law of the most traditional kind. Nevertheless, the Commission might consider it necessary to add further examples in the commentary to article 24; he would have no objection to such a step.

24. As had been noted, the temporal element could play an important role in the interpretation of article 19, relating to international crimes and delicts. In that provision, the Commission had stressed the seriousness of the breach of certain international obligations, a seriousness that could also be estimated in terms of the duration of the internationally wrongful act. The concepts of "maintenance by force of colonial domination", of breach "on a widespread scale" of certain international obligations and of international obligations "of essential importance for the safeguarding and preservation of the human environment" could also involve that temporal element. It was thus clear that the *tempus* had even more repercussions than those he had mentioned as examples. He had confined himself to showing that the rule he was proposing to define was of obvious importance in several respects. He could have added that it would also be of undoubted importance when the time came to determine the penalty to which the State that was the author of a breach of an international obligation would be liable.

25. Mr. El-Erian's suggestion<sup>7</sup> that several articles should be devoted to the various cases dealt with in article 24 had both advantages and disadvantages. Everything depended on the importance the Commission wished to attach to the question. Conceivably, it could devote a separate chapter to it, thereby isolating from chapter III (Breach of an international obligation), a chapter IV, concerned specifically with the *tempus commissi delicti*. Without going so far as to suggest that solution, he would advise that the Drafting Committee consider the possibility of dividing article 24 into several articles.

26. Several members of the Commission had commented on the English version of article 24. With regard to the term "comportement", in paragraph 5, which had been translated into English as "action or omission", he agreed that in practice there was often a combination of actions and omissions, and that any omission, even in the case of a crime relating to an event, had certain aspects that were in the nature of an action.

27. With regard to the form of article 24, Mr. Tsu-ruoka had stressed the need to draft a text that would be easy to apply, while Mr. Riphagen had warned against the temptation to venture into the area of primary rules. Mr. Quentin-Baxter (1481st meeting) had considered it essential to specify that the effects of an instantaneous act must be distinguished from an act having a continuing character. As Mr. Calle y Calle had observed (*ibid.*), the term "instantaneous" was not, in fact, always appropriate. Since a distinction was drawn between an "instan-

<sup>7</sup> 1481st meeting, para. 29.



taneous act” and an “act having a continuing character”, and since the former expression was a recognized term in general legal theory, he had made shift with it for the time being, but he was open to other suggestions that were less likely to give rise to controversy.

28. The order of paragraphs 2 and 3 of article 24 could be left unchanged. As it stood, the article brought out fairly clearly the difference between instantaneous acts and continuing acts. He would agree, however, that there were advantages in dealing successively, in paragraphs 3, 4 and 5, with continuing acts, composite acts and complex acts, in other words, with all acts having the common characteristic of occupying a “depth of time”. It would then be necessary to provide separately for the paragraph concerning the *tempus commissi delicti* in cases of breach of obligation to prevent an event from occurring.

29. He thought Mr. Riphagen had been right to observe that the words “the act subsists and remains in conflict with the international obligation”, in paragraph 2, were not absolutely indispensable, since the clarification they provided already followed from paragraph 3 of article 18. However, he wondered whether such repetition might not be useful. With regard to the words “although prevention would have been possible”, in paragraph 3 of article 24, some members favoured their retention, others their deletion. In the end it might be best to delete them, since they related to the existence of the international obligation rather than to the temporal element. In that case, the Drafting Committee should consider the connexion between that paragraph and article 23. Lastly, paragraph 5 of article 24 should be redrafted in the light of paragraph 5 of article 18, since the actions or omissions constituting a complex act need not necessarily originate from different organs of the State, as had been noted by Mr. Calle y Calle (1481st meeting) and Mr. Francis (1480th meeting).

30. The CHAIRMAN suggested that article 24 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>8</sup>

*The meeting rose at 1.05 p.m.*

<sup>8</sup> For consideration of the text proposed by the Drafting Committee, see 1513th meeting, paras. 1 and 2, 5-8, and 19 *et seq.*, and 1518th meeting, paras. 1 and 2.

## 1483rd MEETING

*Monday, 22 May 1978, at 3.05 p.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr.

Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

### The most-favoured-nation clause (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2)

[Item 1 of the agenda]

#### INTRODUCTORY STATEMENT BY THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his first report on the most-favoured-nation clause (A/CN.4/309 and Add.1 and 2), which had been prepared with a view to the second reading by the Commission of the draft articles adopted at its twenty-eighth session.<sup>1</sup>

2. Mr. USHAKOV (Special Rapporteur) said that, in its resolutions 31/97, of 15 December 1976, and 32/151, of 19 December 1977, the General Assembly had recommended that the Commission should complete at its thirtieth session the second reading of its draft articles on the most-favoured-nation clause, taking into account the written comments of Member States of the United Nations and the oral comments made by them in the course of the discussion of the draft articles in the Sixth Committee and the General Assembly, as well as the comments made by the appropriate United Nations organs and intergovernmental organizations. The generally positive response to the Commission's draft articles was mainly attributable to the knowledge and competence of Professor Endre Ustor, the previous Special Rapporteur. Written comments on the draft articles had been received from a number of Member States, organs of the United Nations, specialized agencies and other intergovernmental organizations; they were reproduced in document A/CN.4/308 and Add.1/Corr.1.

3. The report under consideration (A/CN.4/309 and Add.1 and 2) was divided into four sections. Section I contained an introduction, while sections II, III and IV dealt, respectively, with comments on the draft articles as a whole and comments on individual provisions of the draft articles, and with the problem of the procedure for the settlement of disputes relating to the interpretation and application of a convention based on the draft articles. The comments on the draft articles as a whole had been classified under four headings: importance of the problem and of the work of codification; relationship between the most-favoured-nation clause and the principle of non-discrimination; the clause and the different levels of economic development of States; general character of the draft articles.

4. With regard to the last of those headings, he noted that the Commission had several times considered the question whether the draft should be an auton-

<sup>1</sup> *Yearbook... 1976*, vol. II (Part Two), pp. 11 *et seq.*, document A/31/10, chap. II, sect. C.

omous set of articles or an annex to the Vienna Convention on the Law of Treaties,<sup>2</sup> and that it had opted for the former solution. In any event, it was a question the Commission could discuss again when it had completed its second reading of the draft articles. Another question on which the Commission could not take a decision until after its second reading of the draft was the final form of its codification of the topic. The comments on the scope of the draft articles were altogether in line with the Commission's thinking.

5. Mr. ŠAHOVIĆ thought the Commission ought to consider the draft articles in the light of the written and oral comments of Member States and international organizations, and to respond to the wishes expressed in those comments by analysing in the commentary certain questions relating to the structure, wording and general presentation of the draft. Those questions would in any case have to be considered by the Drafting Committee.

6. The CHAIRMAN thanked the Special Rapporteur for his lucid and detailed introduction to sections I and II of his first report—a report on which he was to be congratulated and which would serve as an excellent basis for the work the Commission was to carry out at its current session on the topic of the most-favoured-nation clause.

7. The task of a Special Rapporteur who took over the study of a topic at a late stage was not an easy one, for, in inheriting the results of year of painstaking efforts and lengthy discussions by the Commission, he had to resist the temptation to propose new solutions to problems that had already been settled. He also had to take account of the comments of Member States, as well as of organs of the United Nations, specialized agencies and other intergovernmental organizations, and then reach practical and realistic conclusions in his own reports in order to prevent the Commission, which now had to complete the second reading of the draft articles on the most-favoured-nation clause, from entering into another general debate on questions it had already discussed. Thanks to his wisdom, technical skill and sense of international realities, however, the new Special Rapporteur, who had covered in his report the vast and complex topic of the most-favoured-nation clause in a masterly way and with exceptional faithfulness to the draft articles submitted by his predecessor, was sure to be successful in the task entrusted to him.

DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING

ARTICLE 1 (Scope of the present articles)

8. The CHAIRMAN invited the Special Rapporteur to introduce article 1, which read:

*Article 1. Scope of the present articles*

The present articles apply to most-favoured-nation clauses contained in treaties between States.

9. Mr. USHAKOV (Special Rapporteur) said that the term "treaty", used in article 1, was defined in article 2, paragraph (9), in the same way as in the Vienna Convention on the Law of Treaties. He considered it unnecessary to stipulate in article 1 that the articles applied to treaties in written form, as had been suggested by certain Member States in their oral comments, since the word "treaty", as used in article 1 and in the draft as a whole, had the sense attributed to it in article 2, paragraph (a), which provided that "treaty", meant an agreement in written form.

10. He wished to draw particular attention to the written comments by Luxembourg, Czechoslovakia, and the Netherlands (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A), and by EEC (*ibid.*, sect. C, 6), to the effect that the scope of the draft articles should be extended to most-favoured-nation clauses contained in treaties concluded by certain international entities other than States. EEC, for instance, had proposed that article 2 should be supplemented by the addition of the phrase:

"The expression 'State' shall also include any entity exercising powers in spheres which fall within the scope of these articles by virtue of a transfer of power made in favour of that entity by the sovereign States of which it is composed." (*Ibid.*, para. 7.)

11. What exactly were those international entities? Luxembourg saw them as "unions or groups of States" (*ibid.*, sect. A), Czechoslovakia as international organizations which had the right to conclude international agreements "on behalf of their member States" (*ibid.*), and the Netherlands as international organizations that could act not only on an equal footing with a State in international relations but also in the place of the States that had formed them (*ibid.*). Finally, EEC regarded itself as an organization exercising in a specific area "powers... which are normally wielded by States" (*ibid.*, section C, 6, para. 7).

12. In his opinion, an entity such as EEC was neither a federation nor a confederation of States. Nor was it an international organization properly speaking, for international organizations were intergovernmental organizations that had no supra-State sovereignty and could conclude treaties only in their own name, and not in the name of their members. In his opinion, it was a supranational organization, since it could act on behalf of its member States and bind them by treaties. That was an altogether novel phenomenon, which could not be assimilated either to a State or to an international organization, and to which none of the existing rules of international law applied.

13. He considered it preferable not to extend the scope of the draft articles to treaties concluded be-

<sup>2</sup> For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287.

tween States and supranational organizations such as EEC, since he did not see how it was possible, from the standpoint of the Convention on the Law of Treaties, to place a supranational entity on the same footing as States. It was a question that went far beyond the scope of the draft articles, since it arose in all areas of international law, and particularly in connexion with the responsibility of supranational organizations. The question was whether rules that had been framed for States could be applied to supranational organizations. That was a very broad question, which it was impossible to answer in the context of the draft articles. He therefore suggested that the existing text of article 1 should be left unchanged and that the scope of the draft articles should continue to be limited to most-favoured-nation clauses contained in treaties between States. It should be realized that, if the definition which EEC proposed to add to article 2 were adopted, it would mean having to define the expression "State"—an impossible task—and to amend the definitions set forth in paragraphs (b), (c), and (d) of article 2.

14. Finally, he pointed out that the saving clause contained in article 3, paragraph (c), broadened the scope of the draft article by extending it to "the relations of States as between themselves under clauses by which States undertake to accord most-favoured-nation treatment to other States, when such clauses are contained in international agreements in written form to which other subjects of international law are also parties".

15. Mr. REUTER said that if the Commission excluded treaties concluded with international entities such as EEC, it would seriously limit the scope of the draft and might impair its efficacy. It seemed to him dangerous to categorize EEC as a supranational organization simply because it could conclude treaties in fields which lay within the competence of States, since, in concluding headquarters agreements, the United Nations and the specialized agencies had also concluded agreements with States in areas that were normally within the competence of States. In nuclear matters, for instance, it was essential for certain international organizations to be able to conclude agreements with States in areas that had previously lain exclusively within the competence of States. To adopt too rigid an approach to the question would prevent the conclusion of agreements that were necessary for world peace.

*The meeting rose at 6.05 p.m.*

## 1484th MEETING

*Tuesday, 23 May 1978, at 10.05 a.m.*

*Chairman: Mr. José SETTE CÂMARA*

*Members present: Mr. Calle y Calle, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njen-*

*ga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.*

### Visit of the President of the International Court of Justice

1. The CHAIRMAN said it was a great honour to welcome, on behalf of all the members of the Commission, Mr. Jiménez de Aréchaga, President of the International Court of Justice. As a member of the Commission from 1960 to 1969, Mr. Jiménez de Aréchaga had made a notable contribution to its work; his presence at the discussion of the draft articles on the most-favoured-nation clause was particularly timely, since he had been the first to suggest that the topic should be considered by the Commission.

2. Mr. JÍMENEZ DE ARÉCHAGA (President of the International Court of Justice) said he was much gratified by the opportunity to renew the close association that had always existed between the Commission and the International Court of Justice. The Court continued to follow the Commission's work with keen interest, and was confident that that work would help to resolve the crisis that currently beset international justice.

### The most-favoured-nation clause (*continued*) (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2)

[Item 1 of the agenda]

#### DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 1 (Scope of the present articles)<sup>1</sup> (*continued*).

3. Mr. SUCHARITKUL said that article 1 raised the question of the limits of the scope of the draft articles. He agreed with the Special Rapporteur that there was no need to specify that the scope of the articles should be limited to treaties concluded "in written form", as had been suggested (A/CN.4/309 and Add.1 and 2, para. 60). There were two reasons for that: first, most-favoured-nation clauses were to be found only in treaties concluded in writing, and, secondly, as the Special Rapporteur had pointed out, the term "treaty" was defined in article 2, paragraph (a),<sup>2</sup> of the draft as an "international agreement concluded... in written form".

4. With regard to the proposal to extend the scope of the draft articles to treaties concluded between States and other subjects of international law, he thought there was no need for controversy concerning the question whether an international organiza-

<sup>1</sup> For text, see 1483rd meeting, para. 8.

<sup>2</sup> See 1483rd meeting, foot-note 1.

tion could have supranational personality. It was sufficient to accept that, as sovereign States, the States members of an international organization could, without having to attribute to the organization any supranational personality, delegate to it the power to conduct negotiations and conclude treaties in certain specific areas. For example, in the case of the technical assistance agreement concluded in 1968 between ECAFE and ASEAN, the capacity of ECAFE to conclude international agreements had been recognized by the internal law of Thailand and by the headquarters agreement concluded between Thailand and the United Nations, while the competence of ASEAN in the matter had been recognized in the Bangkok Declaration of 8 August 1967.<sup>3</sup> But, like the Special Rapporteur, he thought the time might not be ripe to extend the scope of the draft articles to treaties concluded between subjects of international law other than States, a question the Commission was currently studying in connexion with the topic of treaties concluded between States and international organizations or between two or more international organizations.

5. In its comments (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 1), UNESCO had implicitly suggested, by its reference to a "most-favoured-organization clause", another way in which the scope of the draft articles might be extended. In his own view, the expression "most-favoured-nation clause" was satisfactory, inasmuch as it was the expression traditionally used. It might, admittedly, be asked what was the precise meaning of the term "most-favoured-nation" and why the word "nation" was used instead of the word "State". But by defining "most-favoured-nation treatment" as "treatment accorded by the granting State to the beneficiary State", article 5 showed that the concept of a nation coincided with that of a State. It would therefore be impossible to replace the word "nation" by the word "organization", and to speak of a "most-favoured-organization clause".

6. That being so, he thought that the Commission must respect the limits set by the existing text of article 1.

7. Mr. EL-ERIAN said that article 1 should remain unchanged, for the reasons advanced by the Special Rapporteur. It must always be borne in mind that, in view of the circumstances that had led to its inclusion in the agenda of the Commission, the topic under discussion was very closely bound up with the law of treaties.

8. In his admirably lucid introduction of article 1, the Special Rapporteur had referred to the difficulty of arriving at a definition of the term "State". In that connexion, it should be remembered that, in its report on its very first session, the Commission had stated that no useful purpose would be served by an

effort to define that term, although such a course had been suggested by some governments.<sup>4</sup> It had used the term in the sense commonly accepted in international practice and had not considered itself called upon to set forth in the draft declaration on the rights and duties of States the qualifications to be possessed by a community in order that it might become a State. In other words, when dealing with the rights and duties of States—surely the most obvious occasion on which to succumb to the temptation of defining the concept of a State—the Commission had decided not to undertake such a task. Moreover, the Commission had followed that practice not only in respect of the law of treaties but also in dealing with the topic of representation of States and with that of treaties concluded between States and international organizations.

9. Mr. CALLE y CALLE noted that Czechoslovakia and the Netherlands had commented (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A) that article 1 greatly limited the scope of the draft because it excluded clauses contained in treaties involving international organizations or entities to which the member States had delegated their powers, a view that had also been very clearly expressed by EEC and, in some degree, by the Board of the Cartagena Agreement (*ibid.*, sect. C).

10. From the outset, it had been decided that a special study should be made of the most-favoured-nation clause, not simply in terms of its application to trade and commerce, but also as a legal institution, and to formulate a draft that would in some way act as a complement to the Vienna Convention on the Law of Treaties.<sup>5</sup> Consequently, there was a dividing line between the problem of treaties between States and the new problem, which was on the agenda of treaties between States and international organizations or between two or more international organizations. Article 1 rightly limited the application of the draft to treaties between States, a limitation that was further underscored by the definition of "treaty" contained in article 2, paragraph (a).

11. To define the basic concept of a State would be a long-term task, and one that would undoubtedly take even longer than that of defining "aggression". No definition of the concept of "State" had been given in other conventions, where such a definition would have been more appropriate than in the draft under consideration. The Commission should continue to use the term "State" in accordance with common sense and common practice, and avoid assimilating certain entities to States, which would in effect be the result of adopting EEC's suggestion for the inclusion of a further definition in article 2 (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 7). He was fully aware of the importance of international organizations and of treaties

<sup>3</sup> American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XI, No. 6, November 1967, p. 1233.

<sup>4</sup> *Official Records of the General Assembly, Fourth Session, Supplement No. 10 (A/925)*, para. 49.

<sup>5</sup> See 1483rd meeting, foot-note 2.

containing most-favoured-nation clauses concluded between such organizations and States, but considered that at that juncture the matter lay largely outside the scope of the draft articles.

12. Article 3, paragraph (c), specified that the restrictions on the application of the articles would not affect the application of their provisions to the relations among States under clauses by which States undertook to accord most-favoured-nation treatment to other States, when such clauses were contained in international agreements in written form to which other subjects of international law were also parties. Such should be the case in respect of international agreements containing most-favoured-nation clauses concluded by EEC and other organizations of the same type. At some future date, another set of articles might well have to be drafted to cover situations in which other subjects of international law were involved, but for the moment article 1, which defined the scope of the draft, should remain as it stood.

13. Sir Francis VALLAT wished to pay a tribute to the care and balance with which the Special Rapporteur had dealt with the difficult question of the case of EEC as an entity exercising sovereign powers on behalf of its member States in an area governed by international law. He agreed that it would be wrong, at that stage, to change the general scope of the draft articles. The proper course was to move ahead and, in accordance with the usual practice, to consider the articles relating to definitions later, after the Commission had had an opportunity, in the light of the discussion, to assess the impact of the draft on situations such as that of EEC; otherwise, the Commission would run the risk of taking a sudden and premature decision, before it had considered all the relevant factors.

14. At the same time, it was essential to place the problem into proper focus. EEC in fact existed, and was now the largest trading entity in the world. The problem was therefore a substantial one and could not be ignored, for it would be pointless to elaborate a set of articles that bore no relation to reality. In the customs sphere, sovereign powers were actually exercised by EEC itself; they were no longer exercised or, in effect, possessed by the member States. For example, EEC negotiated as one of the contracting parties to the General Agreement on Tariffs and Trade, an area in which the most-favoured-nation clause was a matter of great importance. Was the Commission to adopt a negative attitude and produce a set of articles on most-favoured-nation treatment which, as far as trade and commerce were concerned, excluded EEC and similar entities?

15. The treaties negotiated and concluded with States by EEC were certainly governed by international law. The Commission, as a body concerned with the codification and progressive development of international law, could not afford to ignore new problems that arose in the sphere of international law. Moreover, the treaties concluded by EEC were binding on its member States. Indeed, EEC legislation on trade and customs matters was directly ap-

plicable not to the governments but to the peoples of the member States. EEC's regulations, which were in effect laws, contained a formula specifying that they were binding in their entirety and directly applicable in all member States. Consequently, the courts of the member States were legally bound to apply those regulations as legislation of EEC. International, legislative and executive functions were exercised directly by the EEC Commission as such, and it was irrelevant to assert that they were exercised on behalf of the member States. That was the factual and the legal reality. If the International Law Commission chose to place EEC and similar organizations outside the scope of the draft, it would deprive the future instrument on the most-favoured-nation clause of much of its impact in matters of trade.

16. He saw some merit in the EEC suggestion concerning article 2, since it did not attempt to define a State, but simply suggested that the expression "State" also included an entity like EEC. That was not the same thing as attempting a comprehensive abstract definition of the concept of "State". Equally, members would agree that EEC was not in fact a State; it was, perhaps, on the way to becoming a federation, which might be described as a federation with limited powers conferred on the central government. Again, it would not be helpful to classify it as a supranational organization, for it would be more difficult to define the concept of a supranational organization than to define the concept of a State.

17. History never stood still. It was always possible to find examples of cases where general theory had to be adapted to the needs of a particular situation. Plainly, the question as to how to make the draft articles applicable to organizations like EEC called for serious study and deep reflection.

18. Mr. JAGOTA said that the draft articles under study concerned a branch of the law of treaties that had been left aside at the time of the adoption of the Vienna Convention on the Law of Treaties because it required further consideration by the Commission. The most-favoured-nation clause was usually included in trade agreements or treaties and was thus an integral part of what was popularly known as the law of international economic relations. However, the Commission had wisely taken the view that, since most-favoured-nation treatment could be applied in many areas other than trade and commerce, the draft articles should be given broad scope. It was for that reason that article 4 specified that the most-favoured-nation clause meant a treaty provision whereby a State undertook to accord most-favoured-nation treatment to another State "in an agreed sphere of relations". Clearly, it was open to the States concerned to determine the particular sphere of relations. Consequently, although most examples of the application of the clause might relate to trade and commerce, the Commission should ensure that the rules enunciated in the draft remained broad in content and scope.

19. It might also be said that the draft articles under study were perhaps not of the same consequence

as other drafts prepared by the Commission, since they laid down only residual rules in other words, rules that would apply where the parties did not agree, either in the treaty containing the clause or otherwise, on different provisions concerning the application of the clause, as provided by article 26 of the draft, irrespective of whether the future instrument took the form of an additional protocol to the Convention on the Law of Treaties, or of a separate convention. It was thus recognized that, if any problem arose which called for special treatment or consideration, the parties were free, in formulating the clause in a bilateral or multilateral treaty, to deal with the problem as they saw fit. The draft articles therefore had their place, but they could not be viewed as being of the same fundamental importance as rules for general application from which derogations would be permitted only within certain limits.

20. The question had also arisen whether the draft, which was now concerned with most-favoured-nation clauses contained in treaties between States, should be extended to cover similar clauses in treaties between States and other subjects of international law. In fact, the Commission had already decided to deal separately with the topic of treaties concluded between States and international organizations or between two or more international organizations, for the very good reason that it could then be handled in a thorough and systematic fashion. If two topics were dealt with in a single text, there would be a far greater number of problems of interpretation.

21. The inclusion of most-favoured-nation clauses in treaties other than treaties concluded between States alone was already contemplated in article 3, which provided that, for such treaties, the legal régime governing the application of the clause would be independent of the régime set out in the draft. Thus, in a treaty between, say EEC and a State or between EEC and another international organization, there was nothing to prevent the parties from specifying a comprehensive legal régime to cover the application of the most-favoured-nation clause contained in the treaty in question. Nevertheless, he fully appreciated that the problem could not be eluded simply by dealing separately with States on the one hand and international organizations on the other. Inevitably, the question would arise as to how to make a distinction between a State and another subject of international law, more particularly when that subject was an international intergovernmental organization. Obviously, in the context of the topic under consideration, the problem required further consideration. One way to approach it would be to consider whether the relationship between the constituent States and the organization concerned was regulated by international law or by constitutional law. If the relationship was such that both the constituent members and the organization itself were subjects of international law and had treaty-making capacity, then they did not form a State for the purposes of the draft. If, on the other hand, the relationship came under constitutional law, the union of States was a State *per se* for the

purposes of the draft articles. New organizations of a *sui generis* character were emerging, organizations that were able to establish rules and regulations directly applicable to the peoples of the constituent States of the organizations, and that did not require enabling legislation on the part of the government of those States.

22. At the current stage, the best course would be to seek to understand the problem, to confine the scope of the draft to treaties concluded in written form between States, and then to reflect on the possibility, either in a separate text or by means of a stipulation concerning the application of the draft, of setting out guidelines as to what kind of union or community might be covered by the term "State". Should the draft eventually take the form of a convention, difficulties would arise if not only an organization like EEC but also its member States were able to become parties to the convention. It was enough to think of problems of international responsibility or of possible reservations by EEC, by its members or perhaps by only some of its members. Another difficulty would be the practical problem of application, in other words, determination of the sphere of competence actually conferred on the organization by its constituent units and, for example, determination of the jurisdictional question as to whether the action taken or the remedies sought under a treaty fell within the competence of the organization, and thus represented a liability of the organization or only a liability of the State in which the treaty rights and obligations were being exercised and fulfilled. It was plain that the whole question required very careful consideration, for it stretched beyond most-favoured-nation clauses to the law of treaties in general.

23. Mr. SCHWEBEL said that the immediate issue concerned the scope of the draft articles on the most-favoured-nation clause and, by extension, the status of EEC. In his view, EEC was an international organization, albeit one with very broad powers. The fact that it could bind its members, or act on their behalf, was not, however, exceptional either in principle or even, to some extent, in practice. The United Nations, for example, had such powers under Chapter VII of the Charter, and other international organizations had similar powers in their own more limited spheres.

24. He saw no objection in principle to extending the draft articles to cover most-favoured-nation clauses in agreements to which international organizations were parties. Indeed, for the reasons stated by Sir Francis Vallat, there was merit in such an approach. The question was how to give expression to it.

25. The suggestion made by EEC in its comment (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 7), which related to the definition of "State", might not be the best way of dealing with the matter, but it deserved consideration. It might be preferable to extend the scope of the draft articles to encompass international organizations or, alternatively,

to deal with the question by amplifying article 3 (Clauses not within the scope of the present articles). The Commission might also consider applying the convention not only to treaties between States but also to treaties between States and groups of States. Another possible formula would be to apply it to treaties between States and any entity exercising powers in spheres that fell within the scope of the articles by virtue of a transfer of power made in favour of that entity by the sovereign States of which it was composed—in other words, to use the EEC formula but without introducing a definition of “State”. Again, the draft might deal not only with treaties between States but also with treaties between States and international organizations or even with treaties between States and other subjects of international law. All those possibilities were worthy of consideration. He was entirely open-minded as to the manner in which the problem should be dealt with, provided it was in a realistic and progressive manner.

26. Attention had rightly been drawn to the residual character of the draft articles. That was an important point which, in his view, should temper any objections to extending the draft articles to cover international organizations, for it meant that a State, when concluding a treaty that provided for most-favoured-nation treatment, would have full scope in dealing with any problem that might arise concerning the relationship of an international organization.

27. The fact that those residual articles dealt only with agreements between States, and that the Commission was dealing separately with draft articles on treaties between States and international organizations or between two or more international organizations, did not mean that most-favoured-nation agreements between States and international organizations should be omitted from the scope of the draft, on the assumption that they too could be dealt with in a separate instrument at some late stage. Rather, those who had substantive objections to extending the scope of the draft articles on the most-favoured-nation clause should explain how they proposed to deal with the real problems of contemporary international life in that sphere.

28. In reply to a question by Mr. FRANCIS, Mr. ROMANOV (Secretary to the Commission) said that, as instructed by the Commission pursuant to the General Assembly's recommendation, the Secretariat had requested a number of United Nations organs, including UNCTAD, to submit their comments on the draft articles on the most-favoured-nation clause. UNCTAD had acknowledged the letter which the Legal Counsel had addressed to it in that regard but was not among the organizations from which substantive replies had been received (see A/CN.4/308 and Add.1 and Add.1/Corr.1, para. 2).

29. Mr. FRANCIS said that following the adoption by the Sixth Committee of the General Assembly of the draft resolution recommending that the Commission continue its study of the most-favoured-nation

clause, he had moved an amendment in plenary<sup>6</sup> that the question be referred not to the Commission but to UNCITRAL, which, having specialized in such matters, was better fitted, in his view, to deal with the question.

30. There remained an element of doubt in his mind as far as article 1 was concerned, particularly in view of the position of his own region and of the Caribbean Community, which was in many respects similar to that of EEC. His difficulty was compounded by the fact that UNCTAD had still to submit its comments on the draft articles, and in those circumstances he would have to defer the rest of his own comments until it had done so. Since that might not be possible before the Commission concluded its consideration of the item, he would suggest that UNCTAD be invited to submit its comments in time for them to be appended to the Commission's report on the work of its current session.

31. With regard to procedure, he would suggest that, in order to expedite its work, the Commission might wish to consider the draft articles by groups of related articles rather than article by article.

32. Mr. ŠAHOVIĆ considered that, for practical reasons as well as for reasons of principle, no change should be made in the text of article 1. The Commission had been right to limit the scope of the draft articles to most-favoured-nation clauses contained in treaties concluded between States. Since the entire draft had been prepared with that limitation in mind, any extension of its scope would entail the amendment of several articles.

33. However, although he recognized the existence of the problem of supranational organizations and appreciated the concern expressed by certain members of the Commission in that respect, he thought that the Commission should adopt a pragmatic approach, in other words, deal with the question each time it came up during its examination of an article. From the outset, the Commission had taken the view that its work on the most-favoured-nation clause should be based on the Vienna Convention on the Law of Treaties, since what was at issue was the application of the clause from the standpoint of the law of treaties. As could be seen from article 3, concerning clauses not within the scope of the articles, the Commission had duly emphasized that, throughout the draft articles, primary rules must remain in the background. From the point of view of legal technique, it would in any event be possible, under article 3, to apply the draft to most-favoured-nation clauses contained in treaties between States and other subjects of international law. Consequently, the Commission should not exaggerate the importance of the question of the scope of the articles.

34. Mr. THIAM said that, by restricting itself to most-favoured-nation clauses contained in treaties between States, the Commission was clearly following accepted practice. It was, however, desirable that it should assist the progressive development of inter-

<sup>6</sup> See *Official Records of the General Assembly, Twenty-sixth Session, Plenary Meetings*, 1999th meeting, paras. 17 and 18.

national law by reflecting new trends whenever they became apparent. After examining the case of States, of international organizations and of supranational organizations, the Special Rapporteur had come to the conclusion that the draft should be confined to clauses contained in treaties concluded by States. In fact, the distinction between international organizations and supranational organizations was a matter of degree rather than of kind: some organizations appeared to be more supranational than others. Where integration was taken to its extreme, the result was a form of federal State, a situation that implied a transition from the realm of international organizations to that of States. In such circumstances, it became difficult to distinguish international organizations from supranational organizations. If the trend towards supranationality was to be taken into account, international organizations should be judged according to the powers that had actually been conferred upon them. It would be difficult to exclude from the scope of the draft an organization that had been empowered to conclude treaties containing a most-favoured-nation clause.

35. Consequently, he considered that it would be desirable if, without thereby changing the substance of the text of the draft, some means could be found of reflecting the current trend in favour of permitting international organizations to bind by treaty not only States but also entire peoples. An example of that trend was the progress towards an ever greater degree of integration within the Economic Community of West African States. The Commission should give expression to that general trend, if not in one or more articles, at least in the commentary.

36. Mr. QUENTIN-BAXTER agreed that the Commission was in no position at that stage to abandon distinctions that had been carefully drawn, or to confuse matters of drafting and substance by amending the opening, and governing, clauses of the draft articles. At the same time, the Commission would be ill-advised to give the impression that it was ignoring the presence of EEC, and organizations of like character, on the world scene. If it did so, it might be thought to be losing touch with the realities of international life.

37. EEC seemed to him to form a kind of infrastructure: it was neither above nor below the States which constituted its membership, but it provided a substitute for them in certain questions falling within its competence.

38. The substance of the question before the Commission was not, in his view, the distinction between treaties between States, on the one hand, and treaties to which international organizations were parties, on the other. One test that had rightly been stressed was whether the relationships in question were governed by international law or by constitutional law. Another question that he would stress as relevant to the issue was whether the entity concerned was acting in respect of territory, or merely in the general capacity of an international organization. The powers vested in the Security Council under Chapter VII of the

United Nations Charter, as well as the many other real powers bestowed on international organizations by their members, were clearly to be distinguished from cases in which an international organization acted in respect of territory—in other words, in a role typically associated with a State. Possibly, in analysing the problem, the Commission had something to learn from the role of the United Nations Council for Namibia.

39. He did not think the Commission could ignore the possibility that States might—or might have to—choose an international organization as a mechanism for concluding agreements and conducting dealings at the international level regarding the territory of States. That kind of analysis did not, of course, resolve all the questions, for there remained the fundamental problem of the vast difference in the tests of competence applicable to States and to international organizations respectively. One aspect of that problem was that the EEC members held themselves bound in respect of their territory by the decisions made by EEC within its competence and on their behalf. To that extent, EEC performed a role analogous to that normally performed by the competent organs of the government of a State.

40. He concurred in the general view that the subject was so vast that the Commission could not hope to resolve it in the course of the second reading of the draft articles. He trusted, however, that the Commission would express its view, in its commentaries to the draft articles, as to the relationship of those articles to an organization such as EEC, which acted under powers conferred by States in regard to their territory.

*The meeting rose at 1 p.m.*

## 1485th MEETING

*Wednesday, 24 May 1978, at 10.05 a.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Calle y Calle, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Sahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

### **The most-favoured-nation clause (continued) (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2)**

[Item 1 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (*continued*)

ARTICLE 1 (Scope of the present articles)<sup>1</sup> (*concluded*)

1. Mr. EL-ERIAN wished to enlarge on his previ-

<sup>1</sup> For text, see 1483rd meeting, para. 8.



ous statement (1484th meeting), in which he had dealt solely with the question of the definition of the term “State”, by raising three main questions.

2. First, what was the purport of an article that sought to delineate the scope of the subject by providing that the articles should apply to most-favoured-nation clauses contained in treaties between States? To his mind, it signified that the draft articles, in their basic orientation and underlying philosophy, were clearly intended to apply to States. That did not mean that an individual article might not deal with the particular circumstances at a given case, but rather that the provisions of the draft articles must be considered, and interpreted, as a whole.

3. Secondly, what was meant by the term “State”? In his view, it was used in the sense attributed to it by the Commission in a number of other drafts, all of which referred to States without endeavouring to define the term. In its 1949 commentary to the draft declaration on the rights and duties of States, the Commission had explained that the word “State” was used in the sense commonly accepted in international practice.<sup>2</sup> Legally speaking, there was no difficulty in defining the term; indeed, a definition had been included by the Pan-American unions in one of their conventions. Essentially, however, the problem was one of recognition, which had caused some members of the community of nations to view certain entities in a different light from that in which they viewed other States.

4. As far as unions of States and international organizations were concerned, he considered that, despite certain similarities, there were fundamental differences between the two types of groupings. Unions of States—whether personal or real, or whether a confederation of States—generally consisted of a structure of States with common central powers. Further, a confederation of States was usually a step towards the creation of a federal or even unitary State, whereas an international organization provided the framework for international co-operation among States without necessarily being envisaged as a step towards the establishment of a State. At the time the Charter of the Organization of African Unity had been drafted, the idea of a confederation of African States, and even of an all-African government, had been mooted, but had been discarded in favour of a more practical association of States formed for the purpose of co-operation in certain areas.

5. The case of customs unions was particularly delicate. In the *Customs Régime between Germany and Austria* case (1931),<sup>3</sup> the Permanent Court of International Justice had held that Austria’s entry into a customs union with Germany constituted an infringement of Austria’s independence under article 88 of the Treaty of Saint-Germain-en-Laye. The vote, however had been very close, and a perusal of

the concurring opinions of the majority was not very convincing. For his part, he did not see how entry into an association with another State for certain purposes could be held to involve an infringement of sovereignty.

6. Thirdly and lastly, the term “supranational” had been used in reference to EEC. He did not like that term, and noted that it did not appear in any treaty. Admittedly, EEC had exceptional powers; but, like the United Nations, which also had wide powers under the Charter, it remained international in character, inasmuch as it was an organization created by a treaty among a number of States. It was an association formed by the free will of its members, each of which was equally free to withdraw from membership.

7. Mr. DÍAZ GONZALEZ observed the draft articles were now at the second reading stage and should therefore be regarded as far as possible as an organic whole, as Mr. Šahović had said (1484th meeting). That did not mean that he was opposed to the introduction of any necessary amendment to the draft articles, but that such amendments should be made in the light of their implications for the draft articles as a whole.

8. It had rightly been stressed that the Commission was primarily concerned with the legal aspects of the most-favoured-nation clause and its application. Of course, it could always consider the economic aspects, which were undoubtedly very important, but it should bear in mind that those aspects were already being dealt with by United Nations specialized agencies with greater competence in the matter. In his view, therefore, the Commission should maintain the dividing line which it had drawn between matters of law and matters of economics, while recognizing that there might be certain overlapping areas of interdependence.

9. Customs unions and associations of States were part of the reality of modern life and should be recognized as such. However, they were still at the evolutionary stage; in most cases they had yet to be firmly institutionalized and their characteristics fully defined. For that reason, a degree of caution was called for, although the door should be left open to introduce ways and means of providing for their case in international law. Article 3,<sup>4</sup> and in particular paragraph (c), paved the way to a certain extent. At some point, however, it would be necessary to determine whether what was involved was constitutional law or international law.

10. As provided in article 26, and explained in the commentary thereto, the draft articles were residuary in character. The special rules applicable to the most-favoured-nation clause were therefore to be interpreted in the light of the Vienna Convention on the Law of Treaties.<sup>5</sup> He did not think the Commission should attempt to define the term “State” at that

<sup>2</sup> *Official Records of the General Assembly, Fourth Session, Supplement No. 10 (A/925)*, para. 49.

<sup>3</sup> *P.C.I.J.*, series A/B, No. 41, p. 37.

<sup>4</sup> See 1483rd meeting, foot-note 1.

<sup>5</sup> *Ibid.*, foot-note 2.

point. In his view, article 1 should be left unchanged. After the Commission had completed its second reading of the whole draft, it might find it necessary to change one or more of the articles, but for the time being it should not attempt to do so.

11. Mr. RIPHAGEN endorsed the views expressed by Mr. Schwebel, Mr. Thiam and Sir Francis Vallat at the 1484th meeting; the articles would have little meaning if they did not deal with most-favoured-nation clauses in treaties concluded by or with international organizations. The purpose of those articles, in his view, was not to embroider the law of treaties but rather to give an interpretation of a particular clause that occurred in a number of treaties. He therefore saw no valid reason why the draft articles should not apply to most-favoured-nation clauses in treaties between an international organization such as EEC and States. Nor did he see any reason why a most-favoured-nation clause in a treaty concluded by an international organization should be interpreted differently from one in a treaty between States. On that understanding, there should be no conceptual difficulty in applying the articles to treaties between international organizations and States, despite the known difficulties in the law of treaties in general regarding treaties concluded by or with international organizations. In questions of State responsibility and succession of States, there was indeed a difference between international organizations and States, but those were different questions. Any international organization could accord most-favoured-nation treatment to a State. That was in keeping with the principle of equality of States and of non-discrimination between foreign States.

12. Indeed, despite the comment by IAEA (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 2), it was still conceivable that at some stage a most-favoured-nation clause would be included in a treaty between the IAEA and a State, since a State that accepted IAEA's control might wish to ensure that it would not be treated differently from other countries.

13. A number of governments and international organizations had reproached the Commission for not taking sufficient account of modern developments. There was some truth in that reproach, particularly with regard to the development of regionalism and that of the new international economic order, both of which were very relevant to the most-favoured-nation clause. The Commission would therefore be well advised to take those developments into account and to provide that the draft articles should apply to most-favoured-nation clauses in treaties between entities other than States.

14. Mr. CEROSTA pointed out that the draft articles had been conceived as a supplement to the Vienna Convention on the Law of Treaties, which dealt only with treaties concluded between States in written form. If that concept was maintained, there would be no need to amend article 1: the draft would logically be applicable to most-favoured-nation

clauses contained in treaties concluded between States in written form. However, the Commission now had before it EEC's comments on the draft (*ibid.*, sect. C, 2), suggesting that the text should also to apply to customs unions and other economic unions of States. He was surprised that EEC had not submitted comments at an earlier stage of the Commission's work. Moreover, none of the States members of the Community had endorsed the amendments proposed by EEC, although two of them—Luxembourg and the Netherlands—had expressed views fairly similar to those of EEC in their written comments (*ibid.*, sect. A). In addition, both Sir Francis Vallat (1484th meeting) and Mr. Riphagen had stressed that it was essential not to exclude customs and economic unions from the scope of the draft. The Commission should therefore take those views into account, if not in the draft itself, at least in the commentary.

15. From discussions with other members of the Commission, he had gained the impression that some of them considered that the problem was essentially a European one, whereas it was in fact a general one. The same theoretical and practical problems as now confronted them had existed as long as there had been customs unions, in other words, since the beginning of the 19th century. But now those unions were becoming more numerous and their rights and duties were growing. It would be remembered that there had been a customs union between Sweden and Norway from 1874 to 1895, a German customs union from 1834 to 1871, a customs and economic union between imperial Austria and the Kingdom of Hungary from 1867 to 1918, and, more recently, a customs union between Belgium, the Netherlands and Luxembourg. In all those cases, there had existed, in addition to the sovereign member States, an entity that had had international rights and duties and had acted in matters of foreign trade and customs as a partial subject of international law.

16. As Mr. Jagota had suggested (1484th meeting), the Commission should consider, article by article, whether the provisions of the draft ought to apply to customs and economic unions, and make appropriate amendments where necessary.

17. Mr. NJENGA regarded the draft articles as primarily a work of codification, except articles 21 and 27, which dealt with the exclusion in certain cases of the application of those articles to developing countries and might therefore be regarded as concerning the progressive development of the law. The extension of the draft articles to cover customs or economic unions as well as free-trade associations could likewise be regarded as progressive development. However, bearing in mind the widely differing nature of the various unions existing throughout the world, he did not think that the inclusion of a general rule to meet the case of only one organization, namely, EEC, could be justified on that ground. He agreed with the view of the Special Rapporteur, as expressed in his report, that the only union of that nature that appeared to exercise powers similar to those of a

State was EEC (A/CN.4/309 and Add.1 and 2, para. 73).

18. The former East African Community had been, in some respects, even more highly integrated than EEC; not only had it dealt with all matters connected with tariffs and the collection of customs dues, but it had also owned the railways and airways, as well as a number of research institutes. Even so, it would have been wrong to consider that Community as a State, and any agreements it had entered into had been in conjunction with its members, which were the guarantors of its performance of the agreements.

19. An amendment worded along the lines suggested by EEC in its comment (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 7) would be going too far, in his view, since the extent of the transfer of power that would be involved or required was not clear. Also, the extent of the residual powers which the member States of EEC would retain, and the reversionary rights that would come into play if a member withdrew from EEC, was not known. It was important to consider who would be responsible if, for example, EEC ceased to function. The questions of State succession that would arise would inevitably be highly complex, although less so if relations were established not only with EEC but also with the States concerned.

20. Organizations such as EEC operated within a constitutional framework that was based, in whole or in part, on delegated responsibility. It would be asking too much to impose that framework on the international community, since most States were not parties to it. It seemed to him that a member of the international community might well be at a loss if it wished to seek redress for the breach of an agreement entered into with EEC and containing a most-favoured-nation clause. For those reasons he agreed that, for the time being, the operation of the draft articles should be confined to States. That did not mean that the realities of the situation should be ignored; in fact, that was not the case, for article 3 made it abundantly clear that the legality of such organizations was not called into question, nor was the application of most-favoured-nation clauses between those organizations and States prevented. EEC and other international organizations would, however, be better advised to press for the exclusion of the operation of the most-favoured-nation clause, for which a much stronger case could be made out.

21. Mr. TSURUOKA explained that, whenever he refrained from commenting on an article, it was because he approved its content. In the case in point, although he shared the view of the Special Rapporteur, he wished to make a few comments in view of the vital importance of article 1.

22. There was no denying that EEC had extensive competence with respect to customs and trade, and in particular was empowered to conclude international agreements. It would nevertheless be very difficult to attempt to resolve in the draft the problems posed

by the existence of unions such as EEC, and it would therefore be better to retain article 1 in its existing form, subject to possible drafting changes. The text of the article, moreover, had been adopted by the Commission after a thorough discussion of the question of customs and economic unions. At the stage the Commission had now reached, it would hardly be feasible for it to recast the many articles which it was formulated following its decision to restrict the scope of the draft to most-favoured-nation clauses contained in treaties between States. Besides, the draft did not deal solely with clauses relating to customs matters, EEC was constantly evolving, and it would be difficult to build a solid legal edifice on such shifting ground.

23. It should not be forgotten either that the Commission had already taken the problem into account, since article 3 provided that all the rules set forth in the articles would apply to a clause which would be subject to them under international law independently of the articles. Clearly, the draft was no hindrance either to the development or to the functioning of EEC. Article 26 showed clearly the residual nature of the draft and article 25 stipulated expressly that its provisions should not be retroactive. In those two articles, the Commission had also made allowance for the special case of customs and economic unions. It might, therefore, be helpful to emphasize in the commentary that the Commission had taken due account of the problem.

24. Mr. TABIBI said that the draft articles, once adopted in final form, would constitute a valuable instrument for international co-operation between developed and developing countries, and much of the credit would be owed to two distinguished jurists from the socialist countries, Mr. Ustor and Mr. Ushakov.

25. The purpose of the draft articles was to supplement the Vienna Convention on the Law of Treaties. The most-favoured-nation clause was always to be found in bilateral or multilateral treaties between States, and to extend the scope of the draft to cover customs unions and similar international organizations would create enormous difficulties. As Mr. Jagota had pointed out (1484th meeting), the Commission was dealing with international law and not with constitutional law. Naturally, the Commission could not remain blind to the great importance of organizations like EEC, but the best course would be to move ahead with its consideration of the articles and then, in the light of the discussion, to investigate the possibility of widening their scope. It should be remembered that governments would have an opportunity to express their views not only in the General Assembly but also at the future plenipotentiary conference.

26. The CHAIRMAN, speaking as a member of the Commission, said it should always be remembered that, as noted by previous speakers, the draft articles were intended as a complement to the Vienna Convention on the Law of Treaties, article 1 of which specified that the Convention applied "to treaties be-

tween States". Moreover, that Convention had been concluded at a time when EEC had already been in existence for some ten years. The convincing arguments advanced by some members of the Commission, that the scope of the draft should be extended to include EEC and other organizations, might be applied equally to some of the problems dealt with in the Vienna Convention. In reality, those arguments went beyond the most-favoured-nation clause and involved recognition of the treaty-making capacity of EEC and similar entities.

27. In the course of the United Nations Conference on the Law of Treaties, the question of treaties concluded between States and international organizations or between two or more international organizations had been left aside, and it now formed the subject of a separate draft being prepared by the Commission. Nobody attending that Conference had been in any doubt that EEC came under the heading of an international organization. Today, it might be claimed that EEC was in fact something more, but it must also be recognized that EEC was not a State. Consequently, the Commission was bound to follow the Vienna Convention and to confine the scope of the rules it was considering to treaties between States. Besides, article 3 contained a very helpful saving clause which made it clear that the draft did not affect existing treaties, while articles 25 and 26 dealt with the non-retroactivity of the draft and the freedom of the parties to agree on different provisions. Consequently, the web of bilateral and multilateral relations within EEC, would be fully preserved. For those reasons, article 1 should be retained in its existing form and referred to the Drafting Committee.

28. Mr. USHAKOV (Special Rapporteur) said that the problem of the applicability of the articles to treaties concluded by organizations such as EEC went beyond the bounds of the topic the Commission was engaged in studying. In his view, EEC could not be assimilated to a State, as suggested in the definition it had proposed for addition to article 2. Nor, strictly speaking, was it an international organization, since it had supra-State powers which international organizations such as the United Nations and its specialized agencies did not have. Unlike other international organizations, EEC enjoyed exclusive competence in certain spheres, which enabled it to conclude treaties on behalf of its members and even to legislate directly. No other international organization had such power. EEC constituted a new and unique phenomenon, which was neither a State nor an international organization, but an intermediate entity that might be termed a "supranational" organization. CMEA, for example, unlike EEC, was not a supranational institution. The Programme of socialist economic integration stated that "socialist economic integration is completely voluntary and does not involve the creation of a supranational institution",<sup>6</sup> and the Char-

ter of CMEA guaranteed "respect for sovereignty and national interest".<sup>7</sup>

29. There could obviously be no question of ignoring the existence of EEC or its economic significance and the role it played in international trade. Sir Francis Vallat had said (1484th meeting) that account should be taken of the fact that EEC concluded agreements that were governed by international law. But what were the rules of international law applicable to agreements concluded by EEC? In the case of the activities performed by EEC as an international organization, they were the rules applicable to treaties concluded between States and international organizations or between two or more international organizations—rules that the Commission was in the process of drafting. But were the rules of the Vienna Convention on the Law of Treaties applicable when EEC performed supranational activities in respect of which it sought to be treated as a State, in other words, when it concluded treaties on behalf of its member States? That question could not be answered in the context of the draft articles under consideration, since it was essential to know first what were the rules applicable to treaties concluded between States and international organizations. As long as that question remained unanswered, it was impossible to say whether the draft articles should apply to treaties concluded by international organizations such as EEC. The question of the applicability of the draft articles must be settled in the more general context of the rules applicable to treaties concluded between States and international organizations or between two or more international organizations.

30. However, the question of the scope of the draft articles arose in relation not only to EEC but also to treaties concluded orally. Article 2, paragraph (a), defined a "treaty" as "an international agreement concluded ... in written form", but a most-favoured-nation clause might also be contained in an oral agreement. Admittedly, the safeguard clause in article 3 provided that "the fact that the present articles do not apply ... to a clause on most-favoured-nation treatment contained in an international agreement between States not in written form ... shall not affect ... the legal effect of any such clause", but it was none the less true that such a most-favoured-nation clause did not come within the scope of the draft articles, any more than did the "most-favoured-organization clause" to which UNESCO had referred in its comment (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect.C, 1).

31. It would be impossible, however to produce a draft that took account of every eventuality, and he suggested that article 1 should be referred to the Drafting Committee.

32. Following a brief procedural discussion, the CHAIRMAN suggested that article 1 be referred to the Drafting Committee and that the Commission

<sup>6</sup> A/C.2/272, p. 5.

<sup>7</sup> United Nations, *Treaty Series*, vol. 368, p. 266.

postpone its consideration of article 2 until after it had examined the remaining articles of the draft.

*It was so agreed.*<sup>8</sup>

*The meeting rose at 12.55 p.m.*

<sup>8</sup> For the consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 13 and 14.

## 1486th MEETING

*Thursday, 25 May 1978, at 11.35 a.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Ago, Mr. Calle y Calle, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

### Organization of work (*continued*)\*

1. The CHAIRMAN said that the Enlarged Bureau had decided that, for the current session, the Planning Group should consist of Mr. Šahović, as Chairman, and Mr. Ago, Mr. Díaz González, Mr. El-Erian, Mr. Schwebel, Mr. Tabibi, Mr. Ushakov and Sir Francis Vallat. In accordance with the usual practice, any member of the Commission interested in taking part in the discussions of the Planning Group was welcome to attend its meetings.

2. The Enlarged Bureau had also recommended that a working group consisting of Mr. Quentin-Baxter as Chairman, and Mr. Calle y Calle, Mr. Njenga, Mr. Pinto and Mr. Yankov be appointed to study the item entitled "Review of the multilateral treaty-making process", included in the provisional agenda of the thirty-fourth session of the General Assembly.

3. If there were no objections, he would take it that the Commission agreed to those proposals.

*It was so agreed.*

### The most-favoured-nation clause (*continued*) (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2)

[Item 1 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (*continued*)

ARTICLE 3 (Clauses not within the scope of the present articles)

4. The CHAIRMAN invited the Special Rapporteur to introduce article 3, which read:

#### *Article 3. Clauses not within the scope of the present articles*

The fact that the present articles do not apply (1) to a clause on most-favoured-nation treatment contained in an international agreement between States not in written form, or (2) to a clause contained in an international agreement by which a State undertakes to accord to a subject of international law other than a State treatment not less favourable than that extended to any subject of international law, or (3) to a clause contained in an international agreement by which a subject of international law other than a State undertakes to accord most-favoured-nation treatment to a State, shall not affect:

(a) The legal effect of any such clause;

(b) The application to such a clause of any of the rules set forth in the present articles to which it would be subject under international law independently of the articles;

(c) The application of the provisions of the present articles to the relations of States as between themselves under clauses by which States undertake to accord most-favoured-nation treatment to other States, when such clauses are contained in international agreements in written form to which other subjects of international law are also parties.

5. Mr. USHAKOV (Special Rapporteur) said that article 3 was merely a saving or safeguard clause, whose wording was based on that of article 3 of the Vienna Convention on the Law of Treaties.<sup>2</sup> It did not expand the scope of the articles, as defined in article 1;<sup>3</sup> it merely indicated that the rules of general international law could apply, independently of the rules enunciated in the articles, to certain situations not provided for in the draft.

6. In the oral comments they had made in the Sixth Committee of the General Assembly in 1976, some representatives had said that article 3 could be retained, although its object was covered by article 1 and by the norms of general international law (A/CN.4/309 and Add.1 and 2, para. 99).

7. In its written comments, Luxembourg had expressed the opposite view that, if the artificial restrictions were removed from article 1, article 3 could be deleted without any difficulty (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A). He could not share that point of view because he did not think that article 3 changed the meaning of article 1 in any way, since it did not limit the scope of the draft articles.

8. The Netherlands had stated that article 3 did not cover "the case of a most-favoured-nation clause in an agreement between two international organizations, one of which undertakes to accord to the other treatment not less favourable than that extended to any other subject of international law (whether or not a State)" (*ibid.*). He noted that, in a passage of its commentary, referred to by the Government of

<sup>2</sup> See 1483rd meeting, foot-note 2.

<sup>3</sup> *Ibid.*, foot-note 1.

\* Resumed from the 1475th meeting.

the Netherlands, the Commission had stated that article 3 did not refer to

clauses in international agreements by which subjects of international law other than States undertake to accord to each other treatment not less favourable than that extended by them to other such subjects of international law. That matter was considered during the courses of the twenty-eighth session but the Commission decided to omit such a reference as it is not aware of such clauses having arisen in practice, though hypothetically it is not impossible.<sup>4</sup>

9. He was of the opinion that the Commission had been right not to include in article 3 a safeguard provision relating to clauses of that kind, for the existence of such clauses was, for the time being, very hypothetical. He also considered that it was difficult to refer to "treatment not less favourable than that extended to any other subject of international law", for it was under the jurisdiction of the State and in the territory of that State that most-favoured-nation treatment applied.

10. He was thus of the opinion that the comments by Luxembourg and the Netherlands were not relevant and that the substance of article 3 should not be amended; the wording, however, might have to be made clearer. For example, the meaning of the words "not less favourable", contained in item (2) of the introductory paragraph, might be questioned, for it was difficult to compare the treatment accorded to a State with the treatment accorded to an international organization. Those were drafting questions, however, which could be left to the Drafting Committee.

11. Mr. CALLE y CALLE said that the purpose of article 3 was to protect the types of treaties which the clear and precise terms of article 1 excluded from the scope of the draft and thus to preserve the legal effect of most-favoured-nation clauses contained in such treaties, which were subject to the norms of general international law. It could be seen from article 3 that the treaties not covered by the draft articles included; (1) treaties between States not in written form; (2) treaties in which a State undertook to accord a particular type of treatment to a subject of international law other than a State (for example, to an international organization); (3) treaties in which a subject of international law other than a State (which might again be an international organization) undertook to accord most-favoured-nation treatment to a State.

12. However, article 3 failed to mention yet another category of treaty, namely, treaties between subjects of international law other than States. Treaties of that kind had been excluded on the assumption that they represented theoretical cases that had never arisen in practice and the Commission had therefore decided not to include a reference to most-favoured-nation clauses contained in treaties to which States were not parties. In paragraph (4) of its commentary to article 3, the Commission had stated that it had found it unnecessary to provide in the draft articles

for the hypothetical case of most-favoured-nation clauses contained in international agreements concluded by States and other subjects of international law not in written form.<sup>5</sup> However, in the course of the discussion, the problem had arisen of written treaties between a State and an international organization such as EEC. The Commission should now consider the possibility of including in article 3, paragraph (c), some reference to that type of treaty, which, in the opinion of the Governments of Luxembourg and the Netherlands, would currently be excluded from the scope of the draft on account of the wording of article 1. In his written report, the Special Rapporteur had taken the view that article 3 should remain as it stood, but he had given the impression during his oral presentation that he would agree to certain changes.

13. Paragraph (5) of the commentary to article 3 stated that some members thought that the article should be slightly redrafted, that other believed a radical rearrangement would be necessary, and that the Commission would return to the problem in the course of the preparation of the text for the second reading, taking into account the comments of governments.<sup>6</sup> Clearly, some thought should be given to the question, so that the draft did not completely disregard the phenomenon of customs unions and close-knit systems of economic integration, which were to be found precisely in the sphere of most-favoured-nation treatment.

14. Mr. TSURUOKA agreed with the Special Rapporteur that article 3 should be retained as a whole, but he intended to submit some drafting amendments to the Drafting Committee.

15. Mr. SUCHARITKUL said that, given its purpose, article 3 ought to contain an exhaustive list of the types of agreements or treaties that fell outside the scope of the draft. He had in mind the comments made by Sir Francis Vallat (1484th meeting) and Mr. Riphagen (1485th meeting) in connexion with international agreements between States and EEC. A number of governments had concluded agreements with EEC, some of them agreements of a general trading nature, like the agreement between India and EEC. Such agreements were regarded as binding not only on EEC itself but also on its member countries. The fact that the articles did not apply to a clause contained in an international agreement by which a State undertook to accord to a subject of international law other than a State treatment not less favourable than that extended to any subject of international law would be of little consequence in the case of the type of agreement he had mentioned. The reason was that such agreements between States and EEC contained an undertaking to accord both the EEC and to its member countries treatment not less favourable than that extended to any other State.

16. One source of difficulty or ambiguity in article 1

<sup>4</sup> Yearbook... 1976, vol. II (Part Two), p. 13, doc. A/31/10, chap. II, sect. C, art. 3, para. (3) of the commentary.

<sup>5</sup> *Ibid.*, p. 13.

<sup>6</sup> *Ibid.*

was the expression "treaties between States", since the reader might wonder whether that expression meant treaties concluded by States or treaties that had binding force on the State. His contention was that treaties between States and EEC, which were binding on the member States of EEC, did not lie outside the scope either of article 1 or of article 3.

17. Sir Francis VALLAT said there seemed to be a tendency to assume that, because the topic under consideration was related to the law of treaties, it therefore fell, in some way, within the framework of the Vienna Convention on the Law of Treaties. In his submission, that was not so at all. The Vienna Convention was concerned with general rules governing such matters as the conclusion and interpretation of treaties, whereas the Commission was concerned essentially with the content and interpretation of a particular kind of provision of a special character. That indeed, was clear from an examination of article 3. If the Commission failed to take account of that difference, it was bound to run into serious difficulties of drafting.

18. The subject-matter with which the Commission was dealing extended into a number of areas. From the point of view of the interests of the modern world, the most important for the operation of the most-favoured-nation clause was obviously that of trade and commerce. As a consequence, it seemed to have been assumed that customs or trade was the only relevant question. That, again, was not so. In EEC, for example, there were special provisions governing a number of other areas, such as freedom of movement—both of persons and of goods—, establishment matters, and the conduct of the professions. Thus, although customs and trade was clearly the most important single item covered by the clause, it was certainly possible to enlarge the area of discussion.

19. He could not agree with the suggestion that the Commission should not deal with the question of economically integrated organizations because of its novelty. The fact that a juridical phenomenon was new did not relieve the Commission of its duty to deal with it. Indeed, if it took the view that it must look backwards rather than to the present, then its work would be obsolete before it had even started. In any event, the matter was not particularly new, since the basic treaties dated back at least 20 years, and were not much newer than the concept of the continental shelf in international law and other concepts that had become familiar in recent years. There were, in fact, three European Communities: ECSC, established by the 1951 treaty, which had come into force in 1953, EEC and EURATOM—the latter two established by treaties concluded in 1957 that had come into force on 1 January 1958.

20. The real novelty lay in the fact that the manifestations of the problem had become increasingly evident as time passed. The hard facts of life were now beginning to make themselves felt and the time had come to deal with the problem. Article 3, on the face of it at any rate, did not really do so. The key

provision, contained in paragraph (b), simply meant that clauses to which the draft articles did not apply would be governed by customary international law. Basically, the draft articles were being codified because there had long been divided views on the interpretation of most-favoured-nation clauses and because of the doubt and uncertainty in the matter. If the draft articles could clarify the rules concerning the effect of the most-favoured-nation clause in relation to treaties between States in the strict sense, then, he would suggest, they could clarify the situation in relation to clauses in treaties to which other subjects of international law were parties, particularly when those treaties bound and were operative in relation to States. The problem was one of form, because treaties entered into by EEC were not, in the ordinary sense, binding on member States as such: they were binding on EEC and, through EEC, they operated in relation to the people of the territory. Whether or not to say that EEC treaties did or did not bind States was, to some extent, a question of semantics, but it was no easy legal matter. He did not, however, think that the interests of the international community as a whole would be served if the clauses in question were simply left to be governed by customary international law, with all the uncertainty that implied. If that were the case, article 3 would achieve little or nothing.

21. Moreover, if article 3 did not cover the case of all treaties falling outside the scope of the draft article and which might contain a most-favoured-nation clause, it would give rise to a major problem regarding the relationship between the draft articles and a treaty containing a most-favoured-nation clause left in limbo, as it were. In particular, he would ask how item (2), in the introductory part of article 3, would apply in practice to a treaty effectively concluded directly by an international organization on behalf of a group of States. That was a question to which the Commission should endeavour to find an answer, since it concerned an important legal phenomenon and involved a large section of world trade. In principle, he was not opposed to the retention of article 3, although he considered that, in the current juridical state of the world, it raised extremely serious problems that required very careful consideration.

22. The question had been raised as to how customs regulations were administered in EEC. The headquarters of the EEC customs administration was located in Brussels, but in practice, locally, the EEC customs rules were operated by the same people who operated national law, although, under the common customs policy, it was EEC law that applied. Interpretation of that law was dealt with by the Court of the European Communities.

23. MR. ŠAHOVIĆ thought Mr. Jagota had been right to stress the link between article 3 and article 1, and he was afraid that, in dealing with article 3, the Commission might be led to repeat the discussion that had already taken place on article 1, for the two articles raised the same problems. He agreed with Sir

Francis Vallat on certain points, but thought that the Commission had been right to model article 3 on article 3 of the Vienna Convention on the Law of Treaties, because the draft articles under discussion raised the same problems as the Vienna Convention. Article 3 was one that restricted the scope of the draft and did not set out to resolve all the problems raised in international life by the most-favoured-nation clause. The Commission could deal in its commentary with the specific problems referred to by Sir Francis Vallat.

24. He was therefore in favour of retaining article 3 as it stood, for it reflected the importance that certain members of the Commission attached to the practical problems arising in the case of treaties between States and international organizations and, at the same time, allowed States to resolve those problems, which were at the root of the draft articles, by applying the rules of the Vienna Convention or the rules of customary international law as sources for international law as mentioned in article 3, paragraph (b). He wondered whether it would not be possible to employ the same solution in the case of the clause contained in treaties between international organizations.

25. Mr. SCHWEBEL said that one possible way of dealing with the problem would be to amend paragraph (b) of article 3 by replacing the words "independently of the articles" by the words: "either independently of the articles or by the decision of the parties to an international agreement referred to in this article to apply these articles to such an agreement". He agreed that the effect of paragraph (b) as drafted was to permit the application to any agreement of the rules set forth in the draft articles in so far as those rules were applicable under customary international law. The purpose of his suggestion, therefore, was to introduce the idea that the parties—by which he meant an international organization or some subject of international law other than a State, on the one hand, and a State, on the other—might decide to apply those rules by agreement among themselves. That was perhaps self-evident, but it might be worth while to spell it out.

26. Further, in item (2) of the introductory part of article 3, he would suggest that the word "other" be added between the word "any" and the words "subject of international law".

27. Mr. JAGOTA said that the words "do not apply", at the beginning of the introductory part of article 3, made it clear that it was a saving clause, in other words, that the draft articles applied only to most-favoured-nation clauses in treaties between States, as defined in draft article 1, and not to the clauses referred to in items (1), (2) and (3) of the introductory part of article 3. Paragraph (a) provided that the fact that the articles did not apply to the clauses referred to in items (1), (2) and (3) did not affect the legal effect of those clauses. The question then arose: under what law would they be valid if they were not valid under the draft articles? Paragraphs (b) and (c) referred, in that context, to "inter-

national law", which he interpreted to mean both conventional and customary international law. If that were so, any most-favoured-nation clause contained in an agreement between, say, India and EEC would still be valid even though it did not fall within the scope of the draft articles; and the law governing its validity would be either that the agreement itself or customary international law. It effect, therefore, the article invited the parties to an agreement other than an agreement between States to decide themselves how the most-favoured-nation clause was to be implemented. They could do that either by repeating in the agreement the provisions of the draft or simply by including a reference to those provisions. They could also remain silent, in which case the clause would be interpreted and applied in accordance with customary international law.

28. Paragraph (c) provided that the articles would apply to relations between States *inter se* under a clause contained in an agreement between a State and another subject of international law. The position of EEC was that competence had been transferred to it, so that it alone could be a party to a most-favoured-nation clause, and not its constituent members. The effect of paragraph (c), however, was that, in the case of a trade or other agreement to which a most-favoured-nation clause was appended, not only EEC but also its constituent members would be bound by the clause and the rights and obligations arising thereunder.

29. His view, therefore, was that article 3 was sufficiently comprehensive, save in one respect: it did not cover the case of a most-favoured-nation clause in an agreement between two subjects of international law other than a State, for example, between EEC and some other grouping. The Commission might wish to deal with that point in order to make the matter quite clear. It could then ask the Drafting Committee to find an appropriate wording.

*The meeting rose at 1 p.m.*

## 1487th MEETING

*Friday, 26 May 1978, at 10.05 a.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Calle y Calle, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

### Fourteenth session of the Seminar on International Law

1. The CHAIRMAN invited Mr. Raton, Senior Legal Officer in charge of the Seminar on International Law, to address the Commission.



2. Mr. RATON (Secretariat) said that the fourteenth session of the Seminar would open on Monday, 29 May 1978. In order to ensure a broad geographical representation, the Selection Committee had unfortunately been obliged to refuse a number of candidates who met all the required conditions and had finally chosen only 21 out of a total of more than 70 applicants. So far, 286 persons from 91 different countries had taken part in sessions of the Seminar. For 1978, the Selection Committee had tried to find candidates from States that had not been represented before, so that Burundi, Peru, Sierra Leone, Spain, Sri Lanka, the Yemen Arab Republic and Zambia would now be represented for the first time.

3. With regard to the lecturers, a special appeal had been made in 1978 to members of the Commission who had not yet had an opportunity to address the Seminar, and he was very grateful to those who had agreed to give up part of their time for that purpose.

4. The Seminar's funds, which in 1978 amounted to \$25,000, were always very limited. As a result, two participants had received only partial fellowships, enough to cover their subsistence in Geneva but not their travel expenses. In addition to Denmark, the Federal Republic of Germany, Finland, the Netherlands, Norway and Sweden, whose generosity had made it possible to award fellowships in past years, Austria had made a contribution for the current year as well. He wished to thank those governments but hoped others would help them to raise an additional sum of at least \$2,000 to \$3,000.

5. Lastly, he wished to thank Sir Francis Vallat, the Chairman of the Commission at its twenty-ninth session, for having so admirably defended the interests of the Seminar at the thirty-second session of the General Assembly.

6. The CHAIRMAN thanked Mr. Raton for his report and for his efforts over the years, without which the International Law Seminar would have long since ceased to take place. The Commission was likewise indebted to Miss Sandwell for her assistance.

**The most-favoured-nation clause (*continued*) (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2)**

[Item 1 of the agenda]

**DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (*continued*)**

**ARTICLE 3 (Clauses not within the scope of the present articles)<sup>1</sup> (*concluded*)**

7. The CHAIRMAN expressed concern about the Commission's slow progress. The second reading of the draft articles should be completed by 9 June 1978, to give the Special Rapporteur time to draft the commentary. He therefore urged members to be as succinct as possible in their statements.

<sup>1</sup> For text, see 1486th meeting, para. 4.

8. Mr. FRANCIS said that the second reading of any text was necessarily a delicate matter. The Commission was under a duty to maintain the premise on which the draft articles were based and, after taking account of the comments of governments and international organizations, to engage in what was essentially a tidying-up process. A new member, like himself, was under an obligation to have due regard to the existing structure as well as to any consensus that had developed, while assisting in achieving as wide a consensus as possible on any point of difficulty. Further, although members served in their personal capacity inasmuch as they did not have to seek instructions from their governments, they did not operate in a vacuum, for they were also under a duty to bring to the notice of the Commission any developments of a local or regional character that had a bearing on its work. It was in that context that he had entered certain reservations to article 1 and now felt bound to state his position on article 3, without however seeking to disturb any consensus that had been reached.

9. The historical background to the Caribbean Community began with the disintegration of the Federation of the West Indies in the year from 1957 to 1961, following which the Caribbean Free Trade Association had been established. By the early 1970s, the Caribbean Community had come into being, based on the idea of a common market and increased regionalization and integration. It was a slow process and one that had caused some impatience among certain leaders. That background would perhaps assist in an understanding of the comments submitted by the Secretariat of the Caribbean Community (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 5) and Guyana (*ibid.*, sect. A) regarding customs unions and other similar forms of association.

10. He could not altogether agree that supranationalism was the sole criterion for determining the position of institutions such as the Caribbean Community in relation to most-favoured-nation clauses. Supranationalism involved two elements: the automatic application of legislative decisions to the constituent members of the institution, and the monolithic character of the institution as far as such application was concerned. In his view, a more important consideration was whether the organization had a mandate from its constituent members to act on their behalf in certain areas, for instance, to conclude a treaty involving most-favoured-nation treatment.

11. It was important to ensure that no essential element was omitted from article 3 for, if the Commission were to err, it would be difficult to interfere with the text later. A feature of most United Nations documents was that they were open to more than one interpretation, and in that respect the article ran true to form. Only one interpretation, however, could be given to the omission of any reference to clauses in treaties between international organizations, in view of the limited scope of the draft as defined in article 1.<sup>2</sup> At its twenty-eighth session, the Commission

<sup>2</sup> See 1483rd meeting, foot-note 1.

had decided to omit such a reference because it was "not aware of such clauses having arisen in practice, though hypothetically it is not impossible".<sup>3</sup> He was confident that the Commission would now reverse its decision since, when dealing in 1977 with reservations to treaties between international organizations, it must have seen the wisdom of providing for such an eventuality. He was firmly of the opinion that article 3 should be recast to repair that omission for, as it stood, it meant that in the future a treaty concluded between two international organizations would have no legal effect. For those reasons, the text should be referred to the Drafting Committee.

12. Mr. TABIBI said that, while he maintained the view that the article should be limited to most-favoured-nation clauses in treaties between States and agreed that article 3 should be retained in its existing form, he also thought that the Commission should not shut its eyes to the fact of international organizations and their significance in the modern world. The way should be left open to accommodate the viewpoint of those who contended that organizations such as EEC should be catered for in the draft, because of their impact not only on their own members but also on smaller nations. The Drafting Committee should therefore seek some way of meeting that viewpoint either in the commentary or in the body of the draft, without however jeopardizing the basic principles evolved over the years. His impression was that that, in fact, was the Special Rapporteur's intention. It might be helpful, too, if Mr. Tsuruoka would apprise the Commission of the ideas he proposed to put before the Drafting Committee.

13. Mr. THIAM thought that, in the interests of calm discussion, it would be preferable not to refer specifically to any given international organization, so as not to give the impression that the Commission was laying down rules in favour of or against a particular organization. But contemporary reality must be taken into account; and that was only partially done in article 3, which applied solely to States, to the exclusion of other subjects of international law. The Special Rapporteur had attempted to make a distinction between States and supranational organizations that was very difficult to accept. Since a supranational organization was as much a subject of international law as a State, the Commission could not exclude supranational organizations from its current work of codification. Was the mere fact of not being a State enough to prevent a subject of international law from benefiting from a most-favoured-nation clause?

14. Since the Commission was at a rather late stage in its work, it could simply have indicated in the commentary that it was not systematically excluding from entitlement to the most-favoured-nation clause all subjects of international law other than States. But the existing wording of items (2) and (3) of the introductory part of article 3 made that difficult.

Consequently, the Commission should be slightly more flexible both on the principle and on the wording, so that what now definitely seemed to be the general consensus could be reflected in the text of the article.

15. Mr. NJENGA thanked Sir Francis Vallat for the details he had supplied at the previous meeting about the administration of EEC; he now had a much clearer understanding of EEC's role.

16. He thought that Mr. Schwebel's proposal<sup>4</sup> might provide at least a partial solution to the Commission's problem regarding EEC. In a work of codification such as that undertaken by the Commission, it was important not to go too far, but, equally, not to preclude a situation where the parties concerned agreed to apply the draft articles as an exception.

17. He failed to understand why paragraph (a) departed from the language of the Vienna Convention on the Law of Treaties<sup>5</sup> which, in (a), spoke of "legal force" rather than "legal effect". The latter term could be misleading, since the intent was to provide that the fact that certain clauses were not covered by the draft articles would not prejudice their validity. He would therefore suggest, to clarify the text, that the words "shall not affect: (a) the legal effect..." be replaced by "shall not prejudice (or "shall not affect"): (a) the legal force...". Perhaps the Drafting Committee could attend to that point.

18. Further, he did not see why the words "in written form" had been included in paragraph (c) of the article, when they did not appear in the corresponding provision—article 3, paragraph (c)—of the Vienna Convention. He had noted the explanation given in paragraph (4) of the commentary to article 3, but none the less considered that the inclusion of those words could give the impression that special importance was attached to treaties not in written form. If, as he understood, that was not the case, then the Commission might wish to revert to the language of the Vienna Convention on that point.

19. Mr. TSURUOKA, introducing the amendments that he intended to submit to the Drafting Committee, noted first that item (1) of the introductory part of article 3 referred to a case that rarely, if ever, occurred: that of a most-favoured-nation clause contained in an oral agreement between States. Not only did he question the desirability of providing for such a case; he also considered that it was difficult to speak of a "clause" in an oral agreement. It would therefore be better to replace the words "to a clause on most-favoured-nation treatment contained in an international agreement between States not in written form" by the words "to an international agreement not in written form whereby a party undertakes to accord to another party most-favoured-nation treatment or treatment not less favourable than that extended to any subject of international law". In that

<sup>3</sup> *Yearbook... 1976*, vol. II (Part Two), p. 13, doc. A/31/10, chap. II, sect. C, art. 3, para. (3) of the commentary.

<sup>4</sup> 1486th meeting, para. 25.

<sup>5</sup> See 1483rd meeting, foot-note 2.

formulation, the words "most-favoured-nation treatment" were to be distinguished from the words "treatment not less favourable than that extended to any subject of international law". The definition of "most-favoured-nation treatment" contained in article 5 in fact applied only to the treatment accorded by the granting State to the beneficiary State; it did not apply to subjects of international law other than States. In order to cover such other subjects of international law, whether they granted or benefited from the clause, it would be necessary to introduce the wording he had proposed.

20. It was obvious that items (2) and (3) did not cover every conceivable situation, including the case of an international agreement by which a subject of international law other than a State undertook to accord to another subject of international law other than a State treatment not less favourable than that extended to any subject of international law, as well as the case of an international agreement to which a subject of international law other than a State was a party and by which a State undertook to accord most-favoured-nation treatment to another State. There was no reason why those cases should not be covered in article 3, which would thus be a genuine saving clause. To avoid having to list each of those four cases, a general formula, which would replace items (2) and (3) of the article, might be worked out along the following lines:

"to a clause contained in an international agreement in written form to which one or more subjects of international law other than States are parties whereby a party undertakes to accord to another party most-favoured-nation treatment or treatment not less favourable than that extended to any subject of international law."

Such a formula would offer the added advantage of clearly indicating the cases covered by article 3.

21. Paragraph (b) of the article did not expressly safeguard the application of the rules set forth in the draft articles, independently of those articles, to clauses contained in international agreements concluded between States and other subjects of international law. If the parties to such an agreement considered that a particular rule of the draft was a rule of customary international law, there would be no problem in applying it, but the situation would be more complicated if they considered that the rule was merely one of progressive development, for then the words "under international law" would not help. In paragraph (b), therefore, a distinction should be made between the application of the rules of the draft by virtue of the fact that those rules were established principles of international law, and their application by virtue of a specific agreement reached for that purpose by the parties concerned.

22. Mr. SCHWEBEL said he would be glad if Mr. Tsuruoka would come to the Drafting Committee's meeting and explain his very constructive proposals.

23. Bearing in mind the term of article 1, he would suggest, to emphasize that the rules set forth in the

draft articles could well be applied in other cases, that the word "specifically" be inserted between the words "do not" and "apply", at the beginning of the article, as amended by Mr. Tsuruoka's proposals.

24. Mr. USHAKOV (Special Rapporteur), summing up the discussion on article 3, said he was sure that the many drafting suggestions put forward would be very useful to the Drafting Committee. The Commission had already spent a great deal of time on article 3. Its difficulties arose from the fact that it was trying to do two things at once. In the introductory part of the article, it was dealing with two different problems: that of the types of treaties to which the draft articles did not apply, such as oral treaties or treaties to which the draft articles did not apply, such as oral treaties or treaties to which subjects of international law other than States were parties, and that of the different types of clauses that could be contained in such treaties, such as most-favoured-nation, -State or -organization (whether international or supranational) clauses, and clauses for any other most-favoured subjects of international law. In the corresponding article of the Vienna Convention on the Law of Treaties, the latter problem had not arisen, for all that had been needed was to distinguish between certain types of treaties. Despite the current difficulties, however, he had no doubt that the Drafting Committee would in the end find the most suitable wording for the article. In any event, all the members of the Commission seemed to consider that article 3 was justified and should be kept.

25. Mr. JAGOTA said that if the Commission agreed that the articles applied to States in their relations with one another, but could apply to other cases provided certain conditions were fulfilled, the Drafting Committee might consider the desirability of inserting, in the opening paragraph of article 3, before the final words "shall not affect", an item (4) which would read:

"or (4) to a similar clause contained in an international agreement by which a subject of international law other than a State undertakes to accord most-favoured treatment to other such subjects of international law."

He had deliberately avoided the use of the word "nation" in the expression "most favoured treatment", but had qualified the word "clause" by the word "similar", thus obviating the need to define "most-favoured treatment", because the Commission was in fact confining itself to the scope of article 1, namely, "most-favoured-nation clauses contained in treaties between States".

26. The suggestion by Mr. Tsuruoka concerning subparagraph (b) was helpful. It would probably cover the case of EEC and similar organizations. Nevertheless, it would be advisable to continue to use the expression "clause contained in an international agreement" and to refrain from speaking simply of "international agreement". The draft articles were concerned throughout with most-favoured-nation clauses contained in international agreements, and the Com-

mission should not now draw a distinction between a clause contained in an international agreement and the international agreement itself.

27. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 3 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>6</sup>

ARTICLE 4 (Most-favoured-nation clause) and  
ARTICLE 5 (Most-favoured-nation treatment)

28. The CHAIRMAN invited the Special Rapporteur to introduce articles 4 and 5, which read:

*Article 4. Most-favoured-nation clause*

“Most-favoured-nation clause” means a treaty provision whereby a State undertakes to accord most-favoured-nation treatment to another State in an agreed sphere of relations.”

*Article 5. Most-favoured-nation treatment*

“Most-favoured-nation treatment” means treatment accorded by the granting State to the beneficiary State or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with a third State.

29. Mr. USHAKOV (Special Rapporteur) said that articles 4 and 5 lay at the heart of the draft and established the basis for it. Article 4, which defined the most-favoured-nation clause, was perhaps something more than a simple definition, for it also had a bearing on the scope of the draft articles. The Commission had retained the expressions “most-favoured-nation clause” and “most-favoured-nation treatment”, using the word “nation” instead of the word “State”, for, as it had indicated in paragraph (2) of its commentary to article 4, those were standard expressions sanctioned by custom and the practice of international law.

30. In defining the most-favoured-nation clause as “a treaty provision”, the Commission had once again used the concept of a treaty, already contained in article 1. As the Commission had stated in its commentary to article 4,

Article 4 expresses the idea that a most-favoured-nation pledge is an international, i.e. inter-State, undertaking. ...only through the [beneficiary] State do the persons in a particular relationship with that State, usually its nationals, enjoy the treatment stipulated by the granting State.<sup>7</sup>

Thus it was only the beneficiary State, in its capacity as a State, that could claim most-favoured-nation treatment for persons or things in a particular relationship with it; those persons or things could not claim anything themselves.

31. In paragraph (16) of its commentary to article 4, the Commission had indicated, without claiming to

give an exhaustive list, a number of “agreed spheres of relations” in which most-favoured-nation clauses were used. It had stated that those spheres were “extremely varied”, and had referred not only to the international regulation of trade and payments but also to such other spheres as transport, the establishment of foreign physical and juridical persons, the establishment of diplomatic, consular and other missions, intellectual property and the administration of justice. It had explained that a most-favoured-nation clause could apply to one or more of those spheres and had stressed that:

“The important point is that the clause always applies to a determined sphere of relations agreed upon by the parties to the treaty concerned.”<sup>8</sup>

It must therefore be borne in mind that most-favoured-nation clauses existed not only in the sphere of international trade, as was often believed, but that they could also exist in any other sphere of international relations, provided it was a determined sphere agreed upon by the parties to the treaty.

32. Since article 4 defined the most-favoured-nation clause in terms of “most-favoured-nation treatment”, that expression had to be defined in article 5. As the Commission had stated in its commentary to that article,

The clause embodied in the treaty between the granting and the beneficiary State has to determine the persons or things to whom and to which the most-favoured-nation treatment is applicable and this determination has to include, obviously, the link between the beneficiary State and the persons and things concerned.<sup>9</sup>

that link was, for example, the nationality or citizenship of persons, or the State of origin of products. The relationship between the persons or things in question and the beneficiary State was therefore determined by the clause itself or, in other words, by the treaty.

33. In another passage of its commentary, the Commission had explained why it had chosen the term “not less favourable” instead of the adjective “equal” to denote the relationship between the terms of the treatment enjoyed by a third State and those promised by the granting State to the beneficiary State. It had shown that, although a most-favoured-nation pledge did not oblige the granting State to accord to the beneficiary State treatment more favourable than that extended to the third State, it did not exclude the possibility that the granting State might accord to the beneficiary State additional advantages beyond those conceded to the most-favoured third State. It had also stressed the fact that:

If, as is the usual case, the clause itself does not provide otherwise, the clause begins to operate... if the third State... has actually been granted the favours which constitute the treatment.<sup>10</sup>

It should be noted, then, that the most-favoured-nation clause was applicable only if there was a direct relationship between the granting State and the third State.

<sup>6</sup> For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 16-18.

<sup>7</sup> *Yearbook... 1976*, vol. II (Part Two), p. 15, doc. A/31/10, chapt. II, sect. C, art. 4, para. (11) of the commentary.

<sup>8</sup> *Ibid.*, pp. 15 and 16, art. 4, para. (16) of the commentary.

<sup>9</sup> *Ibid.*, p. 18, art. 5, para. (3) of the commentary.

<sup>10</sup> *Ibid.*, p. 18, para. (5) of the commentary.

34. In the oral comments they had made in the Sixth Committee in 1976, several representatives had expressed the view that article 4 should state explicitly that the essential issue was the relationship between States deriving from the valid terms of a treaty in force, because many treaties had been concluded in historical circumstances that no longer prevailed (A/CN.4/309 and Add.1 and 2, para. 102). His own view was that it was unnecessary to introduce that clarification in article 4, since article 7 made it clear that it dealt with "the most-favoured-nation clause in force between the granting State and the beneficiary State".

35. Some representatives in the Sixth Committee had also stated that articles 4 and 5 should be combined in a single article and that their provisions should be incorporated in article 2 so as not to detract from the traditional importance of definitions (*ibid.*). That was also the opinion of the Government of Luxembourg, which had stated that the provisions of article 4 would be more suitably included among the definitions in article 2 (A/CN.4/308 and Add.1 and Add.2/Corr.1, sect.A). He did not share that view, for he considered that article 4 was much more than a simple definition. He noted that, as indicated in paragraph (1) of the commentary to article 4, the Commission had decided to keep articles 4 and 5 separate from the article on the use of terms because the importance of the terms "most-favoured-nation clause" and "most-favoured-nation treatment", which were the cornerstones of the draft.

36. With regard to article 5, some representatives in the Sixth Committee had expressed the view that that article, as well as article 7, should be reviewed to take account of the fact that a beneficiary State should not automatically be entitled, under a most-favoured-nation clause, to all the privileges enjoyed by the third State when, owing to the existence of a special relationship between the granting and third States, the extension of those privileges to a third State in a particular area was something more than an act of commerce (A/CN.4/309 and Add.1 and 2, para. 112). The Government of Guyana had expressed the same opinion in its written comments, stating that, where there was a special relationship which influenced

the granting of most-favoured-nation treatment in a certain area, making it more than an act of mere commerce... the potential beneficiary State should at least be in a position of equivalence with the third State before it should properly claim all the benefits enjoyed by that third State under a most-favoured-nation clause (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A).

He agreed that, in exceptional cases in which special historical privileges had been accorded by one State to another State (for example, in the case of the diplomatic relations between France and Quebec), most-favoured-nation treatment could be granted on some basis other than a treaty provision. However, those were very rare cases which, should they occur, would normally be regarded as exceptions to the most-favoured-nation clause. He therefore did not

think it necessary to devote a special provision of the draft articles to them.

37. In its written comments (*ibid.*), the Government of Luxembourg had expressed doubt as to whether it was possible to establish a general definition of most-favoured-nation treatment. In its opinion, it was particularly difficult to explain the meaning of the terms "persons" or "things" who or which were in a "determined relationship" with a given State, particularly in the case of economic enterprises and material values such as intellectual property rights. In that connexion he pointed out that it was impossible to provide an abstract definition of the persons or things to where or to which most-favoured-nation treatment was to apply, because the real meaning of the terms "persons" or "things" in a "determined relationship" with a given State could be defined only in the context of a specific clause. It was in the clause itself that the States concerned must indicate to what juridical or physical persons and to what objects, material or otherwise, most-favoured-nation treatment was accorded. It was therefore impossible to indicate in the draft who or what such persons or things were.

38. In reply to a comment by the Government of the Netherlands, which had questioned whether the definition of most-favoured-nation treatment as "not less favourable than treatment extended by the granting State to a third State" was not too broad or at least too vague (*ibid.*), he said that the Commission's task was to draft general rules, which always had to be interpreted in specific cases. There again, it was a matter for interpretation.

39. Referring to the words "same relationship", which the Government of the Netherlands considered likely to be interpreted in too restrictive a manner (*ibid.*), he said that the Commission had clearly explained the meaning of those words and the reasons why it had retained them in paragraph (3) of its commentary to article 5. They could not be defined in the abstract, since they were understandable only in terms of a specific clause, and the Commission's task was to define the most-favoured-nation clause and most-favoured-nation treatment in general terms.

40. In conclusion, he thought articles 4 and 5 should be retained, subject to amendments of a drafting nature that were a matter for the Drafting Committee.

41. Mr. CALLE y CALLE said that articles 4 and 5 undoubtedly took the form of definitions. They were not, however, simple definitions of terms, but definitions of the legal institutions of the most-favoured-nation clause and most-favoured-nation treatment. For that reason, they were appropriately placed in the general structure of the draft.

42. Mr. ŠAHOVIĆ proposed that articles 4 and 5 be referred to the Drafting Committee, for the only problems they presented were drafting problems. The Commission had clearly shown in the commentary why it had presented the definitions of the most-

favoured-nation clause and most-favoured-nation treatment in the form of two separate articles instead of incorporating them in article 2, and the Special Rapporteur had been right to say that article 4 was certainly more than a simple definition. The Drafting Committee should review the wording of articles 4 and 5, which were now drafted in the form of simple definitions, in order to bring out clearly that they were not merely definitions and that their content justified their retention as separate articles.

43. Mr. VEROSTA associated himself with Mr. Šahović's proposal that articles 4 and 5 be referred to the Drafting Committee.

44. Mr. SCHWEBEL noted that the commentary to article 4 included, in a passage devoted to the General Agreement on Tariffs and Trade, the following statement:

Each member granting a concession is directly bound to grant the same concession to all other members in their own right...<sup>11</sup>

He had been informed by persons well acquainted with the operation of the most-favoured-nation clause that that statement should more accurately read:

Each granting a concession in the most-favoured-nation part of its GATT schedule is generally directly bound to apply that concession to the products of all members in their own right...

It was not his intention to take up the time of the Commission in elaborating on the reasoning underlying that view; he simply wished to offer it for the consideration of the Special Rapporteur.

45. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer articles 4 and 5 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>12</sup>

46. Sir Francis VALLAT agreed that the two articles should be referred to the Drafting Committee. Purely as a matter of working technique, however, he thought it advisable to reserve his right to refer to those articles later, inasmuch as they consisted of definitions, if such a course seemed desirable in the light of the discussion of the remainder of the draft.

ARTICLE 6 (Legal basis of most-favoured-nation treatment)

47. The CHAIRMAN invited the Special Rapporteur to introduce article 6, which read:

**Article 6. Legal basis of most-favoured-nation treatment**

Nothing in the present articles shall imply that a State is entitled to be accorded most-favoured-nation treatment by another State otherwise than on the ground of a legal obligation.

48. Mr. USHAKOV (Special Rapporteur) said that article 6 was a saving clause based on the principle

of the sovereignty and liberty of action of States, which reserved the right of a State to grant special favours to another State without third States being able to claim the same treatment in the absence of a legal obligation to that effect on the part of the granting State, usually in the form of a most-favoured-nation clause.

49. Unlike the Government of Luxembourg and the Government of the Netherlands (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A), he was of the opinion that article 6 was not superfluous, and he proposed that it be retained as it stood.

50. Mr. JAGOTA said that it was difficult to grasp fully the meaning of article 6 unless it was read in conjunction with the commentary. In view of the terms of article 1, it would appear at first glance that the legal obligation referred to in article 6 was a legal obligation arising from a treaty. If, however, the legal obligation did not necessarily arise from a treaty, the article should be redrafted to make that point clear.

*The meeting rose at 1 p.m.*

## 1488th MEETING

*Monday, 29 May 1978, at 3.05 p.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

**The most-favoured-nation clause (continued) (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2)**

[Item 1 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (continued)

ARTICLE 6 (Legal basis of most-favoured-nation treatment)<sup>1</sup> (concluded)

1. Mr. TSURUOKA said that, from the legal standpoint, article 6 was not indispensable, but from the political standpoint, it definitely had a place in the draft. In its existing form, the article seemed to be directed both to the beneficiary State and to the granting State, since it referred both to a State's entitlement to be accorded most-favoured-nation treatment and to the legal obligation of a State to extend such treatment. Since the concept of a legal obligation was the basis for the article, it might be preferable to lay the emphasis on the granting State by changing the

<sup>11</sup> *Ibid.*, p. 14, art. 4, para. (10) of the commentary.

<sup>12</sup> For consideration of the texts proposed by the Drafting Committee, see 1521st meeting, paras. 19 and 20, and paras. 21-23.

<sup>1</sup> For text, see 1487th meeting, para. 47.

words “is entitled to be accorded most-favoured-nation treatment by” to the words “is required to accord most-favoured-nation treatment to”.

2. Mr. TABIBI said that article 6 was an important saving clause and, like article 3,<sup>2</sup> served a very useful purpose. If the Commission were to confine itself to most-favoured-nation treatment extended by States to one another under the terms of a written treaty, it might lose sight of the fact that such treatment could also be claimed by a State by law, custom or historical right. In some instances, a legal obligation might transcend the terms of a treaty. In the *Right of Passage over Indian Territory* case,<sup>3</sup> for example, the International Court of Justice had founded its decision not on the Portuguese-Marathas treaty but on customary law. To take another example, in Afghanistan large numbers of nomads travelled across the country to reach the Indian subcontinent and, by custom, had always been granted grazing rights for their animals. Article 6 should certainly be retained, therefore, thus making provision in the draft for oral agreements, customary law (including regional customary law) and claims to most-favoured-nation treatment based on resolutions of international organizations or legally binding unilateral acts by States.

3. Mr. USHAKOV (Special Rapporteur) said that members seemed to be agreed on the value of article 6. The time appeared to have come, therefore, to refer it to the Drafting Committee.

4. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 6 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>4</sup>

ARTICLE 7 (The source and scope of most-favoured-nation treatment)

5. The CHAIRMAN invited the Special Rapporteur to introduce article 7, which read:

*Article 7. The source and scope of most-favoured-nation treatment*

1. The right of the beneficiary State to obtain from the granting State treatment extended by the latter to a third State or the persons or things in a determined relationship with a third State arises from the most-favoured-nation clause in force between the granting State and the beneficiary State.

2. The treatment to which the beneficiary State is entitled under that clause is determined by the treatment extended by the granting State to the third State or to persons or things in the determined relationship with the latter State.

6. Mr. USHAKOV (Special Rapporteur) pointed out that article 7 showed that the source of most-favoured-nation treatment was the most-favoured-

nation clause in force between a granting State and a beneficiary State, but that such treatment was determined by the treatment extended by the granting State to a third State or to persons or things in a determined relationship with that third State. The Commission had dealt at length with those two ideas in its commentary to the article. It had emphasized that the right of the beneficiary State to receive most-favoured-nation treatment from the granting State was anchored in the most-favoured-nation clause and that such treatment—in other words, the extent of benefits to which the beneficiary State could lay claim for itself or for persons or things in a determined relationship with it—depended upon the treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State. The existence of a certain treatment extended directly by the granting State to a third State determined only the operation of the most-favoured-nation clause and the extent of the treatment to be accorded by the granting State to the beneficiary State.

7. In its commentary to article 7, the Commission had indicated that the real source of most-favoured-nation treatment had sometimes given rise to misunderstandings. It had been claimed that the source lay in the treatment granted to the third State. In actual fact, it was not the agreement between the granting State and the third State that served as a basis for the operation of the most-favoured-nation clause; in accordance with the rule *pacta tertiis nec nocent nec prosunt*, the sole source of most-favoured-nation treatment was the most-favoured-nation clause. It followed that the right of a beneficiary State to a certain treatment did not arise from the treaty between the granting State and the third State. As the Commission had pointed out in its commentary, that provision reflected the view that the basic act (“acte règle”) was the agreement between the granting State and the beneficiary State; that agreement took the form of a most-favoured-nation clause. The agreement between the granting State and the third State was nothing more than an act creating a condition (“acte condition”).<sup>5</sup> If there was no treaty or other agreement between the granting State and the third State, the rule stated in the article became even more evident. The root of the right of the beneficiary State was obviously the treaty containing the most-favoured-nation clause. The extent of the favours to which the beneficiary of that clause might lay claim would be determined by the actual favours extended by the granting State to the third State. It should also be noted that it was possible to include restrictions in the most-favoured-nation clause and, accordingly, to limit the favours to which the beneficiary State could lay claim. Thus a condition could be imposed, as provided in articles 8 and 10.

8. In his opinion, the oral comments made in the Sixth Committee in 1976 with respect to articles 5

<sup>2</sup> See 1483rd meeting, foot-note 1.

<sup>3</sup> *Right of Passage over Indian Territory (Merits)*, Judgment of 12 April 1960, *I.C.J. Reports 1960*, p. 6.

<sup>4</sup> For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 30 and 31.

<sup>5</sup> See *Yearbook... 1976*, vol. II (Part Two), p. 22, doc. A/31/10, chap. II, sect. C, art. 7, para. (5) of the commentary.

and 7, as contained in the report of the Sixth Committee to the General Assembly,<sup>6</sup> did not in fact apply to article 7.

9. Written comments on article 7 had been submitted by Luxembourg, Colombia and the Netherlands. The Government of Luxembourg had questioned whether the argument underlying article 7—based on the distinction between the “arising” of the rights granted by the clause and their “determination”—was entirely relevant. It had noted that the clause in fact created only a conditional obligation, the condition depending upon the favours that might subsequently be extended to a third State, and that it might therefore be going too far to say, as the Commission had stated in its commentary, that the clause was the “exclusive” source of the beneficiary State’s right (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A).

10. The Government of Colombia had noted that, according to article 7, the basis of the beneficiary State’s right to most-favoured-nation treatment was the “most-favoured-nation clause in force between the granting State and the beneficiary State”. Logically, however, the words “in force” used in the article defined neither the prerequisites nor the effects of the rule in question. If a treaty between the granting State and the beneficiary State regulated the content and scope of application of the most-favoured-nation clause, there would be no grounds whatever for referring to a relationship between the granting State and the third State. The Government of Colombia had stated that that view was confirmed by article 18 of the draft, under which the right of the beneficiary State to any treatment under a most-favoured-nation clause not made subject to the condition of material reciprocity “arises at the time when the relevant treatment is extended by the granting State to a third State”. Yet there was no direct reference in the article to the basic treaty as the source of the right, the substance of which was defined by the treatment accorded by the granting State to a third State. Consequently, the Government of Colombia had proposed that the words “in force” in article 7, paragraph 1, should be replaced by the word “agreed”. If, however, the words “in force” were to be retained, the end of paragraph 1 might be drafted to read; “... the most-favoured-nation clause in force between the granting State and the third State” (*ibid.*).

11. The Government of the Netherlands had pointed out that paragraph 1 referred to persons or things “in a determined relationship with a third State”, while what the Commission had had in mind was persons or things “in the same kind of relationship with a third State as the relationship determined by the conditions of the most-favoured-nation clause”. The same problem arose at the end of paragraph 2: “the determined relationship with the latter State” (namely the third State) did not exist (*ibid.*).

12. Those comments by the Government of the Netherlands had been based on the commentary to articles 8, 9 and 10, in which the Commission had explained that the meaning of material reciprocity, as indicated in paragraph (e) of article 2, was “equivalent” treatment, namely, treatment of the same kind and of the same measures.<sup>7</sup> However, the clause referred to in article 7 was not a most-favoured-nation clause conditional on material reciprocity; it was a simple most-favoured-nation clause.

13. With regard to the comments by the Government of Luxembourg, he fully shared the view expressed by the Commission in its commentary, namely, that article 7 set out the basic structure of the operation of the most-favoured-nation clause. Paragraph 1 stated that the right of the beneficiary State to obtain most-favoured-nation treatment arose solely and exclusively from the clause in force, in other words, from the agreement in force in which it was contained. The Commission obviously did not have to deal with questions of the validity of clauses or of the agreements containing them, since those were dealt with by the Vienna Convention on the Law of Treaties.<sup>8</sup> The right to a treatment was not conditional; it arose naturally from any clause in force. It was the treatment to which a State could lay claim under the clause that was conditional, or rather, variable, because it was determined by the treatment extended to the third State or to persons or things in a determined relationship with that State, as explained in article 7, paragraph 2. Consequently, he proposed that the word “only” be inserted in paragraph 1, between the word “arises” and the words “from the”, in order to indicate clearly that the clause was the only source of the right of the beneficiary State. The Commission would then be not merely describing a situation; it would be stating a rule of international law.

14. As to the comments by the Government of Colombia, he considered that article 7, paragraph 1, very clearly indicated that the sole source of the right of the beneficiary State to most-favoured-nation treatment was the most-favoured-nation clause in force between the beneficiary State and the granting State. That obviously presupposed that the clause, which was by definition a treaty provision, was in force, since the treaty containing it was also in force. The clause could also operate if there was a direct relationship, within the scope of the clause, between the granting State and a third State. That was also reflected in article 7. Consequently, there was no need for the amendments to article 7, paragraph 1, proposed by the Government of Colombia.

15. Mr. VEROSTA supported the views of the Special Rapporteur. Referring to the titles of articles 6 and 7 (“Legal basis of most-favoured-nation treatment” and “The source and scope of most-favoured-nation treatment”), he wondered whether the Com-

<sup>6</sup> Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 106, doc. A/31/370, para. 39.

<sup>7</sup> Yearbook... 1976, vol.II (Part Two), p. 28, doc. A/31/10, chap. II, sect. C, arts. 8, 9 and 10, para. (41) of the commentary.

<sup>8</sup> See 1483rd meeting, foot-note 2.



mission had intended to make a distinction between the “legal basis” of most-favoured-nation treatment and its “source”. Article 17 of the draft articles on State responsibility<sup>9</sup> referred to “the origin” of an international obligation. The Drafting Committee should try to standardize the terms used. In the title of article 7, it might delete the word “source”, which was rather too vague. It might also formulate the rule in paragraph 1 in negative form, by providing that “the right of the beneficiary State... arises only...”.

16. Mr. CALLE y CALLE said that article 7 was one of the most important articles of the entire draft, for it dealt with the basic mechanism of the operation of the most-favoured-nation clause. In stating that the right to most-favoured-nation treatment arose from a clause in force between the granting State and the beneficiary State, paragraph 1 left aside the possibility that a treaty might exist between the granting State and a third State. In that case, the basic treaty from which the right to most-favoured-nation treatment arose would not be the treaty between the granting State and the third State but the pre-existing treaty between the granting State and the beneficiary State, as could be seen from the decision reached by the International Court of Justice in the *Anglo-Iranian Oil Company* case.<sup>10</sup> Now that the Commission was engaged on its second reading of the draft, that point should be made even clearer in the commentary to the article, for some confusion might arise between a “third State” in the context of “granting State” and “beneficiary State” in paragraph 1 of the article, and a third State that might in fact be a beneficiary State as a result of the provisions of a treaty between the granting State and the third State. In other words, there would be two kinds of third State, one that fell within the scope of the draft and another that, technically, was governed by the general law of treaties.

17. As had been pointed out by Mr. Verosta, further clarity was required even in the title of the article, which spoke of the “source and scope of most-favoured-nation treatment”. Was the Commission referring to the source of the treatment or to the moment at which the obligation to accord equal treatment arose? Logic would suggest that that moment arose when such treatment was extended to a third State. In the Spanish version of paragraph 1, the word “dimana” should be replaced by “surge” or “se origina”, since the paragraph related to the very source of the obligation to extend most-favoured-nation treatment. On the other hand, he could not support the Special Rapporteur’s proposal to insert the word “only” after the word “arises”, since he doubted whether the Commission could exclude other elements that formed part of the obligation arising to grant the treatment; to introduce the word “only” would make the paragraph too restrictive.

<sup>9</sup> *Yearbook... 1977*, vol. II (Part Two), pp. 11 *et seq.*, doc. A/32/10, chap. II, sect. B, 1.

<sup>10</sup> *Anglo-Iranian Oil Co. (jurisdiction)*, Judgment of 22 July 1952, *I.C.J. Reports 1952*, p. 93.

18. The proposal by the Government of Colombia to reword the last part of paragraph 1 to read: “... the most-favoured-nation clause in force between the granting State and the third State” revealed a basic error of approach. If it were adopted, the meaning of the paragraph would be precisely the opposite of what was intended.

19. Mr. ŠAHOVIĆ said that none of the members of the Commission seemed to question the principles enunciated in the two paragraphs of article 7, and that the only problems were drafting problems. Articles 4 to 7 referred to concepts and situations that were very similar, and all formed part of the introduction to the draft. He wondered what had induced the Commission to deal in a single article with the two separate questions of the source and the scope of most-favoured-nation treatment. Not only ought the Drafting Committee to consider the possibility of devoting two separate articles to those questions, but it should also examine article 7 and the three articles that preceded it from a general standpoint.

20. Mr. EL-ERIAN said that the Special Rapporteur’s conclusions and suggestions for drafting changes were acceptable, but the points raised by Mr. Šahović and Mr. Calle y Calle should be carefully considered by the Drafting Committee.

21. Mr. USHAKOV (Special Rapporteur) said that article 6 dealt with the substance of the most-favoured-nation clause and not necessarily with the most-favoured-nation clause contained in a treaty in written form. According to the definition of “most-favoured-nation clause” given in article 4, such a clause was “a treaty provision”, in other words, a written provision. If the reference in article 6 had been to a “most-favoured-nation clause”, it would have had to be a reference to a clause in a written treaty. However, that article also covered non-written clauses, which accordingly could not be designated as “most-favoured-nation clauses”. In paragraph (4) of the commentary to article 6, the Commission had referred to the resolutions of international organizations and to legally binding unilateral acts as possible bases for most-favoured-nation treatment.

22. That was the cause of the difficulties raised by the titles and wording of articles 6 and 7. If the Commission provided in article 7, paragraph 1, that the right of the beneficiary State “arises only from the most-favoured-nation clause”, it would be difficult to know how to interpret article 6, since that provision referred to another source of most-favoured-nation treatment—a source that could not be called a “most-favoured-nation clause”. He himself had no wording to propose and doubted whether the Drafting Committee could find a satisfactory answer.

23. Lastly, he noted that the French version of articles 6 and 7 referred to the “droit” to be accorded, or to obtain, most-favoured-nation treatment, whereas in the English version the word “right” appeared only in article 7; in article 6, the words “a le droit” had been rendered by the words “is entitled”.

24. Mr. JNENGA agreed with the Special Rapporteur that the draft dealt with most-favoured-nation clause contained in treaties in written form. However, article 6 was expressed in such categorical terms that it might conflict with the saving clause contained in article 3. The Drafting Committee should consider including in the text of the article some reference to article 3.

25. Mr. JAGOTA said it was plain that, since article 6 was a saving clause, it must be drafted in general terms. That was why it contained no reference to the most-favoured-nation clause or to the right of a beneficiary State. Article 7, paragraph 1, however, was directly concerned with the right of the beneficiary State and the source of that right. Adoption of the Special Rapporteur's suggestion to insert the word "only" after the word "arises" in that paragraph might create difficulties by blurring the distinction between article 6 and article 7, paragraph 1. If the Drafting Committee decided that it would be worth while to adopt that suggestion, it might consider inserting a reference in the title of article 7 to the source of most-favoured-nation treatment in relation to the right of the beneficiary State. In that way, the word "only" would be confined to the application of that right, and would not be confused with the general saving clause contained in article 6.

26. Mr. VEROSTA shared Mr. Jagota's opinion, but suggested that the word "source" be replaced by "origin" or "legal basis", since the word "source" was normally used to denote the conventional or customary origin of an obligation, and was not sufficiently precise in the existing context.

27. Mr. DÍAZ GONZÁLEZ said that, in the Spanish version of paragraph 1, there would be no difference in meaning between the word "dimana" and the phrase "no nace sino exclusivamente de", or a similar formulation. However, the word "dimana" might with advantage be replaced either by the word "surge", or, following the terms of the title of the article, by the words "tiene su fuente en".

28. Mr. EL-ERIAN said that, throughout the discussion, reference had been made to written treaties as the source of the obligation to extend most-favoured-nation treatment. Admittedly, under article 2 of the Vienna Convention on the Law of Treaties, a treaty meant an international agreement concluded between States "in written form", but that definition had been drawn up precisely for the purposes of that Convention. In his opinion, the Commission should not exclude in all situations the possibility of a treaty not in written form.

29. Mr. USHAKOV (Special Rapporteur) wondered whether Mr. El-Erian really wanted to introduce into the draft a meaning of the term "treaty" other than that defined in article 2, paragraph (a), and which had been used in the Vienna Convention on the Law of Treaties.

30. Mr. EL-ERIAN fully recognized that the draft under consideration might be viewed as an outcrop of the Convention on the Law of Treaties and that the

Commission should of course follow certain methods. He had simply wished to point out that, as in the case of the Vienna Convention, the legal situation regarding treaties not in written form should be governed by the general principles of international law.

31. Mr. AGO considered that, although treaties other than written treaties existed, the Commission must confine itself to written treaties. Indeed, the draft articles on the most-favoured-nation clause had been designed as a complement to the Vienna Convention on the Law of Treaties; any broader definition of the term "treaty" might therefore be a source of confusion. In addition, it was difficult to see how a non-written treaty could contain a most-favoured-nation clause, since the wording of clauses of that kind required great precision.

32. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 7 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>11</sup>

ARTICLE 8 (Unconditionality of most-favoured-nation clauses),

ARTICLE 9 (Effect of an unconditional most-favoured-nation clause), and

ARTICLE 10 (Effect of a most-favoured-nation clause conditional on material reciprocity)

33. The CHAIRMAN invited the Special Rapporteur to introduce articles 8, 9 and 10, which read:

*Article 8. Unconditionality of most-favoured-nation clauses*

A most-favoured-nation clause in a treaty is unconditional unless that treaty otherwise provides or the parties otherwise agree.

*Article 9. Effect of an unconditional most-favoured-nation clause*

If a most-favoured-nation clause is not made subject to conditions, the beneficiary State acquires the right to most-favoured-nation treatment without the obligation to accord material reciprocity to the granting State.

*Article 10. Effect of a most-favoured-nation clause conditional on material reciprocity*

If a most-favoured-nation clause is made subject to the condition of material reciprocity, the beneficiary State acquires the right to most-favoured-nation treatment only upon according material reciprocity to the granting State.

34. Mr. USHAKOV (Special Rapporteur) said that articles 8, 9 and 10 took into consideration only two categories of clauses: unconditional clauses and clauses conditional on material reciprocity. The commentary to those articles stated that so-called "conditional" most-favoured-nation clauses had existed in the eighteenth and nineteenth centuries and even in

<sup>11</sup> For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 32 and 33.

the early twentieth century, but that they had since completely disappeared in theory and in practice; that was why the only two categories of clauses dealt with in the draft articles were unconditional clauses and clauses conditional on material reciprocity. The former were usually to be found in treaties of commerce. The latter could be used only in certain spheres, such as consular immunities and functions, matters of private international law and matters dealt with by establishment treaties. They could not apply in commercial matters, because they would presuppose trade between two States in the same products on the same terms, something that never occurred in practice.

35. With regard to the comments on draft articles 8, 9 and 10, he noted that, in 1976, the Sixth Committee had expressed doubts as to the reservation provided for in article 8 whereby the parties might agree to make the application of the most-favoured-nation clause subject to certain conditions. It was obvious that States were free to include in their clauses any conditions they pleased, but such conditions might or might not be within the scope of the draft. It had been stressed that clauses made conditional upon material reciprocity were not conducive to the unification and simplification of international relations. The view had also been expressed, in connexion with paragraph (24) of the commentary to articles 8, 9 and 10, that, by acknowledging the necessity of establishing equivalence, the draft articles would offer the most disadvantages countries an invaluable asset in their negotiations with their more developed counterparts.

36. Governments had not submitted any written comments on article 8. The whole concept of the draft, and of articles 8, 9 and 10 in particular, was based on the fact that there were now two types of clauses: those that were not conditional upon material reciprocity and those that were. The latter could apply and be used only in certain spheres of relations; in other, such as trade, they were quite simply impossible. He proposed that article 8 be retained as it stood.

37. There had not been any oral or written comments on article 9, and he proposed that it be retained as it stood.

38. Article 10 had been the subject of written comments. The Government of Luxembourg had recommended its deletion and had expressed doubts about the advisability of introducing the idea of "reciprocity", which it considered ambiguous. In its view, article 10 dealt less with a question of reciprocity than with one of "compensation" or material "equivalent" (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A). The Governments of the Hungarian People's Republic and the Ukrainian SSR had submitted comments on the concept of "material reciprocity" (*ibid.*), while the Government of the Netherlands had referred in its comments to the proposal for a new article 10 *bis* made by EEC (*ibid.*, sect. C, 6, para. 15).

39. With regard to the term "material reciprocity", he would draw attention to the comments he had made in connexion with article 2, paragraph (e) (A/CN.4/309 and Add.1 and 2, paras. 91-96). In his opinion, that expression was not satisfactory, but he was unable to suggest a better one and would welcome any proposal to improve it. The main thing was to define it in article 2, for the definition was more important than the term itself. The Commission had already stated that it was in favour of article 10. He was therefore of the opinion that the article should be retained as it stood, subject to amendment of the expression "material reciprocity" during the consideration of article 2. For the time being, it would be desirable that the Commission agree that articles 8, 9 and 10 were relevant and should be retained in the draft.

40. Mr. CALLE y CALLE supported the substance of articles 8, 9 and 10, but if article 10 was intended as the logical counterpart to article 9, then he would suggest that the words "the condition" be altered to "conditions", the plural form being essential, as in article 9. There was also a slight discrepancy between article 10 and article 18 (Commencement of enjoyment of rights under a most-favoured-nation clause) which, in his view, should be corrected. Under the second part of paragraph 2 of article 18, the actual treatment would follow communication of the consent, whereas under article 10 the two would automatically coincide.

41. The broad basis on which LAFTA rested was the application of the most-favoured-nation clause. That was provided for in article 18 of the Montevideo Treaty,<sup>12</sup> which was very similar to the most-favoured-nation clause in the General Agreement on Tariffs and Trade. As was explained in the summary and conclusions of LAFTA's plan of action for the application of the clause (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 8, annex I), the unconditional character of the most-favoured-nation clause had initially predominated. Subsequently, however, the legal validity and relevance of that approach had been called into question, for it conflicted in practice with another basic principle of the Treaty, namely, that of reciprocity, which some countries regarded as the cornerstone of the system. It had been recognized that application of the clause should be based upon equitable and reasonable reciprocity, and the need to grant equivalent compensation had implicitly established the supremacy of the principle of reciprocity over that of the most-favoured-nation clause.

42. He mentioned those facts simply to show that material reciprocity was not the only criterion in the application of the most-favoured-nation clause; there were others too, such as reasonable and equitable conditions and virtually equivalent compensation. That, in his view, was a concept that should be

<sup>12</sup> Treaty establishing a free-trade area instituting LAFTA, signed at Montevideo on 18 February 1960. See *Official Records of the Economic and Social Council, Thirtieth Session, Supplement No. 4, annex II.*

brought out clearly in the commentary, even if it were believed to be covered by article 8, which allowed the parties a measure of freedom to contract, or by article 26 (Freedom of the parties to agree to different provisions). In their existing wording, articles 8, 9 and 10 referred solely to the concept of material reciprocity.

43. Mr. SCHWEBEL said he found the dismissal of the conditional most-favoured-nation clause, in the commentary to articles 8, 9 and 10 somewhat premature. A few such clauses still survived in treaties between the United States of America and other States. Consequently, while paragraph (31) of the commentary was accurate in stating that the conditional clause had "virtually disappeared", he considered that paragraphs (10) and (11) tended to overstate the case. He therefore suggested that, in paragraph (19), the word "almost" be added before the word "completely" and that, in paragraph (11), the word "largely" be added after the word "now".<sup>13</sup>

44. He would be interested to hear the Special Rapporteur's views, as well as those of the other members of the Commission on the EEC proposals regarding reciprocity (A/CN.4/308 and Add.1 and Add.1/Cil.1, sect. C, 6, para. 15).

45. Mr. TSURUOKA said that, at the next meeting, he intended to submit a number of amendments to articles 8, 9 and 10.

46. Mr. RIPHAGEN said he found it difficult to discuss articles 8, 9 and 10 without reference to the new article 10 *bis* proposed by EEC (*ibid.*) and referred to in the Netherlands Government's comment (*ibid.*, sect. A). It would be helpful if the Commission could take the proposed article into account during its discussion, since it dealt with the question of the effect of a most-favoured-nation clause made subject not to material reciprocity but to other conditions.

47. Mr. JAGOTA said his impression was that, while the distinction between conditional and unconditional clauses, as they applied to most-favoured-nation treatment, had held good in the past, the same could not be said of the future.

48. In prescribing rules of general application, certain major trends had to be borne in mind. One such trend was the proliferation of associations formed for the purpose of promoting various aspects of trade and commerce and of development in general. Such associations were of two kinds. On the one hand, there were associations such as EEC, which had the capacity to enter into agreements containing a most-favoured-nation clause and which, it had been agreed, fell outside the scope of the draft articles. On the other, there were associations formed by developing countries for the purpose of negotiating special benefits in the interests of development. The latter generally had to be reconciled within the context of

the operation of the most-favoured-nation clause and, in so far as they did not have a separate legal personality, the draft articles would apply.

49. A country might join a number of associations or groupings, under each of which special but differing benefits in the sphere of commerce and trade were negotiated and a special régime established. India, for example, had concluded a tripartite agreement with Yugoslavia and Egypt for the establishment of a mutually beneficial arrangement in regard to customs and other matters, for which no special machinery having a separate legal personality existed. It was likewise party to the Bangkok Agreement,<sup>14</sup> which again involved an arrangement for the granting of mutual benefits. In all such cases, the question arose as to which of the benefits granted by a country to a group of others in the same association would apply under the most-favoured-nation clause, by virtue of the draft articles, to the members of another association. That situation was not covered by article 21 (The most-favoured-nation clause in relation to treatment under a generalized system of preferences). It was in that respect that the element of conditionality might arise, and the Commission should consider whether that condition should be expressed in terms of material reciprocity or in some other form. For example, if India agreed to accord the same privileges to the members of one group as it gave to those of another, but only in so far as it was able to do so or subject to its best endeavours, that would amount to a condition in regard to the application of the most-favoured-nation clause to the other beneficiaries to which it had also granted benefits. His question, therefore, was whether that type of problem should be regarded as involving conditions of reciprocity or of the application of the most-favoured-nation clause, or whether it should be regarded as falling within the scope of rights under the most-favoured-nation clause.

50. He also wondered whether it was accurate to talk of only two types of most-favoured-nation clause, conditional and unconditional, the sole condition being that of material reciprocity, or whether there might not also be an intermediate position. If so, that should be anticipated in the drafting of articles 8, 9 and 10; if not, the situation was perhaps covered by article 11.

*The meeting rose at 6 p.m.*

<sup>14</sup> First agreement on trade negotiations among developing member countries of ESCAP. For text, see TD/B.609/Add.1 (vol. V), pp. 177-187.

## 1489th MEETING

*Tuesday, 30 May 1978, at 10.05 a.m.*

*Chairman: Mr. José SETTE CÂMARA*

*Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis,*

<sup>13</sup> See *Yearbook... 1976*, vol. II (Part Two), pp. 24 and 27, doc. A/31/10, chap. II, sect. C, commentary to articles 8, 9 and 10.

Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

**The most-favoured-nation clause (continued) (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2)**

[Item 1 of the agenda]

**DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (continued)**

**ARTICLE 8 (Unconditionality of most-favoured-nation clauses),**

**ARTICLE 9 (Effect of an unconditional-most-favoured-nation clause), and**

**ARTICLE 10 (Effect of a most-favoured-nation clause conditional on material reciprocity)<sup>1</sup> (continued)**

1. Mr. USHAKOV (Special Rapporteur), referring to Mr. Jagota's comments at the previous meeting, wished to explain the difference between a conditional and an unconditional most-favoured-nation clause. Any most-favoured-nation clause involved conditions, if only so that its scope should be clearly defined, but conditions of that kind did not make it a conditional clause. For a clause to be conditional, the granting State had to undertake to accord to the beneficiary State the same treatment as that which it accorded to a third State, provided that the beneficiary State accorded to it some counterpart equivalent to that which it received from the third State. Conditional most-favoured-nation clauses had been common in treaties until after the First World War. It had then been realized that clauses of that kind could give rise to enormous difficulties, for it was hard to determine whether the granting State had received the equivalent treatment it had requested from the beneficiary State and whether such treatment was equivalent to that it had received from the third State. In such circumstances, it was always possible to block the granting of most-favoured-nation treatment. It was thus for practical reasons that States had stopped including conditional most-favoured-nation clauses in their agreements. In the absence of explicit conditions of material reciprocity, most-favoured-nation clauses had, accordingly, been deemed to be unconditional.

2. At the previous meeting, Mr. Jagota had also pointed out that the granting State and the beneficiary State could agree on any condition they wished. Thus the granting State could undertake to accord to the beneficiary State any treatment it accorded to a third State, with the exception of that which it accorded to a group of States. In his own opinion, however, a clause containing such a condition was not a most-favoured-nation clause; it was,

at best, a favoured-nation clause. Thus the favours that the granting State extended to a group of States and refused to extend to the beneficiary State might be greater than those it extended, in the same area, to a certain third State. If the granting State confined itself to extending favours to a single third State, a most-favoured-nation clause might be said to exist; if it extended favours to a large number of States, however, a genuine "most-favoured-nation clause", within the meaning of the term as used in the draft, could not be said to exist. Any restriction *ratione personae* prevented the clause from being a most-favoured-nation clause. It was obvious that such a clause could nevertheless apply with the mutual consent of the States in question and that there were numerous general exceptions under international law, such as the one that applied to land-locked States.

3. The CHAIRMAN recalled that it had been suggested that the Commission consider the new article proposed by EEC (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 15) for insertion after article 10. Any member wishing to comment on that proposal was of course free to do so.

4. Mr. USHAKOV (Special Rapporteur) said that, according to EEC, account should be taken of the *de facto* differences in trade conditions resulting from differences in economic systems. That applied not only to countries with centrally planned economies and market-economy countries, but also to industrialized and developing countries. But aside from any political and economic considerations, the proposed article 10 *bis* would lead to the interpretation of an unconditional clause as a conditional clause, inasmuch as, under that provision, a clause that did not actually contain a condition for real reciprocity of advantages should be interpreted as implying a condition of material reciprocity. The idea defended by EEC, as expressed in article 10 *bis*, was certainly not acceptable.

5. Mr. SUCHARITKUL said he had the impression that the legal concept of reciprocity was going to cause some legal and technical difficulties. He noted, incidentally, that reference had constantly been made to reciprocity of treatment, but never to identity of treatment.

6. The order of the articles under consideration seemed logical. It was appropriate to state first the general principle of unconditionality in the form of a presumption: unless the parties to a treaty otherwise agreed, a most-favoured-nation clause was presumed to be unconditional. The following article, relating to the effect of such a clause, gave rise to some difficulty. The application of a most-favoured-nation clause always involved three States: the granting State, the favoured State and the beneficiary State. He was not sure whether reciprocity could operate twice. The favours the granting State extended to the favoured State might already be subject to a condition of reciprocity. In such a case, would the direct application of article 9 lead to the cancellation of the condition of reciprocity contained in the agreement

<sup>1</sup> For texts, see 1488th meeting, para. 33.

between the granting State and the favoured State? It was difficult to answer that question and certainly neither article 8 nor article 9 could do so. The difficulty could, moreover, take a different form: if the agreement between the granting State and the beneficiary State contained a most-favoured-nation clause that was expressly considered to be unconditional, would that clause cancel out the condition of reciprocity between the granting State and the favoured State?

7. The expression "material reciprocity" was also unclear. In most cases, States sought, by means of a most-favoured-nation clause, to grant one another practical advantages. "Material reciprocity" should therefore be understood to mean some practical or tangible reciprocity. In English, however, that expression could be taken as meaning proportionate or substantial reciprocity. The solution to that problem was perhaps to be found in article 2,<sup>2</sup> paragraph (e), where "material reciprocity" was defined, but he was not sure that the explanation offered was really adequate.

8. It was uncertainties of that kind that had prompted Mr. Jagota to ask a number of questions. The Special Rapporteur had answered them by referring to articles 21 to 23 of the draft, which related to general exceptions under international law. In that connexion, he would point out that, under article 26, the granting State and the beneficiary State were free to agree on provisions other than those contained in the draft. They would therefore be free to agree on a clause similar to the one contained in the article 10 *bis* proposed by EEC. With regard to that provision, he would merely point out that, although the purpose of a most-favoured-nation clause was usually to ensure non-discrimination, there were a great many exceptions, particularly in favour of land-locked States and with regard to treatment extended to contiguous State to facilitate frontier traffic or to treatment extended under a generalized system of preferences. The world was thus divided into several categories of States, depending on their geographical location or their level of economic development. It was true that the treatment accorded by a developed State to developing countries under a generalized system of preferences did not necessarily apply to developed States, even when there was a most-favoured-nation clause, but any attempt to cater for other categories of that kind, which would not normally be accepted, would require some very thorough preliminary study.

9. Mr. TABIBI said that most-favoured-nation treatment necessarily implied a favour granted by certain States to other States. In the absence of such a favour, there could be no question of most-favoured-nation treatment. In that sense, article 10, dealing as it did with the condition of material reciprocity, differed in concept from articles 8 and 9, which dealt with the unconditionality of most-favoured-nation clauses and their effect, as well as from the draft

articles as a whole, which were designed to promote trade and mutual co-operation. It had been the view of many members of the Sixth Committee of the General Assembly that a conditional clause would do little to assist the cause of the Third World, since such a clause necessarily implied some kind of compensation on the part of the economically weaker beneficiary developing nations.

10. There was the further question of the position of the land-locked countries. In an arrangement, say, between India and Nepal relating to transit facilities, Nepal, having no port, would find it impossible to offer the same kind of facilities to India. Admittedly, reciprocity was mentioned in the 1958 Convention on the High Seas<sup>3</sup> and also in the 1965 Convention on Transit Trade of Land-locked States,<sup>4</sup> but the time had come to recognize that, in some situations, material reciprocity was not a practical proposition.

11. On that basis, he could accept draft articles 8 and 9. He could also accept article 10, although he regarded a condition of material reciprocity as more in the nature of a trade bargain between two countries and therefore not truly in keeping with the character of a most-favoured-nation clause.

12. He agreed with the Special Rapporteur regarding the new article proposed by EEC, but some further explanation of its content and purport was required.

13. Mr. JAGOTA said the remarks he had made at the previous meeting had been addressed to the way in which the application of the most-favoured-nation clause to trade and commerce might be expressed in terms of the draft, bearing in mind developments in the modern world. The commentary to articles 8, 9 and 10 brought out clearly the distinction between conditional and unconditional clauses. It also suggested that the former did not apply to trade and commerce, but only to matters such as consular relations. That might well have been true historically, but developments, both past and future, made it necessary to ascertain the extent to which such clauses were covered by the draft articles.

14. It was internationally recognized that developing countries should be free to enter into various types of association or arrangement for the purpose of promoting their economies and extending their trade and commerce. An association such as a customs union or free-trade area clearly did not fall within the scope of the draft articles. A group of developing countries might, however, enter into an arrangement for their mutual development and assistance which provided for the application of most-favoured-nation treatment as between themselves. That was by no means an unusual occurrence. The question then arose of the application of the benefits under that arrangement to another grouping to which the countries in question might also be a party. If the clause were defined in absolute terms, the effect would be

<sup>2</sup> See 1483rd meeting, foot-note 1.

<sup>3</sup> United Nations, *Treaty Series*, vol. 450, p. 83.

<sup>4</sup> *Ibid.*, vol. 597, p. 3.

that the benefits negotiated between one group of developing countries would apply automatically to another group. That, in his view, was an entirely unrealistic approach. He had referred in that connexion to the Tripartite Agreement on Trade Expansion and Economic Co-operation among India, the United Arab Republic and Yugoslavia, as well as to the Bangkok Agreement,<sup>5</sup> to which several countries, including India, were parties. Similarly, 16 developing countries were parties to the GATT Protocol relating to Trade Negotiations among Developing Countries, and each of them might enter into special arrangements.

15. If it were simply a matter of applying the most-favoured-nation clause, subject to the condition of material reciprocity, then the draft articles would not cause any difficulty. Such a clause could, however, be so worded as to give rise not to the automatic but to the qualified or conditional application of the benefits enjoyed by the members of one group to those of another. He had in mind, for example, a condition providing that the members of the grouping should use their best endeavours to apply any such benefits, or that such benefits should be applicable given a certain balance of convenience. The next question, therefore, was whether such a provision should be regarded as a conditional application of the most-favoured-nation clause, and therefore as being covered by draft articles 8, 9 and 10, or as an exception, in which case it would fall either under article 21 (The most-favoured-nation clause in relation to treatment under a generalized system of preferences) or under article 3 (Clauses not within the scope of the present articles). Alternatively, it could perhaps be dealt with under draft article 26 (Freedom of the parties to agree to different provisions).

16. The Commission should take note of what was an increasingly common occurrence and at least indicate whether it regarded that occurrence as a condition or an exception to the most-favoured-nation clause, or as a matter on which the parties had complete freedom of action.

17. Mr. USHAKOV (Special Rapporteur) said that the problem raised by Mr. Jagota came under article 15, and that it would be premature to discuss the question of the right of the beneficiary State to the treatment extended by the granting State to a third State under a multilateral agreement. The special case of customs unions and similar associations of States should be left until later.

18. Mr. TSURUOKA proposed some amendments to be articles under consideration. First, in article 8, the words "is unconditional" should be replaced by the words "shall be deemed to be unconditional", which were more accurate because they expressed the idea of presumption on which the article was based. In addition, the reservation at the end of the article, reading "unless that treaty otherwise provides or the parties otherwise agree", might simply be replaced by

the words "unless the parties otherwise agree", which would fully cover the situation in which the treaty otherwise provided. Next, in article 9, the words "without the obligation to accord material reciprocity to the granting State" might be replaced by the words "immediately upon the coming into force of such a clause and without conditions". Lastly, in article 10, since the right of the beneficiary State to most-favoured-nation treatment arose as soon as the clause entered into force, material reciprocity was only a condition for the exercise of that right. He therefore proposed that the words "acquires the right" be replaced by the words "is entitled".

19. Mr. REUTER regarded Mr. Tsuruoka's proposal to replace the words "is unconditional" in article 8 by the words "shall be deemed to be unconditional" as of fundamental importance. He could accept article 8 only with that amendment, and even then with some reservations.

20. The Commission had to decide whether it intended to study certain legal devices in the abstract or from the point of view of their current practical utility. The commentary and the report of the Special Rapporteur showed that conditional clauses had at one time been in favour but were no longer used. If it were true that that time had passed and had been succeeded by an era without conditional clauses, then it would have to be said that the international community had already entered the next era. States, particularly developing countries, no longer wanted abstract equality. Just as, at the internal level, individuals were no longer satisfied with purely nominal equality, so, at the international level, States also aspired to genuine equality.

21. It was therefore not enough to say, as the Commission was saying, that the unconditional clause was the most important. In its proposed article 10 *bis* (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 15), EEC had expressed, albeit somewhat clumsily, the idea that the presumption of the unconditionality of a most-favoured-nation clause was not acceptable for exchanges of goods and services between countries with different social and economic systems. He was therefore of the opinion that, at least, a reference should be included in articles 8, 9 and 10 to the succeeding articles of the draft. However valuable it might be for industrialized States, the presumption of unconditionality was no longer valid in international relations. History had taken its course, and conditional clauses were now reappearing. For example, the treaty concluded between EEC and China contained a most-favoured-nation clause drafted in terms that clearly showed that China did not want abstract equality. The same was true of all other developing countries. That should therefore be taken into account from the outset.

22. Mr. NJENGA agreed that the Commission should revert to the important question raised by Mr. Jagota when it considered the most-favoured-nation clause as it applied to relations between developing countries *inter se*.

<sup>5</sup> See 1488th meeting, foot-note 14.

23. The reason why he was unable to support the new article proposed by EEC was that the proposal was based on the assumption that there were only two economic and social systems: that of the developed market-economy countries and that of the socialist centralized-economy countries. In fact, there were many others. The existence of those two systems did not justify the creation of another category of conditional clause, which would be the effect if the relationship between those systems were omitted from the scope of the unconditionality of the most-favoured-nation clause. He also found the wording of the proposed new article somewhat difficult to understand. Who, for instance, would decide whether most-favoured-nation treatment would lead to "an equitable distribution of advantages and obligations of comparable scale"? In his view, the very purpose of most-favoured-nation treatment was to remove discrimination in trade.

24. Further, he could not agree that it was only under socialist systems that government interests played a part in national trade; even in industrialized countries they did so to a greater or lesser degree. Indeed, developing countries had found that when their textile industries had gained an advantage over those of developed countries, barriers had suddenly been erected—by governments, not by industry.

25. Trade and commerce in developing countries were in the hands both of State bodies and of free enterprise, and consequently could not be classified according to one system or another. Once exceptions were introduced on that basis, varying degrees of discrimination in trade would sooner or later inevitably appear. Qualifications in specific cases, such as in the trade agreements between EEC and China referred to by Mr. Reuter, were quite justified, but such qualifications should not be made the subject of general rules in the draft articles. That would merely pave the way for a built-in mechanism in trade, based not only on social and economic but also on political criteria, and to provide for that type of hidden discrimination would be doing a disservice to the development of international law.

26. Mr. RIPHAGEN said that possibly the most important of all the draft articles were articles 25 (Non-retroactivity of the present articles) and 26 (Freedom of the parties to agree to different provisions).

27. He fully agreed that, in its unconditional form, the most-favoured-nation clause was representative of an era in international economic relations that was now long past. The various exceptions to the clause, as well as the conditions to which it was made subject and the scope of its subject-matter, were all in fact one and the same thing, namely, exceptions to the principle of non-discrimination. The Commission would do well to make that clear, either in the body of the draft articles or in the commentary.

28. There was something to be said for making an objective difference between the various systems of trade, for if different treatment were accorded to cases that were objectively different, then in effect

there was no discrimination at all. That indeed was the basis on which treatment was accorded to developing countries, just as it was the basis for the fact that the treatment accorded to parties within an integration scheme differed from that accorded to parties outside the scheme. Such differences were a reality, and articles 8, 9 and 10 should be reworded to reflect that fact. Mr. Tsuruoka had made some interesting suggestions in that connexion.

29. Lastly, he noted a certain contradiction between article 10, which provided that the beneficiary State acquired the right to most-favoured-nation treatment "only upon according material reciprocity" to the granting State, and article 18, which dealt with the same situation, but provided that the right of the beneficiary State arose at the time of the communication by the beneficiary State to the granting State "of its consent to accord material reciprocity". In his view, article 10 offered the better formulation. He drew attention to the point because it was in the nature of a sequel to what he regarded as an artificial distinction between conditions, exceptions and the scope of the subject-matter of the clause.

30. Mr. ŠAHOVIĆ wished to return to a number of points that had already been mentioned by the Special Rapporteur and that merited further study, particularly by the Drafting Committee, which would have to find a suitable formulation for articles 8, 9 and 10. In the case of article 10, he still had some doubts about the clause subject to the condition of material reciprocity, particularly from the point of view of terminology. While he had no specific suggestion to offer, he thought the definition of "material reciprocity" given in article 2 should be made clearer and the designation of the clause itself made stricter.

31. The Commission had considered the question of the various categories of most-favoured-nation clauses. Mr. Reuter had referred to the practical use of the clause as an instrument in current inter-State relations, mainly in the sphere of international trade. He himself was in favour of a solution whereby the unconditional clause would take precedence over the clause conditional on material reciprocity. That idea should be reflected in the draft. The Commission would then be moving in the direction of a practice that was in keeping with modern conditions. It was obvious that, in practice, there were always cases that called for special solutions, and solutions that were exceptions to the rule; but, as was sometimes said, it was the exceptions that proved the rule.

32. It was necessary to bear in mind the role played by the most-favoured-nation clause in international relations, especially in economic relations, and to place it in a realistic setting. The clause, however, was only one instrument among many in a world that was trying to establish a new international economic order. For instance, account should be taken of the Charter of Economic Rights and Duties of States, article 26 of which enunciated the principles which should provide the legal basis for trade among States, regardless of any differences between their economic



systems. He therefore had some doubts as to the content of article 10 *bis*, in which it seemed that EEC had attempted to formulate a saving clause that would provide a solution to the problems faced by States with different economic and social systems. Incidentally, the Government of Hungary had commented that the clause conditional on material reciprocity applied only in certain non-commercial fields and that application of that clause under trade agreements might give rise to discrimination (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A). The clause was thus under attack from both sides.

33. In his opinion, the solution would be to make the formulation of article 10 more explicit, so as to express the Commission's intention more clearly, but without changing the general tenor of the article.

34. Sir Francis VALLAT recalled that at the 1379th meeting of the Commission he had commented that:

Mr. Ushakov was apparently seeking a form of absolute purity, and absolute purity was rarely fruitful. If the most-favoured-nation clause were to be defined according to the very strict interpretation given by Mr. Ushakov, very few States would be likely to accept the draft articles as a convention. The Commission would thus be accomplishing very pure, but unfortunately altogether fruitless work.<sup>6</sup>

Those comments had been made in connexion with what had at the time been draft article D, but they were equally applicable to articles 8, 9 and 10, which were concerned with the application of the provisions of the draft and therefore could not be separated from the provisions themselves, in other words, from the draft as a whole.

35. At the twenty-eighth session, he had been virtually alone in expressing such views, but now there were signs that members were becoming conscious of the fact that unduly rigid articles would not meet the needs of the modern world. The Commission must consider the relevance of the draft to the facts of international life, and more particularly of international trade and commerce, as they had developed since the end of the Second World War. The set of articles under study might have been appropriate at the end of the nineteenth century, but with the emergence of trade groupings, which were by no means unique to Europe, the situation was now completely different. It was quite wrong to present the problem purely in terms of EEC, for such a course would blind the Commission to the needs of the vast majority of countries. As was pointed out in the comments by EEC (*ibid.*, sect. C, 6, para. 10), many customs union agreements had been concluded which set aside the most-favoured-nation clause, such as those of the West African Customs Union, CARICOM, the Arab Common Market and the Andean Group, while free-trade areas were excluded from the scope of the clause by many regional groups all over the world such as CACM, EFTA, LAFTA and the New Zealand Australia Free-Trade Area.

36. It was essential to take account of groups of that kind if the draft were to have any bearing on trade relations among the States concerned. In that context, the strict and rigid formulation of articles 8, 9 and 10 was quite inappropriate. The rules they contained were stated as absolutes, almost as if, being derived from the definition of the most-favoured-nation clause, they were a kind of *jus cogens*, which they certainly were not. Admittedly, the matter might be rectified to some extent by means of escape clauses, but it was not a valid approach to start out with three articles that were intrinsically irrelevant to modern commercial life and then, in effect, to indicate to the majority of States that they could contract out of the articles if they considered them unacceptable.

37. Part of the difficulty was that the Commission was dealing with the problem of interpreting a particular kind of clause contained in a large number of treaties and it could not take into account the context, the object and purpose of the particular treaty and all the other elements that must affect interpretation. The task was not a hopeless one, but every effort should be made to avoid the trap of undue rigidity and, what was worse, a rigidity which, in the case of articles 8, 9 and 10, also suffered from its own inbuilt ambiguity. In explaining the meaning of the terms "conditional" and "unconditional", the Special Rapporteur had very properly distinguished between a condition that was part of the content of treaty provision and a condition that brought that provision into operation. If it was true that articles 8, 9 and 10 were concerned with the content of the provision and not with the condition that might bring that provision into operation, the articles should be formulated more clearly. Some form of aid to interpretation was also required; otherwise, it would be very difficult to distinguish in a given case between something that was an integral part of a treaty provision and something that brought that provision into operation.

38. Obviously, the new article proposed by EEC (*ibid.*, para. 15) was not drafted in the kind of language normally employed by the Commission. Nevertheless, very careful consideration should be given to including in the draft a provision that expressed the idea contained in the EEC proposal. He agreed with Mr. Reuter's comments concerning the proposed article 10 *bis*. The Commission was faced with a problem of very wide interest that merited examination in connexion with articles 8, 9 and 10, which, it should be emphasized, had to be considered in relation to the remainder of the draft.

39. Mr. SCHWEBEL fully agreed that the set of articles should endeavour to grapple with reality. Accordingly, despite drafting that was not altogether clear or felicitous, the article proposed by EEC could not, from the standpoint of its substance, be dismissed lightly. From the time of Aristotle, it had been recognized that equality among unequals was inequitable. As Mr. Reuter had rightly pointed out, the matter was of universal concern, and not simply one

<sup>6</sup> *Yearbook...* 1976, vol. I, p. 105, para. 33.

of East-West concern. However, the Commission could not ignore the fact that there were differences in the responsiveness of market-economy countries and countries with a centrally planned economy to most-favoured-nation provisions in the trade sphere. For example, unlike the case of market-economy countries, imports into countries with a centrally planned economy did not respond to reductions in tariffs. Mr. Njenga had been right to emphasize that the matter was one of degree and that the countries of the modern world often had mixed economies, but differences of degree could have a very substantial effect on reality—reality which had to be properly assessed by the Commission. In short, he shared the approach taken by Mr. Reuter, Mr. Riphagen and Sir Francis Vallat. The draft must cope with a very real problem but he did not think that any member of the Commission had as yet established in optimum fashion the way in which that to be done.

40. Mr. VEROSTA, referring to Mr. Jagota's remark that several unions or groupings of States had recently been established in Asia, said that it would be interesting for the Commission to see the text of the agreements in question in order to decide whether they constituted exceptions or conditions of material reciprocity. In any event, the Commission should mention those groupings in the commentary; otherwise, it might be accused of failing to take account of the most recent developments.

41. Mr. USHAKOV (Special Rapporteur) said that there seemed to be some confusion about the scope of article 8. For example, he had difficulty in understanding why Mr. Reuter found it unacceptable. Article 8 merely stated that a treaty between States could contain either an unconditional clause or a conditional clause. That was a matter of fact. The article enabled a State to insert in a clause any condition of reciprocity it wished, in which case the clause would be conditional. In its commentary, however, the Commission had noted that conditional clauses no longer existed in the contemporary world. It was possible, however, that that statement might be somewhat exaggerated and that some treaties, such as those to which Mr. Jagota had referred, in fact contained conditional clauses.

42. The question of treaties concluded between countries with different economic systems had also been raised. The point to be decided was whether there were conditional clauses in treaties between the socialist countries of eastern Europe and the capitalist countries. Although that was a possibility, there certainly were not any such clauses in the agreements concluded by the Soviet Union and the capitalist countries, in which the most-favoured-nation clause was always granted without conditions and without compensation. The idea that had served as a basis for the draft had been that clauses conditional on material reciprocity sometimes existed, for example, in the sphere of diplomatic and consular relations. That did not mean, however, that States could not conclude agreements containing conditional clauses: they were quite free to do so.

43. It would not be easy to draft a text that took account of the very rare cases in which the conditional clause required certain compensation for the grant of most-favoured-nation treatment. The Commission had not ruled out such cases, since article 8 contained the proviso "unless that treaty otherwise provides or the parties otherwise agree". In the belief that conditional clauses no longer existed or were extremely rare, the Commission had considered it unnecessary to draft a special article on the operation or application of such clauses. It would of course be possible to come back to that question, although, in its commentary, the Commission had unanimously agreed that only unconditional clauses or clauses conditional on material reciprocity were now in use. It might be possible to find a more appropriate way in which to express the idea of material reciprocity, but in economic relations such reciprocity was practically impossible; it existed only in diplomatic relations or private law relations.

44. The ideas on which articles 8, 9 and 10 were based were perfectly clear and should not give rise to any objections. It would of course be possible to improve the wording, and he would welcome any suggestion for that purpose.

45. Mr. SUCHARITKUL, referring to the discussion on article 10 *bis* proposed by EEC, said that the countries of Asia, for example, were endeavouring to promote economic co-operation by establishing regional groupings, but that they had discovered that the operation of the most-favoured-nation clause was an obstacle to such co-operation. Perhaps one way out of the difficulty was that proposed in article 26 of the draft, namely, the so-called freedom to contract. In fact, however, it was frequently difficult to bring negotiations to a successful conclusion, since the other party or parties wanted to continue to enjoy the benefit of most-favoured-nation treatment, at the expense of the particular group of developing countries. Reference had already been made to wider co-operation throughout Asia, the context of ESCAP, in the areas of trade, commerce and the exchange of goods and services, and to the fact that such specialized treatment should be excluded from existing most-favoured-nation clauses.

46. Mr. Jagota had aptly observed at the previous meeting that a country might belong to more than one regional grouping. Thailand, for instance, belonged not only to ASEAN, the members of which had the same social and economic structure, but also to the Committee for Co-ordination of Investigations of the Lower Mekong Basin, which consisted of Thailand, the Lao People's Democratic Republic, Viet Nam and Democratic Kampuchea, whose resumed participation in the Committee was awaited. It was a local geographical grouping, but the social and economic structure of Thailand was different from that of the other members. The aims of such groupings went beyond the matters dealt with in articles 22 and 23, namely, frontier traffic and the rights and facilities extended to a land-locked State. The countries of Asia wanted to be able to develop their economies in

co-operation with their neighbours, without being hindered by the operation of the most-favoured-nation clause.

47. The CHAIRMAN asked whether members of the Commission thought that articles 8, 9 and 10 could now be referred to the Drafting Committee.

48. Mr. QUENTIN-BAXTER said he was well aware of the tradition that the Commission's Drafting Committee was much more than a body that dealt with matters of form. In the current instance, however, the real subject of debate was whether the Commission proposed to alter radically the entire basis of the draft articles or whether it intended to do what was more usual on second reading of a draft, namely, to note any discrepancy or any need for adjustments to the text. The answer depended perhaps on the view taken by the Commission as to the role of the draft articles when they were completed. If the draft was to be regarded as a dominant set of provisions in international law, very careful consideration must be given to the matters raised so graphically in the course of the discussion, namely, the developments that had taken place in the sphere of trade and the fact that many States of all kinds in all parts of the world found the institution of the most-favoured-nation clause an obstacle rather than a help.

49. The previous Special Rapporteur for the topic, Mr. Ustor, despite his devotion to the task of describing the operation of the most-favoured-nation clause accurately in law, had never sought to claim a primary place for his work. He had considered that it was sufficient to describe an institution so as to enable government lawyers and others to interpret existing treaties and decide how far they wished to depart from the principles enunciated in the draft when drawing up new clauses. It might be affirmed that the draft was describing a situation that had been overtaken by new developments, particularly at the multilateral level, but the work was none the less a contribution of high scholarship that made it easier to gain an understanding of complex institutions in the modern world.

50. Personally, he was not yet persuaded that the Commission should, or indeed could, fundamentally alter the basis and the proportions of the draft articles. If the draft appeared to claim for itself too absolute a status, that danger might be avoided by making minor changes in the wording, or more probably by supplying careful, balanced commentaries. At the current stage, however, he did not think that the discussions in the Commission provided an adequate basis on which the Drafting Committee might deal with articles 8, 9 and 10, although such a basis might well emerge from consideration of the articles that followed.

51. Mr. USHAKOV (Special Rapporteur) said that the articles of the draft, in particular articles 8, 9 and 10 and articles 18 and 19, were all interrelated. The Commission could of course decide to wait until it had completed its consideration of the draft before referring the articles as a whole to the Drafting Com-

mittee. He was not sure, however, whether that was the best procedure to follow, or whether it was even possible.

*The meeting rose at 1.10 p.m.*

## 1490th MEETING

*Wednesday, 31 May 1978, at 10.10 a.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

### Visit of the Vice-President of the International Court of Justice

1. The CHAIRMAN said that it was a great honour to extend, on behalf of the Commission, a warm welcome to Mr. Nagendra Singh, Vice-President of the International Court of Justice. Mr. Nagendra Singh had been a distinguished member of the Commission from 1967 until 1972, when he had been appointed a judge of the Court. All members were familiar with his well-known writing on international law and his learned opinions delivered at the Court.

2. Mr. NAGENDRA SINGH (Vice-President of the International Court of Justice) said that he had been very touched by the kind invitation of the Commission to attend its meeting. It brought back many pleasant memories and bore witness to the strength of the ties that linked the International Court of Justice and the Commission. There was naturally a close relationship between the Court as the adjudicator and the Commission as the codifier of international law. Without precise and unambiguous law the adjudicator would be very handicapped, but codification of international law without the existence of an adjudicatory body would be tantamount to law-making in a vacuum. Justice needed both the judge and the legislator. He wished the Commission every success in its endeavours and was sure that its work would continue to command the admiration and respect of the world.

**The most-favoured-nation clause (*continued*) (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2)**

[Item 1 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (*continued*)

ARTICLE 8 (Unconditionality of most-favoured-nation clauses),

ARTICLE 9 (Effect of an unconditional most-favoured-nation clause), *and*

ARTICLE 10 (Effect of a most-favoured-nation clause conditional on material reciprocity)<sup>1</sup> (*concluded*)

3. Mr VEROSTA thought the best course would be to refer articles 8, 9 and 10 to the Drafting Committee. By the time the Committee came to consider them, it would have the benefit of the Commission's views on other important articles.

4. Mr. TSURUOKA noted that, although a number of members had expressed concern regarding articles 8, 9 and 10, no specific proposal for their improvement had been submitted. It must be acknowledged that article 10 followed logically from article 8, which recognized the freedom of the parties to conclude clauses accompanied by conditions. Article 26<sup>2</sup> also provided for the possibility for the parties to agree to different provisions. However, article 10 dealt expressly only with the effect of clauses made subject to the condition of material reciprocity. Provision should also be made, in the context of that article and without jeopardizing the fundamental idea underlying articles 8, 9 and 10, for the other conditions that might accompany a most-favoured-nation clause.

5. Jurists responsible for interpreting treaties had sometimes been embarrassed by the fact that certain trade treaties had contained a most-favoured-nation clause relating to imports and had at the same time established the right of the importing country to prohibit or limit the imports in question for health or other reasons. That question was obviously difficult to resolve. Mention might also be made of the case of most-favoured-nation clauses relating to the establishment of industrial activities, accompanied by the condition that subjects of the beneficiary State might enter the territory of the granting State only in order to engage in the activities in question. Those were not clauses conditional on material reciprocity. The question therefore arose which draft article applied to the case of the two types of clauses he had mentioned. The case would, in fact, seem to be covered in article 8 by the phrase "unless... the parties otherwise agree", but the effect of those clauses was not made clear in article 10.

6. He therefore suggested that a second paragraph be added to article 10, dealing with the effect of a clause made subject to a condition other than that of material reciprocity, and reading:

"2. If a most-favoured-nation clause is made subject to conditions other than the condition of material reciprocity, the beneficiary State is entitled to most-favoured-nation treatment either to the extent permitted by such conditions or upon fulfilling such conditions, as the case may be."

<sup>1</sup> For texts, see 1488th meeting, para. 33.

<sup>2</sup> See 1483rd meeting, foot-note 1.

7. Sir Francis VALLAT wished to ask the Special Rapporteur whether article 8, by implication, dealt only with the possibility of material reciprocity, or whether it allowed for other conditions to be agreed upon by the parties. If the latter were true, the text should be clear in that regard. If, on the other hand, articles 8, 9 and 10 were concerned solely with the condition of material reciprocity, that should also be made clear so that they did not give rise to disputes. The problem should be looked at anew in the light of the comments by Mr. Tsuruoka, particularly since the Special Rapporteur had pointed out that the condition of material reciprocity was a matter of the past. It was rarely encountered in treaties in modern times and was not essential to trade, which was the most important sphere affected by the operation of the most-favoured-nation clause.

8. Mr. JAGOTA recalled that at the 1488th meeting Mr. Calle y Calle had pertinently commented that article 9 used the word "conditions" in the plural, whereas article 10 dealt only with one "condition". It would seem, therefore, that a most-favoured-nation clause might be subject to different conditions, and that article 10 was concerned only with the condition of material reciprocity. In that case, there must be a lacuna in the articles, but it could be filled by adopting the sound proposal made by Mr. Tsuruoka.

9. Mr. USHAKOV (Special Rapporteur) said that, in his opinion, article 8 did not state any legal rule. It simply stated the obvious fact that clauses must be unconditional or conditional. Article 9 stated the legal rule applicable to the effect of unconditional clauses. In article 10, the Commission had dealt solely with a single category of conditional clauses, namely, the clause made subject to the condition of material reciprocity. The reason why the Commission had followed that course was because it had found that, in fact, there were no conditional clauses other than clauses conditional on material reciprocity, and those were virtually non-existent outside the sphere of consular or diplomatic relations.

10. The question therefore arose whether there really were other categories of conditional clauses. The possibility was not ruled out, and article 8 already made provision for it. Why then had the Commission not so far drafted any text relating to conditional clauses in general? First of all for practical reasons, because the Commission had actually found, as it had indicated in its commentary, that in relations between States there were no conditional clauses other than clauses conditional on material reciprocity. And secondly, because if the Commission tried to establish rules governing the application of conditional clauses, it would run up against innumerable difficulties. The concept of material reciprocity, as defined in article 2, was a specific concept, whereas there was an infinite variety of conditional clauses. It would therefore be very difficult to draft a text applicable to the various categories of conditional clauses, since provision would have to be made for solutions applicable in each of the different cases. For the specific case defined in article 2, it was possible to propose a

specific solution and to make provision for its legal consequences, but it would be difficult, if not impossible, to propose such solutions for a large number of different cases. How could anyone say at what time the most-favoured-nation clause began to operate under all imaginable conditions? Perhaps the agreements cited by Mr. Jagota at the 1488th meeting contained conditional clauses, and for his own part he would be very glad to see the texts of the agreements; but those texts would have to be interpreted before there could be any certainty that the clauses concerned really were conditional clauses.

11. It rested of course with the Commission to take a decision on the subject of conditional clauses, but personally he considered that the best course was to refer articles 8, 9 and 10 to the Drafting Committee, together with all the suggestions that had been made in the course of the discussion.

12. Mr. TABIBI said that the time had come to take a decision in respect of articles 8, 9 and 10. Articles 8 and 9 dealt with the unconditionality of most-favoured-nation clauses and posed no difficulties, for they were simply statements of fact. The Drafting Committee should now consider those two articles, together with article 10 and the amendment proposed by Mr. Tsuruoka, although he had some doubt as to whether article 10 dealt with a condition or a limitation. The Commission could then go on to examine article 11, which might to some extent affect the three articles in question.

13. Mr. SUCHARITKUL said that the problem under consideration had been made a good deal clearer during discussion, particularly by the explanations of the Special Rapporteur. In practice, most members had come across examples of other types of conditions, which might be described as conditions *ratione temporis*, under which most-favoured-nation treatment was enjoyed only from or up to a certain point in time, or was made conditional on other factors. Clearly, the Commission would have to take account of such conditions.

14. He accordingly endorsed the proposal by Mr. Tsuruoka, and suggested as an alternative for consideration by the Drafting Committee a new article, article 10 *bis*, to be entitled "Effect of a most-favoured-nation clause subject to other conditions" and worded along the following lines:

"If a most-favoured-nation clause is made subject to other conditions, the beneficiary State acquires or forfeits the right to most-favoured-nation treatment only on fulfilment of or in accordance with the conditions agreed upon."

15. The CHAIRMAN said that if there were no further comments, he would take it that the Commission agreed to refer articles 8, 9 and 10 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>3</sup>

<sup>3</sup> For consideration of the texts proposed by the Drafting Committee, see 1520th meeting, para. 2, and 1521st meeting, paras. 38-43.

ARTICLE 11 (Scope of rights under a most-favoured-nation clause) *and*

ARTICLE 12 (Entitlement to rights under a most-favoured-nation clause)

16. The CHAIRMAN invited the Special Rapporteur to introduce articles 11 and 12, which read:

*Article 11. Scope of rights under a most-favoured-nation clause*

1. Under a most-favoured-nation clause the beneficiary State is entitled, for itself or for the benefit of persons or things in a determined relationship with it, only to those rights which fall within the scope of the subject-matter of the clause.

2. The beneficiary State is entitled to the rights under paragraph 1 only in respect of those categories of persons or things which are specified in the clause or implied from the subject-matter of that clause.

*Article 12. Entitlement to rights under a most-favoured-nation clause*

1. The beneficiary State is entitled to the rights under article 11 for itself only if the granting State extends to a third State treatment which is within the field of the subject-matter of the most-favoured-nation clause.

2. The beneficiary State is entitled to the rights in respect of persons or things within categories under paragraph 2 of article 11 only if they

(a) belong to the same category of persons or things as those which benefit from the treatment extended by the granting State to a third State and

(b) have the same relationship with the beneficiary State as those persons or things have with that third State.

17. Mr. USHAKOV (Special Rapporteur), introducing articles 11 and 12, wished to remind members of the considerations on which the Commission had based its drafting of those articles. As was indicated in paragraph (1) of the commentary, the rule that was sometimes referred to as *ejusdem generis* was generally recognized and affirmed by the jurisprudence of international tribunals and by diplomatic practice. However, although the meaning of that rule was clear, its application and interpretation were not always simple, and the Commission had cited a number of cases that had been brought before various judicial or arbitral tribunals. Those who drafted most-favoured-nation clauses were always confronted with the dilemma whether to draft the clause in very general terms, and risk impairing its efficacy if the *ejusdem generis* rule were interpreted too strictly, or to draft it in very explicit terms by listing its specific spheres of application, and risk producing an incomplete list. The difficulties encountered were made very clear in paragraphs (10), (12), (13), (14) and (15) of the commentary.

18. Article 11, paragraph 1, stated that the beneficiary State was entitled only to those rights which fell within the scope of the subject-matter of the clause. It was only in that area that the rights originated. For example, if the clause related to shipping, the beneficiary State could not claim most-favoured-nation treatment with respect to international trade. Para-

graph 2 stipulated that the beneficiary State was entitled to the rights under paragraph 1 only in respect of those categories of persons or things who or which were specified in the clause or implied from the subject-matter of the clause.

19. There were two limitations on entitlement to rights under a most-favoured-nation clause: first, the scope of the subject-matter of the clause and the persons and things specified in the clause and, secondly, the scope of the right extended to the third State by the granting State. Article 12, paragraph 1, dealt with the case in which the State itself was the beneficiary and thus related more particularly to diplomatic or consular relations. Paragraph 2 dealt with the case of persons or things in the categories referred to in paragraph 2 of article 11. The beneficiary State was entitled to rights under the clause only if those persons or things (a) belonged to the same category of persons or things as those who or which enjoyed the treatment extended by the granting State to a third State, and (b) had the same relationship with the beneficiary State as those persons or things had with the third State. In paragraph (19) the Commission had explained why it had chosen that wording and had not wished to delve into all the intricacies of the notion of "like products".<sup>4</sup>

20. With regard to the comments on article 11, it was appropriate to mention first the view expressed by the Sixth Committee that the threefold condition of similarity of subject-matter, category of persons or things and relationship with the beneficiary State and a third State, which must be fulfilled under articles 11 and 12, was in keeping with the free will of the parties and with judicial practice (A/CN.4/309 and Add.1 and 2, para. 165). That comment was therefore favourable.

21. The Government of the Netherlands considered that articles 11 and 12 were designed to set out the *ejusdem generis* rule. It had expressed agreement with the sense of the articles but had made two comments on the wording used by the Commission (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A). The proposal to replace the words "the same relationship" by the words "the same kind of relationship" did not seem to improve the text. He would point out that the words "the same relationship" had been chosen by the Commission after careful thought.

22. The Government of Luxembourg had submitted a written comment (*ibid.*) which, he considered, also applied to article 4 and should be taken into consideration thence forward.

23. He suggested that articles 11 and 12 be retained as they stood, apart from drafting improvements—although that could not be an easy matter. Neither governments nor the international organizations had raised any objections to articles 11 and 12, only some

doubts concerning certain of the terms used and the wording of the articles. Perhaps, therefore, the two texts might be referred to the Drafting Committee.

24. Sir Francis VALLAT said that, in general, articles 11 and 12 were well drafted. The meaning of the word "persons", however, as used in the context of relations between persons and States, required clarification. When dealing with the most-favoured-nation clause, it was necessary to cover not only natural persons but also juridical persons, and to take account of the different terminology used in treaties when referring to the latter. The Drafting Committee should perhaps be asked to consider that point, with special reference to the need for a definition of the term "persons" in the draft articles.

25. The CHAIRMAN said that, if there was no further comment, he would take it that the Commission agreed to refer articles 11 and 12 to the Drafting Committee.

*It was so agreed.*<sup>5</sup>

ARTICLE 13 (Irrelevance of the fact that treatment is extended gratuitously or against compensation)

26. The CHAIRMAN invited the Special Rapporteur to introduce article 13, which read:

*Article 13. Irrelevance of the fact that treatment is extended gratuitously or against compensation*

The beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, acquires under a most-favoured-nation clause the right to most-favoured-nation treatment independently of whether the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended gratuitously or against compensation.

27. Mr. USHAKOV (Special Rapporteur) said that article 13, like other articles of the draft, was concerned only with an unconditional most-favoured-nation clause. That point should perhaps be brought out in the article.

28. Article 13 contained a very important rule for the interpretation of the unconditional clause. In substance, the article meant that the beneficiary State could claim the treatment extended by the granting State to a third State, whether such treatment had been extended gratuitously or against compensation.

29. In paragraph (1) of the commentary to article 13, the Commission once again drew a distinction between conditional and unconditional clauses. It added that the advantages extended by the granting State to third States might be classified in a similar manner: they might be granted unilaterally, as a gift, or against compensation. If the granting State unconditionally offered most-favoured-nation treatment to the beneficiary State, the issue was whether the latter's rights were affected by the fact that the promises of the granting State to the third State had made subject to certain conditions or not. On that point, the practice

<sup>4</sup> *Yearbook...* 1976, vol. II (Part Two), p. 33, doc. A/31/10, chap. II, sect. C, arts. 11 and 12, para. (19) of the commentary.

<sup>5</sup> For consideration of the texts proposed by the Drafting Committee, see 1521st meeting, paras. 34 and 35, and 36 and 37, respectively.

was inconsistent, as was apparent from the numerous examples given by the Commission in its commentary. For its part, the Commission had expressed its belief that the rule stated in article 13 was in conformity with modern thinking on the operation of the most-favoured-nation clause. For further details, he would refer members to paragraphs (7) and (8) of the commentary to the article.

30. With regard to oral comments, several representatives in the Sixth Committee had supported article 13 and had in some cases expressed the view that the rule stated was in conformity with modern thinking on the operation of the clause. Some had suggested the addition of a provision to the effect that the most-favoured-nation clause should either not mention any condition at all or should formulate such condition explicitly if a conditional clause was involved. It had also been suggested that article 13 should be combined with article 8 so that article 13 would be subject to the exception contained in article 8 regarding the principle of the independence of the contracting parties (A/CN.4/309 and Add.1 and 2, para. 170).

31. Among the written observations, he noted that the Government of Luxembourg considered that article 13 duplicated articles 8 and 9 concerning the unconditionality of the clause (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A). The Government of the Netherlands, for its part, had raised the question whether the principle enunciated in article 13 also applied if the requirement of material reciprocity were laid down in the legislation of the granting State. If a third State met that requirement and its nationals thereby enjoyed a particular privilege, the beneficiary State should certainly not be able to claim that privilege without satisfying the requirement of material reciprocity (*ibid.*). Article 13, however, was concerned only with unconditional most-favoured-nation clauses; in his opinion, therefore, the observations by the Government of the Netherlands did not apply to that article.

32. There was a certain relationship between articles 9 and 13. Article 9, which concerned the effect of an unconditional most-favoured-nation clause, was couched in general terms, which article 13 was specifically intended to define more precisely. Article 13 fulfilled a need and should therefore be retained, although it should be made clear that it related only to unconditional most-favoured-nation clauses.

33. Mr. ŠAHOVIĆ also agreed that it should be made clear in the text that article 13 applied only to an unconditional most-favoured-nation clause. The reason why the Commission had referred to conditional clauses in certain passages in the commentary was essentially in order to show that a clause of that type did not fall within the scope of article 13. Moreover, the words "gratuitously or against compensation" might lead to misunderstanding. He had in fact asked himself the same questions as the Government of the Netherlands, and for that reason considered that some clarification was necessary.

34. Mr. CALLE y CALLE said that he understood the intent of article 13 to be that a most-favoured-nation clause concluded between a granting State and a beneficiary State would not be rendered conditional by reason of any compensation or other condition attaching to treatment granted to a third State. If that were so, then article 13, which dealt with the fact that the conditions imposed on a third State were irrelevant to a relationship between the beneficiary and granting States, should not be too closely linked to articles 8 and 9, which concerned the conditionality or unconditionality of such a relationship.

36. He noted that the Netherlands, in its comment on article 13 (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A), had expressed doubt as to whether the argument advanced in paragraph (7) of the commentary would obtain if a requirement of material reciprocity were laid down in the legislation of the granting State. In his view, the concern expressed by the Netherlands was met by the terms of article 20 (The exercise of rights arising under a most-favoured-nation clause and compliance with the laws of the granting State).

37. Lastly, he suggested that, in order to bring the Spanish version of article 13 into line with the English and French versions, the words "en interés de" should be replaced by the words "en beneficio de".

38. Mr. VEROSTA noted that, in the opinion of the Special Rapporteur and Mr. Šahović, article 13 concerned only an unconditional most-favoured-nation clause, whereas in the opinion of Mr. Calle y Calle it might also relate to conditional clauses.

39. With regard to the wording, Sir Francis Vallat had suggested that it should be made clear in articles 11 and 12 that the term "persons" referred to juridical persons as well as natural persons. Since that term also appeared in article 13, alongside the term "things", the clarification should perhaps be made in article 2 (Use of terms).

40. Mr. SUCHARITKUL said that article 13 strengthened the presumptions in favour of the unconditionality of the most-favoured-nation clause. In his opinion, the expression "gratuitously or against compensation" should be understood as covering the condition of material reciprocity. Article 13 was therefore broader than articles 8 and 9 in its effects. It had the effect of eliminating the conditions of reciprocity or other compensation conditions in favour of the granting State. It also followed from the combined effect of article 13 and the presumption of unconditionality that the beneficiary State was entitled to more favourable treatment than the most favourable treatment originally extended to the third State. That presumption appeared to be in conformity with modern practice. It was interesting to note that, if the granting State wished to preserve reciprocity, it must make that an express condition. He wondered whether, by weakening the position of the granting State through the application of most favourable treatment, it would not nevertheless be possible to retain the balance sought by contemporary practice.

41. Mr. USHAKOV (Special Rapporteur) said that the treatment extended to the third State should be automatically extended to the State that was the beneficiary of an unconditional most-favoured-nation clause, regardless of the relationships between the granting State and the third State. Whether or not those relationships entailed compensation, they concerned only the granting State and the third State. The fact that there was a conditional clause linking them was irrelevant.

42. It might be asked whether reference should be made, in article 13, to persons and things having a specific relationship with the beneficiary State or with the third State. In fact, article 13 concerned the right to most-favoured-nation treatment and the expression "most-favoured-nation treatment", according to the definition given in article 5, covered not only the States concerned but also persons and things in a determined relationship with them.

43. It would probably be dangerous to define the term "persons" as applying equally to juridical persons and natural persons, as had been suggested. There was, in fact, a wide variety of most-favoured-nation clauses, and some might apply only to natural persons and others only to juridical persons. Only by examining each individual clause could it be determined which type of person was concerned, and the same applied to things.

44. Mr. JAGOTA said that, in his view, articles 13, 14 and 15 laid down rules of interpretation, and he therefore agreed with Mr. Calle y Calle regarding the intent of article 13. As he read it, that article referred to the rights of a beneficiary State arising under a most-favoured-nation clause. Those rights were independent of the relations between the granting State and a third State, so that such factors as the balance of advantage as between those two States, their motivation, the conditions on which treatment was extended and the nature of any compensation were all irrelevant. It was likewise irrelevant whether the clause, as it related to the rights of the beneficiary State, was conditional or unconditional; it could be either, but that matter was in any event regulated separately under draft articles 8, 9 and 10. Thus, the relations between the beneficiary State and the granting State were governed by the terms of the most-favoured-nation clause together with any conditions set forth in it, and did not necessarily have any connexion with the relations between the granting State and a third State. Viewed in that context, article 13 could serve as a useful caution to those who had to negotiate and draft most-favoured-nation clauses. They must ensure that any conditions were specified in the clause, failing which it would not be possible to rely on the relationship between the granting State and a third State.

45. For those reasons, it should be made clear in the commentary that articles 13, 14 and 15 laid down rules of interpretation on the application of the most-favoured-nation clause, and were not concerned with the substance of the rights arising under such a clause between a granting and a beneficiary State.

46. Mr. RIPHAGEN said that one of the difficulties with articles 13, 14 and 15 was that, under the draft articles, a conditional most-favoured-nation clause was nonetheless a most-favoured-nation clause. Those three articles, however, applied only in the case of an unconditional clause, whereas articles 8, 9 and 10 covered conditional clauses as well. He therefore considered that articles 13, 14 and 15 should specify whether the clause was conditional or unconditional.

47. Sir Francis VALLAT said it seemed apparent from paragraph 173 of the Special Rapporteur's report (A/CN.4/309 and Add.1 and 2) that article 13 was by implication dependent on the assumption that articles 8, 9 and 10 dealt with the condition of material reciprocity. If, however, article 10 (Effect of a most-favoured-nation clause conditional on material reciprocity) were to be amended, then the nature and content of article 13, as also of articles 14 and 15, would clearly be affected. Article 13 might be acceptable if the condition of material reciprocity were its sole basis, but the introduction of other conditions, or aspects of interpretation, would call for the most careful consideration on the Commission's part.

48. In the past, the Commission had been extremely cautious about laying down rules of interpretation and, if that were to be the sense of article 13, it would cause him no little concern. In such an event, however, the article should be reworded as a rule of interpretation and should not, as was now the case, be expressed as an absolute rule of law.

*The meeting rose at 1 p.m.*

## 1491st MEETING

*Thursday, 1 June 1978, at 10.05 a.m.*

*Chairman* : Mr. José SETTE CÂMARA

*Members present* : Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

**The most-favoured-nation clause (*continued*) (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2)**

[Item 1 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (*continued*)

ARTICLE 13 (Irrelevance of the fact that treatment is extended gratuitously or against compensation)<sup>1</sup>  
(*concluded*)

<sup>1</sup> For text, see 1490th meeting, para. 26.



1. Mr. DÍAZ GONZÁLEZ said that the first question to be determined was whether the most-favoured-nation clause still existed as a reality in modern international life, bearing in mind the changes it had undergone throughout its evolution and the resultant need to regulate exceptions to its application. In practice, of course, the content of the clause differed according to whether it related to a developed or a developing country.

2. A knowledge of the history of the clause in Latin America, where it had played a significant role on the long road to integration, was of assistance in understanding the difficulties being encountered in drafting articles that would command a consensus. The trend in Latin America, as manifested at the seventh regular session of the Conference of Contracting Parties to the Montevideo Treaty and during the first round of collective negotiations of LAFTA (Buenos Aires), was to affirm the principle of equality of treatment and the removal of barriers and restrictions. Such a policy could not be the most suitable one for countries embarking on industrial development, since it did not permit them to compensate for the difference in costs between their own production and that of more developed countries. Equality of treatment and the removal of barriers tended to create an international division of labour, so that many American countries were condemned indefinitely to agricultural production and production of primary commodities, with all the inevitable social, political and cultural consequences. Historically, the most-favoured-nation clause had been seen as an instrument of free trade that would halt protectionist trends, eliminate discriminatory treatment and create an international division of labour that favoured, first and foremost, the major industrial Powers. Cobden and other advocates of free trade had not concealed their hope that the developed countries, particularly England, would thus achieve an industrial monopoly throughout the world.

3. He did not intend to deal with the extent to which the theoretical equality of the clause might enable the economically weaker countries to overcome the inequalities stemming from contact with economies that had developed in a different manner, or to discuss whether such a policy was the most appropriate for developing countries—the majority of which were producers of primary commodities in their trade with developed countries. In considering trade policy as an economic phenomenon, however, it was impossible to disregard the relationship deriving from trade between countries with economies of different structure, of which the agreement between EEC and the People's Republic of China was a case in point.

4. The American nations had carried their enthusiasm for the principle of equality of treatment, as the basis of any acceptable trade policy, to the extent of advocating the insertion in all trade agreements of the most-favoured-nation clause in its unconditional form. That gesture was all the more generous and symbolic in that it had coincided with an unprecedented increase in the barriers and restrictions im-

posed in international trade, which had had such unfavourable effects on those nations; it meant, in fact, applying the clause to countries which, for their part, were applying restrictive systems.

5. The American nations had adopted the conditional form of the clause as a compromise between most-favoured-nation treatment and a system of particular reciprocal treatment. Thus the benefits granted to one State in return for certain advantages on favours would be granted to third States, only by means of equivalent concessions.

6. However, the situation had changed yet again and the Third World was now calling for something tangible rather than mere promises. Developing countries were seeking to integrate, as indeed were developed countries, and there was a growing trend to achieve such integration by creating associations of States. The constituent instruments of those associations defined what was to be understood by a most-favoured-nation clause, and regulated the legal conditions for its application. Thus, resolution 222 (VII) of the seventh regular session of the Conference of Contracting Parties to the Montevideo Treaty established that "the tariff reductions provided for the subregional agreement shall neither be extended to contracting parties which do not participate in the subregional agreement, nor create for them special obligations".<sup>2</sup> That resolution also provided the legal basis for article 113 of the Cartagena Agreement,<sup>3</sup> which in turn laid down that the advantages provided for in the Agreement should neither be extended to non-participating countries nor create obligations for them.

7. For those reasons, he shared the concern expressed regarding the scope of article 15 (Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement),<sup>4</sup> and fully agreed with the comments of the Board of the Cartagena Agreement (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 4) regarding the possible consequences of that article. In his view, some formula should be evolved for excluding from its terms customs unions, free-trade areas and similar associations.

8. The Commission, in its work of codification, could adopt formulae that either converged towards international reality or followed a course parallel to it. Depending on the course it adopted, the rules it prepared would either come into effect under international law or, if they were not ratified by the majority of States or became anachronistic at the moment of their approval, would remain a dead letter.

9. Mr. QUENTIN-BAXTER said that, during the course of its deliberations, the Commission had be-

<sup>2</sup> LAFTA, *ALALC Síntesis mensual*, Montevideo, Fourth Year, No. 31, January 1968, p. 25.

<sup>3</sup> Subregional Integration Agreement (Andean Pact), signed at Bogotá, 26 May 1969. For English text, see American Society of International Law, *International Legal Materials*, 1969, Washington, D.C., vol. VIII, No. 5, September 1969, p. 910.

<sup>4</sup> See 1483rd meeting, foot-note 1.

come increasingly aware that the difficult problem referred to it by EEC was actually or potentially analogous to other problems that might arise in relation to customs unions or other similar associations of States, and, further, that negotiations on trade were now conducted mainly in the multilateral context and against a background of assumptions that were quite different from those which, historically, had governed the most-favoured-nation clause. EEC, in his view, had been entirely right to draw the Commission's attention to the special situation of a body that acted in place of a State for a given purpose, and there was no need for any emotive reaction to such a development in the contemporary world. It was just as important for those members of the international community that had dealings with EEC to have assurances regarding its contractual arrangements as it was for the members of EEC itself.

10. Among those who upheld the concept of EEC as a body that acted in the place of its member States for a particular purpose was Sir Francis Vallat; at the other end of the spectrum, Mr. Riphagen had suggested that the solution to that and other problems might well be to extend the scope of the draft articles to relations between States and international organizations.<sup>5</sup> It was a wide question, and one that most members would feel unable to resolve in the narrow context of the second reading of the draft articles. At the same time, it was easy to recognize a certain interplay between the problems arising from those articles and the problems arising in relation to the draft articles on treaties to which international organizations were parties. That was why he considered, at that point at least, that little progress would be made in either sphere unless a fairly clear distinction were made between things done *qua* State and things done *qua* international organization.

11. What should have emerged from the Commission's earlier discussion was a clear recognition that treaties concluded by EEC, or any similar body, on behalf of its member States with other States were analogous in spirit to the classic cases of agreements between States with which the Commission was dealing. He would therefore have hoped that the draft articles prepared by the Commission would be helpful in that context. If the Commission had been unable to find a place within the structure of the draft articles for the particular problem posed, it was perhaps because the choice between State and international organization was a difficult one and because EEC displayed certain tendencies that were still the subject of doctrinal debate between it and its members.

12. What had actually resulted from the Commission's earlier discussion was the referral of the problem to the Drafting Committee, and an uneasy feeling with regard, first, to the particular case of a customs union or a more integrated body of States, and

then to the fact that, in the modern world, States did not ordinarily contract solely on the basis of the mechanism provided by the most-favoured-nation clause. There might therefore be some justification for a feeling of uneasiness about the scope of the concept of material reciprocity in the earlier draft; in practical terms, however, it could be accepted that, although such a distinction was not of importance in trade, it might have some residual value in regard to treaties dealing with establishment and non-trade matters. That should not, however, divert the Commission from its original approach, namely, that it was the most-favoured-nation clause in its unconditional form which was typical and which it was seeking to describe.

13. That was the approach to adopt in the discussion on draft articles 8, 9 and 10 and, in particular, on the amendments proposed by Mr. Tsuruoka.<sup>6</sup> If the purpose of those amendments was to make it clearer to the reader that the matter which the Commission sought to describe was a classic phenomenon, and that it was the rule rather than the exception to modify the clause when dealing with it, then those amendments might have their proper place, and it might well be necessary to include in the draft a few more pointers to indicate its relationship to the modern world. If, on the other hand, those amendments meant that the Commission would be faced, as it apparently now was, with a strengthened case for re-writing each successive article, then, in his view, the basically sound structure of the draft might ultimately be subjected to intolerable strain. The Commission was thus faced with a major decision. There was no real doubt that it was describing a classic phenomenon. If States were given proper notice of their right to modify the clause and adequate warning as to the presumptions that would be drawn if they did not do so, then the classic treatment of the clause still had a significant place and the Commission would owe no one an apology for spending time in producing the draft articles. But if the most-favoured-nation clause came to be viewed not as a fixed point of departure but as a movable one, it would be entirely divested of its existing value. The only choice then open to the Commission would be to make such a radical revision that further reports introducing new material of great complexity would be required before it could claim to have done a sound professional job.

14. Bearing all those facts in mind, he considered that article 13 was adequate for the purpose for which it was intended, and he saw no reason in principle why it should not apply, in the general context of the draft, to a conditional most-favoured-nation clause. He would have no objection to any drafting changes that would clarify the reader's understanding of the purpose of the draft articles and their relationship to broader areas. He trusted, however, that the Commission could work within that context, as indicated by the general tenor of the comments

<sup>5</sup> 1485th meeting, para. 11.

<sup>6</sup> See 1489th meeting, para. 18, and 1490th meeting, para. 6.

submitted by governments and made by their representatives in the Sixth Committee of the General Assembly.

15. Mr. FANCIS said that, to someone from the Third World, article 9 (Effect of an unconditional most-favoured-nation clause) and article 10 (Effect of a most-favoured-nation clause conditional on material reciprocity) indicated the need for extreme caution, when concluding treaties, in approaching a most-favoured-nation clause. There was an obvious link between article 9 and article 13, since the latter dealt substantially with a situation that could be inferred from the former. Moreover, the commentaries to articles 4 (Most-favoured-nation clause) and 5 (Most-favoured-nation treatment) were most instructive with regard to article 13. He noted, in particular, that a most-favoured-nation third State might be less favoured than a beneficiary State. He also noted that a most-favoured-nation clause might exactly define the conditions for the operation of the clause and that if, as was usually the case, the clause itself did not provide otherwise, it was at the moment when the third State received treatment falling within the ambit of the clause that the beneficiary's rights came into being. Consequently it seemed that, when treatment was extended gratuitously to a third State, the beneficiary State must receive treatment that was no less favourable. When treatment was extended against compensation, either the condition of material reciprocity would apply under article 10, or under article 9, it would not apply. Further, articles 5 and 9, read together, would negative the application of the condition of material reciprocity to a most-favoured-nation clause enjoyed on unconditional terms.

16. In the light of those considerations, he agreed that article 13 had its place in the draft. It might overlap with article 9, but the draft articles formed an integrated whole and could not be separated into watertight compartments. The proper place for article 13 (and possibly also for article 14) was closer to the articles with which it had a direct and consequential relationship, namely, articles 9 and 10. That view, indeed, was borne out by paragraphs (7) and (8) of the commentary to article 13, which stressed the unconditional character of the clause. He also agreed that the first part of paragraph (7) of the commentary required some clarification.

17. Mr. TSURUOKA, noting that several members of the Commission had referred to article 10, to which he had proposed the addition of a second paragraph,<sup>7</sup> wished to offer some further explanation of the reasons that had led him to submit that amendment. The proposed new paragraph explained how the beneficiary State acquired the right to most-favoured-nation treatment when the clause was made subject to conditions other than a condition of material reciprocity. Many members of the Commission had said that the articles of the draft did not really

reflect developments in the contemporary world, and their concern should be taken into account.

18. Although the Special Rapporteur had said that it was extremely rare for a most-favoured-nation clause to contain conditions other than a condition of material reciprocity and that it was therefore unnecessary to mention those other conditions in the draft, he considered that the Commission should acknowledge the current trend to revert to a former practice, and seize the opportunity to take a step forward in the progressive development of international law. The Special Rapporteur had also said that, in so far as they existed, conditions other than that of material reciprocity were extremely varied and that it would be difficult to cover them all in a single provision. In his own opinion, all that was needed was to indicate how the beneficiary State could obtain most-favoured-nation treatment when the clause was coupled with one of those many conditions. It was enough if that condition were met; the Commission did not have to say how it should be met, since that was a matter for the primary rules. The Special Rapporteur had also pointed out that some conditions were, in fact, only limitations. However, chanceries would now be able to distinguish between limitations and conditions by referring to the last phrase of the proposed amendment.

19. He was in favour of retaining article 13, for it was a very important provision; it dealt with an actual situation that was the outcome of the development of the most-favoured-nation clause. On one point, however, he did not share the view of the Special Rapporteur: he did not think article 13 was limited to unconditional most-favoured-nation clauses. The article merely indicated that the relationship between the granting State and the third State was independent of the relationship between the granting State and the beneficiary State under a most-favoured-nation clause. It was an entirely different matter to refer to that clause to determine whether it was conditional or unconditional.

20. He proposed that the words "or other conditions" be added at the end of article 13, since the meaning of the word "compensation" was very restricted.

21. It would be helpful to include a definition of the terms "persons" and "things" in article 2, on the use of terms, making it clear that those terms denoted, respectively, physical and legal persons, and tangible and intangible objects, including goods, vessels and aircraft.

22. Sir Francis VALLAT said that the words "under a most-favoured-nation clause", at the beginning of article 13, appeared to be entirely general, which was partly why some members were concerned that, if there were provisions or circumstances affecting the character of the clause, the article could be read as applying. He did not think that was the true intention, his understanding being that the article was intended to apply to unconditional clauses. That, in his view, was the nub of the whole problem. As a mem-

<sup>7</sup> See 1490th meeting, para. 6.

ber of the United Kingdom Foreign Office, he had been concerned to defend the unconditional character of the most-favoured-nation clause over a number of years. For example, he had held the view that, in the case of a clause operating between the United Kingdom and another State which was not subject to qualifications in itself, if the other State extended treatment to a third State subject to some kind of favour, the United Kingdom was entitled to claim the benefit of that treatment under the most-favoured-nation clause without having to accord the same favour to the other State. That was a traditional view of the ordinary clause in a standard bilateral commercial treaty, but it was not a view that was always accepted. One of the merits of the draft articles, therefore, would be to clarify that particular situation. At the same time, article 13 should not be so written as to cover ground that it was not intended to cover. Possibly, therefore, the problem might be dealt with partly by redrafting the text of the article and partly in the commentary. He, for his part, would not wish to dissent from the real intent of article 13.

23. In suggesting at the previous meeting that the Commission should consider a definition of the word "persons", and therefore by implication "things", it had not been his intention that the Commission should endeavour to define those terms for the purpose of each and every most-favoured-nation clause. His concern was that, as used in the draft, "persons" might assume either a natural or a corporeal sense. What was needed, therefore, was not a definition in the strict sense, but a definition to show that juridical persons were not excluded. The definitions proposed by Mr. Tsuruoka might offer a satisfactory solution.

24. Mr. SUCHARITKUL said that, if the most-favoured-nation clause was to continue to be of use in the future, it was essential to take account of the realities of international relations. Articles 13, 14 and 15 strengthened the clause in favour of beneficiary States at the expense of granting States, the latter generally, although not necessarily, being developing countries. He therefore welcomed Mr. Tsuruoka's proposal for the addition of a second paragraph to article 10, since it would somewhat redress the balance in favour of the granting State and thus improve the draft articles as a whole. The new paragraph would not entirely dispel his misgivings, but it would serve as a clear pointer to parties concluding or negotiating a most-favoured-nation clause.

25. Although he was prepared to accept the proposed new paragraph as it stood, he thought it preferable to use some such wording as "in accordance with" rather than "upon fulfilling", in view of the two types of conditions involved, namely, condition precedent and condition subsequent.

26. The CHAIRMAN, speaking as a member of the Commission, expressed the view that article 13 was both necessary and well placed in the draft as a whole. It reinforced the principle of the unconditionality of the most-favoured-nation clause, which was the cornerstone of the whole draft. It distinguished between

two kinds of relationship involved in a most-favoured-nation clause: on the one hand, that between the granting and the beneficiary State and, on the other, that between the granting State and a third State. Although the former, by definition, was unconditional, the latter could be made subject to conditions. That was the sense of the article, which was abundantly clear and could therefore now be referred to the Drafting Committee.

27. The meaning of the term "persons" could be clarified in the commentary; no further definition need be included in article 2.

28. Mr. USHAKOV (Special Rapporteur) said that, in his opinion, the idea on which article 13 was based was very clear: in the case of an unconditional most-favoured-nation clause, the beneficiary State acquired, without compensation, the right to the treatment extended to the third State, whether that treatment had been extended gratuitously or against compensation. A slight change in the wording of the article was all that was needed in order to reflect that idea, precisely as it was explained in the commentary. The beginning of the article might read:

"The beneficiary State acquires, without compensation, under a most-favoured-nation clause which is not made subject to conditions of compensation,..."

The addition of those words was all the more necessary since the following article related both to conditional and unconditional clauses.

29. Since article 13 was linked to article 9, the exact meaning of an unconditional clause should also be defined in the latter article. For that purpose, the words "of compensation" should be inserted after the words "if a most-favoured-nation clause is not made subject to conditions", at the beginning of the article, and the words "material reciprocity", at the end of the article, should be replaced by the words "any compensation". If it were drafted in that way, article 9 would become a general provision on the unconditional most-favoured-nation clause.

30. Since members of the Commission seemed to be in general agreement on the principle stated in article 13, the article should now be referred to the Drafting Committee.

31. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 13 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>8</sup>

32. Mr. RIPHAGEN said that the Commission would meet with far fewer difficulties if the scope of the draft were confined to unconditional most-favoured-nation clauses. Whenever the discussion turned to clauses that were not unconditional, problems arose because it was not possible to legislate for

<sup>8</sup> For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 46 and 47.

all conceivable types of conditions. It was then necessary to resort to articles of a tautological character. One course that the Commission might consider would be to start the draft with what were now articles 25 and 26, which specified that the draft applied only to most-favoured-nation clauses contained in treaties concluded after the entry into force of the draft and that the parties were free to agree to different provisions. In that way, a model of interpretation would be provided for a particular kind of clause—the unconditional clause—and the object and purpose of the draft would be made clear from the outset.

33. The CHAIRMAN suggested that the Drafting Committee should consider the idea put forward by Mr. Riphagen.

34. Mr. JAGOTA said that although he had no objection to the question of the order of the articles being referred to the Drafting Committee, further reflection was required with regard to the substance of Mr. Riphagen's suggestion, since the very scope of the draft would be affected if the articles were confined to unconditional clauses. It had already been pointed out, particularly by the Special Rapporteur, that the conditional clause applied generally, although not always, in the sphere of trade and commerce, whereas conditional clauses were normally encountered in consular matters, questions of diplomatic privileges and immunities, access to ports, and so on. The purpose of the current study was to clarify, with respect to the most-favoured-nation clause, the operation of the general provisions of the Vienna Convention on the Law of Treaties<sup>9</sup> and their effects for third parties. The draft should therefore cover both unconditional and conditional clauses. If the set of articles dealt exclusively with unconditional clauses, it might be asked later why the topic had been referred to the Commission rather than to UNCITRAL—and, what was more, the draft might very well fail to take account of reality, even in respect of trade and commerce.

35. Mr. ŠAHOVIĆ thought, like Mr. Jagota, that the question raised by Mr. Riphagen related to the basic structure and purpose of the draft. He supported Mr. Riphagen's suggestion in principle, because in order to be able to lay down rules for the use of the most-favoured-nation clause it was essential to maintain a consistent line throughout the draft.

36. The main purpose of the draft as it now stood seemed to be to resolve the problems raised by the use of the unconditional clause. If the Commission had dealt with the question of the clause conditional on material reciprocity, it was because that clause still survived in certain spheres of relations. Various articles dealt with other exceptions or special situations. The question of the clause conditional on material reciprocity could therefore be examined; with regard to the use of the most-favoured-nation clause in international relations, however, and especially in

economic relations, it was preferable to focus the draft on the rules for the application of the unconditional clause.

37. Mr. USHAKOV (Special Rapporteur) said that, for the time being, and as was only realistic, the draft referred to two categories of most-favoured-nation clause, namely, the unconditional clause and the clause conditional on material reciprocity. Some members had proposed the addition of provisions relating to conditional clauses other than clauses conditional on material reciprocity, but it was questionable whether that was a practical proposal in view of the difficulties involved in drafting provisions of that kind. On the other hand, if the Commission limited the draft to unconditional clauses, the sphere of diplomatic and consular relations and matters dealt with in establishment treaties would not be covered.

ARTICLE 14 (Irrelevance of restrictions agreed between the granting and third States)

38. The CHAIRMAN invited the Special Rapporteur to introduce article 14, which read:

*Article 14. Irrelevance of restrictions agreed between the granting and third States*

The beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is extended under an agreement limiting its application to relations between the granting State and the third State.

39. Mr. USHAKOV (Special Rapporteur) said that article 14 applied both to conditional clauses and to unconditional clauses. In its commentary, the Commission had indicated that the rule stated in that article clearly followed from the general rule regarding third States contained in articles 34 and 35 of the Vienna Convention on the Law of Treaties and also from the nature of the most-favoured-nation clause itself, and that it applied to all most-favoured-nation clauses, whether they belonged to the unconditional type or took the form of a clause conditional upon material reciprocity. That rule was clear and generally accepted. Article 14 therefore gave rise to no difficulties and could be retained as it stood.

40. Mr. VEROSTA said that the Special Rapporteur's position was that the draft articles as a whole applied only to unconditional clauses and clauses conditional on material reciprocity. However, in paragraph (2) of the commentary to article 14, it was stated that the rule proposed in that article applied to all most-favoured-nation clauses, whether they were of the unconditional type or took the form of a clause conditional on material reciprocity. He wondered whether, in the Special Rapporteur's opinion, the only conditional clauses envisaged were clauses conditional on material reciprocity or whether there could be others.

41. Mr. USHAKOV (Special Rapporteur) thought the rule stated in article 14 could apply to any condition of compensation and not only to conditions of material reciprocity, since it referred back to the rule stated in the corresponding article of the Vienna

<sup>9</sup> See 1483rd meeting, foot-note 2.

Convention regarding third States. No one could refuse to grant a right arising from a most-favoured-nation clause; that was why article 14 covered every possible application of the clause. That did not mean, however, that the draft articles dealt with conditional clauses in general. Rather, certain articles were of such a general nature that it was preferable to formulate the rule stated in them in very general terms which would apply not only to the situations expressly referred to, but also to every possible case of the application of the most-favoured-nation clause.

42. Mr. CALLE y CALLE said that the point raised by Mr. Verosta was very important, and particularly so in consideration of Mr. Riphagen's suggestion that the draft should deal only with unconditional clauses. It had been said that article 13 was concerned exclusively with such clauses, in other words, that there was no reason for the unconditionality of the clause to be affected by any other condition to which the treatment extended by the granting State to the third State might be made subject. Paragraph (2) of the commentary to article 14 stated that the rule proposed in the article applied to most-favoured-nation clauses whether they were of the unconditional type or took the form of a clause conditional upon material reciprocity. However, the Spanish version of "material reciprocity" which, according to the definition in article 2, meant "equivalent treatment". The French version however, spoke of "avantages réciproques" (reciprocal advantages). Obviously, the concept of reciprocal advantages was different from that of equivalent treatment. If the problem were simply one of translation, it had to be settled, since the Commission must decide whether it intended to use the precise concept of material reciprocity or the wider concept of reciprocal advantages.

43. The formulation of article 14 was perfectly clear. It indicated that the treatment extended by the granting State to a third State under an agreement limiting its application to relations between those States was irrelevant as far as the application of the most-favoured-nation clause was concerned. Any *clause réservée* was *res inter alios acta*, unless the beneficiary State in some way agreed to the restriction of the scope of the most-favoured-nation clause. Paragraph (1) of the commentary pointed out that the article clearly followed the general rule regarding third States set out in article 34 of the Vienna Convention, which specified that a treaty did not create either obligations or rights for a third State without its consent. Consequently, a treaty between the granting State and the third State did not create obligations, rights or restrictions on the operation of the clause between the granting State and the beneficiary State.

44. Sir Francis VALLAT said that article 14 expressed a perfectly acceptable idea, since no one would want to deny the principle of *res inter alios acta*. But it did not express the idea with sufficient precision. There was indeed a kind of contradiction between the title of the article, which spoke of the irrelevance of restrictions agreed between the granting and third States, and the article itself, which was cast

in the positive form as stated: "the beneficiary State is entitled to treatment...". In that respect, the article departed from the corresponding articles of the Vienna Convention on the Law of Treaties, which were cast in the negative form. Surely, "irrelevance" required the negative form.

45. It was interesting in that connexion to note how the Institute of International Law had dealt with a similar problem. The Institute had stated that the régime of unconditional equality established by the operation of an unconditional most-favoured-nation clause "cannot be affected by the contrary provisions of... conventions establishing relations with third States".<sup>10</sup> The underlying concept was that rights established under an unconditional clause were not affected by the provisions of other treaties to which the States concerned were not parties. It was a better formulation of the principle of *res inter alios acta* than that contained in article 14. He would be grateful if the Drafting Committee would accordingly review the presentation of article 14.

46. The CHAIRMAN, speaking as a member of the Commission, said that article 14 was indispensable. Like article 13, it dealt with the fundamental principle of the unconditionality of the clause, and more especially with the question of the *clause réservée*. In the past, certain learned writers had defended the idea that *clauses réservées* constituted exceptions to the application of the most-favoured-nation clause, and the Economic Committee of the League of Nations had been inclined to accept that view. Nevertheless, the previous Special Rapporteur, Mr. Ustor, had been right to discard a somewhat outdated concept and had included in what had originally been article 8 a saving clause stating: "unless the beneficiary State expressly consents to the restriction of its right in writing".<sup>11</sup> Later, the Commission had decided that a general principle was involved and that such a saving clause was not necessary.

47. Speaking as Chairman, he said that, if there were no further comments, he would take it that the Commission agreed to refer article 14 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>12</sup>

ARTICLE 15 (Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement)

48. The CHAIRMAN invited the Special Rapporteur to introduce article 15, which read:

**Article 15. Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement**

The beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is extended under a bilateral or a multilateral agreement.

<sup>10</sup> See *Yearbook... 1976*, vol. II (Part Two), p. 38, doc. A/31/10, chap. II, sect. C, art. 14, para. (2) of the commentary.

<sup>11</sup> *Yearbook... 1973*, vol. II, p. 108, doc. A/CN.4/266.

<sup>12</sup> For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 46 and 47.

49. Mr. USHAKOV (Special Rapporteur) said that treatment could be extended by the granting State to the third State with or without conditions, but it could also be extended in other ways, for example, under domestic legislation or by a unilateral decision or declaration of the granting State. Such examples implied a direct relationship between the granting State and the third State, which could be governed by a bilateral or a multilateral agreement. Article 15 provided that the fact that the treatment extended by the granting State to a third State was extended under a bilateral or a multilateral agreement had no effect on the application of the most-favoured-nation clause. It might then be asked what type of clause was involved. In fact, article 15 related to any kind of clause, whether it belonged to the conditional type, the unconditional type or any other type, and whether it was used in international trade, in matters relating to customs duties or in any other type of relations between States, such as consular and diplomatic relations, shipping rights or rights of access to the courts. The article covered all possible types of clauses.

50. In its commentary to article 15, the Commission had emphasized that the mere fact of favourable treatment was enough to set in motion the operation of the clause and that, unless the clause otherwise provided or the parties to the treaty otherwise agreed, the beneficiary of the clause was entitled to its benefits irrespective of whether the granting State had extended the favoured treatment to a third State by a bilateral or multilateral agreement or by a mere fact. It was possible to exclude bilateral or multilateral treaties from the scope of the clause, but, in order to do so, the clause or the treaty containing the clause had explicitly to provide for an exception for certain bilateral or multilateral treaties. A State could depart from the rule enunciated in article 15 by means of a special provision in the treaty containing the clause. Unless the treaty otherwise provided, the State that had extended favoured treatment to a third State was bound to extend the same treatment to the State benefiting from a most-favoured-nation clause.

51. The Commission had noted, however, that difficulties might arise in the case of certain multilateral agreements, particularly in the sphere of international trade. Indeed, some States would have difficulties in extending to the beneficiary State the same favours as those they had extended to other States under multilateral trade agreements. That was a question that had already arisen at the time of the League of Nations and had been considered by its Economic Committee. The Commission had been of the opinion that the only way of dealing with those difficulties was to include provisions to obviate them in the clauses themselves, but that it was impossible to lay down a rule that would cater for all situations. In its commentary, it had expanded on that idea by referring to the conclusions of the Economic Committee of the League of Nations and to the practice of States. In paragraph (23), for example, it had indicated that, in view of the considerations stated in the

preceding paragraphs, it had adopted article 15, which stated that the beneficiary State was entitled to treatment extended by the granting State to a third State, whether or not such treatment had been extended under a bilateral or a multilateral agreement.

52. In paragraphs (24) to (39) of its commentary to draft article 15, the Commission had dealt with the case of customs unions and similar associations of States and had considered the possibility of introducing a customs union exception. It appeared, however, that that was an issue entirely separate from those dealt with in article 15. Since article 15 related to all clauses and to all spheres of relations between States and not only to the sphere of economic and trade relations, it seemed premature to examine the question of possible customs union exceptions. He therefore proposed that the discussion of exceptions for customs unions and other similar associations of States should be postponed until the Commission came to consider the question of exceptions in general, in other words, until it discussed articles 20, 21 and 22. The question of customs union was not directly related to article 15.

*The meeting rose at 1 p.m.*

## 1492nd MEETING

*Friday, 2 June 1978, at 10.05 a.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Diaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

### **The most-favoured-nation clause (*continued*) (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2)**

[Item 1 of the agenda]

#### **DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)**

**ARTICLE 15 (Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement)<sup>1</sup> (*concluded*)**

1. The CHAIRMAN said that at the previous meeting the Special Rapporteur had suggested that the case of customs unions should be left aside until the Commission came to discuss the question of exceptions

<sup>1</sup> For text, see 1491st meeting, para. 48.

in general, which would be in connexion with articles 20, 21 and 22.

2. Mr. ŠAHOVIĆ stressed that the fact that the problems of multilateral agreements and customs unions were closely related would necessarily affect the formulation of article 15. Thus, although he could agree to the Special Rapporteur's suggestion, he had some reservations about it.

3. Mr. CALLE y CALLE said that, like Mr. Šahović, he found it difficult to comment on article 15 without referring to the customs union issue.

4. Article 15 was one of a group of articles that sought to ensure that the relationship between the beneficiary State and the granting State was not affected by the conditions or origin of the treatment granted to the third State. However it should be advisable to introduce into the wording of the article the idea of the treatment extended *de facto*, for in practice the treatment extended to the third State might be accorded under a unilateral decision or a legislative act, and not necessarily as a result of a bilateral or multilateral agreement. The case of a bilateral or multilateral agreement that restricted the benefits agreed upon would to some extent fall under the terms of article 14.<sup>2</sup> If the agreement specified the exclusion of States not parties thereto, it was typical of the case of systems of economic integration in which the treatment extended among members could not be granted to non-members.

5. The general rule was that a treaty did not create either obligations or rights for a third State without its consent; equally, a treaty could not abolish the pre-existing rights of a third State. If a new agreement conflicted in some way with earlier international agreements, the latter would have to be renegotiated or denounced, in order to avoid any difficulties for the contracting parties caused by a claim to most-favoured-nation treatment under an earlier commitment. Indeed, EEC had pointed out (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 2) that article 234 of the Treaty establishing EEC (Treaty of Rome)<sup>3</sup> prescribed that the rights and obligations resulting from conventions concluded prior to the entry into force of the Treaty between one or more States, on the one hand, and one or more third States, on the other hand, would not be affected by the provisions of the Treaty. In other words, provision was made for compatibility between the obligations created under a multilateral agreement and pre-existing commitments under agreements that extended most-favoured-nation treatment. Furthermore, in its ruling of 12 December 1972, the Court of Justice of the European Communities had stated that it was an established fact that, when concluding the treaty establishing EEC, the member States had been bound by their commitments under the General Agreement on Tariffs and Trade and could not, by means of an instrument concluded among themselves, escape their obligations towards third countries (*ibid.*).

<sup>2</sup> See 1483rd meeting, foot-note 1.

<sup>3</sup> United Nations, *Treaty Series*, vol. 298, p. 91.

6. In substance, the article was in keeping with the principle of *pacta sunt servanda*, and the rule it enunciated was set out correctly and clearly, although it would obviously be necessary to examine how States could, in the case of customs unions and similar associations, establish explicit exceptions to that rule.

7. Mr. REUTER thought the suggestion made by the Special Rapporteur and the Chairman that the discussion of certain difficult questions should be deferred until later was a reasonable one. He could support it, however, only on certain conditions. In fact, the Commission did not know whether it would have time to complete its work. The text of article 15 would be referred to the Drafting Committee, which might be able to adopt it rapidly, and then it would come back to the Commission; but it was to be feared that the Commission might not have time at the current session to deal with questions whose consideration had been deferred.

8. He would therefore make two proposals. The first was formal in nature and consisted of an amendment for the Drafting Committee. Article 15 should include a form of words indicating that its provisions were without prejudice to articles 21, 27 and, perhaps, a few others. The Drafting Committee should therefore insert in article 15 an explicit reference to those provisions in order to make it clear that the adoption of article 15 did not prejudice the issues with which they dealt.

9. The second proposal was in line with what Mr. Calle had just said. Article 15 took account of the fact that treatment could be extended under a bilateral or a multilateral agreement. But that was not enough, and the words "whatever the legal source of such treatment" should be added. The matter to which Mr. Calle y Calle had referred was probably what could, in technical customs terms, be called treatment extended autonomously or, in other words, by a unilateral act of the State. It might even be simply a practice. The wording of the article should therefore be made more general by indicating the variety of possible legal sources. It was not simply a matter of distinguishing between bilateral and multilateral agreements, for that would imply that reference was being made only to multilateral agreements, and it was precisely that which was unacceptable to many members of the Commission.

10. Mr. SUCHARITKUL, associated himself with Mr. Reuter's comments. Indeed, it could be asked why, in article 15, it was being sought to make a distinction between bilateral and multilateral agreements. Article 15 must be read in the light of article 6, which related to the legal basis of most-favoured-nation treatment. That article stated that: Nothing in the present articles shall imply that a State is entitled to be accorded most-favoured-nation treatment by another State otherwise than on the ground of a legal obligation.

In other words, treatment was extended regardless of its legal source, regardless of the type of legal obligation undertaken, and regardless of the number of contracting parties.



11. Mr. SCHWEBEL also agreed with Mr. Reuter. Article 15 should be recast in order to broaden its terms and bring them into line with the commentary, which was not confined to bilateral or multilateral agreements and which stated: "The mere fact of favourable treatment is enough to set in motion the operation of the clause."<sup>4</sup> The article might be reworded to read:

"The beneficiary State is entitled to treatment extended by the granting State to a third State whether such treatment is extended under a bilateral agreement, a multilateral agreement, or on any other basis."

12. Mr. TSURUOKA said that he would have no great difficulty in accepting the suggestion by the Special Rapporteur concerning the procedure to be followed. The Commission had taken account of the complexity of the question when it had adopted article 15 on first reading, and no new difficulties seemed to have arisen in the mean time.

13. He would nevertheless like to submit a drafting amendment relating only to the English text: it seemed wrong that the words "whether or not" should be followed a little further on in the same sentence by the word "or".

14. The word "agreement" was used in article 15. In his opinion, that term denoted not only an agreement concluded between States, but also an agreement concluded between a State and, for example, an international organization. If that interpretation was correct, it might be advisable to include an explanation of that point in the commentary.

15. Mr. JAGOTA said it was his impression from reading the commentary that the Commission was primarily concerned in article 15 with the application of the most-favoured-nation clause in the spheres of trade and commerce. However, the draft also dealt with the operation of the clause in other spheres. Even if that fact were taken into account, article 15 might well create difficulties for States unless they were especially careful in drafting the terms of most-favoured-nation clauses. For example, it was common nowadays to allow foreign nationals to enter a country without a visa, the aim being to facilitate the movement of persons and, more particularly, to promote tourism. The matter was regulated under bilateral treaties and, in the course of time, it might form the subject of multilateral treaties. Under article 15 in its current formulation, would an unconditional most-favoured-nation clause contained in an agreement automatically lead to the extension, in a case of that kind, of the benefits granted to the parties to a bilateral or multilateral agreement? If the rule set forth in article 15 were made a rule of general application, States would encounter difficulties because of what might be described as the "fictional" granting of most-favoured-nation treatment.

16. The Commission could enunciate the principle embodied in article 15 as a rule and then specify the exceptions thereto or, alternatively, it could delete article 15 altogether. If the article were deleted, certain questions would arise, such as the relationship between earlier and later treaties, especially multilateral treaties. It had been argued that if a party to a bilateral agreement which made provision for most-favoured-nation treatment later entered into a customs union, that party might escape the obligations imposed under the most-favoured-nation clause. But it had also been affirmed that it would be a case of successive treaties on the same subject-matter, to which the principle of *pacta sunt servanda* applied, and that State responsibility might be entailed from a breach of the obligation under the clause. However, that was a separate matter that could be regulated under the law of treaties. On the other hand, if article 15 were retained as a general rule, so many exceptions would have to be provided for that little would be left of the rule itself. From the point of view of substance, article 15 was already covered to some extent by article 14, which referred to treatment extended "under an agreement limiting its application to relations between the granting State and the third State." In effect, article 15 simply elaborated on that point by specifying that the agreement might be bilateral or multilateral. State practice and other factors would be covered by article 6.

17. Consequently, he saw little harm at that stage in deleting article 15—or at least in setting it aside until the Commission came to consider the exceptions.

18. Mr. VEROSTA, referring to the use of the term "agreement" in article 15, said that, in his opinion, unless it was made clear that the agreement could take the form either of a bilateral or of a multilateral treaty, a definition of the word "agreement" would have to be included in article 2.

19. Sir Francis VALLAT said that it would be better to leave aside the discussion of what might be regarded as exceptions to article 15, although he had considerable doubt as to whether they would in fact constitute exceptions. The difficulty lay in the fact that article 15 was cast in the form of a positive entitlement to certain treatment, whereas the real aim of the article was to specify that a right that arose otherwise could not be taken away merely because the granting State entered into a treaty with a third State. If the article were drafted in the negative form, as would be appropriate in speaking of the irrelevance of a particular fact, many misgivings would be dispelled. The effect of an economic integration scheme, customs union or free-trade area would then clearly be quite a separate problem, as the Commission had by implication agreed that it should be.

20. Mr. USHAKOV (Special Rapporteur), replying to the question raised by Mr. Jagota, said that article 15 might have begun with the words "unless the clause or the treaty containing the clause otherwise provides". The Commission had already discussed that

<sup>4</sup> *Yearbook... 1976*, vol. II, p. 39, doc. A/31/10, chap. II, sect. C, art. 15, para. (1) of the commentary.

question, but, after drafting article 26, it had decided to delete those words, since in practice it was difficult to include them in every article in order to indicate that States could depart from the rules stated in the article.

21. It had been asked whether there was a link between article 6 and article 15; the answer was that there was not. Article 6 related to the legal basis of most-favoured-nation treatment, while article 15 concerned the relationship between the granting State and the third State. The Commission had wanted to include that article because the question whether it dealt with bilateral or multilateral agreements between the granting State and the third State had sometimes given rise to difficulties, to which the Commission had referred in its commentary. It did not necessarily mean treaty relations in the broad sense of the term; it could also mean, for example, a unilateral act of the granting State. In order to avoid difficulties of interpretation, it would of course be possible, as Mr. Schwebel had suggested, to add the words "or on any other basis".

22. It had been proposed that the draft should include a definition of the term "agreement", but in the draft articles under consideration the Commission was not dealing with the law of treaties as such. Moreover, any definition required the use of clear terms, and a definition of the term "agreement" might lead to a whole series of other definitions.

23. He still maintained that exceptions relating to economic relations, customs unions or other similar associations of States had nothing to do with article 15 as such, for that article dealt with the right to most-favoured-nation treatment provided for in a conditional or unconditional clause contained in a bilateral or multilateral agreement and extended in any field whatever—diplomatic relations, shipping and so on. The words "bilateral agreement" and "multilateral agreement" meant any oral or written agreement concluded between States or with the participation of other subjects of international law. Such agreements might have been concluded under treaty law or under customary law, and were not only agreements establishing economic associations of States. In his report, he had indicated that agreements establishing economic associations could not be regarded as simple agreements, for they also involved other elements.

24. It would be possible to cast article 15 in the negative form, although it was clear as it stood. It would also be possible, in order to expand the scope of the article, to add the words "under other international obligations". The Drafting Committee might deal with that problem.

25. It was for the Commission to decide whether it wanted to refer article 15 to the Drafting Committee forthwith or only after it had studied the question of exceptions. He was, however, convinced that article 15 in no way affected possible exceptions in the sphere of economic relations, customs unions or other similar associations of States.

26. Sir Francis VALLAT said that, in view of the helpful comments by the Special Rapporteur, it might be appropriate to give a clearer indication of what he had meant by an article drafted in the negative form. At the same time, it should be noted that article 15 prescribed that the beneficiary State was "entitled to treatment extended...", whereas it was more accurate in the context of the most-favoured-nation clause to say that the beneficiary State was "entitled to treatment not less favourable than that extended...", which was not same thing. The article should perhaps read:

"The right of a beneficiary State under a most-favoured-nation clause to treatment not less favourable than that extended by the granting State to a third State is not affected by the mere fact that such treatment is extended to the third State under a bilateral or multilateral agreement."

The word "agreement" might be placed in square brackets, pending a decision on the point raised by Mr. Verosta. Such a form of words would remove some of the anxiety regarding the question of economic integration schemes and other conditions, and it would also meet another aim, namely, to do away with the old argument that the conclusion of another treaty might provide an excuse for a State to escape from its obligations under a most-favoured-nation clause.

27. After a brief procedural discussion in which, Mr. VEROSTA, Mr. RIPHAGEN and Mr. FRANCIS took part, the CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 15 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>5</sup>

ARTICLE 16 (Right to national treatment under a most-favoured-nation clause)

28. The CHAIRMAN invited the Special Rapporteur to introduce article 16, which read:

**Article 16. Right to national treatment under a most-favoured-nation clause**

The beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is extended as national treatment.

29. Mr. USHAKOV (Special Rapporteur) said that article 16 concerned the scope of the most-favoured-nation clause. If the granting State extended national treatment to a third State, the beneficiary State acquired the right to the same treatment. Article 16 thus dealt with any treatment that might be extended to the third State. In its commentary, the Commission had stated: "This rule seems to be at first sight self-evident."<sup>6</sup> It had shown that the practice of

<sup>5</sup> For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 46 and 47.

<sup>6</sup> *Yearbook...* 1976, vol. II (Part Two), p. 48, doc. A/31/10, chap. II, sect. C, art. 16, para. (1) of the commentary.

States confirmed that view and had given examples of the interpretation of that effect of the most-favoured-nation clause by the courts of various countries. In paragraph (7), it had nevertheless referred to one writer's dissenting opinion. Basing its views on the practice of States, the Commission had stated that it had no reason to depart from the conclusion that followed from the ordinary meaning of the clause, which assimilated the beneficiary to the most-favoured nation. The clause was very useful for negotiators of treaties because, if they wished to exclude national treatment, they had to stipulate that fact either in the clause itself or in the treaty containing the clause concluded between the granting State and the beneficiary State. In 1975, in order to indicate the residual character of the article, the Commission had included the following phrase in square brackets at the beginning of the text of article 16: "unless the treaty otherwise provides or it is otherwise agreed"; but in 1976, it had considered that, with the inclusion of article 26 in the draft, it was no longer necessary or appropriate to include those introductory words and it had therefore decided to delete them.<sup>7</sup>

30. Some representatives speaking on that subject in the Sixth Committee of the General Assembly at its thirty-first session, held in 1976, had supported in general the provisions of article 16. Others had, however, expressed reservations. They had noted that the title and text of the article did not seem to be completely in harmony and had, in particular, raised the question of the definition of the term "national treatment" (A/CN.4/309 and Add.1 and 2, para. 230). It would be for the Drafting Committee to deal with the question of the title. It would, of course, be possible to give a definition of "national treatment", but that did not seem essential, since the term was used only in articles 16 and 17. The previous Special Rapporteur, Mr. Ustor, had suggested expanding the scope of the draft and including in it certain articles relating to national treatment, since it was a question that was rather closely related to the question of most-favoured-nation treatment. After a lengthy discussion, however, the Commission had decided not to include in the draft any articles relating to national treatment. The definition proposed by the previous Special Rapporteur could, of course, be used again, but the best solution would probably be to give some thought to the problem and consider it at the same time as draft article 2.

31. The Government of Luxembourg had expressed the view that, given the difference in nature between national treatment and most-favoured-nation treatment, it would be preferable not to confuse those two types of questions and accordingly to delete articles 16 and 17 (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A). However, if those articles were deleted, the question whether the beneficiary State was entitled to the treatment extended by the granting State to the third State as national treatment

would still remain unanswered. Moreover, the commentary to article 16 clearly showed that the practice of States in interpreting the clause was in fact that indicated in article 16. Article 16 was in fact a modification of existing practice and of the customary rules recognized by practically all States. It would therefore be preferable to retain articles 16 and 17, subject to any drafting improvements.

32. In the opinion of the Government of Guyana, the Commission had, in article 16, sought to assimilate the standard of national treatment to the standard of most-favoured-nation treatment, but in the formulation of the article it had failed to take account of the concerns to which all countries had attached great importance for a number of years. The Government of Guyana therefore considered that it would be beneficial to the development of the new law of international economic relations if that article reflected those concerns (*ibid.*).

33. There had also been a written comment by EEC that article 16 would imply that the mutual non-discriminatory commitments granted to each other by States members of a customs union should be extended to third countries (*ibid.*, sect. C, 6, para. 8). He must admit that he did not understand the meaning of that comment. In particular, he did not see how the provisions of article 16 would affect the mutual non-discriminatory commitments of the members of an economic union.

34. The situation seemed to be clear enough. State practice and the generally recognized rules of customary law proved that, from the point of view of international relations among States, article 16 reflected the existing legal situation. The article should therefore be retained, subject to any drafting amendments.

35. Mr. FRANCIS said that he had no difficulty with article 16. It was perfectly clear and afforded yet another example of the great care that was required in negotiating the terms of most-favoured-nation clauses.

36. Mr. DADZIE said that article 16 was acceptable as it stood, provided that article 26 was adopted; otherwise, some drafting changes might be needed.

37. Mr. NJENGA said that article 16 presented no difficulty, subject of course to the exceptions to be provided for, particularly in respect of frontier traffic, which was referred to in article 22. With regard to the drafting, it might be better to replace the words "whether or not", in the English version, by the words "even if". A more neutral formulation of that kind would avoid the implication that national treatment was better than most-favoured-nation treatment, which was not necessarily true.

38. Mr. JAGOTA said a distinction had long been made between most-favoured-nation treatment and national treatment, the distinction being that the latter was generally, although not invariably, much more favourable than the former.

39. Treatment of aliens and the property of aliens could be classified under four headings: treatment on

<sup>7</sup> *Ibid.*, p. 49, para. (9) of the commentary.

the basis of equality, whereby any person not a national of a particular country was treated on the same footing as any other alien; treatment akin to most-favoured-nation treatment, whereby, if certain benefits were accorded to some aliens, those benefits would be accorded to a beneficiary under the most-favoured-nation clause; preferential treatment, which was normally more advantageous than most-favoured-nation treatment; and treatment equivalent to national treatment. It was within that framework that State practice was normally conducted.

40. India, for instance, had a special arrangement with Nepal for national treatment under which citizens of both countries enjoyed freedom of movement, without the need for passports or visas, and a number of trade benefits. Normally, India would not accord national treatment to any other country under a most-favoured-nation clause unless the clause so stipulated; indeed, he knew of no such case.

41. In its comments (*ibid.*, paras. 3 and 4), EEC also made a distinction between treatment under the most-favoured-nation clause and preferential treatment. It referred to EEC practice in the matter, particularly in relation to signatories of the Lomé Convention (the ACP countries), and stated that, under the Convention, the ACP countries were required to accord most-favoured-nation treatment only. In considering treatment in State practice, therefore, it was necessary to take account of all such distinctions and their varying correlations.

42. Article 16 was couched in general terms, but its effect was that any treatment, including national treatment, extended by a granting State to a third State would be accorded to the beneficiary of a most-favoured-nation clause unless, as was clear from paragraph (8) of the commentary, the clause or treaty stated otherwise. In other words, the clause would apply automatically to national treatment unless expressly excluded. He could accept article 16 on that basis, provided it was recognized that the onus would be on those negotiating a most-favoured-nation clause to ensure that it did or did not cover national treatment.

43. Mr. TSURUOKA suggested that the words "in so far as such treatment relates to the same subject-matter" should be added at the end of article 16, and that the title of the article should read: "Irrelevance of the fact that treatment is extended as national treatment". The clarification afforded by the addition of the words he had proposed was self-evident, but it might be helpful and did not burden the text. With regard to the title, it was necessary to avoid giving the impression that the Commission was dealing with a matter of internal law, as the existing title might suggest. In fact, the reference was to national treatment only within the framework of the application of the most-favoured-nation clause.

44. The CHAIRMAN, speaking as a member of the Commission, said that State practice over the centuries had demonstrated the relationship between the most-favoured-nation clause and the national treat-

ment clause. They often appeared together in treaties and the purpose of both was to achieve equality of treatment. They differed, however, in that, whereas one referred to treatment of persons and things pertaining to the State, the other referred to treatment of persons and things belonging to the national legal order of the State. The former Special Rapporteur for the topic, Mr. Ustor, in a felicitous turn of phrase, had referred to national treatment as "inland parity" and most-favoured-nation treatment as "foreign parity",<sup>8</sup> while Mr. Reuter had described a most-favoured-nation clause as "a *renvoi* to another treaty" and a national treatment clause as "a *renvoi* to municipal law".<sup>9</sup> The national treatment clause, traditionally concerned with the treatment of aliens in the national territory, had since found wide application in trade and, as embodied in article III, paragraph 4, of the General Agreement on Tariffs and Trade,<sup>10</sup> constituted, together with the most-favoured-nation clause, one of the main pillars of the GATT system.

45. Those facts were reflected in article 16, which should be retained and referred to the Drafting Committee.

46. Mr. USHAKOV (Special Rapporteur), replying to Mr. Jagota's comments, said that the rule stated in article 16 reflected State practice. Some States, such as India, had so far followed a different practice, but that practice would be safeguarded by article 25 relating to the non-retroactivity of the articles of the draft. It was to be hoped that, in future, those States would follow the majority practice.

47. He also wished to differentiate national treatment, which existed as such, from most-favoured-nation treatment, which existed only if the granting State extended a certain treatment to a third State.

48. Mr. Tsuruoka's suggestion for the addition of a phrase at the end of article 16 did not appear to him to be acceptable. If the proposed clarifications were included in article 16, there would be no reason for not including other clarifications that might be necessary as a result of earlier or later articles.

49. Nor should it be emphasized that national treatment constituted the most favourable treatment. Indeed, article 17 was based on the presumption that national treatment was not always the most favourable. That was why the beneficiary State could choose in each case the treatment it preferred.

50. Furthermore, it could happen that national treatment applied automatically to all aliens, as was the case in the Soviet Union. In that case, it was enough to refer to the constitution, whether a most-favoured-nation clause existed or not. If internal law did not provide for national treatment, the rule stated in article 16 would apply. The article was thus logical; in addition, it reflected the general practice of States.

<sup>8</sup> *Yearbook...* 1974, vol. II (Part One), p. 125, doc. A/CN.4/280, arts. 9 and 10, para. (11) of the commentary.

<sup>9</sup> *Yearbook...* 1964, vol. I, p. 113, 741st meeting, para. 14.

<sup>10</sup> GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No. GATT/1969-1).

51. The CHAIRMAN suggested that article 16 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>11</sup>

ARTICLE 17 (Most-favoured-nation treatment and national or other treatment with respect to the same subject-matter)

52. The CHAIRMAN invited the Special Rapporteur to introduce article 17, which read:

**Article 17. Most-favoured-nation treatment and national or other treatment with respect to the same subject-matter**

If a granting State has undertaken by treaty to accord to a beneficiary State most-favoured-nation treatment and national or other treatment with respect to the same subject-matter, the beneficiary State shall be entitled to whichever treatment it prefers in any particular case.

53. Mr. USHAKOV (Special Rapporteur) said that article 17 applied to the case in which several types of treatment with respect to the same subject-matter were extended to the beneficiary State, which was then entitled to the treatment it preferred in each particular case. Thus, in addition to the treatment it could claim under a most-favoured-nation clause, the beneficiary State might, with respect to a certain subject-matter, also be able to benefit from national treatment or some direct treatment other than national treatment. In the commentary to article 17, the Commission had given a number of examples. When such a choice existed, the beneficiary State logically chose the most favourable treatment, but, from the legal standpoint, it was free to choose the treatment it preferred.

54. In the Sixth Committee, some representatives had stated that article 17 was based on the assumption that national and most-favoured-nation treatment went beyond the beneficiary State's entitlement under the international minimum standard (A/CN.4/309 and Add.1 and 2, para. 242).

55. In its written comments, the Government of Luxembourg had proposed the deletion of both article 16 and article 17 (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A), while the Government of the Netherlands had stated that the Commission should not deal further in the draft with the problems connected with the coexistence of most-favoured-nation clauses and national treatment clauses (*ibid.*). He noted that the Commission itself had considered it unnecessary and impossible to go more deeply into those problems.

56. Mr. JAGOTA said that, as worded, article 17 did not follow on logically from article 16, as was the intention. The first part of article 17 provided that the granting State would undertake by treaty to accord to a beneficiary State most-favoured-nation and national or other treatment. That was not in fact the case. The only clause that operated as between the grant-

ing State and the beneficiary State was the most-favoured-nation clause. Relations between the granting State and the third State, on the other hand, might be based on most-favoured-nation, national or other treatment, the choice of such treatment resting with the beneficiary State. He would therefore suggest that the words "and national or other treatment with respect to the same subject-matter" be replaced by the words "and the treatment extended by a granting State to a third State is most-favoured-nation treatment or national or other treatment with respect to the same subject-matter". It was purely a drafting point that could perhaps be referred to the Drafting Committee.

57. Mr. TABIBI said he would have no objection if the Drafting Committee wished to consider Mr. Jagota's amendment, but considered that article 17 was acceptable as it stood and should be retained. It was clear in its intent, that in any direct arrangement between two parties it was for the granting State to decide what type of treatment should be accorded to the beneficiary State, the latter having no say in the matter.

58. Mr. CALLE y CALLE said that, while articles 16 and 17 both dealt with national treatment, they differed in purpose. The former was designed to protect the beneficiary State from the possibility of national treatment being accorded to a third State, while the latter vested in the beneficiary State an additional right, namely, the right to choose the form of treatment most advantageous to it.

59. He noted that Luxembourg, in its comments (*ibid.*), had proposed the deletion of articles 16 and 17 on the ground that national treatment and most-favoured-nation treatment differed in nature, national treatment being determined by internal law. He also noted that EEC, in its comment, had proposed a new article 16 *bis* (*ibid.*, sect. C, 6, para. 11) relating to certain entities where there was generally inland parity among the members. He would suggest that the Drafting Committee give some thought to the case for excluding national treatment extended within the framework of such entities.

60. Mr. USHAKOV (Special Rapporteur) wished to stress once again the fact that, in the situation referred to in article 17, the beneficiary State could choose between most-favoured-nation treatment, national treatment and treatment that was extended directly and that was even more generous than the two other types of treatment. Thus, the beneficiary State's products could benefit from most-favoured-nation treatment, from national treatment and from direct treatment which might, for example, exempt them from all customs duties. In such a case, the beneficiary State could choose the treatment it preferred. It was to be noted that most-favoured-nation treatment was extended by treaty, that national treatment might depend on internal law and that direct treatment could be the result of a written or oral treaty. It went without saying that States were free to introduce all kinds of exceptions in the most-favoured-nation clause, including exceptions for cus-

<sup>11</sup> For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 46 and 47.

toms unions. In the absence of such exceptions, however, it was the general rule stated in article 17 that applied.

61. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 17 to the Drafting Committee for consideration in the light of the discussion and of the amendments which had been proposed.

*It was so agreed.*<sup>12</sup>

*The meeting rose at 1 p.m.*

<sup>12</sup> *Ibid.*, paras. 48 and 49.

## 1493rd MEETING

*Monday, 5 June 1978, at 3.5 p.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

### **The most-favoured-nation clause (continued) (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2)**

[Item 1 of the agenda]

#### DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (continued)

ARTICLE 18 (Commencement of enjoyment of rights under a most-favoured-nation clause)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 18, which read:

#### **Article 18. Commencement of enjoyment of rights under a most-favoured-nation clause**

1. The right of the beneficiary State to any treatment under a most-favoured-nation clause not made subject to the condition of material reciprocity arises at the time when the relevant treatment is extended by the granting State to a third State.

2. The right of the beneficiary State to any treatment under a most-favoured-nation clause made subject to the condition of material reciprocity arises at the time of the communication by the beneficiary State to the granting State of its consent to accord material reciprocity in respect of the treatment in question.

2. Mr. USHAKOV (Special Rapporteur) noted, first, that article 18 had elicited comments from only two governments: the Government of Luxembourg, which had expressed reservations with regard to the concept of material reciprocity (A/CN.4/308 and Add.1 and Add.1/Corr.1, section A), and the Gov-

ernment of the Netherlands, which had reiterated its reservations concerning article 5 (*ibid.*).

3. Article 18, which specified the time of the commencement of enjoyment of rights under the most-favoured-nation clause, was related to articles 9 and 10.<sup>1</sup> As the Commission had explained in the commentary to article 18, paragraph 1 of that article applied to unconditional most-favoured-nation clauses, while paragraph 2 dealt with clauses made subject to a condition of reciprocity. In order to take account of the distinction recently made by the Commission between a condition of material reciprocity and another condition of compensation, the wording of article 18 would have to be suitably amended.

4. Both article 9 and article 18, paragraph 1, dealt with unconditional most-favoured-nation clauses. Article 9 provided that the beneficiary State acquired "the right to most-favoured-nation treatment without the obligation to accord material reciprocity to the granting State"; article 18 specified the time at which that right arose, namely, "at the time when the relevant treatment is extended by the granting State to a third State". The Drafting Committee should perhaps state exactly when treatment could be regarded as having been "extended". Must such treatment have been extended *de jure* or *de facto*? It would appear that it must have been extended *de jure*. If the granting State had pledged favours to a third State, it mattered little to the beneficiary State whether the pledge had been carried out or not. The pledge gave rise to an obligation for the granting State and it was at that point that the right of the beneficiary State to receive the treatment pledged to the third State arose. The granting State might also have enacted domestic legislation with a view to granting certain favours to a third State, but those favours might not have been immediately accorded. In those circumstances, did the right of the beneficiary State arise once the legislation was adopted, or once the treatment in question was effectively extended to the third State? Although State and international organizations had not raised that question in their comments, the Drafting Committee should endeavour to resolve it.

5. The Drafting Committee should also try to ensure consistency in the wording of paragraphs 1 and 2 of article 18. According to paragraph 1, relating to unconditional clauses, the right of the beneficiary State arose when the relevant treatment was extended by the granting State to a third State. According to paragraph 2, relating to clauses made subject to the condition of material reciprocity, that right arose "at the time of the communication by the beneficiary State to the granting State of its consent to accord material reciprocity in respect of the treatment in question". Paragraph 2 did not specify whether the treatment must have been extended by the granting State to the third State; that condition, which was contained in paragraph 1, was not repeated in paragraph 2. Possibly the condition was to be assumed,

<sup>1</sup> See 1483rd meeting, foot-note 1.

although the word “also”, which appeared in article 19, paragraph 2, did not occur in article 18, paragraph 2.

6. Reverting to the suggestion of Mr. Tsuruoka and Mr. Sucharitkul for the addition of a second paragraph to article 10 or the drafting of an article 10 *bis* concerning conditional clauses other than clauses made subject to a condition of material reciprocity,<sup>2</sup> he stressed that there was an infinite variety of clause of the latter type and that it would be virtually impossible to specify, in article 18, at what point the right of the beneficiary State arose under every conceivable type of conditional clause.

7. In general, the idea in article 18 was clear. Subject to drafting improvements, the article should therefore be acceptable.

8. Mr. DADZIE said he had no difficulty with the substance of article 18. He thought, however, that paragraph 1 should be reworded so that it would be quite clear to the reader that the word “extended” must be understood to mean extended *de jure* rather than *de facto*. Moreover, the assumption underlying the rule in paragraph 2, namely, that the treatment had been extended by the granting State to a third State, should be expressly stated. Both those points could probably be referred to the Drafting Committee for consideration.

9. Mr. TABIBI supported article 18 in principle and was in favour of referring the existing text to the Drafting Committee. He noted, however, that paragraph 1 differed entirely from paragraph 2 in regard to the elements that gave rise to the beneficiary State’s right; in particular, paragraph 2 introduced an element of reciprocity which did not appear in paragraph 1. Moreover, article 7 (The source and scope of most-favoured-nation treatment) was more closely related to paragraph 1 of article 18 than to paragraph 2. The same comments applied *mutatis mutandis* to article 19 (Termination or suspension of enjoyment of rights under a most-favoured-nation clause). He therefore suggested that the Special Rapporteur should consider whether paragraphs 1 and 2 of article 18 should not form two separate articles.

10. Mr. REUTER considered that the points mentioned by the Special Rapporteur were very pertinent; indeed, in addition to the drafting aspects, they raised some real problems of substance. For instance, the term “conféré”, in the French text of paragraph 1 of article 18, had a specific legal meaning in French, whereas the term “extended”, in the English version, referred more to a *de facto* situation. True, the right of the beneficiary State to certain treatment had a legal source, as was apparent from article 7, but the question arose whether that legal title required to be backed by a *de facto* situation. The Commission had already pointed out that a treatment could be extended not only by virtue of a bilateral or a multilateral agreement, but also by virtue of a uni-

lateral legal act or even of a practice. Was it then necessary that, in addition to being established, the legal title should be given material effect? The Special Rapporteur had seen the consequences that that problem could have on the date from which the beneficiary State was entitled to the relevant treatment.

11. There were yet other aspects to the problem. One was the harmonization of articles 18 and 19. Moreover, the question arose, in connexion with article 19, as to the consequences of the concept of suspension introduced in that article. When a right was accorded under a bilateral treaty, for example, and the treaty was suspended, that right continued to exist; what ceased to exist was the according of the relevant treatment. Suspension of a treaty might occur for a number of reasons. For example, under article 60 of the Vienna Convention on the Law of Treaties,<sup>3</sup> a treaty might be suspended if its provisions were violated. If it were assumed that the treatment must in fact have been extended, the rights of the beneficiary State would be suspended when the treaty was suspended. But that was not so evident if reference were made only to the legal title and not to the actual extension of the treatment. For example, a State might be subjected to international sanctions, with the result that certain economic advantages were suspended. Legally, those advantages continued to exist; they were still accorded, but they were not in fact extended. If the decisive factor were taken to be the actual extension of the advantages, then all the States benefiting from a most-favoured-nation clause would suffer the consequences. The Commission had therefore to decide whether to require, as a condition, the actual extension of the treatment, or whether to require only the existence of a legal title thereto.

12. Mr. SUCHARITKUL thought that article 18 as such did not raise any great difficulties, but that it posed a problem in relation to articles 16 and 17, dealing respectively with the right to national treatment under a most-favoured-nation clause and the choice between that treatment and another treatment with respect to the same subject-matter. If the granting State extended to a third State a treatment less favourable than national treatment, a State that was entitled to national treatment under a most-favoured-nation clause would choose national treatment. If the granting State subsequently extended to the third State treatment more favourable than national treatment, could the beneficiary State go back on its choice? That problem arose not only in regard to paragraph 1 of article 18, but also in regard to the condition of material reciprocity referred to in paragraph 2. Moreover, if reference were made to article 19, on the termination or suspension of enjoyment of rights under a most-favoured-nation clause, it would be seen that there was probably a link between that provision and the choice that the beneficiary State could make in accordance with article 17.

<sup>2</sup> See 1490th meeting, paras. 6 and 14.

<sup>3</sup> See 1483rd meeting, foot-note 2.

13. Mr. El-ERIAN pointed out that, under article 18, paragraph 2, the commencement of the beneficiary State's right was in effect made subject to a condition precedent, in the same way as, under article 19, the termination of that right was made subject to a condition subsequent. He therefore suggested that the said paragraph 2 should be reworded, in terms as simple as those used in paragraph 1, to provide that, where the right of the beneficiary State was made subject to a condition, it arose at the time when that condition was fulfilled. He saw no need for the more elaborate formulation used in the existing text.

14. Mr. RIPHAGEN thought that the word "treatment" in fact had three possible meanings: *de facto* treatment; treatment under national law; treatment under international law.

15. He noted a certain contradiction between article 18, paragraph 2, and article 19, paragraph 2, on the one hand, and article 10 (Effect of a most-favoured-nation clause conditional on material reciprocity), on the other. Article 10 provided that the beneficiary State acquired the right to most-favoured-nation treatment "only upon according" material reciprocity to the granting State; and according to paragraph (e) of article 2 (Use of terms), material reciprocity meant "equivalent treatment". That was susceptible of two interpretations: the equivalent treatment could be accorded either *de jure* or *de facto*.

16. However, neither of those interpretations was valid under article 18, paragraph 2, or article 19, paragraph 2, since the condition to be met was the communication by the beneficiary State to the granting State of its consent to accord material reciprocity. Such a communication presumably gave rise to an international obligation, but that did not mean that the obligation would be performed under national legislation or by *de facto* treatment. The Drafting Committee could usefully examine that point with a view to restoring the balance between the rights and obligations of the parties under the clause.

17. With regard to the suspension or termination of the beneficiary State's right as a sanction for the breach of a treaty by a third State, it might appear unjustified at first sight to provide that such a breach had a prejudicial effect on the beneficiary State under a most-favoured-nation clause. However, if suspension or termination by the granting State of the treatment extended to a third State were without effect on the application of the most-favoured-nation clause to the beneficiary State, that would be tantamount to attaching importance to a relationship between the granting State and third States that had been considered irrelevant in other respects. It also showed a certain lack of balance between the right and obligations under the clause, a matter that should perhaps be considered by the Drafting Committee. He would be inclined to think that the date on which the right to most-favoured-nation treatment arose and the time when the condition of material reciprocity was considered to be fulfilled were questions of *de facto* rather than of *de jure* treatment.

18. Sir Francis VALLAT recalled that, when the terms "accord" and "extend" had been considered by the Drafting Committee in 1975, the intention had been to use the former term to refer to treaty obligations arising mainly on the part of a granting State to a beneficiary State, and the latter to the actual extension of treatment, usually to a third State.<sup>4</sup> That distinction was implicit in the wording of article 5 (Most-favoured-nation treatment). Article 10 (Effect of a most-favoured-nation clause conditional on material reciprocity), however, had caused some difficulty, because it dealt with the reverse situation, in which material reciprocity was given by the beneficiary State to the granting State. In that article the word "according" had been used, although, in his view, the Commission should now consider the possibility of using that term only for treatment accorded by a granting State to a beneficiary State. He believed that it was the use of the word "according", in article 10, that had led the Commission into error in the case of article 18, and possibly of article 19. The reference in article 18, paragraph 2, to the communication by the beneficiary State to the granting State of its consent to accord material reciprocity, was a departure from the essence of the matter. What was really at issue was whether or not the beneficiary State in fact gave material reciprocity to the granting State.

19. In view of the importance of the point, he would suggest that the Drafting Committee reconsider the use of the terms "accord" and "extend" throughout the draft.

20. Mr. TSURUOKA proposed that article 18 be reworded to read:

*"Article 18. Commencement of right to claim treatment under a most-favoured-nation clause*

"1. The beneficiary State is entitled to claim, under a most-favoured-nation clause not made subject to conditions, any treatment extended by the granting State to a third State from the time when the relevant treatment is extended either in fact or in law by the granting State to the third State.

"2. The beneficiary State is entitled to claim, under a most-favoured-nation clause subject to the condition of material reciprocity, any treatment extended by the granting State to a third State from the time when the beneficiary State consents to accord material reciprocity to the granting State in respect of the treatment in question.

"3. The beneficiary State is entitled to claim, under a most-favoured-nation clause subject to conditions other than the condition of material reciprocity, any treatment extended by the granting State to a third State from the time when (a) the relevant treatment is extended either in fact or in law by the granting State to the third State and (b) the above conditions are fulfilled."

<sup>4</sup> See *Yearbook... 1975*, vol. I, p. 254, 1352nd meeting, para. 4.



21. As it was now worded, article 18 might give the impression that the treatment was extended by the granting State to the third State only when the granting State actually accorded it to the third State. However, under article 7, the right of the beneficiary State had its source in the most-favoured-nation clause. In article 18, therefore, account should be taken of the principle that the right of the beneficiary State derived from the most-favoured-nation clause in force between that State and the granting State.

22. In the proposed amendment, the words "at the time" were replaced by the words "from the time", since article 18 referred to the time from which the beneficiary State began to enjoy its rights, rather than to a particular moment.

23. The words "either in fact or in law" were added in paragraphs 1 and 3 in order to emphasize that the relations between the granting State and the third State were independent of the relations between the granting State and the beneficiary State; the latter could claim the treatment extended to the third State from the time when that treatment was extended either in fact or in law. Where there was a condition of material reciprocity, the beneficiary State could claim the treatment in question from the time when it consented to accord material reciprocity. It was not the time when its consent was communicated that should be taken into consideration. Normally, such consent was expressed by an exchange of letters or by an administrative agreement. Moreover, the mere fact that the beneficiary State had communicated its consent to the granting State did not mean that it had actually accorded that State material reciprocity.

24. The proposed new paragraph dealt with the case of a clause subject to a condition other than that of material reciprocity. He was less pessimistic than the Special Rapporteur and thought that the Commission might very well cover that case, provided it did not venture into the sphere of primary rules.

25. Mr. USHAKOV (Special Rapporteur) observed that the existing wording of article 18 did not specify the time when treatment was "extended". He therefore proposed that paragraph 1 of the article should be worded along the following lines:

"The right of the beneficiary State to any treatment under a most-favoured-nation clause not made subject to the condition of material reciprocity arises at the time when the obligation of the granting State to extend the relevant treatment to a third State itself arises."

26. The most-favoured-nation clause produced its effects at the time when the granting State undertook to accord a certain treatment to a third State. It mattered little if the treaty between the granting State and the third State providing for that obligation were not performed; the obligation of the granting State might also arise from an act of internal legislation: the beneficiary State might then claim all the advantages that the granting State had extended to third States under its internal law, even if those States did not yet enjoy the advantages in question.

The right of the beneficiary State against the granting State arose with the creation of the obligation of the granting State to the third State, whether that obligation had its source in a treaty, in internal law or in custom. The decisive factor was the obligation of the granting State to the third State, whether that obligation had been performed or not, and there was no need to take into consideration the very hypothetical case of a practice.

27. In the case covered by paragraph 2 of article 18, the right of the beneficiary State arose when that State communicated to the granting State its consent to accord material reciprocity; hence account must be taken of the legal act constituted by the communication of consent. Assuming the existence, for example, of a clause subject to a condition of material reciprocity and relating to immunities to be accorded to consulates, the beneficiary State, on condition that it accorded the same treatment as a third State had accorded to the granting State, might receive from the granting State the treatment that the latter had extended to the third State. However, the beneficiary State might be unable to accord the privileges in question to the consulates of the granting State in its own territory—for example, because no consulate had yet been opened. Hence it was necessary to keep to the communication by the beneficiary State of its consent to accord material reciprocity. Nevertheless, the creation of the obligation of the granting State to the third State might well be made an additional condition.

28. Sir Francis VALLAT said that the Special Rapporteur had raised a new point that should be approached with some caution, for there was a risk of laying down a general interpretation of clauses that were not actually before the Commission. Whether or not a most-favoured-nation clause required that corresponding treatment be extended to a third State, and the point at which an obligation to extend such treatment came into being and thereby brought the most-favoured-nation clause into operation, depended on the wording of the clause. Usually, such clauses were drafted to provide that it was the extension of treatment itself that brought the clause into operation. To depart from that idea, and to envisage the possibility of an obligation to extend treatment to a third State, would be to import a new element into most-favoured-nation clauses; that, in his view, would be a very dangerous approach. As long as the Commission confined itself to the question of extension of treatment, it would be on fairly firm ground.

29. Mr. USHAKOV (Special Rapporteur) replied that the Commission's task was to draft a rule applicable to clauses that contained no special provisions. Where there were special provisions, article 26 would apply. All the articles of the draft were subject to article 26, under which the parties were free to agree on different provisions. In the case of conditions other than the condition of material reciprocity, and with respect to the time at which the rights of the beneficiary State arose, the Commission could draft only a vague provision of no value. Hence it was neces-

sary to refer to specific conditions as determining the time when those rights arose.

30. In conclusion, he expressed the hope that the Drafting Committee would be able to put article 18 into satisfactory form in the light of the comments and suggestions made during the discussion.

31. The CHAIRMAN suggested that article 18 should be referred to the Drafting Committee.

*It was so agreed.*<sup>5</sup>

ARTICLE 19 (Termination or suspension of enjoyment of rights under a most-favoured-nation clause)

32. The CHAIRMAN invited the Special Rapporteur to introduce article 19, which read:

*Article 19. Termination or suspension of enjoyment of rights under a most-favoured-nation clause*

1. The right of the beneficiary State to any treatment under a most-favoured-nation clause is terminated or suspended at the time when the extension of the relevant treatment by the granting State is terminated or suspended.

2. The right of the beneficiary State to any treatment under a most-favoured-nation clause made subject to the condition of material reciprocity is also terminated or suspended at the time when the termination or suspension of the material reciprocity in question is communicated by the beneficiary State to the granting State.

33. Mr. USHAKOV (Special Rapporteur) said that article 19 was closely connected with article 18, to which it formed a corollary. Consequently, if paragraph 1 of article 18 stated that the right of the beneficiary State to any treatment under a most-favoured-nation clause not made subject to the condition of material reciprocity arose at the time when the obligation of the granting State to extend the relevant treatment to a third State itself arose,<sup>6</sup> then paragraph 1 of article 19 would have to provide that the right of the beneficiary State to any treatment under a most-favoured-nation clause was terminated or suspended at the time when the obligation of the granting State to extend the relevant treatment to a third State was terminated or suspended.

34. In that connexion, he reminded the Commission that, according to the 1976 report of the Sixth Committee, it had been suggested that the words "to a third State" should be inserted after the words "granting State" in paragraph 1 of article 19, both for the sake of clarity and in order to bring that paragraph into line with article 18, paragraph 1 (A/CN.4/309 and Add.1 and 2, para. 247). In his opinion, it was irrelevant whether the obligation to extend the relevant treatment were suspended or terminated as a result of the breach of a treaty by the third State: the manner in which the obligation arose and the manner in which it was suspended or terminated were of no importance.

35. In conclusion, he observed that the wording of article 19 depended on that of article 18: if the Draf-

ting Committee decided to amend article 18, article 19 would have to be similarly amended. He therefore proposed that article 19 should be referred to the Drafting Committee together with article 18.

36. Mr. TSURUOKA said he would submit an amendment to article 19 in the Drafting Committee.

37. The CHAIRMAN said that, if there was no objection, he would take it that the Commission decided to refer article 19 to the Drafting Committee.

*It was so agreed.*<sup>7</sup>

ARTICLE 20 (The exercise of rights arising under a most-favoured-nation clause and compliance with the laws of the granting State)

38. The CHAIRMAN invited the Special Rapporteur to introduce article 20, which read:

*Article 20. The exercise of rights arising under a most-favoured-nation clause and compliance with the laws of the granting State*

The exercise of rights arising under a most-favoured-nation clause for the beneficiary State and for persons or things in a determined relationship with that State is subject to compliance with the relevant laws of the granting State. Those laws, however, shall not be applied in such a manner that the treatment of the beneficiary State and of persons or things in a determined relationship with that State is less favourable than that of the third State or of persons or things in the same relationship with that third State.

39. Mr. USAKOV (Special Rapporteur) recalled that article 20 affirmed, on the one hand, that the beneficiary State must respect the relevant laws of the granting State and, on the other hand, that those laws must be applied in such a way as to avoid discrimination between States. Those two rules were to be found in the Vienna Convention on Diplomatic Relations,<sup>8</sup> article 41 of which stipulated that, "Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State", and article 47 that "In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States". Those rules were also included in the Vienna Convention on Consular Relations<sup>9</sup> and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.<sup>10</sup>

40. The oral comments made by representatives in the Sixth Committee in 1976 had been generally favourable to article 20, which had been found satisfactory on the whole (see A/CN.4/309 and Add.1 and 2, para. 251).

41. With regard to the written comment by Luxembourg (A/CN.4/308 and Add.1 and Add.1/Corr.1,

<sup>7</sup> For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 62 and 63.

<sup>8</sup> United Nations, *Treaty Series*, vol. 500, p. 95.

<sup>9</sup> *Ibid.*, vol. 596, p. 261.

<sup>10</sup> *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207.

<sup>5</sup> For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 50-61.

<sup>6</sup> See para. 25 above.

sect. A), article 20 was not intended to allow the granting State to invoke its internal laws in order to restrict the scope of its international obligations or to release itself from them. It was obvious that the beneficiary State was required to respect the law of the granting State only in so far as they were in conformity with the international obligations of that State.

42. Mr. TABIBI was in favour of retaining article 20, which was simply a statement of the obvious and could be referred to the Drafting Committee at once.

43. Mr. ŠAHOVIĆ observed that article 20 stated two separate rules, one concerning the duties of the beneficiary State and the other concerning the duties of the granting State. He hoped that the Drafting Committee would revise the wording of the article so as to formulate those two rules more clearly, as indicated in paragraph 8 of the Commission's commentary.

44. Mr. REUTER agreed with Mr. Šahović. The second sentence of article 20 clearly referred to practices designed to introduce *de facto* discrimination between States. *De facto* discrimination in customs matters was perfectly lawful. It was not clear, however, whether the second sentence referred to abuse of rights. The expression "less favourable" was not very clear in that respect.

45. Mr. SUCHARITKUL was also in favour of requiring respect for national law; however, the condition imposed for enjoyment by the beneficiary State of the right referred to in article 20 did not depend exclusively on the manner of application of those laws. It was not sufficient that, as prescribed in the article, the laws should "not be applied in such a manner that the treatment of the beneficiary State... is less favourable than that of the third State...". If the laws or ground rules favoured, tolerated or permitted discriminatory treatment, they should not be applied, since the effect produced would be inconsistent with the obligation existing under the most-favoured-nation clause.

46. Consequently, it would be advisable to introduce the idea of the substantive quality of the laws and to reword the beginning of the second sentence of the article to read: "Those laws, however, shall not be construed or applied in such a manner...". Construction of the law related more to its non-discriminatory quality, whereas application of the law related more to actual practice.

47. Mr. USHAKOV (Special Rapporteur) pointed out that, under article 20, if persons or things of the beneficiary State were to be entitled to most-favoured-nation treatment, the internal law of the granting State must stipulate that right expressly; for it was only by virtue of the internal law of a State that persons or things of another State could claim any kind of treatment. That did not mean, however, that the beneficiary State was required to comply with laws that conflicted with the international obligations of the granting State; the only laws it must observe were those compatible with the international

obligations of the granting State. Thus article 27 of the Vienna Convention on the Law of Treaties<sup>11</sup> provided that "A Party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

48. It was also necessary to stipulate that the laws of the granting State must be applied in the same way to the beneficiary State and the third State, so as to avoid discrimination. That had been the Commission's intention in paragraph 8 of its commentary, and was the object of the second sentence of article 20.

49. Mr. RIPHAGEN thought that a difficulty might arise in the application of article 20. He had in mind the common situation in international trade in which foreign products were given access to a particular market, but a certificate had to be produced before they could be placed on sale. A State would often recognize the certificates issued by another State, but reciprocal recognition of certificates was based on equivalence of standards. It would be advisable to take into consideration the question whether, under the terms of article 20, the beneficiary State of most-favoured-nation treatment also had the right to recognition of its certificates, even if they were issued on the basis of quite different standards.

50. Mr. REUTER was not sure whether the Commission could improve on the second sentence of article 20, but thought it should at least state in its commentary that that sentence had no precise significance. The rule stated might, indeed, have very dangerous consequences in matters such as health, safety at sea, movement of shipping in ports and pollution control, since it would encourage the weakest possible measures.

51. The CHAIRMAN said that, if there was no objection, he would take it that the Commission decided to refer article 20 to the Drafting Committee.

*It was so agreed.*<sup>12</sup>

52. After a brief procedural discussion in which Mr. USHAKOV, Mr. NJENGA, Mr. FRANCIS and Mr. TABIBI took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to consider articles 21, 22 and 23 separately, in numerical order, and to examine the customs union issue at a later stage.

*It was so agreed.*

53. Mr. REUTER said that, if the Commission were to begin by taking up the most general question, one that deserved priority, because it concerned both developing and developed countries, was that of an exception concerning international commodity agreements, which formed part of the new international economic order. In his view, that question should be the subject of a new article, since it was one of the most general and important issues of all.

*The meeting rose at 6.05 p.m.*

<sup>11</sup> See 1483rd meeting, foot-note 2.

<sup>12</sup> For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 64 and 65.

## 1494th MEETING

Tuesday, 6 June 1978, at 10.05 a.m.

Chairman : Mr. José SETTE CÂMARA

*Members present* : Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

### The most-favoured-nation clause (*continued*) (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2)

[Item I of the agenda]

#### DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 21 (The most-favoured-nation clause in relation to treatment under a generalized system of preferences)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 21, which read:

#### *Article 21. The most-favoured-nation clause in relation to treatment under a generalized system of preferences*

A beneficiary State is not entitled under a most-favoured-nation clause to any treatment extended by a developed granting State to a developing third State on a non-reciprocal basis, within a generalized system of preferences established by that granting State.

2. Mr. USHAKOV (Special Rapporteur) said that, with article 21, the Commission was entering the sphere of general exceptions of the operation of the most-favoured-nation clause. That article, designed to meet the needs of developing countries, was based on the generalized system of preferences (GSP) established by UNCTAD and GATT, which was generally accepted by the international community of States. As the Commission had stressed in its commentary, the system was "non-reciprocal and non-discriminatory";<sup>1</sup> it laid down primary rules for relations between developed and developing countries, which were generally applied in the activities of United Nations bodies.

3. He drew the Commission's attention to the "agreed conclusions" reached by the Special Committee on Preferences set up by resolution 21 (II) of the United Nations Conference on Trade and Development as a subsidiary organ of the Trade and Development Board; experts from those conclusions, which were annexed to decision 75 (S-IV) adopted by the Board at its fourth special session, were reproduced in the Commission's commentary.<sup>2</sup> He re-

ferred, in particular, to section III (Safeguard mechanisms), which stated that

The preference-giving countries reserve the right to make changes in the detailed application as in the scope of their measures, and in particular, if deemed necessary, to limit or withdraw entirely or partly some of the tariff advantages granted.

Developed countries were thus entirely free to limit or even to withdraw completely the advantages granted to developing countries under the GSP established for their benefit.

4. He also drew attention to section IV (Beneficiaries) of the "agreed conclusions", in which the Special Committee noted that, "as for beneficiaries, donor countries would in general base themselves on the principle of self-election". Thus donor countries were entirely free to choose the countries that would benefit from the generalized system of preferences.

5. According to the conclusion in section VI (Duration) of the same document, the initial duration of the GSP had been set at 10 years. The Commission had thus endeavoured to promote the progressive development of existing law by adopting a general rule on a system that had been set up on a merely provisional basis. But it had recognized that "the usefulness of article 21 depends upon the permanence and the development of the generalized system of preferences".<sup>3</sup> In that connexion, he stressed that the Commission was not called upon to ensure the permanence of the GSP; that was a matter for the States that had adopted the system.

6. In section IX of its conclusions (Legal status), the Special Committee on Preferences had recognized that

no country intends to invoke its right to most-favoured-nation treatment with a view to obtaining, in whole or in part, the preferential treatment granted to developing countries in accordance with Conference resolution 21 (II) [of UNCTAD]...

7. The Commission had endorsed that conclusion and had noted that

There seems to be general agreement... that States will refrain from invoking their rights to most-favoured-nation treatment with a view to obtaining in whole or in part the preferential treatment granted to developing countries by developed countries.<sup>4</sup>

It had thus established, as a general rule, an exception in favour of the GSP, so that the functioning of that system should not be hampered by the operation of the most-favoured-nation clause.

8. He noted that the Commission had stated in its commentary that

The rule contained in article 21 applies to any State beneficiary of a most-favoured-nation clause irrespective of whether it belongs to the developed or to the developing category.<sup>5</sup>

The GSP was established by the granting State, which was therefore entirely free to decide not only what preferences it would grant to developing countries, but also which developing countries would ben-

<sup>1</sup> *Yearbook...* 1976, vol. II (Part Two), p. 58, doc. A/31/10, chap. II, sect. C, art. 21, para. (3) of the commentary.

<sup>2</sup> *Ibid.*, pp. 59-60, para. (5) of the commentary.

<sup>3</sup> *Ibid.*, p. 63, para. (14) of the commentary.

<sup>4</sup> *Ibid.*, para. (13) of the commentary.

<sup>5</sup> *Ibid.*, para. (19) of the commentary.

efit from them. Thus the notion of a developing State varied from one granting State to another. Generally speaking, the political conception of a developing State, which was generally recognized by the international community and corresponded to the enlarged Group of 77, did not apply to economic and trade relations, for developing States were at very different levels of economic development. Unlike the political conception, the economic conception of a developing State was thus extremely variable and it was for each granting State to define what it meant by a "developing State" in the context of the GSP.

9. For example, under the GSP established by Hungary, to which the Commission had referred in its commentary,

beneficiary countries are those developing countries in Asia, Africa and Latin America whose *per capita* national income is less than Hungary's.<sup>6</sup>

According to that definition, a country whose *per capita* income was greater than Hungary's was not, for Hungary, a developing country, although it might be regarded as such by another country for the purpose of the GSP. To that first condition Hungary had added three others: it considered that beneficiary countries were countries

which do not apply discrimination against Hungary; which maintain normal trade relations with Hungary and can give reliable evidence of the origin of products eligible for preferential tariff treatment.<sup>6</sup>

10. It thus appeared that, if the Commission tried to lay down a general rule for developed and developing countries, it would be very difficult to interpret the principle of freedom of choice by the granting State, on which the GSP was based. In any event, it was virtually impossible to give a general definition of developing and developed States in the context of international economic and trade relations. In that connexion, he pointed out that the Commission

took cognizance of the fact that there is at present no general agreement among States concerning the concepts of developed and developing States.<sup>7</sup>

However, the problem of the definition of those concepts did not arise in article 21, since it was the granting State itself that drew up the list of developing countries to which it decided to grant preferences under the GSP. Moreover, the Commission had stressed that "the system is based on the principle of self-selection, i.e. that the donor countries have the right to select the beneficiaries of their system and withhold preferences from certain developing countries,<sup>8</sup> and had also taken "account of the fact that the countries establishing their own preferential system were free to withdraw their grants in whole or in part".<sup>9</sup>

11. With the exception of the comment by Sweden to the effect that, in view of the temporary nature of

generalized systems of preferences, it was not desirable "to grant to those systems a special legal status by including a specific article on those preferences in the draft articles regarding the most-favoured-nation clause" (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A), most of the written and oral comments by governments and organizations favoured the retention of article 21 and related not so much to the article itself as to the inclusion in the draft of new provisions making exceptions in favour of developing countries.

12. In reply to the oral comments of certain representatives in the Sixth Committee who had considered that "it was not quite clear how generalized the system of preferences would be in order to qualify for the exception provided in article 21" (see A/CN.4/309 and Add.1 and 2, para. 258), he said that it was not for the Commission but for States to generalize the system of preferences.

13. In his opinion, the suggestion of the Government of Colombia that the word "developed" should be inserted before the words "beneficiary State" in order to prevent the most-favoured-nation clause from creating "an imbalance in international trade and [giving] rise to inequitable and non-reciprocal benefits" (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A), was contrary to the principle of self-selection by the granting State on which the GSP was based. Indeed, as the Commission had pointed out in its commentary,

The provision must apply also to developing beneficiary States because if it did not the basic principle of the generalized system of preferences—the principle of self-selection—could be circumvented.<sup>10</sup>

14. There had been three main proposals relating to the inclusion in the draft articles of new provisions making exceptions to the most-favoured-nation clause in favour of developing countries: the first, made by EEC (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 6) and supported by the Netherlands (*ibid.*, sect. A), sought to enlarge the scope of article 21 by referring in it not only to the GSP but also to the special links resulting from preferential agreements concluded by industrialized States with developing countries; the second, made by the United States (*ibid.*), sought to include in article 21 a provision similar to the GATT missions that afforded some protection to third States benefiting under a most-favoured-nation clause; the third, made by ECWA (*ibid.*, sect. B) and supported by the German Democratic Republic (*ibid.*, sect. A), related to the preferences and advantages that developing countries granted to each other in their mutual relations.

15. With regard to the first proposal, the secretariat of GATT had indicated in its comments (*ibid.*, sect. C, 3) that a group set up by the Trade Negotiations Committee was in process of developing the "legal framework" for a differential system of pref-

<sup>6</sup> *Ibid.*, p. 61, para. (9) of the commentary.

<sup>7</sup> *Ibid.*, p. 63, para. (19) of the commentary.

<sup>8</sup> *Ibid.*, para. (17) of the commentary.

<sup>9</sup> *Ibid.*, para. (15) of the commentary.

<sup>10</sup> *Ibid.*, para. (19) of the commentary.

erences, similar to the GSP, that would provide differential and more favourable treatment for developing countries in relation to the provision of the General Agreement on Tariffs and Trade. The treatment that would be accorded to developing countries under that system on a non-reciprocal basis would constitute an exception to the application of the most-favoured-nation clause.

16. If that system of differential treatment were already well established and generally recognized, as was the GSP, he would be quite willing to mention it in article 21 along with the GSP or to devote a separate article to it. But as the system was still being worked out and its legal effect had not yet been defined, it would be difficult to refer to it in the draft articles. The term "preferential régime" used in the amendment proposed by EEC did not seem clear. Nevertheless, if the Commission could define the notion of a preferential régime and considered that such a notion was generally recognized, the scope of article 21 could be widened on the basis of the text proposed by EEC.

17. With regard to the United States proposal, he thought it would be difficult to include in article 21 the system of protection provided for by GATT, because that system was not generally recognized and its inclusion would be contrary to the principle of self-selection on which the GSP was based.

18. As to the ECWA proposal for the exclusion from the application of the most-favoured-nation clause of the preference and advantages granted by developing countries to each other in their mutual relations, he fully supported the view that developing countries were under no obligation to extend to developed countries, in particular under a most-favoured-nation clause, the preferences and advantages they granted to each other to promote their economic development. However, under the ECWA proposal, no beneficiary State, even if it were a developing State, would be entitled by virtue of the most-favoured-nation clause to any treatment extended by a developing granting State to a developing third State in the context of preferential trade agreements. He would therefore suggest that the word "developed" should be inserted before the words "beneficiary country" in the text of that proposal, so as to reflect the idea expressed in article 21 of the Charter of Economic Rights and Duties of States,<sup>11</sup> that, in order to promote the expansion of their mutual trade, developing countries could "grant trade preferences to other developing countries without being obliged to extend such preferences to developed countries". There again, however, the problem arose of what was meant by a "developed State" and a "developing State" in the context of international trade relations. He was nevertheless prepared to try to take the ECWA proposal into account, although he foresaw that it would give rise to difficulties.

19. Mr. NJENGA pointed out that, as noted in the UNCTAD memorandum quoted in paragraph (3) of the commentary, the generalized non-reciprocal, non-discriminatory system of preferences for the benefit of developing countries had three objectives: to increase the increase the export earnings of the developing countries, to promote their industrialization and to accelerate their rates of economic growth. Consequently, it was necessary at that juncture to examine the extent to which the system met those objectives and to determine whether the draft would prove generally acceptable as the basis for a future convention. In his oral presentation, the Special Rapporteur had given a clear idea of the functioning of the system and of its inbuilt weaknesses.

20. In its "agreed conclusions" (excerpts from which were reproduced in paragraph (5) of the commentary), referring to the legal status of the system, the Special Committee on Preferences, established under UNCTAD resolution 21 (II), had taken note of the statement by the preference-giving countries that the system would be governed by the consideration that the tariff preferences were temporary in nature, that their grant did not constitute a binding commitment and, in particular, that it would in no way prevent their subsequent withdrawal in whole or in part or the subsequent reduction of tariffs on a most-favoured-nation basis, whether unilaterally or following international tariff accommodations. Moreover, the grant of tariff preferences would be conditional on the necessary waiver or waivers in respect of existing international obligations, in particular of those arising from the General Agreement on Tariffs and Trade. Thus it was possible to identify a number of serious shortcomings in the system.

21. Admittedly, the system might be continued beyond the initial period of 10 years, but it was essentially a stopgap measure and it would not resolve the long-term problem. Moreover, despite the existence of the system, the current economic situation was in many respects worse than that prevailing at the time of the first session of UNCTAD, in 1964. Other measures were therefore required if the current trend were to be reversed. Tariff preferences were wholly at the discretion of the donor country, since they could be withdrawn at any time, and the system could also be gravely undermined by subsequent reductions of tariffs granted on a most-favoured-nation basis.

22. It should also be noted that the principle of selection of beneficiaries by the donor country was in effect contrary to the original purpose of the scheme, which had been to create a non-discriminatory system. If the donor could select the beneficiary in the light of economic or even political considerations, the system might easily lead to discrimination between developing countries, as had indeed happened in the past. (For example, before the conclusion of the Lomé Convention,<sup>12</sup> a serious criticism of the

<sup>11</sup> General Assembly resolution 3281 (XXIX).

<sup>12</sup> Convention between the European Economic Community and 46 African, Caribbean and Pacific States.

Yaoundé Convention<sup>13</sup> had been that it tended to favour a particular group, namely, the former French colonies.) In addition, by virtue of the principle of self-selection, donor countries were entitled to choose not only the beneficiaries but also the products to be covered by the preferences, and they sometimes excluded or set strict limits on imports of the very items in which developing countries held a competitive position, for example, textiles and shoes in the case of the EEC scheme of generalized preferences.

23. Another disadvantage of the GSP was that it applied only to manufactures and semi-manufactures. Paragraph (11) of the commentary pointed out that, according to the report of the Trade and Development Board on its fifth special session, representatives of developing countries had judged that the system was of little or no benefit, since their countries did not produce manufactures or semi-manufactures, but supplied only primary materials and semi-processed agricultural commodities that were not covered by the system. That was clearly a major drawback for developing countries, particularly the countries of Africa and the smaller countries of Asia and Latin America. At the same session of the Board, representatives of developing countries had also observed that the actual benefits of the scheme were still meagre because of the limited coverage, the limitations imposed on preferential imports by ceilings and the application of non-tariff barriers to the products covered.

24. In that connexion, it was essential to take account of the effects of economic unions such as EEC, which were designed to set up a wall against non-members. However, there was a major difference between economic unions of developed countries and those of developing countries. The purpose of economic unions of developing countries was to facilitate development, whereas that of economic unions of developed countries was to expand their markets and to compete with other blocs of developed countries. The barrier thus erected against non-member countries could be lowered to some extent, but it would not be removed, especially in the case of sensitive products. Last, but by no means least, there were the many kinds of non-tariff barriers, which were often more prejudicial than the tariff barriers themselves.

25. He fully endorsed article 21 in its existing form, but thought it should be supplemented by a new article 21 *bis*, which would read:

With a view to promoting the expansion of their mutual trade, developing countries may grant trade preferences to other developing countries in accordance with bilateral or regional arrangements, without being obliged to extend such preferences to developed countries on the basis of the most-favoured-nation clause. Such arrangements shall not constitute an impediment to general trade liberalization and expansion.<sup>14</sup>

<sup>13</sup> Convention of Association between the European Economic Community and the African and Malagasy States associated with that Community.

<sup>14</sup> Subsequently circulated as document A/CN.4/L.266.

That formulation was an improvement on the ECWA proposal, as it did not create a situation of discrimination between developing countries. Many developing countries had emphasized the need to expand trade among themselves, and it was essential to do so outside the overall system created by GATT. Article 21 *bis* was simply a further incentive to help developing countries to arrive at a situation in which they would be able to compete with other States on a non-discriminatory basis. If the article were seen as an element in the progressive development of international law, it would be wholly justifiable for the Commission to take account of existing economic realities.

26. Mr. REUTER said it was his understanding that article 21 *bis* did not establish an obligation to grant advantages under a most-favoured-nation clause to developed countries, but that it established an obligation to grant such advantages to developing countries. Consequently, if a Latin American economic union abolished customs duties on certain products as among its members and a member of that union concluded a treaty containing a most-favoured-nation clause with Hong Kong, the economic union would have to extend to Hong Kong the benefit of that clause.

27. Mr. CALLE y CALLE said that article 21 provided for the first of the exceptions to the application of the most-favoured-nation clause. It dealt with an express exception, embodied in the clause itself, and had been introduced because the Commission shared the concern of mankind at the flagrant imbalance between the economies of countries at differing levels of development. That was a major problem and had given rise to new principles as well as to recognition of the fact that equal treatment of unequal subjects could lead to injustice.

28. In its commentary to article 21, the Commission had first noted General Principle Eight of recommendation A.I.1 adopted by UNCTAD at its first session. According to the secretariat of UNCTAD, it followed from that principle that the application of the most-favoured-nation clause to all countries, regardless of their level of development, would satisfy the conditions of formal equality, but would in fact involve implicit discrimination against the weaker members of the international community. Under the terms of General Principle Eight, developing countries need not extend to developed countries preferential treatment in operation among themselves. Developed countries, for their part, were to grant concessions to all developing countries and extend to those countries all the concessions they granted to one another, without requiring reciprocity.<sup>15</sup>

29. Article 21 was based on the principle of equity, which had received wide support in the Sixth Committee of the General Assembly. Various positions had been adopted on the article. Some representa-

<sup>15</sup> See *Yearbook... 1976*, vol. II (Part Two), p. 8, doc. A/31/10, para. 42.

tives had held that it should be retained as it stood, since it represented the most that could be done for the developing countries. That view was shared by the Special Rapporteur, who had concluded in his report, after considering various proposals for the addition of new provisions, that it would not be advisable to change the terms of the article (A/CN.4/309 and Add.1 and 2, para. 281). Other representatives had held that article 21 should not be confined to trade matters, but should be extended to cover all systems of preferential treatment. They had maintained that there was a wide range of subjects for international co-operation, including financial assistance and the transfer of technology, that could be covered by an article of wider scope. In that connexion it had been observed that, logically, the order of the exceptions to the application of the clause should be changed so as to proceed from the general to the particular. The latter exceptions would cover such matters as frontier traffic, facilities accorded to land-locked States and generalized systems of preferences which, despite the word "generalized", were limited to particular spheres.

30. In addition, proposals had been submitted by EEC (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 6) and ECWA (*ibid.*, sect. B). In its comment, ECWA had suggested that it might be advisable either to make the draft article more general, with no specific reference to the GSP, or to expand it to include other forms of preferential treatment for developing countries. It had also pointed out that the article neglected to mention preferences granted among developing countries.

31. Article 21 of the Charter of Economic Rights and Duties of States made it quite clear that an exception should be made for trade preferences granted by developing countries to other developing countries, and also provided that, in those cases, developing countries should not be obliged to extend such preferences to developed countries.

32. In the light of those considerations, he hoped the Commission would consider enlarging the scope of the article, even though the underlying idea was sound. It was also necessary to take account of the views expressed in the Sixth Committee of the General Assembly regarding the need to include further exceptions in favour of developing countries. Mr. Njenga had already made a proposal in that sense, and the Special Rapporteur had himself said that new articles relating to developing countries could be introduced, in addition to articles 21 and 27.

33. Mr. TABIBI said it would be very helpful if the Secretary-General of UNCTAD or, failing him, the UNCTAD official responsible for preferences, were invited to attend the Commission's meeting on that question and make a statement, with special reference to the important events that had occurred since 1975. He suggested that the secretariat of the Commission should get in touch with UNCTAD to see whether that was possible.

34. Mr. FRANCIS trusted that Mr. Tabibi's sugges-

tion would be without prejudice to his own earlier suggestion<sup>16</sup> that UNCTAD should be invited to submit written comments on the draft articles on the most-favoured-nation clause. It was a delicate matter, on which the General Assembly, as well as the Commission, would like to have UNCTAD's reaction.

35. The CHAIRMAN said that the Secretary to the Commission would approach the Secretary-General of UNCTAD on the matter.

*The meeting rose at 1 p.m.*

<sup>16</sup> See 1484th meeting, para. 30.

## 1495th MEETING

*Wednesday, 7 June 1978, at 10.05 a.m.*

*Chairman* : Mr. José SETTE CÂMARA

*Members present* : Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

### The most-favoured-nation clause (*continued*) (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2)

[Item 1 of the agenda]

#### DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 21 (The most-favoured-nation clause in relation to treatment under a generalized system of preferences)<sup>1</sup> (*continued*)

1. Mr. SCHWEBEL said that, while there was obvious merit in the objectives of the GSP, it was not certain whether those objectives would be attained in practice, especially as the effect of such preferences was diluted by other derogations from the most-favoured-nation clause.

2. There were a number of questions to be answered. For example, of what significance were generalized preferences for the State trading economies, where all imports were brought in by a State agency? And, in other economies, whom did they benefit? Were the commodities covered by preferences available to consumers in developed countries at lower prices, or were the profits siphoned off by middlemen? Did the system not tend to favour the most developed of the developing countries? And, in the developed countries, did it not place an unfair

<sup>1</sup> For text, see 1494th meeting, para. 1.



burden of adjustment on migrant workers rather than on the economy as a whole? The reaction of the labour movement to generalized preferences, in the United States at any rate, had certainly not been wholly positive. There was the further question of the benefits of such a system for developing countries. Had wages actually increased in the industries concerned? Had the increased revenues remained in the countries concerned and been productively invested? There was also the fact that, as most-favoured-nation treatment was applied and expanded and as tariffs and trade barriers were lifted, so the value of generalized preferences was diminished *pro tanto*. Thus, in a sense, there was a clash between those preferences and the proper objective of the world economy as a whole, which was to liberalize trade.

3. Nevertheless, he believed that there was a case for including a provision on the GSP in the draft articles. Article 21, however, had its deficiencies. One of its effects would be to except from most-favoured-nation clauses general preferences granted to developing countries regardless whether those preferences fell within a waiver or exception such as the current GATT waiver, and thus to deny to a non-beneficiary of generalized preferences any basis for questioning, on most-favoured-nation grounds, the effects of the extension of preferential tariffs to a developing country. That was a major departure from the existing régime: the GATT waiver procedure afforded some measure of protection to third States that were beneficiaries under the most-favoured-nation clause and, in particular, provided that any Contracting Party which considered that a benefit accruing to it under the General Agreement had been impaired could bring the matter before the Contracting Parties for review and notification. Article 21 provided no such protection. Moreover, the legal basis for differential and more favourable treatment for developing countries was currently the subject of multi-lateral trade negotiations.

4. For those reasons, he believed that article 21 required further examination and that consideration should be given to including in it a provision for some mechanism to determine the applicability of generalized preferences in a given case.

5. Mr. FRANCIS said that article 21 represented a turning point in the progressive development of international law. It was therefore to be contrasted with the preceding articles, which were in the nature of a classical statement of the law on the application of the most-favoured-nation clause.

6. Any defects in the substance of the article should not be attributed to the Commission, for many of the issues involved fell outside its purview. He had in mind, for example, the phasing out of special or vertical preferences, the 10-year period during which the GSP would apply, and the objectives of the system, which were to improve export earnings, to promote industrialization and to further economic growth—objectives that, in his view, were now much farther from attainment than when the GSP had

been introduced. Those objectives were nevertheless part and parcel of the new international economic order. Consequently it was for GATT, the UNCTAD Special Committee on Preferences and the General Assembly to determine the extent to which the system should or should not be made permanent or quasi-permanent until such time as developing countries were on comparable terms, in the competitive sense, with the developed world.

7. Moreover, it was clear from the second sentence of article 26 of the Charter of Economic Rights and Duties of States<sup>2</sup> that the General Assembly considered that the system of generalized preferences should now be viewed in an entirely different light. That, indeed, was the rationale behind Mr. Njenga's proposal (A/CN.4/L.266),<sup>3</sup> which had his full support. That proposal took account of the realities of the modern world as they affected developing countries, and of the need for a partnership effort by the developed and the developing world to bring about a more equitable state of affairs. In his view, the Commission had a duty to respond to that situation and to go a step further with a view to securing the unanimous approval of the General Assembly.

8. With regard to procedure, in view of the limited time at the Commission's disposal, he would suggest that the Commission consider article 21 and the proposed new article 21 *bis* in conjunction with article 27 (The relationship of the present articles to new rules of international law in favour of developing countries),<sup>4</sup> since much of what was embodied in Mr. Njenga's proposal was dealt with in the commentary to article 27.

9. The CHAIRMAN said that any member so wishing could, of course, also refer to article 27 in his comments.

10. Mr. DADZIE said that article 21 dealt with a matter that had long engaged the attention of the international community, namely, the flagrant imbalance between developed and developing countries, and that the rule it laid down would no doubt be welcomed by developing countries. The article did not, however, provide the whole answer. In particular, it did not meet the three objectives of the GSP laid down in paragraph 1 of UNCTAD resolution 21 (II).<sup>5</sup> At best, therefore, it could be regarded as only a move in the right direction.

11. Although a number of members of the Sixth Committee of the General Assembly had supported article 21 in so far as it conformed with the international community's efforts to relieve the imbalance between developed and developing countries, they had not been clear as to how generalized the system would have to be in order to qualify for the exception provided for under the article. Many had considered

<sup>2</sup> General Assembly resolution 3281 (XXIX).

<sup>3</sup> See 1494th meeting, para. 25.

<sup>4</sup> See 1483rd meeting, foot-note 1.

<sup>5</sup> See *Yearbook... 1976*, vol. II (Part Two), p. 58, doc. A/31/10, chap. II, sect. C, art. 21, para. (3) of the commentary.

that the article should be expanded or that an additional article should be formulated to except from the operation of the most-favoured-nation clause any preferences granted by the developing countries to one another.

12. The shortcomings of the various proposals submitted with that object, to which the Special Rapporteur had drawn attention, seemed to have been remedied in Mr. Njenga's proposal, save possibly the question of defining a developing State. That, however, was the least of the Commission's worries. The absence of a definition would not raise any real difficulty in practice: not for a moment could it be suggested that, under Mr. Njenga's proposal, a developing country could extend preferences to a developed country. The wheels of progress should not be halted by such academic uncertainties. The Sixth Committee of the General Assembly was awaiting a solution along the lines of Mr. Njenga's proposal; that proposal would not only serve to demonstrate the Commission's close interest in the position of developing countries, but it would also make a positive contribution to the solution of their economic problems. He therefore recommended that the Commission should refer article 21, together with Mr. Njenga's proposal, to the Drafting Committee.

13. Mr. TABIBI said that the idea of a generalized system of non-reciprocal and non-discriminatory preferences had been introduced with a view to alleviating poverty and reducing the gap between rich and poor countries. It was one of many schemes devised to support the economies of the weaker nations and to exclude the operation of the most-favoured-nation clause. To subject developed and developing countries to the same rules in matters of trade would result in implicit discrimination against the weaker members of the international community.

14. Two-thirds of that community lived in Asia, Africa and Latin America, which had contributed much to the great cultures, civilizations and religions of the world, and indeed to the brotherhood of mankind. Yet their peoples subsisted in destitution, afflicted by hunger all ill-health. The economic problems of the world were on the increase and the survival of the human race was in jeopardy. The population explosion threatened to strain the earth's resources to breaking point. The super-Powers seemed unable to halt or contain the escalating arms race, the cost of which had risen in two decades from \$200 billion to \$400 billion annually. A mere fraction of that sum would go a long way towards curing the ills of the developing world.

15. By contrast, the affluent countries were enjoying unprecedented prosperity, the only concern of their peoples being to improve their already high standard of living. In other countries, however, millions of young people were unemployed and had to look on while members of their own families suffered the often fatal effects of ill-health and under-nourishment.

16. It was to resolve such problems that the first session of UNCTAD had been convened, and at-

tended with such high hopes by the representatives of the third world. All had trusted that the principle of general non-reciprocal and non-discriminatory preferences would resolve the problems of the developing world, so that it could bid farewell to poverty, hunger and underdevelopment. The representatives of the major Powers, who had resisted the scheme initially, had yielded on realizing that it had the backing of the entire third world. At the second session of UNCTAD, the principle of preferential treatment for exports of manufactured and semi-manufactured goods had been accepted in resolution 21 (II), and the Special Committee on Preferences had been established. Expectations for the scheme had not, however, been realized; for political and other reasons the scheme had not worked as expected and in some cases had even proved detrimental to a developing third State. That had been so, for example, in 1963, when EEC had granted preferences to a number of African countries. In any event, what the countries of the third world wanted was preferences for their primary commodities, whereas what they had been offered was preferences for their manufactured and semi-manufactured products.

17. The scheme had nevertheless served some purpose. The Soviet Union had been the first country to introduce a unilateral system of duty-free imports from developing countries, covering all products. Subsequently Australia, Hungary and the United States had also introduced preferential schemes. The scheme announced by EEC in 1971 had been mainly concerned with manufactured and semi-manufactured products. In its resolution 3362 (S-VII) on development and international economic co-operation, adopted at its seventh special session, held in September 1975, the General Assembly had recommended (section I, paragraph 8) that the generalized scheme should not be terminated at the end of the 10-year period originally envisaged. That in itself was a sign of its usefulness in a limited sphere.

18. The third world countries had come to recognize the need for co-operation and were now offering each other preferences on regional, subregional and bilateral bases. Admittedly, the trade involved amounted to only a small fraction of world trade, but it was none the less extremely important for certain countries. For example, one-third of Afghanistan's foreign trade—exports of dried and fresh fruit—was with the subcontinent of India. That trade had been carried on for thousands of years and it was essential that it should continue without restriction. It was with that end in view that the Kabul Declaration,<sup>6</sup> adopted in December 1970 at the meeting of the Council of Ministers for Asian Economic Co-operation, at which he had presided the Drafting Committee, had called for regional co-operation on preferences.

19. In the light of all those considerations, he strongly supported Mr. Njenga's proposal, and pro-

<sup>6</sup> Kabul Declaration on Asian Economic Co-operation and Development (E/CN.11/961).

posed that it be referred to the Drafting Committee together with article 21. He opposed the adoption of any definition of “developed countries” or “developing countries” because of the many elements involved and the differences that existed within both groups. The United Nations had its own criteria and the matter should therefore be allowed to rest.

20. Mr. REUTER pointed out that, as a member of the Commission acting in his individual capacity, the views he expressed were not those of the French Government and still less of EEC. Personally, he attached the greatest importance to the Charter of Economic Rights and Duties of States.

21. Articles 21 and 21 *bis* were acceptable, subject to drafting amendments; in particular, express reference should be included to the Charter of Economic Rights and Duties of States. He fully endorsed the value judgements made in respect of the GSP. That system was a joke, which had finally benefited only six or seven States. EEC was certainly not equal to its task; however, it was doing much more than its members would do individually and more than certain great Powers were doing.

22. Although rather belatedly, he wished to express some doubts about the Commission’s method of work. Articles 21 and 21 *bis* stated widely accepted principles. No one decided that the GSP justified an exception to the application of the most-favoured-nation clause and that developing countries could conclude preferential agreements among themselves that might not be invoked by States beneficiaries of a most-favoured-nation clause. In adopting articles of that kind, the Commission seemed to be following the “blow by blow” method of considering one exception after another. It was open to question whether, by so doing, it would be able to cover all existing exceptions. However, if the Commission persevered in that path, he would submit a draft article reading as follows (A/CN.4/L.265):

*“Article 21 ter. The most-favoured-nation clause and treatment extended under commodity agreements*

“A beneficiary State is not entitled under a most-favoured-nation clause to the treatment extended by a granting State under an agreement open to all member States of the international community, concluded under the auspices of the United Nations or an organization of a universal character belonging to the United Nations family and the object of which is the economic régime of a commodity, if the grant of the benefit of the most-favoured-nation clause is contrary to the object and purpose of such an agreement.”

That article would be followed by others, one of which dealing with customs unions and free-trade zones.

23. By thus proceeding “blow by blow”, the Commission gave the impression that it was not looking to the future. True, article 27, which provided that the articles of the draft were without prejudice to the

establishment of new rules of international law in favour of developing countries, concerned the future, but in reality it contained only illusory promises. It would be better to drop that provision and draft a more specific text. To that end, he thought the Commission could take the Charter of Economic Rights and Duties of States as a basis and recognize the principles embodied in that instrument as applied to the effects of the most-favoured-nation clause. He proposed the following text (A/CN.4/L.264):

*“Article A. The most-favoured-nation clause and treatment extended in accordance with the Charter of Economic Rights and Duties of States*

“A beneficiary State is not entitled under a most-favoured-nation clause to the treatment extended by a granting State under an agreement in conformity with the Charter of Economic Rights and Duties of States if the grant of the benefit of the most-favoured-nation clause is contrary to the object and purpose of such an agreement and

“(a) if the agreement is open to all member States of the international community and is concluded under the auspices of the United Nations or an organization of a universal character belonging to the United Nations family; or

“(b) if the conformity of the agreement with the principles of the Charter of Economic Rights and Duties of States is subject to review by an organ of the United Nations or an organization of a universal character belonging to the United Nations family.”

24. The purpose of that article was to make an exception to the application of the most-favoured-nation clause under certain specific conditions, namely, if the grant of the benefit of the clause was contrary to the object and purpose of an agreement concluded in conformity with the Charter of Economic Rights and Duties of States. What came to mind first were commodity agreements, which might contain quantitative clauses concluded in a spirit of universality. It was clear that a third State could not claim the benefit of a most-favoured-nation clause to obtain a right accorded in the specific context of such an agreement. It should be noted that agreements of that kind concerned not only developed but also developing countries. Moreover, several articles of the Charter of Economic Rights and Duties of States attached much importance to them. Other categories of agreements, such as those relating to co-operation and technology, could raise the same kind of problems as commodity agreements. In all cases, the interests of the international community should take precedence over individual interests.

25. The article he proposed contained two alternative safeguards. The agreement in question must be open to all States members of the international community and must have been concluded under the auspices of the United Nations or an organization of a universal character belonging to the United Nations family. Failing that, the conformity of the agreement

with the principles of the Charter of Economic Rights and Duties of States must be subject to review by an organ of the United Nations or an organization of a universal character belonging to the United Nations family. With regard to the latter condition, he stressed that, as the Special Rapporteur had rightly pointed out, there was currently no definition of a "developing country". Just as, under the GSP, the preference-granting States could determine which countries were entitled to preferences, so developing countries that granted each other mutual advantages must be free to decide which countries they regarded as developing countries. Some States were regarded as developing countries by certain organizations, but not by others. It was because of the consequent danger of anarchy that he had provided for a review procedure. As he believed in the good faith and the usefulness of international organizations, he relied on review by an organ of the United Nations or an organization of a universal character belonging to the United Nations family.

26. Mr. SUCHARITKUL shared the views expressed by the Special Rapporteur when he had introduced article 21 at the previous meeting.

27. With regard to article 27, he agreed with Mr. Reuter that it was useless in its existing form. The Commission must draft more positive provisions.

28. Although it was true, as Mr. Njenga had pointed out at the previous meeting, that the exception to the GSP was neither satisfactory nor adequate in every case, since the application of the system tended to be arbitrary and to eliminate all chance of negotiation, that exception was nevertheless a minimum requirement and therefore indispensable. In view of the explanations given by the Special Rapporteur, therefore, he endorsed the content of article 21.

29. Article 21 *bis* proposed by Mr. Njenga (A/CN.4/L.266) met a need. If slightly amended, it could also cover the case of ASEAN. In addition, the words "bilateral or regional arrangements" should be replaced by the words "bilateral or regional co-operation agreements", in order to avoid any possible confusion with the entirely different type of regional arrangements referred to in Articles 52, 53 and 54 of the Charter of the United Nations.

30. Although there was certainly no legal basis as yet for the distinction between developed and developing States, there were a number of criteria for placing a State in one category or the other. For example, financial criteria could be adopted, such as *per capita* national income, as used by IMF and IBRD. By means of such criteria, various stages of development could be distinguished, and a State could pass from one category to another; Spain, for example, had recently been treated as a developed country at the Conference on International Economic Co-operation (known as the North-South Conference). Other useful criteria included literacy, health conditions, birth rate and life expectancy. It was not for the Commission, however, to decide in which category States belonged, but for the sovereign States themselves. What was important was to enable developing countries to

develop, avoiding the operation of the most-favoured-nation clause if necessary, in accordance with the spirit of article 27.

31. Mr. JAGOTA said that, as all members were aware, a movement was now on foot in the United Nations to refashion and develop international law in the sphere of international economic relations. Under its Statute, the Commission's object was not only to codify but also to promote the progressive development of international law. That was a fact he hoped the Commission would take into account when considering all the questions before it; it was one that he had tried to keep in mind in his comments on the draft articles in 1976, when he had represented the Government of his country in the Sixth Committee. In dealing with the most-favoured-nation clause in the context of the law of treaties and of the rights and obligations of third States, the Commission had indeed adopted a very wise and progressive approach. It had taken modern world trends into consideration and, in codifying the traditional law relating to the clause, it had also drawn attention to the application of that law in the development of international economic relations. Article 21, the proposed article 21 *bis* and article 27 were of the utmost importance and should be examined with all necessary care and impartiality.

32. The Special Rapporteur had traced developments since 1964, but the question arose why one particular article should relate exclusively to trade when the most-favoured-nation clause had been given much wider scope for the purposes of the draft as a whole. The difficulty was that the subject was being dealt with in the context of State practice as well as of the work of specialized bodies. Consequently, if article 21 were to deal with the clause solely in the context of trade—although that was not specifically stated in the text of the article—it was to be hoped that all the members would familiarize themselves with the work done by UNCTAD and GATT, and more particularly by the GATT "Framework" Group.

33. Great changes had taken place in the fundamental conception of the GSP. Originally, the system had been conceived of as an autonomous and selective scheme of preferences granted by developed to developing countries. But the system was temporary, it was not legally binding, it had been established for a period of only 10 years, and its operation even required a waiver in respect of existing international obligations under the General Agreement on Tariffs and Trade. The GATT "Framework" Group was trying to make it a permanent system that did not constitute a derogation from the operation of the clause. In other words, the system would constitute a recognized exception that did not require an express waiver in each practical case of application.

34. Again, it had been emphasized that the system should be non-reciprocal and non-discriminatory, so that the autonomy of the parties in applying the system did not signify a right to determine what was a developing country, in other words, a right to discrim-

minate. Such a right could not be invoked simply by asserting that it was impossible to define the term "developing country". Otherwise, the choice made by the granting State would be arbitrary: it would be based on many considerations, political as well as economic, and justification would always be found for discriminating among developing countries. The autonomy of developed countries should lie not in the selection of the beneficiaries, but in the selection of the levels of the preferences; once commodities or products of interest to developing countries as a whole had been placed on the list of preferences, developed countries should not differentiate either among the products or among the countries to which the preferences were to be granted.

35. If the words "generalized system of preferences" were to be understood as referring solely to trade, that point was not immediately apparent from the formulation of article 21, and it should be made clear either in the commentary or in any other manner deemed appropriate by the Drafting Committee. The wording took account of the concern that the system should not be bound by any time-limit and that it should be regarded as a recognized exception to the operation of the most-favoured-nation clause. On the other hand, the phrase "a generalized system of preferences established by that granting State" raised difficulties, since it failed to allow for the element of non-discrimination and to limit the discretion of the granting State. It would be advisable for the Drafting Committee to consider inserting the word "non-discriminatory" before the words "generalized system". Similarly, the opening words of the article should be recast to read "a developed beneficiary State...".

36. As to the question raised by the Special Rapporteur regarding the words "generalized system of preferences", practical suggestions had been made in the Sixth Committee, and he supported the idea of using a broader form of words, such as "a differential and more favourable treatment". It should be emphasized that the absence of a definition of a developing country should not lead to arbitrary decisions and discrimination by developed States. Even in the absence of such a definition, article 21 could be interpreted and applied in the spirit in which it had been drafted, as could article 21 *bis*, which he endorsed for the reasons so ably put forward by Mr. Njenga. The proposed article was entirely in keeping with recent developments in State practice and international law in the modern world.

37. The Drafting Committee might also consider whether the exception to the operation of the clause made for trade preferences granted by developing countries to one another should also apply in the case of bilateral arrangements. In his view, such an approach might create difficulties in regard to the proper conception of most-favoured-nation treatment and lead to considerable diversity and confusion in the law on that subject. It would be preferable for the exception to be embodied in regional or even global arrangements, the word "global" meaning that any

region of the world could participate. In each case, however, the parties would be developing countries, not developed countries.

38. Lastly, more time was needed to reflect on the important proposal made by Mr. Reuter on the question of method and on the exception he had proposed for commodity agreements (A/CN.4/L.265). Obviously, very many exceptions would have to be enumerated and, if the exception Mr. Reuter had in mind were not one of general application, it could probably be covered by the provisions of article 26.

39. Mr. EL-ERIAN said that the Commission was engaged in one of its most important debates. In its great tradition of thoroughness, it was discussing an article that raised a number of basic issues of legal theory and of methodology. The differences of opinion expressed by the members did not lie in ideology or in politics, but in a healthy difference of approach. Although the Commission was a subsidiary organ of the General Assembly and could therefore settle matters by majority vote, it had always sought to reach its conclusions by consensus.

40. It had been suggested that the Commission might in fact contribute to the fragmentation of the general régime of international law by drawing up a particular set of rules for a certain category of States only. The Commission was obviously committed to a universally applicable law of nations, although the task was becoming increasingly difficult because the community of nations no longer consisted of a small and homogeneous group of States. As a result of independence movements, the number of States in the world had more than quadrupled, and the current challenge was to preserve the general régime of international law and, at the same time, to take full account of the fact that a new international community had emerged.

41. The solid ground of positive international law constituted the point of departure for the Commission's work, but it should also be remembered that another object of that work was to promote the progressive development of international law. For example, with regard to the draft articles on State responsibility, it had been maintained by some that the resolutions of the General Assembly referred to in the commentary to article 19 (International crimes and international delicts),<sup>1</sup> did not constitute positive international law; however, the Special Rapporteur on that topic had cited those resolutions as an indication of the direction in which international law was or should be moving. The subject-matter of international law was not simply the political rights and duties of States; it now covered such matters as economic development, the creation of economic and social conditions conducive to international peace and security, and the sovereign equality of States, in other words, the principles and purposes of the international

<sup>1</sup> *Yearbook... 1976*, vol. II (Part Two), pp. 96 *et seq.*, doc. A/31/10, chap. III, sect. B, 2, art. 19, paras. (25) *et seq.* of the commentary.

order that the United Nations had been trying to establish since its foundation.

42. Many years had passed since the work done on the draft declaration on the rights and duties of States, which had been concerned solely with political considerations. The world community now spoke of the economic rights and duties of States, of solidarity and of co-operation. As pointed out in the Special Rapporteur's report (A/CN.4/309 and Add.1 and 2, para. 255), a number of representatives in the Sixth Committee had supported article 21 in its existing form as corresponding to the efforts of the international community to relieve the flagrant imbalance between developed and developing countries.

43. In that connexion, he wished to pay a tribute to the Special Rapporteur for his comprehensive and entirely objective presentation of the article and of the comments on it by States and international organizations, and for his readiness to consider any suggestions that might meet the views expressed in the Sixth Committee.

44. The choice now was whether or not to expand article 21 to mention other forms of preferential treatment for developing countries, particularly preferences granted by developing countries to one another. An attempt to widen the scope of article 21 would certainly meet with difficulties. It had been pointed out that there was no definition of a "developing country", and admittedly a clear-cut distinction could not be drawn in every case between "developed" and "developing" countries. Nevertheless, the concept existed and the Commission should not shy away from sanctioning it because it had not yet been fully defined or was not yet based on firm criteria. Many countries had entered reservations concerning the provisions of the Charter of Economic Rights and Duties of States, but no one had challenged the new international legal and economic order. The draft must take account of such fundamental changes, and for that reason he fully supported article 21 *bis*, proposed by Mr. Njenga.

45. Naturally, more time was needed to study the proposal put forward by Mr. Reuter (A/CN.4/L.264) and he would comment on it at a later stage in the discussion.

*The meeting rose at 1 p.m.*

## 1496th MEETING

*Thursday, 8 June 1978, at 10.05 a.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

**The most-favoured-nation clause (*continued*) (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2)**

[Item 1 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (*continued*)

ARTICLE 21 (The most-favoured-nation clause in relation to treatment under a generalized system of preferences<sup>1</sup> (*continued*))

1. Mr. ŠAHOVIĆ said that the discussion had highlighted the problems raised by articles 21 and 27<sup>2</sup> and shown that it was necessary to adopt the application of the most-favoured-nation clause to the needs of developing countries. In his opinion, the Commission was dealing with three categories of problems: those raised by State and organizations in their written and oral comments, those resulting from general political, economic and legal developments since the adoption of the draft articles on first reading, and the drafting problems raised by articles 21 and 27.

2. With regard to the first category of problems, most States had approved, in principle, the formation of articles 21 and 27 and the general approach to them adopted by the Commission. However, they had generally stressed the need to resolve the problems arising from the trend towards a more systematic organization of economic co-operation and, in particular, of trade co-operation among developing States. That, in his view, was the main task assigned to the Commission by States.

3. With regard to the general developments that had taken place since the consideration of the draft as first reading, various comments had strongly emphasized the shortcomings of the GSP, which had been criticized for not offering permanent guarantees to developing countries. Attempts had been made to remedy those shortcomings by seeking other means of meeting the needs of developing countries; in particular, negotiations had been conducted within the framework of GATT with a view to establishing a new differential system of preferences. In that connexion, he thought Mr. Reuter had been right in stressing, at the previous meeting, the importance of international commodity agreements. He was aware that reservations existed concerning the legal value of the Charter of Economic Rights and Duties of States,<sup>3</sup> but he believed that, since the Commission was now engaged in progressive development, it was within the legal framework of that charter that it should seek solutions acceptable to all categories of States.

4. Real progress towards the establishment of a new international economic order had so far been meagre. That was a consequence of the world economic situation, which was reflected in contemporary international law.

<sup>1</sup> For text, see 1494th meeting, para. 1.

<sup>2</sup> See 1483rd meeting, foot-note 1.

<sup>3</sup> General Assembly resolution 3281 (XXIX).

5. In view of those two facts, he believed that, in adopting articles 21 and 27 on first reading, the Commission had made a laudable effort and shown that it was capable of resolving the problems raised by the application of the most-favoured-nation clause to developing countries. Nevertheless, to meet the wishes of States, particularly of developing States, it should go a step further and take account of the possible impact of the expansion of economic and trade relations among developing countries on the application of the clause. That was a question of crucial importance, to which the Commission should devote a separate article.

6. The drafting comments made by States should be taken into account by the Drafting Committee when it reviewed the wording of article 21. In particular, consideration should be given to the observations made concerning the GSP, for example by the United States (A/CN.4/308 and Add.1 and Add.1/Corr.1, section A), which required further clarification.

7. His own opinion was that article 21 should be retained, but that it should be improved and adapted to the current economic situation; for despite its shortcomings, the GSP existed and must be taken into account. The impression must not, however, be given that it was the only means of safeguarding the interests of developing countries. Account must also be taken of the other problems that arose, and he doubted whether article 27 could resolve those problems and meet all the need of developing countries. The article was too general and he thought it would be necessary to find a solution better adopted to the needs of States and to the problems raised by the practical application of the most-favoured-nation clause. He therefore supported Mr. Njenga's proposal (A/CN.4/L.266),<sup>4</sup> which was based on the principle stated in article 21 of the Charter of Economic Rights and Duties of States. If the Drafting Committee accepted that proposal, however, it should draft article 21 *bis* in a manner more in keeping with the nature of the draft. The form the new article should take could be debated: should it be a positive article stating a rule, or an article providing for a safeguard or an exception? The Drafting Committee should study that question and propose to the Commission a solution calculated to satisfy the international community, for it was States that must take the final decision.

8. Besides the formula proposed by Mr. Njenga, the Commission had a choice among several other possibilities. Mr. Reuter had made two very interesting proposals (A/CN.4/L.264<sup>5</sup> and A/CN.4/L.265<sup>6</sup>) that deserved attention, although they might go beyond the scope of the discussion and the Commission might not be able to adopt them without first making a thorough study of the various problems they raised. Commodity agreements should certainly be con-

sidered, but it was not clear that they should be directly linked to the application of the most-favoured-nation clause. Perhaps that question could be dealt with in a more general formulation relating to differential or preferential treatment, since the agreements concerned were mainly between developing exporting countries and developed importing countries.

9. In any event, all those problems should be referred to in the commentary, which should be very detailed and provide answers to the questions raised during the discussion and to the problems posed by the changing world situation.

10. Mr. TSURUOKA was in favour of retaining article 21 in its existing form. It dealt with a special case of the application of the most-favoured-nation clause, which was worth mentioning in the draft articles because the GSP was quite widely used and was of some practical value. It was necessary to decide, however, whether the Commission should confine itself to referring only to the case of the GSP; for quite apart from its merits, article 21 raised the question of the place to be given, in the general structure of the draft, to special, if not exceptional, situations relating to the application of the most-favoured-nation clause.

11. It must first be recognized that the existence of such special situation was an undeniable fact of international practice. Those situations could be divided into two categories: those resulting from agreements between the parties to a treaty containing a most-favoured-nation clause, and those resulting from geographical conditions, in which the will of the parties played only a secondary role, as in the treatment extended to facilitate frontier traffic and the rights and facilities extended to land-locked States.

12. Whereas the special situations in the second category were rather limited in character, those in the first were very numerous, or even unlimited, at least in theory. For example, among the treaties concluded by Japan with certain foreign countries, there was one in which the parties had agreed that the most-favoured-nation clause relating to imports and exports of goods should not apply to the advantages granted in respect of national fisheries products. In another, the parties had agreed on various categories of exceptions, for instance, that the clause should not constitute an obstacle to the application of measures relating to imports of gold or nuclear materials or to trade in armaments. Another treaty provided for non-application of the clause to measures taken by the parties to fulfil their obligations for the maintenance of international peace and security and to protect their vital interests. A treaty could, of course, stipulate that one of the parties was not entitled to claim advantages that the other party had granted or would grant to developing countries under a specific agreement concluded for the purposes of economic development or technical assistance.

13. The list of situations of that kind was virtually unlimited. That being so, the question arose how such an infinite variety of situations was to be taken

<sup>4</sup> See 1494th meeting, para. 25.

<sup>5</sup> See 1495th meeting, para. 23.

<sup>6</sup> *Ibid.*, para. 22.

into account in the draft. It had been said that there were two possible methods. The first, which Mr. Reuter had called the "blow by blow" method, was to enumerate all the possible cases. The second was to regulate the situations in question by general provisions. He thought the first method would make the Commission's task too arduous, because the variety of cases was too great, and it might also lead the Commission inadvertently to omit cases that were important in certain respects.

14. How had the Commission taken account of special cases of the application of the most-favoured-nation clause? It had dealt with the second category of special situations—those in which the objective elements were dominant—in articles 22 and 23, relating to treatment extended to facilitate frontier traffic and to rights and facilities extended to a land-locked State. To the first category of situations it had devoted only article 21, relating to the GSP.

15. He thought that article 21 should be retained in its existing form, without any additional article, since the Commission had made a point of adopting article 26, which provided for the "freedom of the parties to agree to different provisions". It had thus found a very clever solution, for article 26 covered all possible cases in a general way, without any omissions. He was therefore in favour of retaining article 21, was adopted on first reading, since article 26 recognized the existence of special situations regarding the application of the most-favoured-nation clause and gave the parties wide freedom by allowing them to limit the scope of the clause or make it subject to any conditions they pleased.

16. Mr. Njenga's proposal (A/CN.4/L.266) had been motivated by the legitimate desire to protect the interests of developing countries and by fear that the most-favoured-nation clause might harm those countries' interests. He did not believe, however, that article 21 or any other provision of the draft could really harm the interests of developing countries, since article 26 enabled the contracting parties to adapt the most-favoured-nation clause as they wished, by treaty or by other means. When a State A, which considered itself to be a developing State, concluded a treaty with State B, which it considered to be a developed State, it could indeed, in the words of the text proposed by Mr. Njenga, "grant trade preferences to other developing countries in accordance with bilateral or regional arrangements, without being obliged to extend such preferences" to State B under the most-favoured-nation clause. There was nothing against that in the draft. An agreement of that kind would thus enable a developing State to achieve the purpose of Mr. Njenga's proposal.

17. He reserved his opinion with regard to Mr. Reuter's proposals (A/CN.4/L.264 and A/CN.4/L.265), which he considered very complex.

18. Sir Francis VALLAT considered article 27 as the point of departure for the articles now under discussion. The Commission had fully acknowledged the principle that consideration must be given to the

needs of developing countries. No one would wish to deny that principle and, as far as he was concerned, article 27 could be referred to the Drafting Committee without further delay.

19. As for article 21, it had been considered at length on first reading and had been drafted with great care. From the point of view of substance, it too merited full support. It had to be recognized, however, that both articles fell within the sphere of the progressive development of international law. Moreover, the Commission was now dealing with trade, finance and economics and he suspected that, like him, some members felt a little out of their depth. It was sometimes difficult to understand the implications for States of the various proposals that had been made, for things were not always what they seemed. For example, a uniform system of customs duties might well conceal serious discrimination as a result of the way in which the system was administered. Consequently, he approached the problems now before the Commission with a sense of humility and considerable misgiving. As could be seen from the commentary, the GSP was a comparatively new phenomenon and not altogether stable in itself. A number of statements by members had reflected a feeling of uncertainty and even insufficiency in respect of the system, which indicated the need to proceed with caution. Indeed, by the time the articles came into force, the GSP might well have proved unsatisfactory and have disappeared.

20. The proposed article 21 *bis* (A/CN.4/L.266) went even further than article 21 into the sphere of the progressive development of the law. The arguments advanced by Mr. Njenga had been very impressive, but he could not agree with the idea that the establishment of EEC had led to higher protective customs barriers. In the main, the customs barriers of the individual member countries would have been higher than they were currently under the unified system of EEC, which operated a scheme of generalized preferences and followed a policy of liberalization of trade. In principle, he was prepared to accept the underlying idea of the proposed article 21 *bis*. The Commission was in a position in which it could only do its best where questions of policy were concerned and perform its function by making it clear that it was submitting to governments what it considered to be the best draft for a particular situation. Ultimately, it was for governments themselves to decide whether the policy of the draft was acceptable.

21. Nevertheless, the wording of article 21 *bis* raised some difficulties, since the terms used assumed a process of self-selection that almost ran counter to the principles of international co-operation and international law. After all, there was no clear-cut distinction between developed and developing countries and it was not easy to be absolutely sure that, for all or for certain purposes, a particular State was developed or developing. For instance, some States that generally regarded themselves as developing countries might be classified as developed countries if pet-



roleum production were taken as the relevant criterion. Again, many so-called developed countries had their own problems and were facing economic decline. The existence of such countries had also to be acknowledged. A very serious problem arose when the undefined concept of “developed” and “developing” was combined with the process of self-selection, for that led to a sliding scale that was not worthy of the standards of drafting adopted by the Commission.

22. The very sound and sensible proposals made by Mr. Reuter (A/CN.4/L.264 and A/CN.4/L.265), which avoided introducing the process of self-selection and had the merit of being based on established documents, namely, the Charter of Economic Rights and Duties of States and existing commodity agreements, might meet the situation even better than did the somewhat minuscule article 21, which was not really very effective. Article 21 *ter* was comparatively straightforward, but some problems of drafting arose in regard to article A. However, the Commission had never been daunted by the difficulty of transforming a valuable idea into a viable draft and very serious consideration should be given to those proposals.

23. Lastly, Mr. Francis had pointed to the fundamental truth that trade was a matter of co-operation. In the long run, trade that flowed only one way led to an imbalance in payments and to a situation in which the channels of trade became blocked and eventually broke down. Trade must of necessity be reciprocal. Consequently the Commission would not further its objectives if, in the process of providing for the needs of developing countries, it also created problems for developed countries. Both sides of the world needed each other, especially in trade. Unfortunately the Commission was inclined, at that juncture, to take a one-sided view of a two-sided problem. A genuinely balanced approach was needed to the whole question of qualifications or exceptions in relation to the most-favoured-nation clause.

24. Mr. QUENTIN-BAXTER said that he was extremely grateful for the Special Rapporteur's lengthy introduction of article 21, which reflected the great importance all members attached to the topic under discussion, and for statements such as that made by Mr. Njenga (1499th meeting), which had reminded the Commission of the political and economic circumstances to which the draft must relate.

25. The subject posed great difficulties because it contained many diverse elements. Most members felt that the most-favoured-nation clause was so much a world of its own, had so many implications and was so compressed as a standard form of clause in a treaty, that it badly needed explanation, and that the average practitioner of international law would gain much from a short set of articles that would serve as a guide to the nature of the clause. However, if the clause itself was ripe for codification, its sphere of application certainly was not. The truth of the matter was that, even if the Commission were able, at a given point in time, to produce an accurate description of the world of bilateral and multilateral trade negotiations, that world was constantly changing—a fact

of the utmost importance, which had to be borne in mind at every stage in the examination of the draft. The Commission was concerned to explain a clause that involved much of a tacit nature and had a lengthy history of State practice; it was not describing the modern environment in which the clause must float or sink.

26. It was also worth remembering that, in the last resort, almost all the rules enunciated in the draft were presumptions. There had been a tendency to draw a distinction between two groups of articles: articles 13 to 20, which had been regarded somewhat as rules of interpretation and, on the first reading of the draft, could have been called “properties of the clause”; and articles 21 to 27, which dealt with exclusions. However, both those groups of articles simply contained presumptions that did not limit the freedom of States to contract. In the first group it was presumed, rightly or wrongly, that no exception was implied. For example, if natural treatment were not specifically mentioned, the most-favoured-nation clause gave entitlement to national treatment. The second group contained a negative presumption, namely, that even if frontier traffic, for example, were not specifically mentioned, the intention was that frontier traffic should form an exception. Such rules were useful for those who, in the future, would have to draw up treaties containing a most-favoured-nation clause, in whatever modified form. The clause was still a basic element in modern multilateral trade law and even in the philosophy of GATT.

27. Article 21 in its existing formulation reflected the awareness that, in the contemporary world, multilateral trade negotiations were of a protean character and that the clause was expected not to dominate, but to give way to developments in that sphere. Much the same was stated in article 27, which he regarded as a kind of invitation. In other words, after describing the properties of the clause, the draft went on to affirm that in the modern world the clause existed in the sphere of trade with a different set of values and that it was for the international community to establish the relevant rules. Such a provision might be considered rather offhand, but great care should be taken not to step beyond the central purpose of the draft, which was to describe a clause that the parties to a treaty were free to modify. One reason for caution was that an accurate description, at a particular point in time, of a world experiencing such rapid change, might impair the developments that were taking place. Moreover, the Commission was on the very edge of its competence. Yet another risk was that, in making substantive statements about the realities of the world of multilateral trade negotiations, the Commission might be subjecting those statements to the limitations of the articles of the draft, all of which were dominated by the proposition that States were free to contract as they chose. On the other hand, no State, if it valued the principles of international co-operation, had the right to conclude a bilateral agreement in which it set aside the develop-

ing principles of the world of multilateral negotiations and of the United Nations family of organizations. But again, the Commission could not state the opposite and claim that it had found a new rule of *jus cogens* that limited freedom of contract.

28. The only course was to make it clear that the Commission was not deceived about the proper place of the clause in the modern world. Like the secretariat of GATT, it believed that the concept of the most-favoured-nation clause would continue to form a part of the theory to which the world subscribed in developing forms of trade negotiation. The Commission should also accept without definition the terms "developed country" and "developing country". No country was more troubled than New Zealand to find itself classed as a developed country, since it was acutely aware of the fact that its economy was based almost entirely on primary products and was heavily dependent upon international trade in such products. Perhaps matters would change for, as Sir Francis Valat had pointed out, economic situations, like political situations, waxed and waned. The only certainty about the future was that changes would take place.

29. He fully appreciated the importance of reflecting the draft the concepts embodied in the proposed article 21 *bis* (A/CN.4/L.266) but, for the sake of the cause so close to Mr. Njenga's heart, the article should not be anchored too closely to something as fragile as the use or disuse of the most-favoured-nation clause. It should be drafted in a way that allowed it to tie in with the set of presumptions and rules on exclusions set out in the draft. Moreover, account must be taken of the extremely interesting proposals made by Mr. Reuter.

30. It was entirely appropriate for the Commission to give pride of place to the question of developing countries and to acknowledge the very important developments in the sphere of multilateral trade negotiations. If they formed an exception, the exception was quite different in quality from any other of a more narrow or localized character.

31. Mr. SCHWEBEL said that the substance of article 21 *bis* proposed by Mr. Njenga (A/CN.4/L.266) was close to that of article 21 of the Charter of Economic Rights and Duties of States, which read:

Developing countries should endeavour to promote the expansion of their mutual trade and to this end may, in accordance with the existing and evolving provisions and procedures of international agreements where applicable, grant trade preferences to other developing countries without being obliged to extend such preferences to developed countries, provided these arrangements do not constitute an impediment to general trade liberalization and expansion.

Unlike certain other provisions of the Charter, that article had commanded wide support in the General Assembly and it would be preferable if Mr. Njenga's proposal were brought even more closely into line with its wording.

32. He found a good deal of merit in the substance of the proposals made by Mr. Reuter, who had strongly urged the Commission to abide by the pro-

visions on the most-favoured-nation clause contained in the Charter of Economic Rights and Duties of States; however, the phrasing of the proposals raised some difficulties.

33. Mr. Šahović had alluded to the comments by the United States on article 21 (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A), and the Charter of Economic Rights and Duties of States as also relevant in clarifying the thrust of those comments. The United States Government had sought to point out that the GSP was now subject to certain safeguards that were absent from article 21 in its existing formulation and should be incorporated in the text. From the articles of the Charter of Economic Rights and Duties of States relating to the most-favoured-nation clause, which were reproduced in paragraph (12) of the commentary to article 21, it could be seen that, under article 18, developed countries should enlarge the system of generalized non-reciprocal and non-discriminatory tariff preferences to developing countries in conformity with the relevant agreed conclusions and decisions adopted on the subject "in the framework of the competent international organizations"—a clear reference to the GATT waiver provisions. Article 26 of the Charter referred to "generalized non-discriminatory and non-reciprocal preferences in favour of developing countries, on the basis of mutual advantage, equitable benefits and the exchange of most-favoured-nation treatment". The provisions of articles 18, 21 and 26 of the Charter had been very carefully drafted, and full account and advantage should be taken of them in the draft articles now before the Commission.

34. At the time, he wished to make it clear that he did not support the Charter of Economic Rights and Duties of States as a whole; nor, in his opinion, should the Commission. It was a recommendatory resolution of the General Assembly, which had met with a number of negative votes, and with a great many such votes on certain articles. It was in no sense sacred; it was not a codification of existing international law and could not be viewed as a progressive development of international law. In some respects, it might even be regarded as regressive. It certainly contained some objectionable provisions, and the sponsors themselves had recognized that initial attempts to make it an element of the codification and progressive development of international law had had to be abandoned. In short, for the purposes of the draft articles under consideration, it was appropriate and desirable to look to the pertinent provisions of the Charter of Economic Rights and Duties of States for guidance, but the Commission should avoid any broader embrace than was necessary of that controversial document.

35. Mr. RIPHAGEN shared the general view that article 21 was inadequate.

36. He found considerable merit in the EEC proposal that the words "within a generalized system of preferences" should be replaced by the words "under a preferential régime" (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 6). The latter formula

was more general and would thus cover the “other differential measures” that article 18 of the Charter of Economic Rights and Duties of States urged developed countries to adopt. He could not agree that such a change would fundamentally alter the nature of the rule, for although generalized system of preferences” had come to be a term of art in international trade, it clearly denoted a system of tariff preferences.

37. He agreed that consideration should be given to adding, at the end of article 21, the clause in the first sentence of article 18 of the Charter of Economic Rights and Duties of States, which read: “consistent with the relevant agreed conclusions and relevant decisions as adopted on this subject, in the framework of the competent international organizations”. That would reflect the view expressed by GATT in its comments, to the effect that the difficulties in interpreting several of the terms used in the article could best be overcome “in an institutional framework for continuous consultation and negotiation” (*ibid.*, sect. C, 3, para. 7).

38. He also agreed that the substance of Mr. Njenga’s proposal (A/CN.4/L.266) should be included within the framework of the draft articles. However, the Drafting Committee should examine the proposal with a view to bringing its wording into line with that of article 21 of the Charter of Economic Rights and Duties of States, from which the proposal derived.

39. Account should likewise be taken of Mr. Reuter’s proposal that commodity agreements would be regarded as an exception to most-favoured-nation treatment (A/CB/L.265). Such agreements were obviously confined to the parties concerned and could not be invoked by a beneficiary State under a most-favoured-nation clause.

40. Lastly, he was very much in favour of the new article A proposed by Mr. Reuter (A/CN.4/L.264), which would place the exception covered by article 21 in a wider institutional framework. He trusted that the Drafting Committee would give full consideration to that proposal for, if accepted, it would bring the draft articles much closer into line with existing international law on trade and commerce.

41. Mr. VEROSTA thought a provision such as article 21 was necessary. Article 21 *bis* proposed by Mr. Njenga (A/CN.4/L.266) seemed acceptable, but the text should be in conformity with the provisions of the Charter of Economic Rights and Duties of States. As for the general article proposed by Mr. Reuter (A/CN.4/L.264), it was justified in many respects. Article 21 was the first of several articles dealing with exceptions to the operation of the most-favoured-nation clause, and the proposed new article had the merit of being more general than the most general of those articles. The Drafting Committee should nevertheless try to assign to each of the provisions its proper place, so that they would be presented in logical order.

42. Among the exceptions to the application of the

most-favoured-nation clause, there was one that had been recognized ever since the existence of that clause, but was not mentioned in the draft: the exception for customs unions. Besides modern associations of States, such as EEC, there had been real customs unions since the beginning of the nineteenth century. The Drafting Committee should therefore introduce an exception for such unions in the draft, possibly in article 15. Developing countries should not be prevented from forming customs unions in the certain knowledge that they would not have to suffer from the operation of the most-favoured-nation clause.

43. The CHAIRMAN, speaking as a member of the Commission, said that article 21 had been regarded as one of the most important by the General Assembly, where it had been well received.

44. The Commission could not disregard the special situation of developing countries in the face of the realities of modern trade relations; privileged treatment for those countries, with a view to ensuring that the operation of the most-favoured-nation clause did not result in unfair competition, was now a general feature of relations between States. However, it was not for the Commission to study the nature and results of the generalized system of non-reciprocal and non-discriminatory preferences that had been unanimously approved at the second session of UNCTAD, in 1968. That system was certainly far from attaining its objectives. It had rightly been criticized for not covering agricultural products, which were the main export of developing countries, particularly of the least developed among them. The system also incorporated a series of safeguard mechanisms and temporal restrictions that further limited the dimensions of the results achieved. The Commission’s task, however, was to ensure that the progress made, albeit modest, was respected and preserved in the draft articles. In that connexion, paragraph 5 of the Tokyo Declaration,<sup>7</sup> which was the basis of the current multilateral trade negotiations conducted in the framework of GATT, had introduced a new principle for securing additional advantages for developing countries, namely, that of differential and more favourable treatment. That new trend should find expression in the draft. The concept of differential treatment was wider than that of preferential treatment and could be applied to a vast range of matters relating to economic co-operation between developed and developing countries.

45. A proposal to reword draft article 21 had been before the Sixth Committee of the General Assembly,<sup>8</sup> but the consensus of opinion had been in favour of retaining the existing text, while leaving the way open for fresh efforts by the international community to favour the special situation of developing

<sup>7</sup> Declaration of Ministers approved at Tokyo on 14 September 1973 (GATT, *Basic Instruments and Selected Documents, Twentieth Supplement* (Sales No. GATT/1974-1) p. 19).

<sup>8</sup> See *Official Records of the General Assembly, Thirty-first Session*, agenda item 106, doc. A/31/370, para. 67.

countries. Article 27 (The relationship of the present articles to new rules of international law in favour of developing countries) was a very useful saving clause to that end. In his view, therefore, the limited results of the GSP should be protected from the operation of the most-favoured-nation clause and the way left open for new rules of international law in favour of developing countries.

46. With regard to the proposals before the Commission, he agreed that a provision on the line proposed by Mr. Njenga (A/CN.4/L.266) should be included in the draft. If it were accepted that the most-favoured-nation clause should not apply to agreements between developed and developing countries, then for the same reasons agreements between two developing countries should also be excluded from the application of the clause. Mr. Njenga's proposal could, however, be simplified by the deletion of the words "in accordance with bilateral or regional arrangements". Those words were not strictly necessary, and in any event arrangements other than bilateral or regional arrangements might be involved. He also considered that the second sentence of the proposal should be deleted, as the wording was somewhat vague. Who would decide whether the arrangements in question constituted "an impediment to general trade liberalization and expansion", and what exactly was meant by "general trade liberalization and expansion"? With those changes, the proposal would still serve its purpose, but would be more concise.

47. As to Mr. Reuter's proposal to exclude treatment extended under commodity agreements (A/CN.4/L.265), he was not sure whether a general exception of that kind was necessary. Further study was perhaps required to determine whether most-favoured-nation clauses were used in commodity agreements to an extent that warranted the inclusion of such an exception in the draft articles. There was, of course, always the possibility of a negotiated exception.

48. He also had some doubts about Mr. Reuter's proposal to exclude treatment extended in accordance with the Charter of Economic Rights and Duties of States (A/CN.4/L.264). In particular, he wondered whether the draft articles, which might be the subject of a future convention, should refer in that context to that charter which, as a resolution of the General Assembly, was not mandatory. At the same time, he recognized the value of Mr. Reuter's proposals and suggested that they be referred to the Drafting Committee, together with article 21 itself and all the other proposals and comments made during the discussion.

49. Mr. USHAKOV (Special Rapporteur) said that, since he could not review all the comments made during the discussion of article 21, he would refer to only a few of the main points raised.

50. His reply to the question whether the Commission should deal with all the recognized exceptions to the operation of the most-favoured-nation clause was in the affirmative. The Commission was called upon both to codify, by confirming existing rules, and to carry on the progressive developments of international

law, by stating the rules that emerged from the new trends. On the other hand, it should not deal with all the exceptions that might be found in treaties or in most-favoured-nation clauses. States were free to agree on any other exceptions, but those would apply only in their relations among themselves. The exceptions that should be mentioned in the draft were those that were recognized by the international community and that applied even in the absence of any express stipulation. Those referred to in articles 21 to 23 belonged to the latter class of exceptions. The exception for a generalized system of preferences, dealt with in article 21, was not based on customary international law, but it was recognized widely enough to be considered necessary. As the Commission had stressed in paragraph (13) of the commentary to article 21, there appeared to be general agreement in principle, expressed within United Nations organs, that States should adopt a generalized system of preferences. It was on the basis of that general agreement that the Commission had formulated the rule stated in article 21, which was a provision embodying progressive development of international law.

51. The exceptions provided for in articles 21 to 23 were exceptions *ratione personae*, since they applied to certain States that were excluded from the application of the most-favoured-nation clause. It was important to specify clearly which States those were. For the purposes of article 21, they were States to which a developed granting State did not accord the benefit of a generalized system of preferences; for the purposes of article 22, they were States other than contiguous States; for the purposes of article 23, they were States other than land-locked States.

52. Considered from a different viewpoint, articles 21 to 23 contained exceptions *ratione materiae*, since each article related to a particular sphere. Article 21 related to the GSP, and in particular to customs duties. However, the system might be expanded. The Commission was not called upon to criticize it or to point to its shortcomings; nevertheless, it must take note of the fact that States had agreed on a certain practice. On the other hand, the Commission could not, for the time being, refer to differential treatment, which was not yet generally applied. If such treatment became general, article 27 of the draft would come into play.

53. Since articles 21 to 23 embodied exceptions for developing countries, and since the general article proposed by Mr. Reuter (A/CN.4/L.264) was much wider in scope, he would refrain from commenting on that proposal for the time being.

54. In referring to the Charter of Economic Rights and Duties of States, several governments and international organizations had expressed the view that any preferences or advantages granted by developing countries to one another should be excluded from the operation of the most-favoured-nation clause. Specific proposals to that effect had been submitted by ECWA (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. B) and subsequently by Mr. Njenga

(A/CN.4/L.266). The latter text, however, was not entirely satisfactory. On the one hand, it made no mention of the granting State and the beneficiary State; on the other hand, it could not be affirmed, as in the text, that developing countries “may grant trade preferences”. Those countries could themselves decide whether or not they were in a position to grant such preferences, it being understood that general international law did not prevent them from doing so. Moreover, it was not appropriate to specify that such preferences were granted “in accordance with bilateral or regional arrangements”, since the granting State could accord them in any way it wished, for example, by a unilateral decision or under a provision of its internal law. It would be better to draft article 21 *bis* the following lines:

A developed beneficiary State is not entitled under a most-favoured-nation clause to any preferential trade treatment extended by a developing granting State to a developing third State.

55. Thus stated, the rule should be acceptable to all States, provided, however, that it were made clear what was meant by a “developing third State” in the context of trade. Some countries could be regarded as developing from the political point of view but as developed from the point of view of trade. Unless it could be specified which countries were developing countries in the context of trade, the proposed article might raise a number of difficulties.

56. Mr. ROMANOV (Secretary to the Commission) said that, in accordance with the request made by the Commission at its 1494th meeting, Mr. H. Stordel, Deputy Director of the Manufactures Division of UNCTAD, had agreed to address the Commission the following morning, 9 June 1978, on issues of direct relevance to the Commission’s work on the most-favoured-nation clause.

*The meeting rose at 1.05 p.m.*

## 1497th MEETING

*Friday, 9 June 1978, at 10.05 a.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

**The most-favoured-nation clause (*continued*) (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2, A/CN.4/L.264-266)**

[Item 1 of the agenda]

### DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 21 (The most-favoured-nation clause in relation to treatment under a generalized system of preferences)<sup>1</sup> (*concluded*)

1. The CHAIRMAN invited Mr. Stordel, Deputy Director of the Manufactures Division of UNCTAD, to address the Commission.

2. Mr. STORDEL (UNCTAD secretariat) said that the question of most-favoured-nation treatment, and its relationship to the preferential treatment of developing countries, had been of major concern to UNCTAD since its inception. General Principle Eight of recommendation A.I.1, adopted at the first session of the Conference, provided *inter alia* that international trade should be conducted to mutual advantage on the basis of most-favoured-nation treatment. It also provided that developed countries should grant concessions to all developing countries, and should extend to the latter all the concessions they granted to one another; in so doing, they should not require any concessions from developing countries in return. New preferential concessions, both tariff and non-tariff, should be extended to developing countries as a whole and should not be extended to developed countries. Developing countries should not be required to extend to developed countries preferential treatment in operation among themselves.<sup>2</sup>

3. Although most-favoured-nation treatment aimed at equality of treatment, it was, paradoxically, preferences that provided a means of enabling developing countries to come closer to real equality of treatment. The most-favoured-nation principle did not in fact take account of inequalities in economic structure and levels of development in the world; equal treatment of countries that were economically unequal was equality only in the formal sense, and actually amounted to inequality. Thus preferential reductions on imports from developing countries brought those countries closer to achieving equality of treatment with producers in the national or multinational markets by taking account of their lower level of development and correcting a situation in which their exports were placed at a disadvantage compared with those of developed countries.

4. The breakthrough in the introduction of generalized preferences for products originating in developing countries had been achieved with resolution 21 (II), adopted at the second session of UNCTAD. That resolution provided that the objectives of the generalized non-reciprocal, non-discriminatory system of preferences in favour of developing countries should be: (a) to increase their export earnings;

<sup>1</sup> For text, see 1494th meeting, para. 1.

<sup>2</sup> *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No. 64.II.B.11), p. 20.

(b) to promote their industrialization; (c) to accelerate their rates of economic growth.<sup>3</sup>

5. Decision 75 (S-IV), adopted by the Trade and Development Board at its fourth special session, defined the legal status of the GSP; it recognized that no country intended to invoke its rights to most-favoured-nation treatment with a view to obtaining, in whole or in part, the preferential treatment granted to developing countries in accordance with Conference resolution 21 (II), and that the Contracting Parties to the General Agreement on Tariffs and Trade<sup>4</sup> intended to seek the required waiver or waivers as soon as possible. The decision also took note of the statement made by the preference-giving countries that the legal status of the tariff preferences to be accorded to the beneficiary countries by each preference-giving country individually would be governed by the following considerations: first, that the tariff preferences were temporary in nature; secondly, that their grant did not constitute a binding commitment and, in particular, did not in any way prevent their subsequent withdrawal in whole or in part or the subsequent reduction of tariffs on a most-favoured-nation basis, whether unilaterally or following international tariff accommodations; thirdly, that their grant was conditional upon the necessary waiver or waivers in respect of existing international obligations, in particular in the General Agreement on Tariffs and Trade. The decision also provided that developing countries that were to share their existing tariff advantages in some developed countries as the result of the introduction of the GSP would expect the new access in other developed countries to provide export opportunities at least to compensate them.<sup>5</sup>

6. Mainly on the basis of Conference resolution 21 (II) and decision 75 (S-IV) of the Trade and Development Board, a large number of developed countries had introduced schemes of generalized preferences. Such schemes were currently applied by the following developed market economy countries: Australia, Austria, Canada, the EEC countries (Belgium, Denmark, France, Federal Republic of Germany, Ireland, Italy, Luxembourg, Netherlands, United Kingdom), Finland, Japan, New Zealand, Norway, Sweden, Switzerland and the United States. The following socialist countries of Eastern Europe also granted preferential treatment to developing countries: Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Poland and USSR.

7. A number of the schemes had undergone important changes since their entry into force, and UNCTAD had made continuing efforts to improve them.

In that connexion, special mention should be made of resolution 96 (IV), adopted at the fourth session of UNCTAD, which provided *inter alia* that the generalized system of non-reciprocal, non-discriminatory preferences should be improved in favour of developing countries, taking into account the relevant interests of developing countries that enjoyed special advantages, as well as the need to find ways and means of protecting their interests. With regard to the duration of the GSP, the resolution provided that it should continue beyond the initial period of 10 years originally envisaged, bearing in mind, in particular, the need for long-term export planning in developing countries.<sup>6</sup>

8. Developing countries were interested in strengthening the legal status of the GSP. Accordingly, the Manila Declaration and Programme of Action, adopted by the developing countries in February 1976,<sup>7</sup> proposed that the system should be given a firm statutory basis and made a permanent feature of the trade policies of the developed market economy countries and of the socialist countries of Eastern Europe.

9. An important step towards the improved legal status of the system had been the adoption of the Charter of Economic Rights and Duties of States,<sup>8</sup> article 18 of which called for preferential treatment for developing countries, not only in the area of tariffs, but also, where feasible, in other areas.

10. Such areas were indicated in UNCTAD resolution 96 (IV), which dealt with a set of interrelated and mutually supporting measures for expansion and diversification of exports of manufactures and semi-manufactures of developing countries, and in UNCTAD resolution 91 (IV), on multilateral trade negotiations.<sup>9</sup> Resolution 96 (IV) requested developed countries to give consideration to the view of developing countries that developed countries should apply the principle of differential and more favourable treatment in favour of developing countries to non-tariff barriers also. Resolution 91 (IV) urged the practical and expeditious application, in the multilateral trade negotiations, of differential measures that would provide special and more favourable treatment for developing countries in accordance with the provisions of the Tokyo Declaration;<sup>10</sup> it emphasized further that there was widespread recognition that subsidies and countervailing duties were areas in which special and differentiated treatment for developing countries was both feasible and appropriate. It also stressed the need to ensure that the least developed countries received special treatment in the context of any general or specific measures taken in favour of developing countries during the negotiations.

<sup>3</sup> *Ibid.*, Second Session, vol. I (and Corr.1 and 3 and Add.1 and 2), Report and Annexes (United Nations publication, Sales No. E.68.II.D.14), p. 38.

<sup>4</sup> See 1492nd meeting, foot-note 10.

<sup>5</sup> See *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 15 (A/8015/Rev.1)*, pp. 261 *et seq.*, Part Three, annex 1.

<sup>6</sup> *Proceedings of the United Nations Conference on Trade and Development, Fourth Session*, vol. I (and Corr.1), Report and Annexes (United Nations publication, Sales No. E.76.II.D.10), p. 10.

<sup>7</sup> *Ibid.*, p. 109.

<sup>8</sup> General Assembly resolution 3281 (XXIX).

<sup>9</sup> *Proceedings of the United Nations Conference on Trade and Development, Fourth Session*, vol. I (and Corr.1) (*op. cit.*), p. 14.

<sup>10</sup> See 1496th meeting, foot-note 7.

11. Stressing the importance of the preferential treatment that developing countries accorded or intended to accord to each other, he affirmed that, in establishing a new international economic order, collective self-reliance and increasing co-operation among developing countries were of capital importance. Preferential trade arrangements among developing countries, including those of limited scope, could play a key role, to an ever-increasing extent, in measures of economic co-operation among developing countries. Accordingly, resolution 1(I) of the UNCTAD Committee on Economic Co-operation among Developing Countries called upon the Secretary-General of UNCTAD, in establishing the work programme on economic co-operation among developing countries, to give special priority to the initiation of studies on a global scheme of trade preferences among developing countries, and to the intensification of ongoing work and activities relating to the strengthening of subregional, regional and interregional economic co-operation and integration among developing countries.<sup>11</sup>

12. Such were the objectives and forms of preferential treatment for developing countries as they had developed in the recent past, and particularly in the Second United Nations Development Decade. The issue of preferential treatment was still under consideration in UNCTAD, as well as in the context of the multilateral trade negotiations being held within the framework of GATT. It raised a number of complex questions, the resolution of which was not foreseeable at that stage. He would point out, however, that article 21 was confined to tariff preferences under the GSP, whereas developing countries were seeking preferential treatment or special differentiated treatment in all areas of trade relations with developed countries. Moreover, they considered that preferential treatment granted in trade among themselves should not be extended to developed countries. In that connexion, he wished to stress the importance of article 27<sup>12</sup> which, he understood, was intended to leave the way open for the elaboration of new rules to the benefit of developing countries in regard to their preferential treatment.

13. There was no doubt that the Commission's work could contribute substantively to the maintenance and further development of such preferential treatment in the Third Development Decade and thereafter. It would be necessary, however, for the preferential treatment described to be adequately covered by the draft articles. In that spirit, he wished the Commission all success in its further work.

14. Sir Francis VALLAT said that the information provided by the UNCTAD representative was most valuable and trusted that Mr. Stordel's statement would be circulated as a document of the Commission.

15. It would be helpful if the Commission could have a list of the countries that were beneficiaries under the schemes of generalized preferences applied by developed countries and by EEC. That would assist the Commission in distinguishing between developed and developing States for the purposes of the draft.

16. Mr. STORDEL (UNCTAD secretariat) said the UNCTAD secretariat would be pleased to provide the Commission with such a list.

17. The CHAIRMAN thanked Mr. Stordel for his contribution to the Commission's work and said that his statement would be reproduced in full.<sup>13</sup>

18. He invited the Commission to continue its consideration of article 21.

19. Mr. JAGOTA said that he could accept the text proposed by the Special Rapporteur at the previous meeting,<sup>14</sup> which he understood was a rewording of the text proposed by Mr. Njenga (A/CN.4/L.255).<sup>15</sup>

20. The CHAIRMAN, noting that there were no further comments, suggested that article 21 be referred to the Drafting Committee, together with the proposals and comments relating to it.

*It was so agreed.*<sup>16</sup>

ARTICLE 22 (The most-favoured-nation clause in relation to treatment extended to facilitate frontier traffic)

21. The CHAIRMAN invited the Special Rapporteur to introduce article 22, which read:

*Article 22. The most-favoured-nation clause in relation to treatment extended to facilitate frontier traffic*

1. A beneficiary State other than a contiguous State is not entitled under the most-favoured-nation clause to the treatment extended by the granting State to a contiguous third State in order to facilitate frontier traffic.

2. A contiguous beneficiary State is entitled under the most-favoured-nation clause to the treatment extended by the granting State to a contiguous third State and relating to frontier traffic only if the most-favoured-nation clause relates especially to the field of frontier traffic.

22. Mr. USHAKOV (Special Rapporteur) pointed out that article 22, like articles 21 and 21 *bis* and article 23, applied to both conditional and unconditional clauses. All those articles related to the right of the beneficiary State to certain treatment, irrespective of the nature of the most-favoured-nation clause.

23. Paragraph 1 of article 22 provided that a beneficiary State other than a continuous State was not entitled under the most-favoured-nation clause to the treatment extended by the granting State to a contiguous third State in order to facilitate frontier traffic. That exception to the operation of the clause was

<sup>11</sup> *Official Records of the Trade and Development Board, Seventeenth Session, Supplement No. 2 (TD/B/652), annex I, p. 15.*

<sup>12</sup> See 1483rd meeting, foot-note 1.

<sup>13</sup> Subsequently issued as document A/CN.4/L.268.

<sup>14</sup> 1496th meeting, para. 54.

<sup>15</sup> 1494th meeting, para. 25.

<sup>16</sup> For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 66-75.

therefore an exception *ratione personae*; it applied only to beneficiary States that were not contiguous third State and relating to frontier traffic only if the clause related especially to frontier traffic.

24. In its commentary to article 22, the Commission had explained the basis of the article. It seemed to be quite general practice for commercial treaties concluded between States with no common frontier to except from the operation of the most-favoured-nation clause advantages granted to contiguous countries in order to facilitate frontier traffic. Commercial treaties concluded between contiguous countries constituted a different category inasmuch as the countries might or might not have a uniform regulation of the frontier traffic with their neighbours. However, it was not because stipulations on the frontier traffic exception were so frequently to be found in treaties that the Commission had judged that it should be codified. It had seemed to the Commission that the rule was in conformity with the constant practice of States and in harmony with the *ejusdem generis* rule reflected in articles 11 and 12. The Commission had also noted that the expression "frontier traffic" was not unequivocal since it might mean the movement of goods or persons, or of both. The expression usually related to persons residing in a certain frontier zone and to their movements to, and labour relations in, the opposite frontier zone, and also to the movement of goods between the two contiguous zones, which was sometimes restricted to goods produced in those zones. National regulations on frontier traffic varied considerably, not only as to the width of the zone in question but also as to the conditions of the traffic between the two zones lying on either side of the common frontier. To determine the meaning of "frontier traffic" it was therefore necessary to refer, in each case, to the most-favoured-nation clause concluded between the granting State and the beneficiary State.

25. With respect to the comments made on article 22, many representatives in the Sixth Committee had declared themselves in favour of that provision (A/CN.4/309 and Add.1 and 2, para. 300). In their written comments, most governments had also approved of article 22; an exception was Czechoslovakia, which agreed with the substance but doubted the advisability of retaining paragraph 2 (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A). In his opinion, it was essential to retain that paragraph, since it specified that a contiguous beneficiary State was entitled to the treatment extended by the granting State to a contiguous third State and relating to frontier traffic only if the most-favoured-nation clause related specifically to frontier traffic.

26. Mr. CALLE Y CALLE said that article 22 was at first sight clear enough and corresponded to established State practice. Paragraph 2, however, gave rise to some difficulties, since it extended the concept beyond frontier traffic for trade in a given area to the movement of goods and persons generally. An example was provided by Peru, which had five frontiers, with differing geographical, social and economic con-

ditions prevailing in each frontier zone. In such a case, it would be illogical to extend the facilities granted to, say, a highly populated zone, to another zone that was virtually uninhabited. Furthermore, facilities were accorded under regional integration schemes with a view to promoting integration through the movement of goods and persons; thus Chile, a State contiguous to Peru, having withdrawn from the Cartagena Agreement,<sup>17</sup> could not claim the facilities extended to the parties to that agreement. That, at least, was his understanding of the position. In addition, facilities extended under such schemes eventually became part of the law of each State party to them, which was a further reason why a contiguous State that was not a party to an integration scheme could not automatically claim those facilities. He thought some reference should be made to that point in the commentary. Nor did the *ejusdem generis* rule entitle a contiguous State to claim the facilities extended to another country whose situation was very different, both in fact and in law.

27. Mr. TABIBI, endorsing the comments made by the Special Rapporteur and Mr. Calle y Calle, said that article 22 reflected State practice and embodied a principle that had been recognized in article XXIV of the General Agreement on Tariffs and Trade as well as in a number of commercial treaties. The article was particularly important for the countries of Asia and Africa owing to their historical, ethnic, linguistic and cultural ties and the consequent need to liberalize trade and contacts in order to resolve their many problems and improve their relations. The point could, of course, have been covered in article 11 (Scope of rights under a most-favoured-nation clause) and article 12 (Entitlement to rights under a most-favoured-nation clause), but it was preferable to deal with it expressly in a separate article. He therefore considered that article 22 should be retained and referred to the Drafting Committee.

28. Mr. AGO was in favour of retaining article 22 as adopted by the Commission on first reading. He stressed the fact that situations always varied from frontier to frontier. For instance, the agreements concluded between Italy and Yugoslavia regarding their common frontier had no equivalent for the frontiers separating Italy from other countries. Hence it was essential to specify that the most-favoured-nation clause could apply to treatment extended to facilitate frontier traffic only if express provision were made for such application. The Special Rapporteur was therefore right to recommend the retention of paragraph 2 of article 22.

29. Mr. USHAKOV (Special Rapporteur), referring to the comments made by Mr. Calle y Calle, said that paragraph 2 of article 22 seemed to have given rise to a misunderstanding. According to that provision, two conditions must be met for the most-favoured-nation clause to apply: the beneficiary State must be a contiguous State, and the granting State must have concluded with the beneficiary State a

<sup>17</sup> See 1491st meeting, foot-note 3.



most-favoured-nation clause relating especially to frontier traffic. Consequently, if Peru granted a contiguous State certain treatment in order to facilitate frontier traffic and was not bound to other contiguous States by a most-favoured-nation clause relating expressly to frontier traffic, the latter States could not claim the treatment in question. If such a clause existed, it must have been concluded at the wish of the granting State itself. It was obvious, therefore, that no State was automatically obliged to extend to all contiguous States the treatment it had accorded to one of them.

30. He also wished to point out that the expression "contiguous beneficiary State" should not be understood to mean only a State having a common land frontier with the granting State; it could also mean a State separated from the granting State by a stretch of water. For instance, although Japan and the Soviet Union had no land frontier, they had concluded an agreement on frontier traffic.

31. Mr. AGO thought that that last point should be mentioned in the commentary to article 22. That article should not be interpreted as applying only to traffic across a land frontier. It was obvious, for example, that there was frontier traffic between Italy and Tunisia across the Sicilian channel and between Italy and Switzerland across Lake Lugano.

32. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer article 22 to the Drafting Committee for examination in the light of the comments and suggestions made during the debate.

*It was so agreed.*<sup>18</sup>

ARTICLE 23 (The most-favoured-nation clause in relation to rights and facilities extended to a land-locked State)

33. The CHAIRMAN invited the Special Rapporteur to introduce article 23, which read:

*Article 23. The most-favoured-nation clause in relation to rights and facilities extended to a land-locked State*

1. A beneficiary State other than a land-locked State is not entitled under the most-favoured-nation clause to rights and facilities extended by the granting State to a land-locked third State to facilitate its access to and from the sea.

2. A land-locked beneficiary State is entitled under the most-favoured-nation clause to the rights and facilities extended by the granting State to a land-locked third State and relating to its access to and from the sea only if the most-favoured-nation clause relates especially to the field of access to and from the sea.

34. Mr. USHAKOV (Special Rapporteur) said that article 23 was based on State practice and on international instruments of a more or less universal character. The prescribed exception to application of the most-favoured-nation clause related to rights and facilities extended to a land-locked State to facilitate its access to and from the sea.

34. Paragraph 1 of article 23, which corresponded to paragraph 1 of article 22, provided that a beneficiary State other than a land-locked State was not entitled under the most-favoured-nation clause to rights and facilities extended by the granting State to a land-locked third State to facilitate its access to and from the sea. Under paragraph 2, two conditions must be met for a beneficiary State to be able to acquire such rights and facilities: the State must be a land-locked State and the most-favoured-nation clause it had concluded with the granting State must relate especially to access to and from the sea. It was therefore by its own wish that the granting State agreed to extend to other land-locked States the rights and facilities it had accorded to a State in that category.

36. In its commentary to article 23, the Commission had explained that the exception provided for in article 23 had been proposed by Czechoslovakia, in 1958, at the Preliminary Conference of Land-locked States. In 1964, UNCTAD had adopted a principle according to which

The facilities and special rights accorded to land-locked countries in view of their special geographical position are excluded from the operation of the most-favoured-nation clause.<sup>19</sup>

The Third United Nations Conference on the Law of the Sea, which had not yet completed its work, was moving towards the adoption of a similar principle.

37. In drafting article 23, the Commission had not intended to take up the study of the rights and facilities that were needed by land-locked States or were due to them under general international law. It had wished to take account of the fact that 29 sovereign States, constituting one-fifth of the members of the international community, were land-locked, and that 20 of them were developing States, some of them among the least developed countries. It had considered that the principle set out in the article was now generally recognized.

38. One member of the Commission had pointed out that the Third United Nations Conference on the Law of the Sea might adopt other rules in favour of land-locked States. He had proposed that article 23 should not be limited to the right of access to and from the sea, but should extend to any treatment accorded to a third State by virtue of the fact that it was land-locked or otherwise geographically disadvantaged, unless the beneficiary State was itself so land-locked or otherwise geographically disadvantaged. The Commission had believed, however, that it would not be appropriate to pursue that question until the results of the Conference were known.

39. In the Sixth Committee, many representatives had approved article 23, sometimes mentioning international legal instruments or texts on which the article was based (A/CN.4/309 and Add.1 and 2, paras. 305 and 306). In their written comments, governments had approved the article, although Czechoslovakia had

<sup>18</sup> For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 76-79.

<sup>19</sup> *Yearbook... 1976*, vol. II (Part Two), p. 65, doc. A/31/10, chap. II, sect. C, art. 23, para. 2 of the commentary.

expressed doubts about the advisability of retaining paragraph 2 (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A). For reasons similar to those he had given in connexion with paragraph 2 of article 22, he considered that the paragraph should be retained.

40. Mr. TABIBI was strongly in favour of article 23, which should be referred to the Drafting Committee as it stood.

41. The matter dealt with in the article had been discussed in 1958 by the Preliminary Conference of Land-locked States, which he had attended. Subsequently, at its first session, UNCTAD had adopted eight principles relating to the transit trade of land-locked countries, the seventh of which had been reaffirmed in the preamble and in article 10 of the 1965 Convention on Transit Trade of Land-locked States. The matter had also been dealt with in the "revised single negotiating text" of the Third United Nations Conference on the Law of the Sea.<sup>20</sup>

42. He still wondered whether a single article was sufficient to cover the question of the share of the land-locked countries in the resources of the ocean, or whether some additional provision were not needed. He would not press that point, however, since it had been agreed that it should be left in abeyance.

43. The term "land-locked", although now in common usage, was not in fact in conformity with international law and he would have preferred the expression adopted by the First United Nations Conference on the Law of the Sea, namely, "States having no sea coast".<sup>21</sup> The term "land-locked" implied that some countries had no sea. That was not so; they had no sea coast, but the sea belonged to them just as much as to all other States, as was shown by the fact that their merchant ships plied the oceans of the world. To persist in using the term "land-locked" was to refuse to recognize the legal rights and the heritage of those countries. The term should therefore be changed, or at the least should be explained in the definitions.

44. Mr. AGO observed that the expression "Etat sans littoral", used in the French version of article 23, should satisfy Mr. Tabibi.

45. With regard to certain comments made by governments, he wished to dispel a misunderstanding. There was no reason to await the results of the Third United Nations Conference on the Law of the Sea. The Conference was to draw up the general rules of international law applicable to land-locked States, but those rules might not be the same tomorrow as today. The Commission, for its part, had to consider what rights and facilities particular treaties might grant to land-locked States in addition to those to which they

were entitled under general international law. It was precisely those additional rights and facilities which, if they were extended by the granting State to a land-locked third State, could be claimed by a land-locked beneficiary State only if the most-favoured-nation clause expressly so provided. Article 23 had been drafted in the same spirit as article 20; the rights and facilities extended to a land-locked State, in addition to those to which it was entitled under general international law, were extended *intuitu personae*. It followed that paragraph 2 of article 23 should be retained. Otherwise, when a State having common frontiers with several land-locked States extended special rights to one of them, those rights would no longer afford any advantage since, through the operation of the most-favoured-nation clause, they would automatically have to be extended to all the other contiguous land-locked States. Although Italy, by reason of its special relations with Switzerland, granted that country certain facilities, it could not be expected to accord them to other land-locked States through the operation of a general most-favoured-nation clause. Article 23 should therefore be retained as it stood.

#### Co-operation with other bodies (*continued*)\*

[Item 11 of the agenda]

46. The CHAIRMAN said that it was his privilege, on behalf of all the members of the Commission, to extend a very warm welcome to Mr. Sen, Secretary-General of the Asian-African Legal Consultative Committee, and to Mr. Alsayed, Secretary-General of the Arab Commission for International Law.

#### STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

47. The CHAIRMAN invited Mr. Sen, Observer for the Asian-African Legal Consultative Committee, to address the meeting.

48. Mr. SEN (Observer for the Asian-African Legal Consultative Committee) wished first to convey the apologies of the Asian-African Legal Consultative Committee for having been unable to be represented at the twenty-eighth and twenty-ninth sessions of the Commission, especially in view of the increasing co-operation between the two bodies on their common objective of fostering the growth of an international law acceptable to both developed and developing nations. It was gratifying that so many members of the Commission had been closely associated with the work of the Committee, and in that connexion it was pertinent to mention the active contribution made over the years by Mr. Dadzie, Mr. El-Erian, Mr. Jagota, Mr. Njenga, Mr. Pinto and Mr. Tabibi. Moreover, at its nineteenth session, held in Doha (Qatar), the Committee had been privileged to welcome Mr. Francis, who had attended the session on behalf of the Commission.

<sup>20</sup> *Ibid.*, paras. (1) to (4) of the commentary.

<sup>21</sup> See *Official Records of the United Nations Conference on the Law of the Sea*, vol. II, *Plenary Meetings* (United Nations publication, Sales No. 58.V.4, vol. II), p. 88, Annexes, doc. A/Conf. 13/L.11, para. 26.

\* Resumed from the 1475th meeting.

49. The Committee's membership programme of activities had expanded year by year and its work had been gradually oriented towards providing assistance to the governments of the region in carrying out their growing role in the development of international law and international relations. During the first 10 years of its existence, the Committee had proved its value to the governments of member countries, most of them newly independent, by making recommendations on major topics requiring attention at the time, such as diplomatic relations, immunity of States in respect of commercial transactions, extradition of fugitive offenders, status and treatment of aliens, dual or multiple nationality, legality of nuclear tests and rights of refugees. In the following 10 years, the scope of the Committee's functions had come to include the rendering of assistance to member countries and to other Asian and African governments in their preparations for various diplomatic conferences convened by the United Nations and its agencies. Relations had also been established on a regular basis with UNCITRAL and UNCTAD and a standing sub-committee had been set up to examine all trade law questions of interest to the region. For the previous three years, the secretariat had also been performing certain advisory functions relating to the problems of member governments.

50. The Committee's session at Kuala Lumpur, in 1976, had been attended by observer delegations from 22 non-member governments as well as by observers from the United Nations and other international organizations. The number of observer delegations from non-member governments had increased to 33 at the session held at Baghdad and to 35 at the session at Doha. At each of those three sessions, the United Nations had been represented by Mr. Zuleta, special representative of the Secretary-General at the Third Conference on the Law of the Sea, and, in accordance with the usual practice, observer delegations had participated in the deliberations of the Committee and in informal meetings.

51. The priority topic at those sessions had been the law of the sea, on which the Committee had begun work in 1971, with a view to assisting both member and non-member governments in their preparations for the Third United Nations Conference on the Law of the Sea. The Committee had prepared extensive documentation and background material and several proposals for the Conference, such as those relating to the exclusive economic zone; moreover, the concept of archipelagos had originated in the Committee's deliberations. At the Kuala Lumpur session, the discussion had centred on the provisions of the revised single negotiating text and more especially on the exploration and exploitation of the resources of the sea-bed area outside national jurisdiction. At the Baghdad session, an attempt had been made to reconcile the differences in approach between the Group of 77 and developed countries. One important trend noted at that session had been the willingness of a large number of delegations to consider ways and means of reaching a compromise solution, prov-

ided the basic principle that the sea bed was the common heritage of mankind were not placed in jeopardy. At the Doha session, discussions had continued on the system of exploitation of the sea-bed area, the financing of the Enterprise and financial arrangements with contractors, and questions concerning the rights and interests of land-locked and geographically disadvantaged States.

52. In accordance with the provisions of its statutes, which required it to examine all questions under consideration by the Commission, the Committee had prepared for its Baghdad session a study on succession of States in respect of treaties. It had noted that the draft articles prepared by the Commission<sup>22</sup> were largely acceptable, but had drawn the attention of member governments of the Committee to certain aspects of article 2, paragraph 1 (f), and of articles 6, 7, 11, 12, 15, 16, 18, 29, 30 and 33, to Mr. Ushakov's proposal on multilateral treaties of a universal character,<sup>23</sup> and to a proposal on the settlement of disputes<sup>24</sup> that had been placed before the Commission at its twenty-sixth session. The topic had been further discussed at the Doha session in the light of the views expressed at the first session of the United Nations Conference on Succession of States in respect of Treaties, held at Vienna in 1977.

53. Territorial asylum, another topic of considerable importance, had been discussed at the Kuala Lumpur session in preparation for the conference held at Geneva in 1977. The Committee had considered two draft conventions in some detail, and comments on the drafts had been prepared and submitted to member governments.

54. In regard to trade law, great progress had been made at the Kuala Lumpur session on international commercial arbitration, the international sale of goods and the carriage of goods by sea, and major recommendations on those subjects had been adopted at the Baghdad and Doha sessions.

55. In regard to commercial arbitration, the Committee had recommended the use of the UNCITRAL Arbitration Rules<sup>25</sup> in *ad hoc* arbitrations; it had also recommended that UNCITRAL should consider preparing a protocol to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>26</sup> with a view to clarifying certain matters that had raised difficulties. Following a decision to promote the establishment of arbitration centres as part of an integrated system for the settlement of commercial disputes, a regional centre had been set up at Kuala Lumpur in April 1978, negotiations were taking place to establish another centre at Cairo and consideration was being given to setting up a third centre, in an African country. The purposes of the

<sup>22</sup> *Yearbook... 1974*, vol. II (Part One), pp. 174 *et seq.*, doc. 9610/Rev.1, chap. II, sect. D.

<sup>23</sup> *Ibid.*, pp. 172 and 173, doc. A/9610/Rev.1, foot-note 57.

<sup>24</sup> *Ibid.*, pp. 173 and 174, foot-note 58.

<sup>25</sup> *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17)*, chap. V, sect. C.

<sup>26</sup> United Nations, *Treaty Series*, vol. 330, p. 3.

centres were, *inter alia*, to promote international commercial arbitration in the region, to co-ordinate the activities of existing arbitral bodies and to assist in the conduct of *ad hoc* arbitrations and the enforcement of arbitral awards. Two model contracts had been prepared for use in the international sale of certain commodities, and steps were being taken to circulate them as widely as possible to the appropriate organizations. Considerable assistance had been received from ECE in preparing the forms. In addition, the Committee had prepared comments on the draft of the United Nations Convention on the Carriage of Goods by Sea.

56. Other matters under consideration included certain aspects of the law on the environment and reciprocal assistance in the prosecution and prevention of economic offences; and the Committee would, of course, prepare notes and comments on the topics now being examined by the Commission. Arrangements had also been made for a special meeting of legal advisers of member governments, under the chairmanship of Mr. Jagota, to permit an exchange of views on the organization of legal advisory services and on methods and techniques for dealing with problems of international law. It was the Committee's intention that consultations of that nature, which had proved extremely fruitful, should be continued.

57. In the past year, official relations had been established between the Asian-African Committee and the European Committee on Legal Co-operation, and ties with the Inter-American Juridical Committee had been further strengthened. It was gratifying that closer links had been achieved among the regional organizations enjoying observer status with the Commission. He had attended a session of the European Committee on Legal Co-operation, and it had been interesting to note the similarity in the approach adopted by the two bodies, even though the work of the European Committee served a group of highly developed countries, whereas the work of the Asian-African Legal Consultative Committee related primarily to developing countries. He had been able to discuss various matters of mutual interest with the President of the Inter-American Juridical Committee during a visit to Brazil, and discussions had also been held on future co-operation between the Asian-African Committee and OAS.

58. He wished to conclude by expressing the Committee's gratitude to the Commission for its continued co-operation and support, which had made it possible for the Committee to play an effective part in furthering the common objective of establishing the international legal order envisaged in the Charter of the United Nations.

59. The CHAIRMAN said that it was gratifying to note the continuing progress in co-operation between the Commission and the Committee and the stronger ties between the Committee and other regional organizations concerned with international law. Particularly striking was the Committee's practical approach to its work and the way in which it sought to help

Asian and African governments in their preparations for diplomatic conferences such as the Conference on the Law of the Sea, the Conference on Territorial Asylum and the Conference on Succession of States in respect of Treaties. It had also been very interesting to hear of the Committee's close contacts with UNCITRAL and the establishment of international arbitration centres, which would certainly be of very great assistance to the member countries. It only remained for him to thank Mr. Sen for his statement and to express the hope that co-operation between the Commission and the Asian-African Committee would prove even more fruitful in the future.

STATEMENT BY THE OBSERVER FOR THE ARAB  
COMMISSION FOR INTERNATIONAL LAW

60. The CHAIRMAN invited Mr. Alsayed, Observer for the Arab Commission for International Law, to address the meeting.

61. Mr. ALSAYED (Observer for the Arab Commission for International Law) conveyed the greetings of the Secretary-General of the League of Arab States and his sincere wishes for the continued success of the Commission's work. The codification and progressive development of international law was a task of the utmost importance and it was the firm conviction of all those who believed in and worked for a sound international order that the Commission would contribute to the strengthening of the rule of law among nations, as an instrument for the maintenance of peace and security and the promotion of justice and progress.

62. The Commission's decision to respond favourably to the request of the Secretary-General of the League of Arab States had been greatly appreciated by the League and by its legal bodies. The Council of the League had adopted a resolution on 8 September 1977 to establish a "commission for international law on the Arab level" and had decided to seek representation of the newly established body at the meetings of the International Law Commission under arrangements similar to those made for other organizations engaged in the codification and progressive development of international law at the regional level.

63. Long before the establishment of the Arab Commission for International Law, other organs of the League of Arab States had undertaken intensive work in the legal sphere. The Charter of the League, drawn up in 1945, had specified that the Council of the League should establish a permanent committee responsible for legal matters. In the sphere of international law and international organizations, the legal committee had prepared a number of drafts of conventions concluded under the auspices of the League, such as the Headquarters Agreement, the General Convention on Privileges and Immunities, the Convention on Extradition and the Convention for Judicial Assistance and Execution of Judgements. It had also initiated the preparation of a number of legal studies and publications such as a treaty series and a legislative series.

64. The legal bodies of the Arab League had followed the International Law Commission's work with great interest. The conventions concluded on the basis of drafts prepared by the Commission were landmarks in the codification and progressive development of international law. Naturally, the Arab Commission was paying close attention to the current consideration of such important topics as State responsibility, succession of States in respect of matters other than treaties, the most-favoured-nation clause, treaties between States and international organizations or between two or more international organizations, and the law of the non-navigational uses of international watercourses. He also felt bound to express his appreciation of the valuable work of the Codification Division.

65. Co-operation between the International Law Commission and the Arab Commission would undoubtedly assist the latter in the fulfilment of its objectives and he had the honour to extend to the Chairman an invitation to attend the next session of the Arab Commission for International Law.

66. The CHAIRMAN thanked Mr. Alsayed for his very interesting statement, from which the Commission had learned much about the legal work done under the auspices of the League of Arab States. It was indeed very encouraging to hear of the close interest shown in the Commission's work. Unquestionably, co-operation between the Arab Commission and the International Law Commission would prove to be of great value and he was most grateful for the kind invitation to attend the first session of the Arab Commission for International Law.

67. Mr. FRANCIS wished to express his gratitude to Mr. Sen for the courtesy shown to him when he had attended the session of the Asian-African Legal Consultative Committee held at Doha. He had been impressed not only by the organization and conduct of the session, but also by the very high quality of the discussions. The Committee was certainly doing extremely valuable work for the Asian and African regions. The establishment of the Arab Commission for International Law also augured well for the future. Mr. Alsayed would certainly become a familiar figure to the members of the International Law Commission and, as an Arab and an African, he too could take pride in the achievements of the session of the Asian-African Legal Consultative Committee held in Qatar.

68. Mr. TABIBI, speaking on behalf of the Asian members of the Commission, congratulated Mr. Sen and Mr. Alsayed on their excellent statements. The devotion of Mr. Sen to the cause of international law had done much to increase the membership of the Asian-African Legal Consultative Committee, a body that rendered great service to Asian and African governments. The presence of Mr. Alsayed was also most welcome, for Arab jurists had made important contributions not only to the work of the Commission, but also to that of the International Court of Justice. The establishment of the Arab Commission for International Law could not fail to further the work un-

dertaken on the codification and development of international law.

69. Sir Francis VALLAT, speaking on behalf of the Western members of the Commission, said that it was a particular pleasure to join in expressing gratitude and appreciation to Mr. Sen and Mr. Alsayed and to do so after Mr. Tabibi, for it was during Mr. Tabibi's chairmanship of the Commission that new emphasis had been laid on the Commission's relations with regional bodies. The presence of the representatives of such bodies at meetings of the Commission was of enormous assistance, because there was no real substitute for personal contact. He wished to express sincere thanks for the very valuable statements made by Mr. Sen and Mr. Alsayed and was especially pleased that it had been his privilege to be able to inform the Commission, at the beginning of the session, of the request made by the League of Arab States that special relations be established between the Arab Commission for International Law and the International Law Commission.

70. Mr. CASTAÑEDA, speaking on behalf of the Latin American members of the Commission, thanked Mr. Sen and Mr. Alsayed for their statements. The Asian-African Legal Consultative Committee had done extremely valuable work, which had obviously had a great impact on the deliberations of the United Nations Conference on the Law of the Sea. Fortunately, he had had an opportunity to appreciate its work when attending the sessions held in Tokyo and Delhi. It was particularly satisfying to note the strengthening of the ties between the Asian-African Committee and the Inter-American Juridical Committee.

*The meeting rose at 1 p.m.*

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## 1498th MEETING

*Monday, 12 June 1978, at 3 p.m.*

*Chairman* : Mr. José SETTE CÂMARA

*Members present* : Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

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The most-favoured-nation clause (*continued*) (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2, A/CN.4/L.264-266)

[Item 1 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (*continued*)

ARTICLE 23 (The most-favoured-nation clause in relation to rights and facilities extended to a land-locked State)<sup>1</sup> (concluded)

1. Mr. DADZIE said that, in view of the fundamental importance of the right of land-locked States to free access to the sea, which derived from the principle of the freedom of the high seas, it was essential that the articles on the most-favoured-nation clause should provide for an exception under which that special right of land-locked States was recognized, so as to take account of their natural geographical position. He was therefore quite certain that the rule stated in article 23 would be welcomed by all 29 of the land-locked States, 20 of which were developing countries and 12 of which were located in Africa. It would also be welcomed by the coastal States in Africa that had agreed to provide their less fortunate neighbours with access to the sea.

2. At the previous meeting, Mr. Tabibi had drawn attention to the inappropriateness of the term "land-locked". Although the Commission could certainly rely on Mr. Tabibi, who had made tireless efforts on behalf of the land-locked States, to advise it on that point, his own view was that the expression had now become a term of art and that the interests it served constrained the Commission to retain it. Perhaps the Drafting Committee might look into the matter.

3. Mr. NJENGA said that, although he had no real difficulty with article 23, he thought its provisions should be brought into line with those of part X of the draft convention on the law of the sea, contained in the "Informal Composite Negotiating Text",<sup>2</sup> which was being discussed at the Third United Nations Conference on the Law of the Sea. That part of the Informal Composite Negotiating Text had not yet been adopted, but it commanded the broad support of both land-locked and transit States. In particular, he drew attention to article 126 of the draft convention, which read:

Provisions of the present Convention, as well as special agreements relating to the exercise of the right of access to and from the sea, establishing rights and facilities on account of the special geographical position of land-locked States, are excluded from the application of the most-favoured-nation clause.

Thus, whereas that article provided for total exclusion from the application of the most-favoured-nation clause, article 23 of the draft under consideration excluded only States other than land-locked States. There was no reason, however, why facilities accorded under an agreement between Kenya and Uganda, for example, should not be denied to a land-locked State in Europe in the same way as to any coastal State in Africa. He therefore proposed that the beginning of paragraph 1 of article 23 should be amended to read: "A beneficiary State other than a land-locked State in the region or subregion...". That wording would help to lighten some of the burdens

placed on transit States when they accorded facilities to land-locked States.

4. He also proposed that the definition of a land-locked State as "a State which has no seacoast", contained in article 124, paragraph 1 (a), of the draft convention on the law of the sea, should be included in the draft before the Commission.

5. Mr. EL-ERIAN recalled that not only had article 23 been approved by many representatives in the Sixth Committee, as the Special Rapporteur had pointed out (A/CN.4/309 and Add.1 and 2, para. 305), but the underlying principle of the article was also embodied in the 1965 Convention on Transit Trade of Land-locked States,<sup>3</sup> and the article was to some extent based on principle VII, adopted by UNCTAD at its first session.<sup>4</sup> It was also in line with the special measures for land-locked countries adopted at the fifth Conference of Heads of State or Government of Non-Aligned Countries.

6. As Mr. Dadzie had stressed, the right of land-locked States to access to and from the sea was based on the principle of the freedom of the high seas. It was also based on the principles of international solidarity and equity, and article 23 was designed to surmount some of the difficulties experienced by certain countries by reason of their geographical situation. Hence he fully supported that article.

7. He shared Mr. Dadzie's view that it would not be appropriate for the Commission to reconsider the use of the term "land-locked State", which had become a term of art.

8. Mr. CASTAÑEDA fully supported both the substance and the wording of article 23. He welcomed the fact that the Special Rapporteur had limited the application of the article to rights and facilities extended to land-locked States to facilitate their access to and from the sea, and had not agreed with the proposal of one member of the Commission that it should also apply to the right of land-locked States to participate in the exploration and exploitation of the living resources of the economic zones of coastal States. Acceptance of that proposal would have made it practically impossible to apply the future convention on the law of the sea. The Special Rapporteur had also been right to avoid the temptation to include a reference to geographically disadvantaged States in article 23.

9. The most-favoured-nation clause was very difficult to apply in matters other than trade, and particularly in matters relating to the right of land-locked States to access to and from the sea, because conditions differed enormously from one region to another. Consequently, Mr. Njenga had perhaps been right in suggesting that the application of article 23 should be limited to land-locked States belonging to the same region or subregion.

<sup>1</sup> For text, see 1497th meeting, para. 33.

<sup>2</sup> *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. VIII (United Nations publication, Sales No. E. 78.V.4), p. 1, doc. A/CONF.62/WP.10.

<sup>3</sup> See 1489th meeting, foot-note 4.

<sup>4</sup> See *Yearbook... 1976*, vol.II (Part Two), p. 65, doc. A/31/10, chap. II, sect. C, art. 23, para. (2) of the commentary.

10. Mr. SUCHARITKUL also considered that the special relationships that might exist between States varied from country to country and from region to region. He therefore agreed with Mr. Njenga that the exception to the application of the most-favoured-nation clause should cover only rights and facilities extended to land-locked States in the same region or subregion with a view to improving their access to and from the sea; that would amount to providing, in article 23, for an exception to the exception. For example, it was inconceivable that Zambia should claim the same rights and facilities as were extended by Thailand to Laos, because the agreement between Thailand and Laos would necessarily specify the transit routes. Perhaps, therefore, the Commission should consider the concept of geographical proximity in order to take account of the fact that relations between States might vary. In that connexion, he pointed out that Malaysia and Thailand were now in the same position vis-à-vis Viet Nam because of their continental shelf in the Gulf of Thailand, and that Japan and China had become contiguous States because of their continental shelf. It was also necessary to consider the position of States like Singapore, which was not only an island, but nearly surrounded by foreign air-space. It was thus clear that, if the Commission decided to retain article 23 as it stood, States would have to be very cautious in agreeing to most-favoured-nation clauses.

11. Mr. JAGOTA fully supported the retention of article 23, which made an exception for the rights of a beneficiary State other than a land-locked State in respect of the special advantages that might be accorded to a land-locked State by another State to facilitate its access to and from the sea.

12. At the previous meeting, Mr. Tabibi had described recent developments in the law relating to the rights of land-locked States and, in particular, the efforts of those States to expand their trade and obtain access to the resources of the sea. In article 23, however, the Commission was not concerned with the substance of those rights; it was concerned only with the principle that, under a most-favoured-nation clause, a beneficiary State other than a land-locked State would not be entitled to certain rights or facilities that were extended to a land-locked State. In his opinion, that principle was well conceived and should be protected and defended.

13. Mr. Tabibi had suggested that the Commission should enlarge the scope of article 23 by referring to recent developments in the law relating to the resources of the sea. But although the United Nations Conference on the Law of the Sea had made good progress, for example, on the question of the fishing rights of land-locked States in the economic zones of coastal States, nothing had yet been embodied in a generally agreed United Nations document or would take such a form until the Conference had completed its negotiations and reached a consensus on a number of interrelated issues. It would therefore be advisable for the Commission to wait until those developments had crystallized before, as Mr. Njenga had

suggested, trying to bring article 23 into line with the provisions adopted by the Conference on the Law of the Sea.

14. With regard to the term "land-locked State", he agreed with Mr. Tabibi that it had a negative connotation, whereas the intention was simply to indicate a State that had no access to the sea. He considered, however, that the problem had been adequately resolved in the 1965 Convention on Transit Trade of Land-locked States and in the Informal Composite Negotiating Text of the Conference on the Law of the Sea, in which the term "land-locked State" was used and defined. If a definition of the term were needed in the Commission's draft, it could be included as a foot-note to article 23.

15. Lastly, he supported Mr. Njenga's suggestion that the Drafting Committee should consider article 23 in the light of article 126 of the Informal Composite Negotiating Text, provided that no changes were made in the basic provisions now contained in article 23.

16. The CHAIRMAN, speaking as a member of the Commission, supported the existing text of article 23, which fully covered all the situations the Commission had in view. He did not think it need be feared that land-locked States outside a particular region might claim the same rights and facilities as land-locked States within that region. The wording of article 25 made it quite clear that the rights and facilities extended by the granting State to the land-locked State were extended only in order to facilitate its access to and from the sea.

17. If there were no objections, the Chairman would take it that the Commission agreed to refer article 23 to the Drafting Committee for consideration in the light of the comments made during the discussion.

*It was so agreed.*<sup>5</sup>

#### PROPOSED NEW ARTICLES

ARTICLE 23 *bis* (The most-favoured-nation clause in relation to treatment extended by one member of a customs union to another member)

18. The CHAIRMAN invited Sir Francis Vallat to introduce his proposal for a new article 23 *bis* (A/CN.4/L.267), which read:

*Article 23 bis. The most-favoured-nation clause in relation to treatment extended by one member of a customs union to another member*

A beneficiary State other than a member of a customs union is not entitled under a most-favoured-nation clause to treatment extended by the granting State as a member of the customs union to a third State which is also a member.

<sup>5</sup> For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 80-91.

19. Sir Francis VALLAT, introducing his proposal for a new article 23 *bis*, said that it came within the same general category as articles 22 and 23. The examination of his proposal immediately after articles 22 and 23 thus placed the customs union issue in its proper perspective.

20. A customs union was an international institution, the use of which was now extremely widespread and that took various forms in different parts of the world. It had been his impression, from the commentary to article 15,<sup>6</sup> that there was a rather negative attitude towards customs unions—something that should be avoided when the commentary on that issue was revised. The commentary stressed the lack of evidence of a general exception in favour of customs unions, but did not say much about the lack of evidence of successful claims for most-favoured-nation treatment from members of customs unions. In fact, the general experience had been that States with most-favoured-nation clauses had not wished such clauses to constitute obstacles to States intending to join a customs union or other similar associations of States. That was a point that should be made in the commentary. The commentary should also place more emphasis on the widespread use of customs unions and free-trade areas in the modern world, for the task of developing countries would be greatly facilitated if they knew that they did not have to be concerned in any way with the effect of most-favoured-nation clauses on steps taken towards integration in matters of trade and customs. Article 23 *bis* contained a clear-cut legal test that could be used to determine when a State was entitled to relief from a most-favoured-nation clause.

21. Reason would seem to be entirely on the side of the inclusion in the draft articles of a provision such as the one he was now proposing, but whether it should take the form of an exception was less clear. Article 23 *bis* dealt with the effect of some sort of abstract and ideal most-favoured-nation clause. Accordingly, an exception for customs unions seemed quite natural, and it would require very clear language in an agreement to show that, by granting most-favoured-nation treatment, a State intended to debar itself from entering into a customs or other type of union with other States in the future. The treatment accorded to a member as such was of a different order from the treatment simply extended to a third State as such. Although he doubted whether the Commission was engaging in the progressive development of international law in discussing customs unions, he thought it should move with the times and take account of the trend towards integration in matters of trade and customs, even if that involved an element of progressive development.

22. He had drafted article 23 *bis* in the style of the other articles to which it was related and it was thus open to as much improvement as they were. For example, he did not think it was accurate to say that

a State was entitled to “treatment extended”; rather, it was entitled to “treatment not less favourable than”. Such drafting problems, however, could be dealt with by the Drafting Committee.

23. It might be asked exactly what a customs union was. The problem of definition was not, however, insuperable, if, indeed, a definition were necessary at all. It was certainly less difficult to define a customs union than to define a “developing” or a “developed” country, or “frontier traffic”. “Frontier traffic” was a very elastic term, that could almost be extended to cover the content of draft article 23 *bis*, since a customs union involved an area in which goods moved freely and in which the States concerned were nearly always contiguous. Article 23 *bis* was thus closely linked to article 22 and, in a sense, a natural extension of it. The Commission might therefore find it more logical to place article 23 *bis* after article 22.

24. Mr. USHAKOV (Special Rapporteur) suggested, in connexion with article 23 *bis*, that the Commission should consider the comments made by Member States and international organizations on article 15, since those comments related not so much to article 15 itself as to the exceptions to be included in the draft articles for certain economic unions.

25. In the Sixth Committee, in 1976, some representatives had spoken in favour of including in the draft articles a rule establishing a general exception to the principle of the application of the most-favoured-nation clause in the case of customs unions and other associations of States; others had opposed the introduction of such a rule (A/CN.4/309 and Add.1 and 2, paras. 178 *et seq.*).

26. In their written comments, some States, for example the Byelorussian SSR, the German Democratic Republic, Hungary and the USSR (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A), had opposed the inclusion of an exception to the operation of the most-favoured-nation clause in the case of customs unions and similar associations. Others, for example Guyana, Luxembourg and Sweden (*ibid.*), had favoured such an exception.

27. Among the international organizations, the secretariat of GATT (*ibid.*, sect. C, 3) had considered that the question of the application of the clause in the case of economic unions should be the subject of negotiations in specialized international organizations, and hence did not lend itself easily to codification at that stage.

28. ECWA was in favour of including a stipulation that the clause did not refer to “intro-customs union treatment” (*ibid.*, sect. B). The Board of the Cartagena Agreement also advocated making “exceptions from the general rule in the cases of customs unions, free-trade areas and other similar associations of States, as in the General Agreement on Tariffs and Trade” (*ibid.*, sect. C, 4).

29. EEC, for its part, whose position was shared by the Netherlands (*ibid.*, sect. A), considered that con-

<sup>6</sup> See 1483rd meeting, foot-note 1.



firmation of an exception for customs unions could be found in both the practice and the doctrine of States and that, even if a normal rule to that effect and the current practice of governments did not exist, international law should establish such an exception. It therefore proposed supplementing articles 15 and 16 with a new article 16 *bis*, establishing an exception to the application of the most-favoured-nation clause for "in particular economic unions, customs unions or free-trade areas" (*ibid.*, sect. C, 6, para. 11).

30. In his opinion, a generally recognized exception to the operation of the most-favoured-nation clause in the case of economic unions of States did not currently exist in international law. That could be seen from the Commission's commentary to article 15. Admittedly, many exceptions of that kind were to be found in treaties containing a most-favoured-nation clause or in the clause itself. But did that prove that such exceptions were admitted as a general rule, that it was consequently unnecessary to include them in treaties containing a most-favoured-nation clause and that customs unions were automatically excluded from application of the clause? The Commission had answered that question in the negative and he took the same position. If it could be concluded from the frequent examples of exceptions to the clause that such exceptions formed a customary rule, the same conclusion must be drawn in regard to the clause itself, which was much more common in treaties than the exceptions. However, the fact that the most-favoured-nation clause was found in so many treaties did not prove that it constituted a generally accepted customary rule. Indeed, as the Commission had pointed out in its commentary to article 6:

Although the grant of most-favoured-nation treatment is frequent in commercial treaties, there is no evidence that it has developed into a rule of customary international law.<sup>7</sup>

It was thus impossible to assert that an exception to the clause, which was less frequent than the clause itself, was a rule of customary international law.

31. However, even if an exception for economic unions did not exist as *lex lata*, it could be introduced into the draft articles as *lex ferenda*, for the progressive development of international law. In his report (A/CN.4/309 and Add.1 and 2, paras. 205-217), he had pointed out the difficulties that would confront any attempt to introduce such a rule into the draft articles. Answers would be needed to three questions: For which areas of the operation of the clause were exceptions in favour of economic unions of States necessary? For which specific economic unions of States and on what specific conditions should an exception to the clause be made? Was it sufficient to provide for exceptions only in the case of economic unions of States, or were other unions of States and certain economic agreements in a similar situation?

32. With regard to the first question, he thought it would be so difficult to determine the specific clauses

<sup>7</sup> *Yearbook... 1976*, vol. II (Part Two), p. 20, doc. A/31/10, chap. II, sect. C, art. 6, para. (3) of the commentary.

for which exceptions should be made in favour of economic unions that the only alternatives were to cover either all the clauses by exceptions or none at all.

33. As to the second question, he recalled that in the Commission's commentary the matter of exceptions for economic unions of States had been discussed under the heading "The case of customs unions and similar associations of States". The term "similar associations of States" was acceptable only inasmuch as it demonstrated the inadvisability of formulating exceptions. If exceptions were introduced in the draft, it would be necessary to draw up an exhaustive list of the economic unions to which they were to apply. In the oral and written comments, reference had been made to customs unions, free-trade areas, economic communities and regional and sub-regional integration. In addition to that list, it would be necessary to give a legal definition of each type of union to be covered by the exceptions. Unlike Sir Francis Vallat, he considered that such definitions would be indispensable. The General Agreement on Tariffs and Trade contained definitions of a customs union and a free-trade area. In the absence of such definitions, the exceptions for economic unions provided for under the General Agreement would not apply. For the purposes of the draft, it would be necessary to provide for much wider exceptions, covering all possible associations of States. If the Commission made exceptions for only type of economic union, other types would be placed at a disadvantage.

34. In regard to regional and subregional integration, it should be noted that not every type of integration called for exceptions to application of the clause. It was true that, in the case of EEC, economic integration required exceptions so that the treatment accorded to each other by two member States would not be extended to a non-member State through the operation of the most-favoured-nation clause; the same did not apply, however, to CMEA, since the economic integration of the socialist countries was based on different principles.

35. As to the third question, regarding the advisability of extending the exceptions to certain economic agreements that were in a similar situation to that of economic unions of States, the exceptions to obligations under the General Agreement on Tariffs and Trade were interpreted as relating not only to customs unions and free-trade areas but also to preliminary agreements leading to the establishment of a customs union or free-trade area. In the context of the draft, if the exceptions were to be of such wide scope, it would be necessary to define economic agreements of that kind, and that would not be easy.

36. Consequently, he thought it was almost impossible to draft a general clause on exceptions for economic unions of States. On the other hand, it was always possible, and relatively easy, to provide for exceptions in specific cases. The member States of an economic union usually had no difficulty in determining which existing clauses and the agreements containing them required revision to provide for ex-

ceptions, so that beneficiary States that were not members of the union would not be able to claim certain treatment extended by member States to one another. Similarly, a State that was about to become a member of an economic union would take care to include such an exception, where necessary, in the most-favoured-nation clauses it contracted as a granting State.

37. Turning to the proposed new articles, he pointed out that, in article 23 *bis*,<sup>8</sup> Sir Francis Vallat referred only to customs unions, although he had mentioned similar associations in his oral presentation of the article. An article of that type could not be confined to customs unions, since States and international organizations, in their oral and written comments, had mentioned a number of other types of economic union.

38. Article 21 *ter* proposed by Mr. Reuter (A/CN.4/L.265)<sup>9</sup> made an exception for treatment extended under commodity agreements. That was really an exception to article 15, under the terms of which the most-favoured-nation clause was applicable whether the treatment extended to the third State was extended under a bilateral or a multilateral agreement. Thus the purpose of article 21 *ter* was to exclude agreements governing the economic régime of a commodity. Hence that question should not be considered for the time being. Moreover, it might well be asked why an exception should be made for commodity agreements but not for agreements on manufactures or semi-manufactures. According to Mr. Reuter, article 21 *ter* should benefit developing countries. But in commodity trade the beneficiary State of a most-favoured-nation clause was normally a developing country, whereas the granting State was a developed country. It followed that the beneficiary State would not be able to claim, for its commodities, the advantages accorded by the granting State to third States on its own market. If the developed granting State was a party to a "universal" agreement but the developing beneficiary State was not, the latter would not be able to invoke the clause. If developing beneficiary States were to be benefited and protected, they would automatically have to become parties to such universal agreements. In addition, article 21 *ter* did not refer to regional agreements, although there was no reason why such agreements should not be placed on the same footing as universal agreements. Thus the proposed article would not achieve its purpose, which was to benefit developing countries.

39. As to article A proposed by Mr. Reuter (A/CN.4/L.264),<sup>10</sup> it belonged to the law of treaties. Under the terms of that article, a beneficiary State was not entitled to the treatment extended by a granting State under an agreement in conformity with the Charter of Economic Rights and Duties of States<sup>11</sup> if

the grant of the benefit of the clause was contrary to the object and purpose of such an agreement and if the agreement was universal. A provision of that kind would be feasible if all States accepted the principle that universal agreements must be in conformity with the Charter of Economic Rights and Duties of States. The Commission, however, could not propose such a rule, even in the context of the progressive development of international law. In his article, Mr. Reuter also proposed that the conformity of the agreement with the principles of the Charter of Economic Rights and Duties of States should be subject to review by an organ of the United Nations or an organization of a universal character belonging to the United Nations family. Such a proposal was not acceptable. Sovereign States could not be deprived of the right to interpret for themselves the agreements to which they were parties, even were that task to be entrusted to an organ of the United Nations. For that to be possible, the conformity of a universal agreement with the principles of the Charter of Economic Rights and Duties of States would have to be erected into a rule of *jus cogens*, which was far from being the case.

40. In brief, it was not possible to draft a general provision on exceptions for economic unions. The difficulties to which such unions might give rise in regard to the application of a most-favoured-nation clause could be overcome by means of exceptions made in each particular case, when the clause was negotiated.

41. Mr. TSURUOKA was similarly convinced that it would be useless to provide for exceptions for economic unions in the draft articles. The Commission had reached that conclusion after discussing the question at length. The main reason for its decision had been concern to avoid institutionalizing discrimination. When a State undertook to grant most-favoured-nation treatment, it undertook not to place the beneficiary State in a situation involving discrimination in relation to a third State. If the granting State was a member of an economic union and did not accord to the beneficiary State the treatment that it extended to a third State that was a member of the union, it committed an act of discrimination against the beneficiary State, and that was precisely what the most-favoured-nation clause was intended to prevent. It should not be forgotten that, in practice, a granting State that was a member of an economic union could try to persuade a non-member beneficiary State to forgo application of the clause to advantages granted within the union. Nothing in the draft prevented it from doing so. Moreover, in commerce a practice had developed along those lines. Admittedly, it was sometimes difficult to persuade the beneficiary State to agree to such an exception to the operation of the clause, but granting States usually succeeded, for example by providing for prior consultation procedure, to be applied before the beneficiary State was finally deprived of an advantage granted within a union.

42. Practical reasons also militated against any exceptions to the application of the clause in the case

<sup>8</sup> See para. 18 above.

<sup>9</sup> See 1495th meeting, para. 22.

<sup>10</sup> *Ibid.*, para. 23.

<sup>11</sup> General Assembly resolution 3281(XXIX).

of economic unions. It would be difficult to define a customs union precisely and to distinguish advantages accorded within such a union from those extended outside it. The difficulties increased when a customs union became an economic union, which might in turn become a political union. There was nothing to prevent such developments, but they should not harm a beneficiary State that remained outside the union.

43. Lastly, he emphasized the importance of articles 25 and 26 in that connexion. The purpose of those provisions was to avoid hindering the development of unions of States, without prejudice to the obligations assumed by the granting State towards the beneficiary State, in accordance with the great principle *pacta sunt servanda*.

44. Mr. CALLE y CALLE said that the subject of Sir Francis Vallat's proposed new article 23 *bis* was a controversial one that had given rise to differences of opinion in the Commission and in the Sixth Committee of the General Assembly.

45. Many States that participated in customs unions and integration schemes were reluctant to accept the general idea underlying article 15 (Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement), namely, that the source of the treatment extended to a third State in no way affected the automatic and unrestricted application of the most-favoured-nation clause.

46. International organizations did not support that idea either. The GATT secretariat, for instance, after noting in its comments that the draft did not refer to customs unions, free-trade areas or similar groupings, had stated that it assumed that the Commission, in its further work, would take account of the developments that had taken place in that connexion (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 3). In other words, it considered that the Commission should not disregard an international reality—a need felt by countries, particularly developing countries, that were seeking to promote their development through customs unions and integration schemes.

47. On the other hand, it had been said that State practice in fact excepted customs unions and integration schemes from the application of the clause, because it was an obstacle to their satisfactory operation. The weight of doctrine was clearly in favour of such an exception. As far back as 1936, the Institute of International Law had referred to customs unions as a necessary exception,<sup>12</sup> and in 1969 it had stated in unequivocal terms that a beneficiary State should not be able to invoke the clause to claim treatment identical with that granted to one another by States participating in a regional integration scheme.<sup>13</sup> One of the alternative articles relating to customs unions

and free-trade areas proposed by the late Mr. Hambro<sup>14</sup> had been on those lines.

48. Furthermore, EEC, in its comments, had expressed the view that the exception in question was a customary rule, but had added that, if no such exception existed, it would have to be established (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 10). The Commission thus had to decide whether to establish such an exception by embodying it in the draft.

49. He agreed that a more balanced approach was needed in the commentary to article 15, which suggested that it was impossible to cover or provide for the kind of situation in question. After all, it was States that would conclude agreements containing the clause, and it was when they did so that the scope of the provisions agreed upon would be decided. That was particularly true because the convention would apply to all future treaties containing the clause.

50. In his view, therefore, the Commission should give the closest consideration to the proposed article 23 *bis*, which would meet a real need and satisfy the aspirations of States as expressed in the Sixth Committee of the General Assembly and reflected in their written comments. The article would also dispel some of the concern expressed by members of the Commission.

*The meeting rose at 6.15 p.m.*

<sup>14</sup> See *Yearbook... 1976*, vol. II (Part One), p. 135, doc. A/CN.4/L.242.

## 1499th MEETING

*Tuesday, 13 June 1978, at 9.35 a.m.*

*Chairman*: Mr. José SETTE CÂMARA

*Members present*: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

**The most-favoured-nation clause (*continued*) (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2, A/CN.4/L.264-266)**

[Item 1 of the agenda]

PROPOSED NEW ARTICLES (*continued*)

ARTICLE 23 *bis* (The most-favoured-nation clause in relation to treatment extended by one member of a customs union to another member)<sup>1</sup> (*continued*).

<sup>12</sup> *Yearbook... 1969*, vol. II, p. 180, doc. A/CN.4/213, annex II, resolution, para. 7.

<sup>13</sup> *Annuaire de l'Institut de droit international*, 1969, Basel, vol. 53, t. II, p. 379.

<sup>1</sup> For text, see 1498th meeting, para. 18.

1. Mr. SUCHARITKUL said that with Sir Francis Vallat's proposed new article 23 *bis* the Commission had arrived at a crossroad. Whichever path it chose, however, customs unions, which had been in existence for 150 years, were a fact and would remain so, whether the proposed new article were adopted or not.

2. He had been favourably impressed by Mr. Njenga's proposal for a new article 21 *bis*,<sup>2</sup> as amended in accordance with the Chairman's proposal,<sup>3</sup> but considered that it was still not sufficiently comprehensive, as it covered trade matters only and did not extend to other forms of economic co-operation.

3. Customs unions and other forms of economic integration reflected a sophisticated level of economic development to which it was difficult for the countries of Asia, Africa and Latin America, many of which had only recently attained independence, to attain. Consequently, he considered it necessary, while preserving the most-favoured-nation clause, that the special position of developing countries should be catered for. He therefore suggested that some such wording as "or an association of States for regional economic co-operation" should be added after the words "customs union" in the title and in the text of the proposed new article 23 *bis*.

4. Mr. QUENTIN-BAXTER said that the issues raised by Sir Francis Vallat's proposal and those relating to the scope of the articles, although essentially different, were similar in two superficial respects, which nevertheless gave cause for concern. Both involved customs unions, free-trade areas and other similar associations of States, and both were redolent of the atmosphere of the wars of religion, where questions of high principle had not been dealt with in a spirit of pure reason but had become instead a means of exacting an oath of allegiance. The Commission was in effect being asked to pronounce for or against customs unions, and the latent anxiety of the minds of most members was that the draft would be put to the torch by whichever side its answer displeased.

5. The differences between the issues involved in the scope of treatment and those involved in the subject under consideration were very real. In the former case, the Commission was entitled to state in the commentary that it could conceive of no reason why the draft should not have the same value for treaties to which a union was a party as it had for treaties between States. While there was no problem at the practical level, however, there was a very real one theoretically, for the Commission's standards of codification would be prejudiced if it were to burden a set of articles on a very limited topic with a major doctrinal development that had to be considered elsewhere.

6. Sir Francis Vallat's proposal, on the other hand, came fairly and squarely within the scope of the sub-

ject before the Commission. It had been peatedly stated that the Commission was dealing almost exclusively with a series of presumptions. In effect, it was establishing a check-list to alert the lawyers of the future to the possible implications of any agreements they might conclude that contained the most-favoured-nation clause. On that simple test, it was clear that customs unions were so much a part of contemporary life that, should the Commission disregard them, it would lay itself open to a charge of unreality and cause doubt to be cast on the integrity of the draft as a whole.

7. But it was one thing to say that the question of customs unions should be dealt with in the context of a check-list and an entirely different matter to say that it should be treated as an exception in the absolute sense. The argument advanced by one side was that customs unions were a reality and must therefore be mentioned. On the other side, it was contended that in effect a statutory interference with a private contract was being created. The question that required a little more thought, therefore, was whether the Commission was going further than it ought by shifting the balance between the parties to treaties. His own view was that the Commission would be very ill-advised to endeavour to draw any comparison between that issue and article 21,<sup>4</sup> which dealt with the GSP and with relations between developed and developing States. The latter related to a matter of such prominence in current multilateral developments that it could confidently be said that nobody using a most-favoured-nation clause in any context directly involving trade or economic issues could fail to be aware that it must be read subject to those developments.

8. The argument could even be said to extend to definitions, in which connexion he did not think that an analogy could be drawn between the definition of a customs union on the one hand and the definition of developed and developing States on the other. The latter terms were in the nature of a floating currency, used within a particular context, and any attempt on the Commission's part to peg that currency would cause justifiable resentment and result in rejection. An analogy between the proposed new article and articles 22 and 23, however, relating respectively to frontier traffic and land-locked States, was entirely reasonable. Indeed, the discussion on draft article 22 indicated that its dimensions might be somewhat broader than had been apparent on the first reading of the commentary. The difference between customs unions and frontier traffic was largely to be viewed in terms of the interest and controversy those issues aroused; within the context of presumptions regarding the meaning of the most-favoured-nation clause, it would suffice to draw attention to the matter and to describe it fairly carefully in the commentary.

9. He agreed that there was no need to include in the proposed new article a second paragraph along

<sup>2</sup> See 1494th meeting, para. 25.

<sup>3</sup> See 1496th meeting, para. 46.

<sup>4</sup> See 1483rd meeting, foot-note 1.

the lines of paragraph 2 of articles 22 and 23, but he thought some slight change was required in Sir Francis Vallat's proposal. The words "other than a member of a customs union" paralleled the phraseology of paragraph 1 of articles 22 and 23, but in the latter case they provided a link with paragraph 2, and that was the justification for their inclusion. When dealing with frontier traffic and land-locked countries, it was perhaps reasonable to think in terms of exceptions to exceptions. The most-favoured-nation clause might not work between unequal parties, for example between land-locked States and other States, but it might have some application as between land-locked States themselves. That idea could not, however, be translated to the customs union issue. To provide that a beneficiary State other than a member of a customs union was not entitled under a most-favoured-nation clause to certain treatment implied that a beneficiary State that was a member of a customs union was entitled to such treatment. That of course was nonsense. If the treatment was valid, it was because both parties were members of a customs union and not because of the operation of the most-favoured-nation clause. Consequently, although it was a minor point, he would not be able to consider the proposed new article without the deletion of the words "other than a member of a customs union".

10. The proposition, then, was that States or other international persons, when contracting in the matter of most-favoured-nation clauses, would be presumed to embody a classic exception in favour of customs unions or free-trade areas. Testing the reasonableness of that presumption by taking article 16, relating to national treatment, as a point of comparison, it would be seen that the two articles were comparable to the extent that they both reflected the idea that the beneficiary was treated not merely as the most privileged kind of alien but in precisely the same way as the citizens of the country concerned. Yet the effect of article 16 was that parties concluding most-favoured-nation clauses laid themselves open to national treatment being invoked in terms of the most-favoured-nation clause, whereas they did not do so if they were members of a customs union. There were, however, cases where it was plainly the intention of the parties to exclude national treatment. Consequently, it was essential to envisage all the circumstances in which the articles might apply and, in particular, to strengthen the commentary by providing a warning that, as far as existing treaties were concerned, it should not be assumed that it was the intention of the parties to accept the presumption in the manner in which it had been framed by the Commission. That might dispel some of the concern felt on the point.

11. There remained a residual area of some importance. New agreements should not cause the Commission concern provided there was a clear rule in the articles that an exception was implied for customs unions. However, the parties might never have adverted to the possibility that one or other of them, for the purposes with which the most-favoured-

nation clause dealt, would join a customs union, free-trade area or other similar association. If that was a real hypothesis, as he believed, then he would ask whether it was reasonable to provide that right was on the side of the State that jointed the customs union. In his view, the presumption was if anything the opposite, and the party changing its position had the primary obligation to negotiate with a view to arriving at a reasonable solution.

12. In the light of those facts, he considered that it should be possible to include in the draft articles a provision lying somewhere between the two main positions on the issue and perhaps not couched in such positive and unqualified terms as Sir Francis Vallat's proposal.

13. Mr. REUTER said that the Commission was faced with two serious questions: what image should it form of the economic world of the future, and how should it interpret its task? On the latter point, it could either prepare extremely detailed texts or confine itself to drafting general provisions that would merely express hopes.

14. The Commission undoubtedly faced a problem concerning the law of treaties, and more particularly the interpretation of treaties. Experience showed that the expression "most-favoured-nation treatment" no longer had the same meaning as in the past. The aim, therefore, was to propose a rule of interpretation that would be valid for the future. Yet it was a fact that the rules the Commission was establishing for the future would also apply to the present and the past. That was proved by the fact that the International Court of Justice had based its advisory opinion on the continued presence of South Africa in Namibia<sup>5</sup> on article 60 of the Vienna Convention on the Law of Treaties,<sup>6</sup> which in principle applied only to treaties concluded after its entry into force, and its judgment in the fisheries jurisdiction case<sup>7</sup> on the *rebus sic stantibus* principle embodied in article 62 of that Convention. In the case under discussion, therefore, the issue concerned both the past and the future.

15. The proposal was that a most-favoured-nation clause couched in general terms should be considered as embodying only a limited number of exceptions. The advocates of that approach maintained that the Commission should refrain from drafting detailed and complicated provisions. In that connexion, a distinction must be made between a case in which it was possible to choose between a simple or a complicated formulation of one and the same rule and a case in which two different rules had to be formulated. It was one thing to say that a most-favoured-

<sup>5</sup> Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), Advisory Opinion, *ICJ Reports 1971*, p. 16.

<sup>6</sup> See 1483rd meeting, foot-note 2.

<sup>7</sup> Fisheries jurisdiction (United Kingdom v. Iceland), Merits, Judgment: *ICJ Reports 1974*, p. 3.

nation clause couched in general terms was considered to embody only two or three exceptions and another to say that different interpretations might be placed on the will of States contracting such a clause. In the latter case, the criterion governing the choice was not simplicity but conformity with the circumstances of the modern world.

16. The Special Rapporteur had invoked the argument of simplicity in support of the view that exceptions to the application of the clause should be limited; he had emphasized that it would be difficult to give a definition of the term "developing country". However, what that expression embodied was only too clear. In article 7, paragraph 2 (b), of the Lomé Convention,<sup>8</sup> 53 developing countries and nine other countries used the expression "developing country" without defining it. According to that provision, most-favoured-nation treatment was not applicable in respect of trade or economic relations among African, Caribbean and Pacific States or between one or more of those States and other developing countries. The expression "commodity agreement" appeared in many texts, particularly in the Charter of Economic Rights and Duties of States.<sup>9</sup> Nor did the expression "customs union" require definition.

17. It seemed that in the future, whether or not the Commission expressly so provided, no State would accept a most-favoured-nation clause without reserving the right not to apply it should its application conflict with the needs of the contemporary world. For instance, in paragraph 1 of article 2 of the trade agreement recently concluded between EEC and China,<sup>10</sup> the Contracting Parties accorded each other most-favoured-nation treatment in a number of clearly defined areas, but in paragraph 2 of that article they stipulated that paragraph 1 did not apply in the case of:

(a) advantages accorded by either Contracting Party to States which together with it are members of a customs union or free-trade area;

(b) advantages accorded by either Contracting Party to neighbouring countries for the purpose of facilitating border trade;

(c) measures which either Contracting Party may take in order to meet its obligations under international commodity agreements.

Article 3, paragraph 3, of the Lomé Convention contained a similar provision on commodities. It would be advisable, therefore, for the Commission to make express provision for the point so that third world countries would not see a non-existent trap in the most-favoured-nation clause.

18. The Commission had two courses before it if it presumed that States concluding a most-favoured-nation clause intended to subordinate its application to the future needs of the international community: it could either accept the article 21 *bis* proposed by Mr.

Njenga with regard to the trade preferences that developing countries granted each other, along with the article 23 *bis* proposed by Sir Francis Vallat, as amended to meet the suggestions of Mr. Sucharitkul, in which case there would be no reason for him to withdraw his proposed article 21 *ter* on commodity agreements (A/CN.4/L.265);<sup>11</sup> or it could draft a general provision such as his proposed article A (A/CN.4/L.264),<sup>12</sup> which provided a solution to the problem of customs unions and free-trade areas. Although slightly inconsistent, the needs of the contemporary world and those of the future world were fairly clear. It was necessary that small Powers, and principally developing countries, should be able to join together in groupings which, whatever their form, always implied a certain degree of permanence. But the international community also needed universal rules and an international economic order, which could now be seen to be taking shape on the horizon. Of course, the Charter of Economic Rights and Duties of States was not yet fully accepted and the EEC Council of Ministers had stated that it did not constitute law. Yet it existed, was unique of its kind and constituted a significant promise for the future of mankind. If offered a solution to the discrepancy between a world order and regional orders, a discrepancy that must be removed in the interest of the former. He had tried to reflect those ideas in his draft article A. He hoped that at least some trace of them would remain in the Commission's work.

19. With regard to his proposed draft article 21 *ter* on commodity agreements, he visualized the case of a State concluding a most-favoured-nation clause but omitting to enter a reservation on commodities. If the United Nations subsequently drew up a commodities agreement, that State would not want to become a party to it for fear that the beneficiary State might invoke provisions that could not be reconciled with the commitments of the granting State, for example provisions on reserved markets or quotas. In an economic world that was moving towards unity, it was not feasible to prevent States that concluded a most-favoured-nation clause from stipulating an exception that would operate if the international community drew up an agreement that was in the general interest of States. The article should be seen not as an attack on the most-favoured-nation clause but as an attempt to reconcile it with the needs of the modern world.

20. Personally, he was prepared to accept either an adequate list of exceptions or a general provision such as his proposed article A. The main point was that it should not be assumed that States concluding a most-favoured-nation clause in the future would disregard the fundamental rules needed by the international community.

21. Mr. BEDJAOUI thought that one of the major exceptions to the application of the clause must lie in

<sup>8</sup> *Official Journal of the European Communities*, Luxembourg, 30 January 1976, vol. 19, No. L 25 p. 12.

<sup>9</sup> General Assembly resolution 3281 (XXIX).

<sup>10</sup> *Official Journal of the European Communities*, Luxembourg, 11 May 1978, vol. 21, No. L 123, p. 2.

<sup>11</sup> See 1495th meeting, para. 22.

<sup>12</sup> *Ibid.*, para. 23.

the status to be reserved for developing countries. From that standpoint, article 21 was very useful, although it did not go far enough. The Drafting Committee should take due account of proposals such as those of Mr. Njenga and Mr. Reuter.

22. The problem of applying the most-favoured-nation clause in face of the desire of developing countries to obtain special and more favourable treatment was to be seen in an historical context. The multilateral trade negotiations in progress in GATT on the basis of the Tokyo Declaration<sup>13</sup> provided developing countries with an opportunity to insist on the need for methods whereby differential measures could be applied to them under conditions that would guarantee them special and favourable treatment. Such measures must be applicable to the full range of trade relations between developing and developed countries, so as to provide a new and more solid structure for world trade. The developing countries had proposed that the Trade Negotiations Committee should undertake a major reform of the General Agreement, and in December 1976 the Committee had set up a "Framework" Group to consider questions relating to the international framework of world trade. Since 1977 the Group had been examining five points, one of which was the legal framework for differential and more favourable treatment for developing countries in relation to the provisions of the General Agreement, and in particular to the most-favoured-nation clause. Those five points were very important, because the existing framework of the General Agreement was inadequate to meet the trade needs of developing countries. The Group's conclusions should be taken into consideration in the articles before the Commission, particularly in article 21 *et seq.*

23. Wider use of the most-favoured-nation clause would lead to a gradual reduction in the gap between the right arising under the most-favoured-nation clause and those arising under the GSP, and thus to the disappearance of the meagre advantages that developing countries derived from that system. The GSP should not therefore be regarded as an accessory to a general trade framework of which the most-favoured-nation clause was the instrument. By placing third States on an equal footing in respect of domestic legislation, article 10 ran counter to various resolutions adopted at Colombo in 1976 by the Fifth Conference of Heads of State or Government of the non-aligned countries, as well as to various resolutions adopted by the United Nations, in the framework of the Charter of Economic Rights and Duties of States, on co-operation among developing countries. That was why he attached great importance to Mr. Njenga's proposal, a proposal that was moreover in keeping with the work of UNCTAD, which had laid the foundations for a preferential system in trade among developing countries.

24. It was true that the rights of developing countries were reserved in article 27; that was an essential

provision, as was demonstrated in particular by the work of the fourth session of UNCTAD, the resolutions adopted by the non-aligned countries in Colombo, the initial conclusions reached at the Conference on International Economic Co-operation and the progress made in the multilateral trade negotiations in Geneva. But those developments also showed the need for a broader review of article 21, with maximum account being taken of the proposal put forward in response to the concerns of the international community.

25. In short, the Commission should not only take into consideration the conclusions arrived at in the "Framework" Group in regard to the most-favoured-nation clause, but should also look beyond the GSP, which constituted a particular framework within a general system based on reciprocity, to the specific problems and new realities represented by the system of preferences or collective self-help being pursued among developing countries. From that standpoint, although article 27 reserved the future rights of developing countries in a general way, it could create a dangerous void. That was an additional reason for strengthening article 21 in favour of developing countries.

26. Mr. EL-ERIAN said that, as was indicated in the commentary to article 15, it had been generally agreed in the Commission, during the discussion on the matter in 1975 and 1976, that there was no customary rule establishing an implicit exception to the application of the most-favoured-nation clause in the case of customs unions and similar associations of States. He shared that view. The matter had already been discussed in the League of Nations. Thus the International Conference for the Abolition of Import and Export Prohibitions and Restrictions, held at Geneva in 1927 to establish a convention, had considered whether States not parties to that instrument might, by virtue of bilateral agreements based on the most-favoured-nation clause, claim the benefit of any advantages mutually conceded by the States parties, and had urged that the conclusion of plurilateral conventions would be hindered if countries, while not acceding to such agreements, might still, without giving any counter-engagements, avail themselves of the engagements undertaken by the signatory States to such conventions. In other words, countries had been advised to endeavour to adjust their obligations under the new conventions to their other obligations. That had applied in the case of the Treaty of Rome<sup>14</sup> establishing EEC; the parties had been advised to renounce their previous obligations or to find a way of resolving any difficulties that might arise. If it were decided, in the absence of a customary rule providing for an implied exception, to formulate a provision on the matter, such a provision would be *de lege ferenda* and not of *jus cogens*.

27. Bearing in mind the terms of article 26, on the freedom of the parties to agree to different provi-

<sup>13</sup> See 1496th meeting, foot-note 7.

<sup>14</sup> United Nations, *Treaty Series*, vol. 298, p. 11.

sions, and of article 25, on the non-retroactivity of the articles, there were two possible ways of regulating the situation after the convention had been concluded: provision could be incorporated in the clause itself or in the treaty containing the clause, in which case there would be no problem, or alternatively there could be a residual rule in favour of an implied exception. That meant that the scope of the draft articles would be very limited.

28. He would concede that it was difficult to define customs unions with any accuracy, but the difficulty was not insurmountable. Moreover, the integrity of the Commission's work did not permit it to avoid the problem and to cast the burden on States. It had made that mistake in 1956 in failing to agree on the extent of territorial waters; the adverse consequences of that omission were common knowledge. At the time, however, the Commission had not been working on a consensus basis.

29. Lastly, the fact that the Commission had decided earlier to leave certain problems aside should not debar it from reconsidering them with a view to making the draft more complete. He trusted that the Drafting Committee would produce a generally acceptable formula.

30. Mr. ŠAHOVIĆ agreed with those who had emphasized the importance of the problem of customs unions, but thought that its importance should not be exaggerated; the Commission was not dealing with the issue for the first time and had already succeeded in defining a good many of its aspects. The problem was indeed a real one, whose importance was emphasized by the political pressures exerted by certain groups of States. The Commission should adopt a clearer position on the subject so that States would be enabled to express their views more precisely. The various reports of special rapporteurs and the Commission's commentaries showed that there was still hesitation on the matter. The Commission should continue to maintain a degree of equilibrium among the various interests involved. That did not mean that it should not adopt a position on the issue, but that it should take into account the overall realities of the situation and the dimensions of the various problems, as well as the possible consequences of an article such as article 23 *bis*. The same importance could not be attached to all problems and all exceptions. For instance, the problems posed by customs unions, which article 23 *bis* attempted to settle, were not as important as those posed by the situation of developing countries, to which the Commission had devoted article 21 and to which it would probably devote other articles, such as article 21 *bis*.

31. He thought it unnecessary to devote an article to the problems posed by customs unions, because such problems had thus far been settled by State practice. The question now was how much importance to attach, in the draft articles, to the solution represented by that practice. Was it necessary to devote one or more articles to them, raising the exception concerning customs unions to the rank of a universal rule of law, be it a positive rule, a rule of interpretation or

merely a proviso? Was it essential to attach such importance to the situation of customs unions and other regional economic organisations? He did not think so.

32. It was true that the subject currently received considerable attention, and he was grateful to Mr. Reuter for having taken account of that tendency in the modern world and of the problems encountered in seeking to define the new international economic order. However, the problem was how to deal with the situation of customs unions from the standpoint of the new international economic order; from that angle, he did not believe it necessary to insist on the concept of customs unions. Although the concept existed, and must therefore be taken into account, there were also many new forms of regional and sub-regional intergovernmental organization through which States were endeavouring to settle their economic problems. Consequently, the questions concerning the exception formulated in article 23 *bis* did not arise in the case of customs unions alone; much wider issues were involved, as was shown in the comments of governments and international organizations. It was not possible, therefore, to deal with problems concerning customs unions without taking account of their influence on universal problems; while recognizing the prevailing trend in favour of restricted groupings among States, it was important to keep constantly in mind the principle of universality on which any element of the new international economic order must be based.

33. Article 21 *bis* (A/CN.4/L.266) posed the problem in much more balanced terms than article 23 *bis*; while emphasizing the particular situation of developing countries and the need to respect their interests, it indicated in the second sentence that account must also be taken of the universal interests of the international community by not allowing arrangements among developing countries to constitute "an impediment to general trade liberalization and expansion".

34. Article 23 *bis* should therefore be amended to emphasize the need to take account of the interests of States other than members of customs unions. While recognizing that "States have the right, in agreement with the parties concerned, to participate in subregional, regional and interregional co-operation in the pursuit of their economic and social development", article 12 of the Charter of Economic Rights and Duties of States stipulated that

all States engaged in such co-operation have the duty to ensure that the policies of those groupings to which they belong correspond to the provisions of the present Charter and are outward-looking, consistent with their international obligations and with the needs of international economic co-operation, and have full regard for the legitimate interests of third countries, especially developing countries.

It must not be forgotten that, in their existing form, customs unions frequently hampered normal economic relations and the development of fruitful economic co-operation among all States.

35. In practice, the problems of trade and economic co-operation, and especially the problems posed by the



application of the most-favoured-nation clause in the case of customs unions, were resolved by negotiation, which regulated relations between members of customs unions and third States. It was therefore unnecessary for the draft to include an article such as article 23 *bis*. However, if the Commission decided to insert such an exception in the draft, it must formulate it more flexibly, taking into account not only the interests of States members of customs unions but also those of third States, since the clause must conserve its real purpose, which was to enable all States to develop their economic co-operation.

36. Mr. JAGOTA said that, if the Commission established a rule to which there were too many exceptions, the rule itself might remain an empty shell. On the other hand, if the draft failed to take account of the legitimate interests of all countries, it would not have the requisite durability. However, if the draft were to include articles like article 21, on the GSP, and article 21 *bis*, which protected the fair and legitimate interests of developing countries, it would be only fitting to accommodate the ideas expressed in article 23 *bis* as well; they should be inserted as a proviso within due limits. In that way, the draft would form an equitable and well-balanced set of articles on the most-favoured-nation clause.

37. Earlier in the discussion, the view had been expressed that, because the draft related to most-favoured-nation clauses contained in treaties between States, it would be going too far to extend the notion of "State" to include international organizations like EEC. The proposed article 23 *bis* would help to fill the gap and fell within the scope of the draft, for it concerned relations between the granting State, the third State and the beneficiary State, even though it was an exception entailing advantages and benefits granted by one State to another when both were member of a customs union. However, articles 23 *bis* in its existing form would not apply to the members of EEC, for the States concerned must have treaty-making capacity to accept conventional obligations concerning most-favoured-nation treatment; the economic integration achieved by EEC was such that EEC was a unit constituting a single customs territory, and all its trade agreements and trade policy decisions were made by the organization itself and not by its members. There were of course other customs or similar unions that had not yet reached the same stage of integration as EEC, and they would be covered by article 23 *bis*.

38. The Special Rapporteur had pointed out that the most-favoured-nation clause was not a rule of customary international law and that, consequently, any exceptions to it could not be based on international custom. The fact remained, however, that the Commission was now developing the law on the topic and it was appropriate that the draft should include legitimate exceptions to the operation of the clause. Many treaties offered examples of the type of exception now under discussion. The matter was fairly common and could therefore be regulated. Article XXIV of the General Agreement on Tariffs and

Trade<sup>15</sup> defined the concepts of a customs union and a free-trade area and took account of the possibly harmful effects of a customs union by providing for prior approval by the Contracting Parties to GATT to determine whether a customs union that would constitute an exception to the system would in fact promote international trade rather than raise barriers to it. When considering article 23 *bis*, the Drafting Committee should bear in mind the concerns reflected in article XXIV of the General Agreement and ensure that most-favoured-nation treatment under existing treaties was protected when a party or parties to those treaties later entered into a customs union.

39. In addition, in conformity with the language employed in article XXIV, paragraph 4, of the General Agreement, a statement should be inserted in article 23 *bis* to the effect that the purpose of a customs union or free-trade area must be to facilitate trade among the constituent territories and not to raise barriers to the trade of other States with such territories.

He agreed with Mr. Šahović regarding the kind of wording to be used, which might indeed be taken from article 12 of the Charter of Economic Rights and Duties of States.

41. Finally, the term "customs union" would have to be elaborated on, although not necessarily defined, in order to indicate that the members of an association of that type had treaty-making capacity to enter into most-favoured-nation commitments; otherwise, the expression "customs union" would be interpreted in a restrictive manner, as it was in the General Agreement. Consequently, the term would have to include similar organizations, such as free-trade areas, whose purpose was to grant particular benefits to their members but whose members, since they did not form single customs territories, retained the necessary treaty-making capacity. If the Drafting Committee were to take account of those considerations, the exception could be included in the draft without further need of the safeguards contained in the General Agreement, for it should be remembered that the provisions of articles 25 and 26 of the draft would be applicable as well.

42. Mr. DÍAZ GONZÁLEZ said that the lengthy discussion had clearly brought out the various approaches to the important topic of the most-favoured-nation clause and, in particular, to the scope of the clause. Countries belonging to customs unions or to organizations designed to secure economic integration had rightly expressed their concern in that connexion, as had certain economic associations, such as the Board of the Cartagena Agreement.

43. The scope of the clause had changed and would continue to change, more especially in regard to the international economic relations that were closely bound up with the development of the nations now forming the international community. After the Sec-

<sup>15</sup> See 1492nd meeting, foot-note 10.

ond World War, the structure of the international community had changed radically, with the emergence of many new States, which now represented the majority of its members. Moreover, those States participated in the organizations responsible for regulating international relations and co-operation and were developing the law that was to govern the new international society. It was therefore logical that they should seek the best way to defend and protect their interests within the new international economic order. The new international law must reflect the concern of all States to ensure the effective protection of their interests. Codification of the law could only mean co-ordination of the past with the present, as a bridge to the future. In other words, it entailed the progressive development of international law, which was a prime objective of the Commission under its terms of reference. The proposals now under discussion were simply proof of the need to seek a realistic formula. They would certainly contribute to the preparation of a viable set of articles acceptable to most States.

44. The comments he had made in connexion with article 15,<sup>16</sup> were relevant to the current discussion. He therefore supported the proposal made by Sir Francis Vallat, since article 23 *bis* introduced, although perhaps timidly, an element that would meet the aim the Commission had set itself: to facilitate the codification of the clause and to adapt it to its new sphere of application. Obviously, the Drafting Committee might make it more comprehensive, in the light of the proposal made by Mr. Njenga and Mr. Reuter, which would not fail to command his support.

45. Mr. CASTAÑEDA said it was evident from the discussion that, in view of the many differences in State practice, it was not possible to speak in the case under consideration of an exception that was a principle of general international law. Indeed, if a dispute were to arise under existing conditions, the most-favoured-nation clause would probably prevail; as the Special Rapporteur had pointed out, the subject involved treaty obligations of great importance and any derogation therefrom would be warranted only on the strongest of grounds, namely, the existence of a higher law. Fortunately, however, the task of the Commission was not to act as a court of justice and hand down a decision on a particular dispute, but to legislate for the future.

46. From that standpoint, the Commission should adopt the most fundamental criteria and go straight to the heart of the matter. It was almost axiomatic that the contemporary world required that associations of States be formed for the purpose of economic integration. With the exception of a small number of very large and highly populated countries, the States in the modern world were too small and had too few resources to function alone. The Commission must necessarily take that into account. At the same time,

the treatment that the members of a customs union or similar kind of grouping extended to one another represented discrimination against non-member States. The only conclusion to be drawn, as the Special Rapporteur had pointed out, was that customs unions or other types of economic associations were incompatible with the operation of the most-favoured-nation clause. Accordingly, in gauging the value of the proposal of Sir Francis Vallat, it was necessary to determine whether that proposal met the needs of the international community. In his opinion, anything that favoured the establishment of customs unions or the like was in keeping with those needs. The Commission should look favourably on the trend towards the establishment of customs unions, which should form exceptions to the application of the most-favoured-nation clause.

47. Opinions were divided as to whether customs unions were helpful or prejudicial to developing countries. Paragraph (33) of the commentary to article 15 quoted the assertion by UNCTAD that the difficulties faced by developing countries in exporting had been heightened with the formation of regional groupings among developed countries. It was nevertheless true, as pointed out in paragraph (2) of the commentary to article 27, that the establishment of schemes of preferences among developing countries had been acknowledged as one of the arrangements best suited to contributing to trade among themselves. There was a clear impression that, in the long run, economic associations among developing States were of great help in furthering trade and forms of co-operation among those countries.

48. He therefore supported the proposed article 23 *bis*, but thought that it should not be confined to customs unions. Admittedly, it would be extremely difficult to determine the exact scope of the provision, but the difficulty was not so great as to prevent enunciation of the rule. An imperfect rule was better than no rule at all, for in the absence of a rule it might be asserted that no rule existed, in which case the principle of the operation of the most-favoured-nation clause would prevail.

49. Commodity agreements would unquestionably become a major factor in the establishment of forms of aid and co-operation among certain States, and Mr. Reuter's proposal on that subject (A/CN.4/L.265) should certainly be adopted. It had to be recognized that, in a heterogeneous world, the number of exceptions to the clause was bound to increase, since the exceptions responded to changing needs. Similarly, article 21 *bis*, proposed by Mr. Njenga (A/CN.4/L.266), reflected the new efforts being made by developing countries to improve their situation. Having failed to secure substantial financial and technological aid from developed countries, developing nations had been studying more closely the possibility of collective self-reliance; article 21 of the Charter of Economic Rights and Duties of States specifically stated that developing countries should endeavour to promote the expansion of their mutual trade. However, the move by developing countries to

<sup>16</sup> See 1491st meeting, para. 7.

aid one another would be frustrated if, in the schemes they adopted, they were obliged to grant most-favoured-nation treatment to developed countries. Mr. Njenga's proposal was therefore of the utmost importance, although consideration might be given to linking it with article 27. For whereas article 21 dealt with arrangements between developed and developing countries and the establishment of a generalized system of preferences, article 27, dealing with new rules of international law in favour of developing countries, could apply to arrangements agreed upon among those countries.

50. Mr. VEROSTA said that there always had been and always would be customs unions, for States were sovereign and free to conclude international treaties, and neither developed nor developing States could be denied the right to form such unions.

51. The situation under public international law regarding exceptions to the most-favoured-nation clause had been defined by the Institute of International Law at its Brussels session, in 1936. Paragraph 7 of the resolution adopted by the Institute at that session provided:

The most-favoured-nation clause does not confer the right:

to the treatment which is or may hereafter be granted by either contracting country to an adjacent third State to facilitate the frontier traffic;

to the treatment resulting from a customs union which has been or may hereafter be concluded...<sup>17</sup>

The same idea had been expressed at the Institute's session in Edinburgh, in 1969. Paragraph 2 (b) of the resolution adopted at that session, relating essentially to the operation of the most-favoured-nation clause in the case of multilateral treaties, provided:

States to which the clause is applied should not be able to invoke it in order to claim a treatment identical with that which States participating in an integrated regional system concede to one another.<sup>18</sup>

Needless to say, an integrated regional system included customs unions and free-trade areas.

52. For that reason, and for the reasons he had already mentioned in the discussion, he supported article 23 *bis* proposed by Sir Francis Vallat. He hoped that the Drafting Committee would modify and expand its wording, particularly in the light of the suggestions made by Mr. Sucharitkul.

53. Mr. RIPHAGEN said that the Commission must take two facts into account. First, 20 articles of the draft described the classic unconditional most-favoured-nation clause, which operated automatically and conferred only formal equality; consequently, the draft must include all the various exceptions to the clause. Secondly, it could be seen from State practice that a granting State that was a member of a customs union or the like had never extended to a non-mem-

ber State the treatment granted to a member State. Indeed, the Special Rapporteur had recognized that it was impossible for a granting State to extend exactly the same treatment. An obvious exception was therefore the one contained in Sir Francis Vallat's proposal.

54. Yet the matter did not rest there, for if the beneficiary State was not entitled to the same treatment as that received by members of the customs union, it was none the less entitled to protection of its interests. It was for precisely that reason that special rules were laid down in article XXIV of the General Agreement on Tariffs and Trade and in articles 12 and 18 of the Charter of Economic Rights and Duties of States. He fully agreed with the comments made by Mr. Jagota, Mr. Quentin-Baxter and Mr. Šahović, and considered that the Drafting Committee should include in the wording of Sir Francis Vallat's proposal a formulation designed to protect the interests of a beneficiary State that was not a member of the customs union.

55. The CHAIRMAN, speaking as a member of the Commission, thought that any benefit granted under a bilateral or multilateral treaty could be invoked by the beneficiary State in order to claim most-favoured-nation treatment, whether the treaty was open or restricted. The fact that treaty benefits were often expressly excluded from most-favoured-nation treatment was another argument in support of the view that, unless the exclusions were expressly stipulated, the benefits in question could generally be claimed by any beneficiary of most-favoured-nation treatment. Moreover, the usual procedure of negotiating waivers of such treatment confirmed the existence of the general principle. The same argument applied to customs unions and similar associations of States. A free-trade area, an interim régime leading to the formation of a customs union or free-trade area, or any other similar association or grouping of States, was not an exception to the general rule unless the granting and the beneficiary States so agreed.

56. The exhaustive examination of the customs union issue by the previous Special Rapporteur, Mr. Ustor,<sup>19</sup> left no room for doubt. Clauses expressly excluding most-favoured-nation treatment were so common that one writer, R. C. Snyder, stated that in treaties concluded between the First and Second World Wars he had found no fewer than 280 clauses containing exceptions for customs unions. That practice subsisted, and if States found it necessary to include in treaties an express clause of exclusion it was because there was no general rule of international law establishing the exception as a presumption. The very number of express clauses, far from proving the existence of a general rule of customary international law that excluded such benefits, was evidence that the exception in question was simply a conventional exception and nothing more.

<sup>17</sup> *Annuaire de l'Institut de droit international*, 1936, Brussels, vol. II, p. 291. Text reproduced in *Yearbook... 1969*, vol. II, p. 181, cod. A/CN.4/213, annex II.

<sup>18</sup> *Annuaire de l'Institut de droit international*, 1969, Basel, vol. 53, t. II, p. 379.

<sup>19</sup> *Yearbook... 1975*, vol. II, pp. 7 *et seq.*, doc. A/CN.4/286, paras. 9-63.

57. Moreover, situations resulting from the application of article XXIV of the General Agreement on Tariffs and Trade did not support the conclusion that an implied exception existed. Indeed, it had to be borne in mind that the cornerstone of the General Agreement was an unconditional most-favoured-nation clause. Consequently, the somewhat complex provisions of article XXIV were simply another express clause establishing a specific exception that reconciled the commitments entered into under the General Agreement with commitments under other treaties. As Mr. Ustor had emphasized at the time, article 234 of the Treaty of Rome maintained existing treaty rights and obligations pending negotiations for the removal of any incompatibility between such rights and obligations and those resulting from the Treaty, as would also occur in the case of an exception to the application of most-favoured-nation clauses.

58. It should also be emphasized that, during the 20 years of EEC's existence, the member States of that powerful economic entity had succeeded perfectly in respecting the traditional practice of including exceptions in treaties whenever necessary. For all those reasons, the thought that the Commission should not attempt to formulate a rule establishing a general exception for customs unions and similar associations of State. Nevertheless, he recognized that the proposed article 23 *bis* was an improvement on the text proposed by EEC (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 11), and he would not oppose the idea of referring it to the Drafting Committee. The proposals made by Mr. Reuter were also of the utmost importance. He hoped the Drafting Committee would produce a text acceptable to everyone.

59. Mr. USHAKOV (Special Rapporteur) said that, although the Commission had already decided that the draft should not include exceptions like the one proposed by Sir Francis Vallat in his article 23 *bis*, some questions still had to be cleared up.

60. To begin with, one might well ask, as had Mr. Castañeda, whether the proposed article served the interests of developing countries. He did not think so, for it excluded all beneficiary States, including developing States, from the benefit of the treatment extended by the granting State within a customs union. In that respect, it conflicted with article 21 *bis* proposed by Mr. Njenga (A/CN.4/L.266), a text that also covered customs unions and other similar associations of States but excluded only developed States from the benefit of the treatment that developing States granted to one another in such economic associations. In stating that developing countries might "grant trade preferences to other developing countries in accordance with bilateral or regional arrangements, without being obliged to extend such preferences to developed countries on the basis of the most-favoured-nation clause", article 21 *bis* protected the interests of developing countries against those of developed countries. Article 23 *bis*, on the other hand, protected the interests of all members of a customs

union, whether developing or developed States, against the interests of any beneficiary State—even a developing State—that was not a member of the union. Under Sir Francis Vallat's proposal, a developing beneficiary State that was not a member of a customs union would not be entitled by virtue of a most-favoured-nation clause to the treatment extended by a developed granting State to a developed third State within a customs union. That was contrary to the purpose of the draft articles, which was to protect the interests of developing countries against those of developed countries.

61. Another question that arose was how a most-favoured-nation clause that did not contain an express exception of customs unions was to be interpreted. In such a case, was it to be understood that there was an implicit exception and that the treatment extended within a customs union was automatically excluded from the application of the clause? He did not think so; in the absence of any express stipulation in the clause, it must be deemed that no exception existed. That was also the conclusion reached by the previous Special Rapporteur, Mr. Ustor, in his sixth report.<sup>20</sup>

*The meeting rose at 1 p.m.*

<sup>20</sup> *Ibid.*

## 1500th MEETING

*Wednesday, 14 June 1978, at 10.10 a.m.*

*Chairman*: Mr. José SETTE CÂMARA

*Members present*: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Sahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

**The most-favoured-nation clause (*continued*) (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2, A/CN.4/L.264-266)**

[Item 1 of the agenda]

PROPOSED NEW ARTICLES (*concluded*)

ARTICLE 23 *bis* (The most-favoured-nation clause in relation to treatment extended by one member of a customs union to another member)<sup>1</sup> (*concluded*)

1. Mr. USHAKOV (Special Rapporteur) said that the rule proposed by Sir Francis Vallat in article 23 *bis* was in effect a complete reversal of the practice of States. Until now, if States parties to a

<sup>1</sup> For text, see 1498th meeting, para. 18.

treaty containing a most-favoured-nation clause decided to exclude customs unions and free-trade areas from the operation of the clause, they had specifically so stipulated in the clause itself. In the absence of an express exception in that regard, the clause was to be interpreted as applying equally to customs unions and other similar associations of States.

2. That conclusion had been reached by the previous Special Rapporteur, Mr. Ustor, in his sixth report,<sup>2</sup> on the basis of legal doctrine and the practice of States. It had also been the conclusion reached in 1933 by the League of Nations Economic Committee which, under the heading "Wording of the clause", had recommended a standard text for a most-favoured-nation clause containing an exception for "advantages resulting from a customs union already concluded or hereafter to be concluded by either contracting party".<sup>3</sup>

3. R.C. Snyder, mentioned by Mr. Ustor in his report,<sup>4</sup> had found 280 customs union exception clauses in the economic treaties concluded between the two world wars—proof that, when States parties to a treaty wished to make an exception to the most-favoured-nation clause in regard to customs unions, the exception was stipulated explicitly in the text of the treaty. Article 23 *bis*, on the other hand, provided that customs unions would automatically be excluded from application of the clause. Consequently, if States parties decided not to exclude customs unions, they would have to stipulate that fact in the clause, and that amounted to a complete reversal of existing practice.

4. Who might benefit from such a reversal? In his opinion, chiefly EEC, which had emphasized the need to include in the draft articles an exception in favour of economic unions, customs unions and free-trade areas, and had therefore suggested supplementing articles 15 and 16 by an article 16 *bis* establishing an exception for members of such associations (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 11).

5. Sir Francis VALLAT said he would not have chosen to speak at that point if the proposed article 23 *bis* had been referred without further contention to the Drafting Committee. In view of the comments made by the Special Rapporteur, however, it was essential to restore a sense of balance, for the Commission appeared to have wandered deep into the realm of politics.

6. If the matter were to be left on a political plane, the right course for the Commission would be to make it clear that a political decision was required and, as it had often done in the past, leave it to governments to decide for themselves whether or not to accept the article. He held absolutely no brief for

EEC or for the Government of the United Kingdom: he had been a professor of law, he was now a private practitioner and he did not accept instructions from anyone. Like all the members, he was dependent upon the material placed before the Commission and his sole purpose was to assist the Commission objectively, to the best of his ability, in the preparation of a balanced set of articles that would be acceptable and viable in the modern world. The Special Rapporteur had conceded, by implication, that the existing members of EEC had resolved their problems with regard to the most-favoured-nation clause. The proposed article 23 *bis* was consequently not of direct interest to them, but it would be of assistance to States that might seek to join EEC in the future. There were currently three potential candidates for admission to EEC and, although they might not be regarded technically as developing countries, they all had very weak economies. The idea that the proposed article 23 *bis* was designed to help only developed States was incorrect. Its intention was to avoid discrimination and open the way for all States that wanted to follow the modern trend towards economic integration, a trend just as strong in Latin America or the Caribbean, for example, as in Europe.

7. The purpose of the draft was to set forth residual rules, i.e. rules of interpretation that would apply in the absence of specific treaty clauses to the contrary. Where specific clauses existed, as in the case of the General Agreement on Tariffs and Trade, they would obviously take effect, and no general presumption in the draft would affect their operation, whether under the General Agreement or under any other bilateral or multilateral treaty. It had been pointed out that one writer had found 280 exception clauses in treaties; in the past, the Commission had taken far fewer examples as solid evidence of the practice of States. After all, the Commission was attempting to generalize that practice, and it was therefore incorrect to argue that it would be doing something wrong in accepting a proposal that gave expression to such exceptionally strong evidence of that practice. He would therefore suggest that, in accordance with its usual approach to problems, the Commission should reject that argument.

8. Lastly, in presenting his proposal, he had indicated that the wording of the article could be more flexible. He wished to assure the Commission that, when the proposed article came before the Drafting Committee, he would take full account of the suggestions that had been made.

9. Mr. NJENGA fully agreed with the views expressed at the previous meeting by the Chairman in his capacity as a member of the Commission. The proposed article 23 *bis* did not enunciate a rule that now existed; it was concerned more with the progressive development than with the codification of international law. After providing in article 21 *bis* (A/CN.4/L.266) for problems affecting all developing countries, the Commission had perhaps gone as far as it could along the path of progressive development, especially since some members had voiced

<sup>2</sup> *Yearbook... 1975*, vol. II, pp. 9 *et seq.*, doc. A/CN.4/286, paras. 9-63.

<sup>3</sup> *Ibid.*, p. 13, para. 30.

<sup>4</sup> *Ibid.*, p. 12, para. 26.

strong opposition to the inclusion of the proposed article 23 *bis* in the draft.

10. It could hardly be said that there was a consensus on the article, and the Commission could not easily shed its responsibility by simply referring the text to the Drafting Committee. In view of the very serious political aspects of the matter, the only solution was to discuss the subject in the commentary and point out that a political decision was required by governments. At the current stage, referral of the text to the Drafting Committee, except for some adjustment in the wording, would not be the most appropriate course.

11. Mr. JAGOTA said that each member was entitled to consider the matters before the Commission independently, without instructions and without any responsibility towards the government that had nominated him. At the same time, all members were responsible for ensuring that the drafts prepared by the Commission codified and progressively developed international law and constituted rules that were both reasonable and durable.

12. On the first reading of the draft, the Commission had decided that the customs union exception was a question to be judged by governments themselves on the basis of political and economic considerations, and the exception had therefore been omitted from the set of articles. The most-favoured-nation clause was a device to promote co-operation and liberalize trade. The exceptions considered so far by the Commission were general exceptions to be made in the interests of developing countries, because those countries were in a underprivileged position and did not have the capacity to benefit adequately from co-operation. There was undoubtedly a movement towards the establishment of customs unions and free-trade areas, chiefly for the purpose of pooling the resources of the member States with a view to joint development and expansion of their mutual trade. The danger, however, was that the trade activities of those unions or areas might be increasingly confined to the member States. Difficulties had been experienced by developing countries in certain negotiations and he had wondered whether the Commission should leave the matter to be negotiated by treaty partners through an exception clause or whether, with the proper safeguards, it should establish a general exception on the matter in the draft. In his view, provided the proposed article 23 *bis* took account of the legitimate interests of States and their autonomy in forming customs unions and other trade groupings and also ensured that the trade and other interests of developing countries would not be adversely affected, it would not give rise to the fear that had been expressed by the Special Rapporteur.

13. Obviously, the article would have to be so drafted that it would not represent a means of escape from treaty obligations. Even with payment of compensation, it was possible to escape from a particular system of trade. For that reason, the point raised by Mr. Šahivić (1499th meeting) was very important. The article should be worded in such a way as to en-

sure that trade relations with third countries were not detrimental to developing countries. A suitable formulation might be taken from article 12 of the Charter of Economic Rights and Duties of States,<sup>5</sup> which specified that all States forming part of subregional, regional and interregional groupings must make sure that the policies of those groupings were "consistent with their international obligations and with the needs of international economic co-operation" and had "full regard for the legitimate interests of third countries, especially developing countries". More specifically, article 18 of that instrument prescribed that, in the conduct of international economic relations, "the developed countries should endeavour to avoid measures having a negative effect on the development of the national economies of the developing countries". If the article included those safeguards, in other words, if it protected existing benefits and also specified that the establishment of customs unions must not adversely affect the trade and other interests of developing countries, it might be recommended to governments for consideration.

14. Plainly, the matter was rather a sensitive one and any suggestion made by the Commission with a view to producing a well-balanced set of articles would have to be acceptable to the majority of developing countries.

15. The CHAIRMAN, speaking as a member of the Commission, said that if States had had to include in treaties so many express exceptions to the operation of the most-favoured-nation clause, he failed to see how those numerous examples could be regarded as constituting a general rule of international law. If the Commission had to set aside any argument, it should be that of Sir Francis Vallat.

16. Mr. USHAKOV (Special Rapporteur) pointed out that article 12 of the Charter of Economic Rights and Duties of States, after providing that States had the right, "in agreement with the parties concerned, to participate in subregional, regional and interregional co-operation in the pursuit of their economic and social development", set out the conditions for such co-operation by stipulating that

All States engaged in such co-operation have the duty to ensure that the policies of those groupings to which they belong correspond to the provisions of the present Charter, and are outward-looking, consistent with their international obligations and with the needs of international economic co-operation, and have full regard for the legitimate interests of third countries, especially developing countries.

He did not, however, think that the Commission could set out the same conditions in its draft articles, since its task was not to tell economic groupings of States what they must do but to indicate how the clause was to be interpreted.

17. For the same reason, the second sentence of article 21 *bis*, proposed by Mr. Njenga, also went beyond the competence of the Commission, since it did not rest with the Commission to dictate to develop-

<sup>5</sup> General Assembly resolution 3281 (XXIX).

ing countries the terms and conditions of their bilateral or regional arrangements.

18. Replying to a question put by the CHAIRMAN, Mr. NJENGA said that there was no consensus on the proposed article 23 *bis*. However, he was not opposed to referral of the article to the Drafting Committee, on the understanding that it was made abundantly clear to the General Assembly that the Commission had not been unanimous in its opinion on the contents of the article.

19. Mr. USHAKOV (Special Rapporteur) was in favour of referring article 23 *bis* to the Drafting Committee, in keeping with the Commission's normal procedure.

20. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer the texts proposed by Mr. Reuter (A/CN.4/L.264 and A/CN.4/L.265), Mr. Njenga (A/CN.4/L.266) and Sir Francis Vallat (A/CN.4/L.267) to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>6</sup>

**Succession of States in respect of matters other than treaties (continued) (A/CN.4/301 and Add.1,<sup>7</sup> A/CN.4/313)**

[Item 3 of the agenda]

**DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR**

**ARTICLE W (Treatment of State debts in cases of uniting of States)**

21. The CHAIRMAN invited the Special Rapporteur to introduce chapter VI of his ninth report (A/CN.4/301 and Add.1), reproduced as chapter I of the tenth report (A/CN.4/301 and which dealt with the treatment of State debts in cases of uniting of States, as well as article W, which read:

**Article W. Treatment of State debts in cases of uniting of States**

On the uniting of two or more States in one State, the successor State thus formed shall not succeed to the debts of the constituent States unless:

- (a) the constituent States have otherwise agreed, or
- (b) the uniting of States has given rise to a unitary State.

22. Mr. BEDJAOU (Special Rapporteur) said that at the current session he intended to introduce three new articles (articles W, 24 and 25), which would complete the second part of the draft articles<sup>8</sup> on succession to State debts. The previous year, he had examined the treatment of State debts in the case of

transfer of part of the territory of a State (article 21) and in the case of newly independent States (article 22), and he now proposed to examine what became of those debts in three other case of State succession, namely, uniting of States (article W), separating of a part or parts of the territory of a State (24) ((A/CN.4/313, para. 26) and dissolution of a State (article 25) (*ibid.*, para. 77). It would then remain for the Commission, in accordance with the wishes of certain of its members and of the Sixth Committee, to examine at its next session the question of archives, which were part of State property, and the procedure for the peaceful settlement of disputes.

23. Article W, which might become article 23, dealt with the treatment of State debts in cases of uniting of States. In that article, the expression "uniting of States" had the same meaning as in article 14, relating to State property. It concerned two or more States which united and thus formed a successor State. It was not a question of the total annexation of one State by another, which was prohibited by international law and did not lead to the creation of a new State, whereas the uniting of States necessarily led to such creation.

24. State practice, to which he had referred in his ninth report (A/CN.4/301 and Add.1, chap. VI), showed that the constitutional form of the successor State thus created was of considerable importance where the treatment of debts was concerned. When a uniting of States resulted in the creation of a unitary State, the constituent States ceased to exist completely from the standpoint both of international public law and of internal public law. All powers therefore passed to the successor State, which must obviously take over all the debts of the constituent States. In the case of a confederation of States, on the other hand, the constitutional links were so vague and the degree of integration so weak that it had even been questioned whether confederations of States possessed international legal personality.

25. Fauchille, for instance, had said that "a confederation of States is a composite of States rather than a composite State". As that author had pointed out, "each of the confederate States retains its autonomy, its independence, the enjoyment of its sovereignty, both external and internal, except for minor restrictions inherent in the very idea of association".<sup>9</sup> In that case, each of the predecessor States must continue to bear the debts it had contracted. However, was there a uniting of States in such a case? According to the definition given in article 14, a uniting of States should lead to the formation of a successor State. Accordingly, if the confederation of States had no international personality, as Fauchille suggested, there was no formation of a new successor State.

26. Between the two extremes of the unitary State and the confederation of States there was the intermediate case of a federation of States. In a federation, integration went deeper than in a confederation.

<sup>6</sup> For consideration of the text proposed by the Drafting Committee, see 1520th meeting, paras. 3 and 4.

<sup>7</sup> *Yearbook... 1977*, vol. II (Part One), p. 45.

<sup>8</sup> See *Yearbook... 1977*, vol. II (Part Two), pp. 56 *et seq.*, doc. A/32/10, chap. III, sect. B, 1.

<sup>9</sup> See A/CN.4/301 and Add.1, para. 399.

tion, at least in respect of external relations and defence. In that case there was unquestionably, from the standpoint of public international law, one successor State and one only, formed by the constituent States that had relinquished their external powers to it. Practice varied, however, in the matter of State debts: depending on the circumstances and the period, there were instances both of the passage of the debts of the predecessor States to the federation and of the continued responsibility of the predecessor States for their debts. In that connexion, the State practice to which he had referred in his ninth report provided many examples of conflicting procedures. Finally, to complicate matters even further, certain federations, described as such by their constituent instruments, were really confederations, and vice versa.

27. Accordingly, the uniting of States could assume very complex forms and covered a range of very different cases—association of States, confederation, federation, political union, merger into a unitary State etc.—which, in the matter of succession to State debts, afforded extremely varied types of solutions, making codification very difficult.

28. Since the constitutional form of the successor State played an essential role in revealing the degree of merger of the predecessor States and at the same time in determining the treatment of their debts, reference must be made to the instruments of internal or international law that effected the uniting of the States under consideration. Accordingly, in its codification work, the Commission must take account of two realities observable in State practice. First, there was always a legal instrument that had given rise to the uniting of States. It was difficult to imagine that two or more States would unite without expressing their will to do so in an instrument of international or internal public law: an international convention or rules of internal law such as a charter of union, a constitution or a fundamental law. Secondly, the legal instrument in question nearly always covered the problems posed by succession to State property or State debts. Two conclusions followed. First, the agreement of the States parties remained the customary and general juridical basis for the settlement of problems relating to State debts when a succession occurred, and the rule to be drafted in that connexion would therefore, more than ever, be residual, a fact that should perhaps be indicated more clearly in the text of article W by laying emphasis on such agreement. Secondly, the treatment of debts did not, in practice, pose serious problems for States that united, because the matter was settled by an international agreement or, after the event, by an instrument of internal public law.

29. But how could reference be made, in a rule of international law, to internal legislation adopted by the successor State to settle succession to debts? How, more generally, was it possible to express the fact of State practice that the constitutional form of the successor State was the determining factor in the choice of a solution to the problems of passing of debts? It was difficult to formulate a rule of interna-

tional law that simply referred the matter to the instrument of internal law governing the constitutional form taken by the new successor State. At the same time, it was impossible to ignore earlier and contemporary State practice, of which he had given several examples in his report (A/CN.4/301 and Add.1, chap. VI), in connexion with the formation of the United States of America, the Swiss Confederation, German unity, Italian unity, the Austro-Hungarian union, the Swedish-Norwegian union, the union between Denmark and Iceland and the uniting of States in Central America, as well as with the more recent cases of Malaysia, the United Arab Republic and the United Republic of Tanzania. The difficulty of the problem lay in the fact that it was necessary to codify cases as different as that of Italian unity, where a unitary State had been created, and that of the personal union between Sweden and Norway, and to formulate a rule that would embody both a principle and its opposite.

30. The treatment of State debts in cases of uniting of States depended on the constitutional form of the successor State, which was determined by the will of the predecessor States. By definition, a uniting of States was an operation dependent on law and the will of the constituent States and could only be voluntary. The treatment of debts therefore depended primarily on the will of the predecessor States. If the predecessor States effected a merger that completely abolished their international legal personalities, it seemed logical that the new successor State should succeed to all the debts of the predecessor States. If, on the other hand, the predecessor States manifested the will to unite, but to retain some degree of competence with respect, for example, to their internal affairs, which implied a degree of responsibility for the management of those affairs, they should be allowed to exercise some responsibility with regard to the debts they had contracted before uniting.

31. Should the rule be expressed in negative or positive form? Should the Commission lay down the principle that debts did not pass (with exceptions, one based on the agreement of the parties and the other on the unitary form of the successor State), or should it, on the contrary, lay down the principle that debts did pass (with exceptions, one based on the agreement of the parties and the other on the very vague form of the type of association or union of the States under consideration)? He had hesitated between those two symmetrical and contrary formulae, but noted that both led to the same result, namely, that in all cases of uniting of States it was the will of the component States, as reflected in the constitutional form taken by the union of States, that tipped the balance in favour of one solution rather than another.

32. Article 14, on the treatment of State property in the event of a uniting of States, set forth in paragraph 1 the principle that property passed, but in paragraph 2 referred the question of its allocation between the successor State and its component parts to the internal law of the successor State. That was a



provisional article, however, and had been placed in square brackets. He had not employed the same formula in the case of debts because the considerable mass of historical precedent that he had studied and reviewed in his report tended to favour the view that debts did not pass. He had found it impossible to take parallelism so far as to ignore the facts.

33. Finally, of all the types of States succession, a uniting of States probably left least room for the principle of equity. Although that principle did not disappear entirely, it nevertheless played a minor role; that was fairly logical, since recourse to equity was more imperative in the case of separation or dissolution of States, where equity might be infringed by some to the detriment of others, than in the case of a uniting of States, where its function was less necessary although still useful.

34. The CHAIRMAN, speaking for the members of the Commission, warmly congratulated the Special Rapporteur on chapter VI of this ninth report, which compelled admiration, and on his brilliant oral introduction. As usual, Mr. Bedjaoui had used abundant precedents to develop a line of argument leading to an article that was logically necessary.

35. Mr. TABIBI said that article W provided for two eventualities: if the uniting of States gave rise to a unitary State, that State would be responsible for State debts, but if it gave rise to a federation or a confederation, the constituent States would be responsible. The rule thus laid down was quite clear and its background fully explained in the Special Rapporteur's report, which gave some notable examples of uniting of States. He therefore recommended that the article be accepted and referred to the Drafting Committee.

36. The Special Rapporteur had referred to cases of annexation and absorption of States. Such cases were of course contrary to international law, and he would suggest that the Commission make it clear, in its report to the General Assembly, that they had been dealt with only for the sake of historical comparison.

37. Mr. CALLE y CALLE approved of the article without reserve. Rather than couching it in positive terms, the Special Rapporteur had chosen to draft it as a residual rule with emphasis on agreement of States. That agreement could be embodied in an international legal instrument or, as was perhaps more frequently the case, in the constitution of the successor State itself.

38. Mr. DADZIE wished to record his entire satisfaction with the Special Rapporteur's report and introductory comments. He agreed that article W should be referred to the Drafting Committee.

39. Mr. USHAKOV considered that the principle set forth in the article under consideration was generally acceptable; in cases of a uniting of States without formation of a unitary State there was no succession to State debts, but if it gave rise to a unitary State the latter, as the successor State, succeeded to the debts of the predecessor States.

40. As currently worded, however, article W confined itself to saying whether or not the successor State "succeeded" to the debts; it would be better to follow the terminology used in preceding articles and indicate when State debts "passed" or did not pass to the successor State. Moreover, the introductory wording of the article was not in conformity with that of the corresponding provision of part I of the draft, relating to succession of States in respect of State property, namely, article 14. That provision began, "When two or more States unite and thus form a successor State", a formula that could with advantage be reproduced in article W. He wondered why the Special Rapporteur had departed from that formulation, which was found in the draft articles on succession of States in respect of treaties.<sup>10</sup> As drafted, article W could give the impression that it was also applicable to cases where States united without thereby forming a successor State. That, however, was not a case with which the Commission had to deal. The case that should be covered by article W was the same as that envisaged in article 14, namely, a uniting of States giving rise to a successor State. According to the definition of the term "succession of States" in article 3, to form a successor State meant to substitute a successor State for predecessor States in the responsibility for their international relations. That was the specific case in which the Commission had to settle the question of the passing of State debts.

41. It remained to be determined whether, in principle, the State debts of predecessor States should or should not pass to the successor State. He considered that they should, just as, under article 14, the State property of predecessor States passed in principle to the successor State. Otherwise States would hasten to unite, being assured that they would shed their debts while their property passed to the successor State. The Commission should therefore lay down the general principle of the passing of State debts, and specify the exceptions. The principle was logical and appeared consistent with State practice. The article proposed by the Special Rapporteur seemed in fact to be based on that principle but did not express it clearly, since it unnecessarily covered a case where there was no succession to State debts, namely, that in which two or more States united without thereby forming a successor State.

42. Mr. SCHWEBEL said that, despite the Special Rapporteur's persuasive analysis, he found the flavour of article W not altogether felicitous, particularly if the article were read without the benefit of the Special Rapporteur's explanations. He was inclined to think that cases where a succession occurred might be more rather than less characteristic, and that the article was less subtle than the report in that respect. For instance, as pointed out in the report, it was not only a unitary State that would assume the debts of the constituent parts: a federal State might also do

<sup>10</sup> *Yearbook... 1974*, vol. II (Part One), p. 252, doc. A/9610/Rev.1, chap. II, sect. D, art. 30.

so, at least jointly if not alone. He had no precise wording to suggest, but thought that the article should be recast in more positive terms; subparagraph (b) might then be amended to refer not to the unitary State but to the kind of federal or confederal State that left the debts to the constituent parts, although it was questionable whether any genuine confederations still existed.

43. Mr. NJENGA said that, although the intent of article W was to cover a specific and limited case of uniting of States, it was cast in such a way that it seemed to extend to a far wider spectrum of relations. That caused him some concern, particularly bearing in mind paragraph 1 of article 14, which provided that, when two or more States united and thus formed a successor State "the State property of the predecessor States shall... pass to the successor State". If State property passed, then debts must also pass. His concern was partially dispelled, however, by paragraph 2 of article 14, which provided that the allocation of the State property "to its component parts shall be governed by the internal law of the successor State".

44. It would be seen, from some recent examples of uniting of States, that there was no problem in that connexion as far as Malaysia was concerned. The United Arab Republic, too, had formed a fully integrated union and, although that union was now dissolved, article W would have operated to transfer State debts as well as State property to the successor State. In the case of the United Republic of Tanzania, however, union was still not complete. Under its interim constitution, responsibility for certain matters, such as external relations and defence, was vested in the United Republic, but not responsibility or other important issues. In Zanzibar, for instance, questions relating to the ownership of State and private property and the administration of justice remained the sole responsibility of the Government of Zanzibar under the leadership of its President, who was also Vice-President of the United Republic of Tanzania. Consequently, if a rule were adopted whereby the United Republic of Tanzania succeeded to the debts of the predecessor State, Zanzibar would pay nothing and yet retain all its assets.

45. A rule drafted in such wide terms would therefore be undesirable, and he thought that article W should be recast to provide in positive terms for cases where the uniting of States gave rise to a unitary State, with a proviso that broader kinds of relationship would be governed either by agreement or by the constitution, depending on the type of arrangement arrived at.

46. Mr. ŠAHOVIĆ thought that the Drafting Committee could find a solution to all the questions that had been raised. In particular, the Drafting Committee should try to establish a parallel between articles 14 and W. It should be noted, too, that the introductory phrase of article W was applicable only to States that federated, and it was therefore difficult to link it to subparagraph (b), which concerned a uniting of States giving rise to a unitary State.

47. He hoped that the Drafting Committee would reconcile the wording of articles 14 and W; article 14 used the expression "component parts", the corresponding words for which in article W were "constituent States", and "predecessor States" were mentioned in article 14 but not in article W.

*The meeting rose at 1 p.m.*

## 1501st MEETING

*Thursday, 15 June 1978, at 10.05 a.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

### Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/301 and Add.1,<sup>1</sup> A/CN.4/313)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR (*continued*)

#### ARTICLE W (Treatment of State debts in cases of uniting of States)<sup>2</sup> (*concluded*)

1. Mr. REUTER said that he could accept article W subject to any necessary drafting changes. The article dealt with a specific case: that of a State that was independent, from the international point of view, uniting with one or more States, also independent, to form a new State, so that it ceased to be a State at the international level. All other cases, including those of succession between States and other entities such as international or supranational organizations, were outside the scope of the draft. If other such cases were to be brought within the scope of the draft, the definitions in article 3<sup>3</sup> would have to be amended, in particular the definition of the term "succession of States".

2. That definition was particularly important for the distinction that had to be made between the topic of succession of States and that of State responsibility. If a local authority under public law failed to discharge its debts, it could be determined, in accordance with the draft articles on State responsibility,<sup>4</sup>

<sup>1</sup> *Yearbook...* 1977, vol. II (Part One), p. 45.

<sup>2</sup> For text, see 500th meeting, para. 21.

<sup>3</sup> See 1500th meeting, foot-note 8.

<sup>4</sup> *Yearbook...* 1977, vol. II (Part Two), pp. 9 *et seq.*, doc. A/32/10, chap. II, sect. B, 1.

whether there had been a wrongful act in international law; if so, that act was attributable to the State to which the local authority belonged. Article W dealt with the case in which an entity that had formerly been a State ceased to be a State and became an entity under public law, such as a province or *département*. Such an entity kept its debts, and only if it failed to discharge them did the situation contemplated in the draft articles on State responsibility arise. The Special Rapporteur had provided, however, for an exception in cases where the predecessor State lost its legal identity under the internal law of the successor State, responsibility for the debt then falling on the latter. Otherwise, the successor State was responsible for the debt only in the event of an internationally wrongful act on the part of the predecessor State that had become a constituent State. That approach was in conformity not only with the other articles of the draft but also with the articles prepared by the Commission on other topics.

3. Mr. EL-ERIAN shared the view that article W should be recast in positive terms, first laying down the basic rule that the successor State formed on the uniting of two or more States succeeded to the debts of the constituent State, then providing for exceptions to that rule. The main point to be borne in mind was that, under international law, a united State formed from a union of States was generally regarded as a single legal entity, even though matters such as the powers of the federal State and of its constituent elements had to be settled by constitutional law.

4. With regard to the uniting of Egypt and Syria as the United Arab Republic in 1958, he agreed with the conclusions drawn by the Special Rapporteur (A/CN.4/301 and Add.1, para. 448). He noted, in particular, the statements that the Provisional Constitution had made no mention of succession to property or debts and that there might be grounds for agreeing with Professor O'Connell that "the UAR would seem to have been the only entity competent to service the debt of the two regions". In that connexion, he informed the Commission that the then Foreign Minister of the United Arab Republic had stated, in a carefully drafted letter addressed to the former Secretary-General of the United Nations, the late Dag Hammarskjöld, that the United Arab Republic would be bound by all the obligations contracted by the two constituent States, not only by those deriving from treaties. Further, as stated in the comments submitted by UNESCO referring to the uniting and dissolution of the United Arab Republic,<sup>5</sup> the arrears of contributions due to that organization from Egypt and Syria before their union had come into being had been treated as a liability of the United Arab Republic. Upon Syria's resumption of its membership of the organization as a separate State in 1961, the contribution attributable to the United Arab Republic for the unexpired portion of the 1961-1962 biennium had been divided in the ratio of five sixths for Egypt

and one sixth for Syria. Comments on the same lines had been submitted by IMF.<sup>6</sup> The Special Rapporteur might wish to consider including a reference to that material in the commentary.

5. Lastly, he wished to commend the Codification Division on the excellence of the United Nations legislative series. He suggested that a list of all the volumes available in that series be included in a later edition of *The Work of the International Law Commission*,<sup>7</sup> for the benefit of students and lawyers, particularly in countries where such material was not readily available.

6. Mr. QUENTIN-BAXTER agreed on the need for a greater degree of conformity in the draft articles, but also considered it necessary to recognize the differences between them. Article 14 appeared in square brackets because the Commission had not been of one mind as to its place in the draft as a whole. Since that article dealt with the passing of property in cases where the uniting of States had given rise to only one State, members were inclined to ask what international law had to do with the way in which a single united State disposed of such matters. But there was a parallel tendency to recognize that it was not unknown in international law for constituent States to retain part of their personality and some element of responsibility. As had already been noted, much of State practice concerned cases in which the new State was rather loosely constructed and retained certain composite aspects.

7. Article W was to be distinguished from article 14 primarily by the fact that, where debts rather than property were concerned, there was another party to consider, namely, the creditor. Whereas it could be argued in the case of property rights that the question was of no concern to the Commission, that could not be said in the case of debts. Many of the difficulties with which the Special Rapporteur had had to contend stemmed from that consideration.

8. A second, but closely allied difference between the two articles was that, in dealing with property rights, the Commission was concerned with rights arising under the internal law of the predecessor State. Consequently, the main problem in dealing with article W and with article 25 (Dissolution of a State) (A/CN.4/313, para. 77) was that the obligations which, it was provided, would not pass to the successor State, would in fact be extinguished. His own conception of the proper function of the law of succession was that international law always involved an "intersection" with internal law and could not properly be construed without the latter. If the Commission divorced the subject from internal law, it would be left with a legal vacuum. The problem was therefore partly artificial, since the Commission, concerned as it was with the triangular relationship, had tended to divorce its thinking from that primary

<sup>5</sup> *Materials on succession of States in respect of matters other than treaties* (United Nations publication, Sales No. E/F.77.V.9), p. 545.

<sup>6</sup> *Ibid.*, p. 550.

<sup>7</sup> United Nations publication, Sales No. E.72.I.17.

point of reference. The very first principle of State succession, after all, was that internal law continued until changed, and that the rights and obligations created under that law persisted. That principle of continuity applied even in the case of the uniting or dissolution of a State. The reasons for the Special Rapporteur's text seemed compelling. It did not endeavour to deal in broad terms with the transfer of debts from one State to another, but concentrated on the position under internal law and the international manifestations of that law. It was for that reason, and partly because the definition of State debt did not altogether correspond to that of State property, that the Commission was now faced with a problem. That was perhaps not the right time to resolve it, but the problem would have to be dealt with when the Commission reverted to the question of definitions.

9. Mr. JAGOTA agreed that a distinction could perhaps be made between State property and State debts as far as the interests of creditors were concerned, but did not think it was germane to the Commission's consideration of article W. Moreover, there was a distinct correlation between those two concepts, in that State debts bore a relationship to State property as defined in article 5, namely, property, rights and interests owned by the State. That nexus was recognized in a number of articles of the draft, in particular, article 24 (Separation of a part or parts of the territory of a State) (*ibid.*, para. 26).

10. He suggested that the Drafting Committee should consider articles W and 14 together, with a view to harmonizing their texts and, as far as possible, using the same wording to convey similar ideas. Generally speaking, legal instruments were either silent on succession to State property and State debts, or dealt with both matters. Very rarely did they refer to one and remain silent on the other. The question of the internal law governing the passing of State property as between the predecessor and successor States should therefore be dealt with in article W in the same spirit as in article 14.

11. The Special Rapporteur and the Drafting Committee might also wish to consider whether the reference in article W to a unitary State should be retained. In his view, it was a vague term that might give rise to controversy as to what did or did not constitute such a State. The Special Rapporteur had in fact recognized the point, both in the definitions and in the sections of his report dealing with the case of Tanzania (A/CN.4/301 and Add.1, para. 450), and with the lessons to be learnt with respect to State debts (*ibid.*, para. 455). In that respect, too, article W should be brought into line with article 14, which did not refer specifically to the nature of the successor State, but merely indicated that the passing of State property should be governed by the internal law of that State, which meant internal law under its constitution. He also noted that article 14 made no mention of an agreement among the constituent States forming the successor State. That point could perhaps be considered when the two articles were brought into harmony.

12. An important point was the residual nature of the rule governing the passing of State debts. The effect of article W was that a debtor State that united with another State normally remained liable for its debt. Only in the case of a unitary State, or where a single State assumed all State property and State debts and the personality of the constituent State was extinguished, was the debt assumed by the successor State. The problem with article W as it stood was the following: if the successor State were defined as the State that replaced the former State, and no mention of the passing of debts were made, either in the agreement among the constituent States or in the constitution, the debtor State could claim that, since it had lost its personality and formed a successor State, its debt had been extinguished. That would lead to endless controversy and the question could not be settled simply by recourse to internal law. Difficulties might also arise in regard to State responsibility, for under the rule as drafted it would not be easy to claim that responsibility none the less passed to the successor State. Consequently, although State practice supported the general theory that a new State, unless it was a unitary State, need not assume the debts of a constituent State, he thought it would help to avoid controversy if, on that point, the wording of article W followed that of paragraph 1 of article 14.

13. Sir Francis VALLAT fully endorsed Mr. El-Erian's suggestion that a list of the volumes published in the United Nations *Legislative Series* should be included in the new edition of *The Work of the International Law Commission*. That would be in keeping with article 24 of the Commission's Statute.

14. Although he agreed in essence with the underlying thoughts of the Special Rapporteur as expressed in article W, he had two points of concern. In the first place, the text perhaps gave the impression of going beyond the scope of the articles as defined in article 1 (Scope of the present articles) and in paragraphs (a) and (c) of article 3 (Use of terms). Of course, the definitions could always be altered, but he doubted the wisdom of so doing because, if the Commission went outside the sphere of the creation of the successor State in the international sense, that would give rise to a series of issues that would only increase the difficulties in an already complex matter. He was therefore inclined to consider that the Commission was dealing with a case in which a successor State meant a State that had replaced another State, in other words, a State in international law, regardless of its internal constitution. In general, a federal State was assumed to be a State for the purposes of succession of States and that, in a sense, should be the end of the matter.

15. A second point of concern was the placing in square brackets of the word "international" in the expression "any international financial obligation", in article 18 (State debt). That left a large area of doubt on a matter that was highly relevant to the topic under consideration. If the word "international" were retained, it could mean that the Commis-

sion was virtually operating in the sphere of treaty law and was not the Commission was virtually operating in the sphere of treaty law and was not really dealing with debts in the ordinary sense. If, on the other hand, that word were deleted, as he believed it should be, then the Commission would be dealing with financial obligations that did not necessarily, in themselves, constitute obligations under international law. He was thinking, for example, of bonded debts, where the State borrowed money on the international market and secured the loan by the issue of bonds, mainly to private persons or corporations. Such debts were debts not in international law, but in internal or private law. That, in his view, was partly where the Commission's difficulty lay. In the case of succession by a uniting of States, debts were inevitably affected by the internal law of the emergent State and internal responsibility for them might be left to the constituent unit or be passed to the federal government. In dealing with State debts, it seemed that the Commission was endeavouring to provide, first, that the new State would be responsible for the debt and, secondly, that the new State would have international responsibility for ensuring that the debt was honoured, even if the burden of payment fell on a component part, which was not quite the same thing. To meet that situation, the article would have to be couched in positive terms, but that would raise the question of the internal legal constitutional position. Consequently, the Commission really had no alternative but to include a safeguard clause providing that the fact that the new government would become responsible for the debt was not intended to prejudice the effect of the internal law of the State after succession had taken place.

16. Lastly, he agreed that article W should be brought into line with article 14 which, in his view, showed the right approach.

17. Mr. CASTAÑEDA fully agreed with the conclusions reached by the Special Rapporteur in his valuable study of the historical precedents and his excellent presentation of the relevant arguments. All members seemed to agree that the rule stated in article W was correct. With regard to the drafting, although the net effect in legal and practical terms would be the same, it might none the less be preferable to formulate the rule in positive form, so that it would read:

“On the uniting of two or more States in one State, the successor State thus formed shall succeed to the debts of the constituent States unless...”

18. A more difficult problem was raised by the use of the vague term “unitary State”, which had no precise meaning in political science and could be used to describe both federal and non-federal States. Moreover, as rightly pointed out at the previous meeting, confederations of States were things of the past and were essentially of academic interest. The examples cited in the report of uniting of States in Central America could be regarded as curiosities of history, since entities in which the constituent States retained all the attributes of sovereignty in internal affairs

could not function effectively in the modern world. Admittedly, it might be asserted that the Commission was **begging** the question if it followed the solution adopted in article 14, which referred to a “successor State” without mentioning a “unitary State”. Nevertheless, in order to overcome the difficulties raised by the term “unitary State”, the Drafting Committee might well take article 14 as a model, rather than enumerate in article W the particular types of State covered.

19. Mr. FRANCIS said it was clear from the 1897 Treaty relating to the Republic of Central America, referred to in paragraph 440 of the ninth report of the Special Rapporteur, that there were instances of unions of States in which the constituent members retained responsibility for their debts and exercised full sovereignty in their internal affairs. Certain problems might arise in modern times in the case of such unions. For example, if two States formed a union for the purpose of external representation and the pursuit of their foreign policy in the United Nations, a new entity would come into being, but what would happen in regard to the obligations of the constituent members to make their financial contributions to the United Nations?

20. It could be seen from paragraph 8 of the tenth report (A/CN.4/313) that the Special Rapporteur had had good grounds for broadening the title and the first part of the article in order to make it clear that the rule stated applied to unions of States in which the constituent members formed separate entities. If that course were followed, subparagraph (b) of the article would be confined to the case of a uniting of States in the proper sense, that was to say, the formation of a single unified State.

21. Mr. BEDJAOUI (Special Rapporteur) noted that there was virtually no difference of opinion among members of the Commission on the questions of substance raised by article W. The problem, therefore, was merely one of finding wording that would preclude the possibility of certain interpretations to which several members had referred.

22. It was a fact that article W raised a drafting problem concerning the definition of uniting of States that could call in question the definition of succession of States adopted by the Commission. Some members of the Commission, including Mr. Ushakov (1500th meeting) and Sir Francis Vallat, had expressed concern that an attempt might be made to extend the scope of article W to associations or confederations of States united by very loose ties, which fell outside the ambit of succession of States as defined in article 3. That article stipulated that the term “succession of States” meant “the replacement of one State by another in the responsibility for the international relations of territory”.

23. He wished to assure members that it was not his intention to depart from the definition of succession of States adopted by the Commission or to call in question the definition of uniting of States given in article 14 in regard to State property. Article W

dealt with the uniting of several States into one State, referred to as the "successor State thus formed". Thus there was no difference between article 14 and article W as far as the definition of a uniting of States was concerned, since the only case contemplated was that of the formation of a successor State.

24. It was clear that the somewhat vague political and economic institutions established in Europe during the previous 30 years did not come within the framework of succession of States, inasmuch as they had not produced a single successor State. For example, it was not possible to speak of the "United States of Europe". Similarly, a confederation that did not have responsibility for the international relations of its component States, or did not have international personality, or whose component States retained their internal and external sovereignty, did not fall within the scope of article W, since it did not entail the existence of a successor State.

25. The application of article W must therefore be strictly limited to cases where there was a succession of States as defined in article 3(a). To obviate any mistakes in interpretation on that point and to establish a parallelism between State property and State debts, he hoped the Drafting Committee would reflect in article W the definition of uniting of States given in article 14, in accordance with the wishes expressed by most of the members of the Commission. The Drafting Committee might also, as suggested by Mr. Šahović (1500th meeting), standardize the terminology of the two articles, article 14 referring to predecessor States where article W referred to constituent States.

26. The first question to be settled, therefore, was whether there was a successor State. The constitutional form of such a State was irrelevant; it sufficed that it was a subject of public international law. He did not think it necessary to limit the scope of the principle stated in article W to unions of States, in the sense suggested by Mr. Francis. There were wide differences in the legal ties uniting the component parts of a federation or a confederation of States and in the legal status of those parts, depending on whether the reference were, for example, to the United States of America or the United States of Brazil, or again to the Swiss cantons, the Canadian provinces or the Soviet Socialist Republics.

27. He thought the Commission should leave aside complex and hybrid cases such as that of the United Arab Republic, mentioned by Mr. El-Erian, whose component parts, although forming a single State, had nevertheless retained a certain identity at the international level after their union. Sometimes, too, the composite State and its component States carried out international responsibilities at the same time; that was true of the Byelorussian and Ukrainian Soviet Socialist Republics, each of which had international personality, since they were Members of the United Nations side by side with the USSR. The latter, consequently, could not be said to be entirely responsible for their international relations.

28. Instead of confining himself, in article W, to stating the principle of the passing of State debts, as he had for the passing of State property in article 14, he had sought to go further and to determine whether it was the composite State or the component State that should assume those debts. He had probably been wrong to do so, because he had thus come up against the problem of the constitutional form of the State, in other words, its internal law.

29. In the matter of debts there was a very great difference, in regard to the risks run by creditors, between cases of uniting of States and cases of separation or dissolution of a State. It was obvious that, in the case of a uniting of States, the component States did not unite in order to evade their debts, which were not likely to be extinguished as in the case of separation or dissolution of a State; the debts would in any event be taken over, either by the successor State or by the component States. The only question that arose was to what extent the debts of the predecessor States passed to the successor State, but that question was of no importance from the creditors' point of view. Hence there was no need to try to determine who should in fact assume the debts.

30. He recognized that Mr. Jagota's preference for a closer parallel between articles 14 and W was justified, but pointed out that article 14 was still in square brackets, because it remained controversial. However, if the Commission wished to establish a parallel between the two articles, he was prepared to draft article W in positive form.

31. He proposed that the article be referred to the Drafting Committee for consideration in the light of the suggestions made by the members of the Commission.

32. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article W to the Drafting Committee.

*It was so agreed.*<sup>8</sup>

ARTICLE 24 (Separation of a part or parts of the territory of a State)

33. The CHAIRMAN invited the Special Rapporteur to introduce article 24 (A/CN.4/313, para. 26), which read:

*Article 24. Separation of a part or parts of the territory of a State*

1. If a part or parts of the territory of a State should separate from that State and form a State, then, unless the predecessor State and the successor State agree otherwise, an equitable proportion of the State debts of the predecessor State shall pass to the successor State, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt.

2. The provisions of paragraph 1 shall apply in the case where a part of the territory of a State separates from that State and unites with another State.

<sup>8</sup> For consideration of the text proposed by the Drafting Committee, see 1514th meeting, and 1515th meeting, paras. 1-54.

34. Mr. BEDJAoui (Special Rapporteur) said that article 24 dealt with the passing of State debts in the event of the separation of a part or parts of the territory of a State. For the sake of parallelism, clarity and internal consistency, the type of State succession to which the article referred had been defined in the same way as in article 15, concerning the passing of State property; the situation contemplated was that in which one or more parts of the territory of a State separated from it to form another State, the predecessor State surviving the separation.

35. He had given examples of State practice in that situation in his tenth report. In the case of the Irish Free State, he had noted that the Treaty of 6 December 1921 between Great Britain and Ireland, by which that State had been created, had apportioned debts between the predecessor State and the successor State on the basis of the principle of equity.<sup>9</sup>

36. In the case of the secession of Singapore, he had found a remarkable symmetry between the adherence of Singapore to the Federation of Malaya in 1963 and its withdrawal from the Federation in 1965, which had been characterized by a return to the *status quo ante*. When the Federation of Malaya had been set up, provision had been made for the passage to it, unless otherwise agreed between the federal government and the government of the State concerned, of "all rights, liabilities and obligations" of its constituent States, including Singapore. Singapore's withdrawal from the Federation in 1965 had brought the return to that State of the "rights, liabilities and obligations" it had transferred to the Federation.<sup>10</sup> That symmetry had been made possible by the circumstances of the case; for it was probable that, on the one hand, the federal or confederal nature of the grouping, which had tended to preserve the identity of the components, and, on the other hand, the short lifespan (two years) of the union, which had prevented a higher degree of integration, had contributed to the nearly total and virtually automatic return to the *status quo ante* in regard to rights, liabilities and obligations, particularly State property and State debts. But it was clear that cases of that kind were not typical.

37. With regard to the secession of Bangladesh, the problem of the apportionment of State debts between Bangladesh and Pakistan was still pending, for the negotiations begun in June 1974 had ended in failure. Bangladesh seemed to have been rather reluctant to assume a share of the debts, although it had claimed 56 per cent of the common property.<sup>11</sup>

38. The paucity of the examples he had cited showed that State practice in the matter under discussion was not very abundant. But that did not mean that State succession of the type in question would have no part to play in the future. On the contrary, it might occur much more often and acquire

considerable importance, since many groups of human beings were now seeking their identity by virtue of the right of peoples to self-determination. That right had been invoked in various forms in the course of history. After the principle of nationalities, upheld by Napoleon III and then, after the First World War, by President Wilson, which had led to the establishment of numerous independent States and changed the map of Europe, and after the decolonization movement following the Second World War, which had enabled numerous peoples of the third world to free themselves from the yoke of colonialism and had profoundly disrupted international relations, some writers now saw a new phase in the invocation of the right to self-determination which, as was shown by the current problems of Africa, spared neither the older States nor the newly independent States. The reason was that certain peoples or ethnic groups had at various times been enclosed within artificial frontiers, so that there were now poly-ethnic States, or States comprising several races, and poly-national races, or races dispersed among several States. It could thus be seen that the problem of State succession, as it might arise in cases of secession, was not an academic but a real problem that might assume considerable importance in the future and must not be overlooked.

39. He should the rule governing that type of succession be constructed? In his view, it must be decided how much weight was to be given, on the one hand to agreement between the parties and, on the other hand, to what was equitable and reasonable. It was clear that agreement between the parties took precedence over everything else. But in the absence of agreement—and it was to be feared that in cases of secession, which often took place with violence, there would be no agreement—recourse must once again be had to equity, which then reasserted its full claim.

40. If it followed that principle, however, the Commission would produce an article 24 on the same lines as article 21, which concerned succession to State debts in the event of transfer of part of the territory of a State. But that type of succession was different from the case of separation dealt with in article 24. Indeed, as he had pointed out in paragraph 20 of his report, the Commission had distinguished very clearly between those two cases. The first case involved the transfer, generally by peaceful means and by agreement between the ceding State and the beneficiary State, of a relatively small and unimportant area of territory, and that did not entail the creation of a new State. The second case involved the secession, generally by violent means and without prior agreement, of a large area of territory, resulting in the creation of a new State.

41. It would thus be unrealistic to adopt the same solution in article 24 as in article 21, since in the case of separation there was often no prior agreement. Recourse must therefore be had once again to the principle of equity, as it had been applied in the other articles. That principle must be seen as an essential ele-

<sup>9</sup> See A/CN.4/313, paras. 11 and 12.

<sup>10</sup> *Ibid.*, paras. 13 and 15.

<sup>11</sup> *Ibid.*, para. 17.

ment of settlement between two protagonists which, given the separation and the conditions in which it occurred, would tend to show very little flexibility towards each other.

42. However, if the Commission invoked the principle of equity, it would have to establish some parallelism between the rule on State debts set out in article 24 and the rule on State property set out in article 15 to cover the same case of the separation of a part or parts of the territory of a State. There would have to be some correlation between the "property, rights and interests" that passed to the successor State and the State debts relating thereto. It was also necessary to take account of any just and equitable claim, so as to achieve the essential balance in the apportionment of debts between the predecessor State and the successor State. Consequently, paragraph 1 of article 24 stressed the principle of equity, while giving due place to the element of agreement.

43. It would be remembered that in article 15, paragraph 2, the Commission had assimilated to the case where a part or parts of the territory of a State separated from it to form a new State the different case of a part of the territory of a State separating from it and uniting with another, pre-existing State. The latter case was not the one contemplated in article 12, which related to the transfer of part of the territory of a State. Article 12 referred to the case of a small area of territory being transferred by one State to another, whereas article 15, paragraph 2, referred to a case where a large area of territory voluntarily separated from one State and united with another. The wording of article 24, paragraph 2, which was similar to that of article 15, paragraph 2, met the need for parallelism between the provisions relating to State property and those relating to State debts.

44. Mr. VEROSTA thought the Drafting Committee would be able to adopt article 24 without change, for it was a clear and well-worded provision covering most of the problems that were likely to arise.

*The meeting rose at 12.50 p.m.*

## 1502nd MEETING

*Friday, 16 June 1978, at 10.40 a.m.*

*Chairman* : Mr. José SETTE CÂMARA

*Members present* : Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

## Organization of work (*continued*)\*

1. The CHAIRMAN said that the Enlarged Bureau had recommended at its latest meeting that, in response to an invitation contained in a note dated 6 March 1978 from the Secretary-General, the Commission should be represented as an observer at the World Conference to Combat Racism and Racial Discrimination, to be held in Geneva from 14 to 26 August 1978. The Enlarged Bureau had authorized him to enter into consultations with members to determine who should represent the Commission at the Conference.

2. If he heard no objection, he would take it that the Commission approved the recommendation.

*It was so agreed.*

3. The CHAIRMAN said that the Enlarged Bureau had also recommended that a letter be addressed to the European Committee on Legal Co-operation explaining that the Commission would be unable to send a representative to the forthcoming session of the Committee because it would be in session itself during the period in question.

4. If he heard no objection, he would take it that the Commission approved that recommendation.

*It was so agreed.*

5. The CHAIRMAN informed the Commission that the Enlarged Bureau had recommended the establishment of a working group on international liability for injurious consequences arising out of acts not prohibited by international law, consisting of Mr. Quentin-Baxter (chairman), Mr. Ago, Mr. Castañeda and Mr. Njenga, and of a working group on jurisdictional immunities of States and their property, consisting of Mr. Sucharitkul (chairman), Mr. El-Erian, Mr. Francis and Mr. Riphagen.

6. If he heard no objection, he would take it that the Commission approved those recommendations.

*It was so agreed.*

7. The CHAIRMAN informed the Commission that the Enlarged Bureau had proposed that the review of State practice, international jurisprudence and doctrine relating to "force majeure" and "fortuitous event" as circumstances precluding wrongfulness (ST/LEG/13), prepared by the Codification Division of the Office of Legal Affairs, should be published in the Commission's *Yearbook* for 1978. In an exchange of views with the Office of Legal Affairs, the Department of Conference Services had expressed some hesitation and had sought to apply a criterion under which the length of certain documents was limited to a maximum of 32 pages. Such a criterion should obviously not apply in the case of important documents of scientific value.

8. The Commission might therefore decide to include the aforementioned study in its 1978 *Yearbook*

\* Resumed from the 1486th meeting.



as a document of the current session, and to inform the Department of Conference Services accordingly.

*It was so agreed.*<sup>1</sup>

9. The CHAIRMAN stated that, in the course of the Enlarged Bureau's meeting, Mr. Ushakov had made a number of suggestions with a view to advancing the work of the Drafting Committee, and thus of the Commission, in connexion with the second reading of the draft articles on the most-favoured-nation clause, the General Assembly having recommended in its resolution 32/151 that the Commission should complete its consideration of that topic at the current session.

**Succession of States in respect of matters other than treaties (continued) (A/CN.4/301 and Add.1,<sup>2</sup> A/CN.4/313)**

[Item 3 of the agenda]

**DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (continued)**

**ARTICLE 24 (Separation of a part or parts of the territory of a State)<sup>3</sup> (concluded)**

10. Mr. CASTAÑEDA said that the Special Rapporteur, with his customary broad historical approach, had rightly pointed to the emergence of a new phase in the exercise of the right of peoples to self-determination. In recent times, centrifugal forces appeared to have prevailed over centripetal forces and the phenomenon of dismemberment of States would doubtless prove to be of enormous importance in the future. Article 24 was therefore one of the most important of the draft articles.

11. Obviously, agreement between the predecessor State and the successor State was a significant element in the apportionment of State debts, but the Special Rapporteur had pointed out in paragraph 20 of his tenth report (A/CN.4/313) that no such agreement might exist, precisely because secession had occurred in circumstances of violence. The principle of equity was therefore an essential element in the solution of the problem of the passing of debts to the successor State.

12. It had been noted that, whereas article 21<sup>4</sup> related to the transfer of a relatively small and unimportant territory, article 24 concerned a larger area of a State's territory. However, from the examples cited in connexion with the two articles, it was not possible to determine conclusively which rule would apply in a particular case. The commentary to article 21 showed that, according to Fauchille, for example, the principle of equity was fundamental, for if the suc-

cessor State acquired some of the property of the predecessor State it must necessarily assume a part of the latter's debts.<sup>5</sup> On the other hand, in the arbitral award rendered in the *Case of the Ottoman Public Debt*, Borel had taken the view that the principle that a State acquiring part of the territory of another State must at the same time take responsibility for a corresponding portion of the latter's public debts was not established in positive international law and that such an obligation could stem only from a treaty in which the obligation was assumed by the State in question.<sup>6</sup> The Commission must think of the future and adopt the new rule proposed by the Special Rapporteur, a rule that was perfectly justified in law and equity and had his full support. The rule embodied the principle that there must be an equitable passing of debts, in some sense proportional to the portion of the property of the predecessor State acquired by the successor State.

13. Again, some parallel might be drawn between article 24 and article 22, on newly independent States, since the latter article stipulated that the provisions of the agreement between the newly independent State and the predecessor State "should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources". That might be regarded as a rule of *jus cogens*, for if the agreement failed to observe that principle, it could be held invalid. Admittedly, articles 24 and 22 did not deal with the same situation; however, article 24 reflected a consideration that was of the utmost importance to international public order and could be likened to a rule of *jus cogens*, namely, that the principle of equity was an essential factor in the apportionment of debts and must therefore be taken into account in the agreement between the predecessor and successor States. Article 24 specified that "unless the predecessor State and the successor State agree otherwise, an equitable proportion of the State debts of the predecessor State shall pass to the successor State"; it thus gave pre-eminence to the principle of equity. Nevertheless, he wondered whether it might not be advisable to state explicitly in article 24 that the agreement between the predecessor State and the successor State must not infringe the principle of equity in the apportionment of State debts, the same way as article 22 called for observance of the principle of the permanent sovereignty of every people over its wealth and natural resources.

14. Mr. TSURUOKA also wished to congratulate the Special Rapporteur, and thought the Commission could now refer article 24 to the Drafting Committee. However, he hoped that the Drafting Committee would establish more of a parallel between paragraph 1 of article 24 and article 14, relating to State property, since greater emphasis on the link that existed between the State debt and "the property, rights and interests which pass to the successor

<sup>1</sup> The document will appear under the symbol A/CN.4/315 in *Yearbook... 1978*, vol. II (Part One).

<sup>2</sup> *Yearbook... 1977*, vol. II (Part One), p. 45.

<sup>3</sup> For text, see 1501st meeting, para. 33.

<sup>4</sup> See 1500th meeting, foot-note 8.

<sup>5</sup> See *Yearbook... 1977*, vol. II (Part Two), p. 72, doc. A/32/10, chap. III, sect. B, 2, art. 21, para. (2) of the commentary.

<sup>6</sup> *Ibid.*, p. 76, para. (21) of the commentary.

State” would bring out more clearly the idea underlying article 24.

15. Mr. FRANCIS said that the dismemberment of any State through secession was always something that grieved the bystander. The excellent rule formulated by the Special Rapporteur could not be faulted in either substance or wording, and he had no hesitation in recommending its referral to the Drafting Committee.

16. Mr. RIPHAGEN said that the rule enunciated in article 24 reflected the practice of States admirably; it referred, like a number of the draft articles, to a proportion of debts that was equitable in the light, *inter alia*, of “the property, rights and interests” that passed to the successor State. He had always thought that the word “interests” in that phrase signified every kind of interest; territory passed to the successor State, and an essential aspect of the whole matter of the passing of debts was the possibility open to the successor State of using that territory for tax purposes. It would be noted, however, that article 25 (A/CN.4/313, para. 77), in referring to the equitable proportion of debts to be assumed by the successor State, spoke of “such factors as its tax-paying capacity and the property, rights and interests passing to it”. It might be advisable for the Drafting Committee to consider whether the formula regarding the equitable proportion of debts should not be the same in all instances, either mentioning the successor State’s “tax-paying capacity”, which was an essential factor, or implying that tax-paying capacity was covered by the words “property, rights and interests”.

17. Mr. SCHWEBEL endorsed the idea of referring the excellent text of article 24 to the Drafting Committee.

18. Mr. Castañeda had expressed the view that the concept of equity or of an equitable apportionment of State debts might partake of *jus cogens*. Personally, he had always considered equity a general principle of law and believed that *jus cogens* should be regarded as a more specific and more precise concept. It was also doubtful whether the principle of the permanent sovereignty of every people over its wealth and natural resources mentioned in article 22—the content of which was disputed—could be regarded as an example of *jus cogens*. It was well known, of course, that the Commission had experienced difficulties in agreeing on what in fact came under the heading of *jus cogens*. Where so much dispute existed over the *jus*, i.e. over the law itself, it was difficult to call it imperative; what in fact was the imperative content of the principle?

19. Mr. USHAKOV said that article 24 raised the problem of the definition of State debt that had already arisen in connexion with article 18. If “State debt” meant exclusively the financial obligations contracted internationally by a State, it was right to say that “the State debts of the predecessor State shall pass to the successor State”. On the other hand, if “State debt” also meant the debts contracted by a State towards its own nationals, whether in-

dividuals or bodies corporate, there could not be said under international law to be a passing of State debt. That remark held true not only for article 24 but also for all the other articles relating to the passing of State debts.

20. He thought the commentary should indicate that, if a debt had been contracted solely for the purpose of developing a part of a State’s territory that later separated to become an independent State, that debt should not simply pass to the successor State in “an equitable proportion”, but in its entirety. In any case, the Special Rapporteur had already referred in his ninth report to localized property financed through certain debts (A/CN.4/301 and Add.1, paras. 221 *et seq.*).

21. As to the drafting, in order to bring the text of article 24 into line with that of article 21, it would be best to refer, in the middle of paragraph 1, to “State debt” in the singular.

22. Regarding the words “unless the predecessor State and the successor State agree otherwise”, he wondered whether the agreement between the parties would prevail or whether it would be defeated by the refusal of a creditor third State to accept the agreement, as authorized in article 20. That question applied to article 21 (Transfer of part of the territory of a State) as well.

23. However, he approved article 24 as a whole, and proposed that it be referred to the Drafting Committee.

24. Mr. PINTO said that he could not fail to praise the formulation of article 24, which should be referred to the Drafting Committee. In particular, he welcomed the fact that the article took account of the principle of equity.

25. The phrase “property, rights and interests” was used in other articles of the draft but was somewhat difficult to understand in the context of article 24. No mention was made of obligations, yet debts were not the only obligations that might be incurred by a State. Under the article, in order to apportion State debts equitably, account must be taken, *inter alia*, of the property, rights and interests that passed to the successor State. Perhaps the Special Rapporteur might explain the difference between “property”, “rights” and “interests”, and also consider the advisability of including a reference to obligations that passed to the successor State, in other words obligations other than the debt or debts in question.

26. Mr. SUCHARITKUL fully supported the principle of the passing of the debts of the predecessor State to the successor State in “an equitable proportion”, which seemed to be the only formula acceptable and applicable in the type of State succession in question, except where, as article 24 prescribed, “the predecessor State and the successor State agree otherwise”. In practice, the application of that formula called for sound judgement and was not always an easy matter, as the Special Rapporteur had clearly shown (1501st meeting) in two cases of State succes-

sion, those of Singapore and Bangladesh. The problem of succession to debts had been easier to resolve in the first case than in the second; the solution depended on different factors in the negotiations and on the successor State's capacity to pay.

27. Mr. TABIBI said that in article 24 the Special Rapporteur had laid down a clear rule on a subject concerning which there was no great wealth of State practice. Moreover, the matter was somewhat complex, as illustrated by the recent secession of Bangladesh. It should, however, be made quite clear in the commentary that, in applying the rule, it was essential to ensure that the debt burden did not fall on a separated part of a State that had not benefited from the loan. A debt might have been incurred, while a State had still been united, for the benefit of one part of the territory only; in such a case, it would be contrary to all justice and equity for that debt to be apportioned on secession. A case in point was that of the Shaba province of Zaire, into which massive investments had been poured from all over the world. Should that province secede and the debt then be apportioned, it would mean the further impoverishment of the poorer parts of the country.

28. Mr. DADZIE expressed his support for article 24, which embodied the principle of equity and took account of the property, rights and interests that passed to the successor State in relation to the State debt. The rule laid down was also rightly made subject to the agreement of the parties. He would therefore recommend that the article be referred to the Drafting Committee for consideration in the light of members' comments.

29. Mr. EL-ERIAN, also expressing support for article 24, said that it dealt with an uncharted area of international law for which no universally accepted rules existed.

30. It might be advisable to place the words "unless the predecessor State and the successor State agree otherwise" at the beginning of paragraph 1. The Drafting Committee might consider that point.

31. In his view, the Special Rapporteur had been right to exclude cases of decolonization from his examples; such cases were concerned more with a change in administration than with the separation of part of a State's territory. In that connexion, he would refer the Commission to the case of *Rex v. Jacobus Christian* (1923),<sup>7</sup> turning on the question whether an inhabitant of South West Africa, a territory at the time under the Mandate of the Union of South Africa, could be charged with high treason. The Supreme Court of South Africa had held in that case that the person concerned could not be considered a national, although South West Africa was a "C" mandated territory.

32. Mr. CASTAÑEDA said that he recognized that article 24 did not reflect a rule of *jus cogens* but laid

down a new rule. In his earlier comments, he had compared that rule with the rule in article 22, which was similar in certain respects. Article 22 referred to the principle of the permanent sovereignty of every people over its wealth and natural resources and, in his view, involved a rule of *jus cogens*; he appreciated, however, that opinions differed on the matter. His point had been that the principle of equity was of such paramount importance to international public order that any agreement reached between the parties must necessarily take that principle into account. That did not mean, however, that he thought a rule of *jus cogens* was involved. There was always a risk of misinterpretation in thus comparing situations that were similar but not identical.

33. Mr. BEDJAOUI (Special Rapporteur) noted that article 24 had given rise to only brief discussion; in the main, members had approved the text proposed. He would therefore confine his remarks to a few clarifications.

34. The Commission did not have to deal with the question raised by Mr. El-Erian regarding colonies, which some had regarded as an integral part of the metropolitan country, or regarding the various categories of mandate, since the draft drew a clear distinction between separation of a part of a State's territory and decolonization, which gave birth to newly independent States. For some 30 years the United Nations had recognized that mandated territories and colonies could not be deemed an extension of the territory of the administering or metropolitan Power. That theory had been enunciated in 1970 in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>8</sup> Under the terms of the fifth principle set forth in the Declaration,

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

35. As Mr. El-Erian and Mr. Castañeda had pointed out, the rule proposed in article 24 included an element of progressive development of international law, since it introduced the principle of equity. In his view, international law must be increasingly imbued with that principle in the future. A future system of international law based on equality was inconceivable. The notion of the sovereign equality of States, invoked all too often, was mere hypocrisy: too many *de facto* inequalities, whether of natural resources, population or other kinds, separated States. The international law of tomorrow would have to be the law of equity, taking account of each and every factor and removing the inequalities.

<sup>7</sup> *The British Year Book of International Law*, 1925, London, vol. 6, p. 211.

<sup>8</sup> General Assembly resolution 2625 (XXV), annex.

36. Mr. Castañeda had rightly said that any agreement between the seceding State and the predecessor State would have to be consonant with international public order; it could therefore be affirmed that such an agreement must respect equity. In that connexion it should be emphasized that, as Mr. Castañeda had pointed out, article 24 did not involve a rule of *jus cogens*; equity was a general principle of law but, unlike the principle of the sovereignty of States over their natural wealth, did not partake of *jus cogens*. The Drafting Committee might seek a formula that would indicate how the agreement between the predecessor State and the successor State should be designed in order to conform to the principle of equity. In that connexion, it should be noted that in practice an equitable agreement benefited not only the part of the territory that seceded but also the predecessor State.

37. Mr. Tabibi, citing the example of Katanga, had mentioned the possibility of a separation of a particularly wealthy part of a State's territory that would leave the predecessor State so impoverished that it would no longer be viable; undoubtedly, the only way for the Commission to deal with such situations would be to provide in general terms that equity must be determined in the light of all the surrounding circumstances. Mr. Sucharitkul had mentioned the opposite case, in which the seceding party's capacity to pay was doubtful, and had expressed the hope that the principle of equity would be applied with sound judgement, which was not always easy. In his own view, it would be necessary in either case to adhere faithfully to the principle of equity.

38. Mr. Ushakov had first emphasized the difficulties that might arise with the definition of the term "State debt" in article 18. The definition did not seem entirely satisfactory, but the Commission should disregard that for the moment. In drawing a distinction between a State's debt under international law and its debt towards its nationals, Mr. Ushakov had reopened the Commission's discussion of the year before. The question was a very delicate one and would have to be dealt with in the commentary to article 24.

39. On the other hand, the words "in relation to that State debt" at the end of paragraph 1 of the article clearly showed that the provision covered localized debts, a point to which Mr. Ushakov had rightly drawn attention. If the proceeds of a loan had been assigned by a State to a part of its territory that later seceded, it was obvious that, in keeping with the principle of equity, the burden of that debt should lie chiefly with the successor State. As the International Court of Justice had indicated in its decision in the *North Sea Continental Shelf Cases*, all the surrounding circumstances must be taken into account in the application of principles of equity.<sup>9</sup>

40. Mr. Ushakov had also posed the question of the position of the creditor third State in the light of arti-

cle 20. It was to be emphasized that article 20 formed part of the general provisions applicable to succession to State debts and was therefore applicable, in theory, to all types of succession governed by specific provisions. In cases of secession, therefore, the creditor had no choice if the debt was shared equitably, a state of affairs that the creditor could not fail to welcome but that none the less raised certain problems that would have to be dealt with in the commentary.

41. As to the comments made by Mr. Pinto in connexion with the phrase "property, rights and interests", as close a parallel as possible had been established between article 24 and the corresponding provision relating to State property, namely, article 15. In article 15, however, the Commission had not used the formulation "property, rights and interests" but had spoken of "State property". According to the definition given in article 5, State property meant the assets of the predecessor State, i.e. the rights, property and interests owned by it at the time of the succession. Perhaps the Commission should review that question of terminology at the next session. Equity obviously required that account be taken of any obligations, over and above the purely financial obligations of debts, that might be assumed by the successor State when the assets and liabilities were apportioned. For the moment, however, it would be best to retain the formula already employed in the draft. In any event, it would not be possible to draw on article 14, as suggested by Mr. Tsuruoka, or even on article 15, which in respect of State property was the equivalent of the article now under consideration, since neither contained the phrase "property, rights and interests".

42. Lastly, Mr. Riphagen had suggested a review of the formulae for determining the "equitable proportion" that appeared in articles 24 and 25, the latter speaking of the "tax-paying capacity" of the successor State. The Drafting Committee might usefully endeavour to reconcile the wording of those two articles.

43. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 24 to the Drafting Committee or consideration in the light of the discussion.

*It was so agreed.*<sup>10</sup>

*The meeting rose at 12.40 p.m.*

<sup>10</sup> For consideration of the text proposed by the Drafting Committee, see 1515th meeting, paras. 55-63.

## 1503rd MEETING

*Monday, 19 June 1978, at 3.10 p.m.*

*Chairman* : Mr. José SETTE CÂMARA

*Members present* : Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. El-Erian, Mr. Francis,

<sup>9</sup> *I.C.J. Reports 1969*, p. 3.

Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/301 and Add.1,<sup>1</sup> A/CN.4/313)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR (*continued*)

ARTICLE 25 (Dissolution of a State)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 25 (A/CN.4/313, para. 77), which read:

*Article 25. Dissolution of a State*

Where a State is dissolved and disappears and the parts of its territory form two or more States, the apportionment of the State debts of the predecessor State shall be settled by agreement between the successor States.

In the absence of agreement, responsibility for the State debts of the predecessor State shall be assumed by each successor State in an equitable proportion, taking into account such factors as its tax-paying capacity and the property, rights and interests passing to it in connexion with the said State debts.

2. Mr. BEDJAOU (Special Rapporteur) reminded members that the Commission had drawn a clear distinction between the separation of a part or parts of the territory of a State, where the predecessor State survived, and the dissolution of a State, where the State disappeared through dismemberment. Those two cases, which were dealt with in articles 24 (*ibid.*, para. 26) and 25 respectively, were clear in theory, but in practice it was sometimes difficult to distinguish one from the other, as several representatives had pointed out in the Sixth Committee, and to determine whether a given case fell under article 24 or article 25. Moreover, even when a situation seemed to be clear, it was not unusual for a State to challenge the description given to it. For example, after the dismemberment of the Ottoman Empire following the First World War, Turkey had regarded itself as one of the successor States, not as the predecessor State. It was particularly important to identify each situation exactly, since the solutions applicable to the passing of State debts and State property varied according to whether the case was one of separation or dissolution.

3. State practice in the matter was fairly abundant, as was clear from the numerous examples he had examined in paragraphs 29 to 61 of his tenth report (A/CN.4/313). If he had confined himself to mentioning the disappearance of the Austro-Hungarian Empire in 1919, that was because it was an extremely complicated case. In general, the dissolution of a

State was the reverse of the process of uniting of States, and, as the Commission had already noted in its commentary to the draft articles on succession of States in respect of treaties, dissolutions of unions of States were far more frequent than dissolutions of unitary States<sup>2</sup> Nevertheless, the dissolution of a State that had not come into being as a result of uniting was quite conceivable.

4. The case of the dissolution of Great Colombia, in the period 1829 to 1831, had been characterized by the existence of an agreement between the entities forming the union, by an equitable apportionment of debts between them and by two arbitral awards rendered in 1869. Those awards had been based on the principle of equitable apportionment of debts, taking account of the resources or capacity to pay of the successor State, namely, Venezuela.

5. The settlement after the break-up of the Netherlands had taken from 1830 to 1839 and had produced a spate of proposed agreements. The five Powers of the Holy Alliance had engaged in long and arduous negotiations, from which some lessons could be learnt. It could be noted, first, that there had been an agreement—even several agreements; also that one of the proposed agreements, the Twelfth Protocol, referred to the existence of principles which, “far from being new, were principles that had always governed the reciprocal relations of States”.<sup>3</sup> Furthermore, the five Powers had reached the conclusion that “upon the termination of the union, the community in question likewise should probably come to an end and, as a further corollary of the principle, the debts which, under the system of the union, had been merged, might, under the system of separation, be redivided”.<sup>4</sup> Thus dissolution had been seen as the opposite of the process of uniting. Lastly, all the official discussions, as well as the objections to and support for the solutions proposed, had been based on the concept of equity and justice. There had been frequent references to the apportionment of debts on “equitable bases” and “in fair proportion”. Yet the claims of “Realpolitik” had not been overlooked, and Belgium had made its agreement conditional on the acquisition of the Grand Duchy of Luxembourg. Finally, a treaty based on equity had been concluded in 1839 and guaranteed by the five Powers of the Holy Alliance.

6. Among the other cases examined, the dissolution, in 1905, of the union between Norway and Sweden was a very special case, in that it had been a personal union formed by two States that had retained their individuality. There had been no need to apportion the debts, since each State had remained responsible for its own debts. Only common debts contracted in respect of diplomatic representation had

<sup>2</sup> See *Yearbook... 1974*, vol. II (Part One), p. 260, doc. A/9610/Rev.1, chap. II, sect. D, articles 33 and 34, para. (2) of the commentary.

<sup>3</sup> See A/CN.4/313, para. 38.

<sup>4</sup> *Ibid.*, para. 39.

<sup>1</sup> *Yearbook... 1977*, vol. II (Part One), p. 45.

been apportioned. The break-up of the union between Denmark and Iceland, in 1944, was also a special case, inasmuch as the financial separation of the two countries had begun in 1871; the final political separation in 1944 had had no financial consequences. As to the dissolution of the United Arab Republic in 1960, his research had not provided sufficient information to enable him to determine what solutions had been applied to the problem of succession to the Union's debts. The same applied to the dissolution of the Federation of Mali in 1960; it was difficult to form an opinion as to the nature, origin and amount of Mali's debts to Senegal, mentioned in a communiqué of 1964. The dissolution of the Rhodesia-Nyasaland Federation in 1963 had led to an apportionment of debts by the administering authority, but that apportionment had been challenged both as to its principle and as to its procedure.

7. An examination of State practice brought up two questions. The first was the nature of the problems raised by the passing of State debts upon the dissolution of a State. The break-up of a State involved that interests were often difficult to reconcile otherwise than by agreement. Thus an agreement seemed indispensable, although it was extremely difficult to reach in the case of a "divorce"; to make it easier, the principles that must be reflected in every agreement should therefore be indicated. It seemed that the principle of equity should govern the apportionment of debts between successor States, due account being taken of all the circumstances of the case. That point emerged, in particular, from the various protocols relating to the separation of Belgium and Holland, which were referred to in paragraphs 65 and 66 of his tenth report (A/CN.4/313). The second question concerned the classification of certain cases of succession, for example, the succession to the Ottoman Empire. In the draft articles on succession of States in respect of treaties, the Commission had at first made a clear distinction between the separation of parts of a State and the dissolution of a State; but, as a result of comments made in the Sixth Committee, it had dealt with both cases in a single article, although it had also devoted a separate article to the case of separation. For succession of States in matters other than treaties, he had retained the distinction between separation and dissolution, taking the survival or disappearance of the predecessor State as the criterion. That criterion was not entirely reliable, however, because knotty problems could arise in regard to the continuity and identity of the predecessor State. On that point, he referred members of the Commission to the comments he had made in paragraphs 70 and 71 of his report, concerning the disappearance of the Kingdom of the Netherlands.

8. The solutions he had proposed were based on the old doctrine, represented in particular by Fauchille and Bluntschli, according to which State debts were apportioned in an equitable proportion between the successor States. Since, in principle, the predecessor State disappeared, creditors were entitled to know what became of their claims. That was why he had

given pride of place to agreement in the proposed rule; only in the absence of agreement should the principle of equity be applied. As in the case of separation of parts of a State, equity required that all the circumstances of the case be taken into account, in particular the "property, rights and interests" passing to the successor State, to which he had added, in the case of the dissolution of a State, the criterion of capacity to pay, bearing in mind the two arbitral awards rendered in 1869 following the dissolution of Great Colombia. That concept was not confined to the tax revenue of the provinces that had become successor States as a result of the dismemberment of the predecessor State; it had a much wider meaning and also included each successor State's capacity to pay.

9. Mr. TABIBI said that the case of the Belgian-Dutch union of 1814, unlike some of the other cases to which the Special Rapporteur had referred in his tenth report, provided clear guidance as to both uniting and separation, and thus provided a sound basis on which to draft a rule.

10. He could therefore accept article 25 in principle, but thought that the word "disappears" was not appropriate in the context, for it did not take account of the fact that the territory and people of the State—if not the State itself—subsisted. Moreover, a union of States that had been dissolved might well form another union at some later date. In the Arab world, for instance, there was a movement towards the formation of a single nation and although the United Arab Republic had been dissolved, a new union of Arab nations might come into being. He therefore suggested that the word "disappears" should be replaced by the words "breaks up", which would convey the same idea without giving the impression that nothing survived of the predecessor State.

11. Sir FRANCIS VALLAT supported article 25 in principle, but thought that three points regarding its background and scope of application should be reflected in the commentary.

12. The first point concerned the problem of classifying cases of succession of States. He noted that, in the Special Rapporteur's last reports, the case of India and Pakistan had been placed under the heading of newly independent States (A/CN.4/301 and Add.1) and that of the Federation of Rhodesia and Nyasaland under the heading of dissolution of a State (A/CN.4/313). His own inclination would have been to regard India as having been a State in 1947, subject to certain qualifications. After all, India had belonged to the League of Nations and had been an original Member of the United Nations, and in many respects had had all the international and diplomatic status of a State. In his view, the case was rather one of dissolution of a State than of the birth of a newly independent State in the sense in which that expression was now understood. The Federation of Rhodesia and Nyasaland, on the other hand, had gradually been given *ad hoc* treaty-making powers and, as a matter of practice, had developed a treaty-making ca-

capacity. But it had still fallen far short of independence, and the situation resulting from its dissolution was closer, he would have thought, to the birth of a newly independent State. Those two cases illustrated the difficulty of making a precise classification.

13. The case of Germany involved special considerations, because the formation of the German Democratic Republic from a large part of the territory of the former German State might be regarded either as the separation of part of a State or as the dissolution of an old State and the creation of two new ones. The debt problem, however, had been largely resolved by the agreement concluded in London 1953,<sup>5</sup> under which the Federal Republic of Germany had assumed responsibility for many of the debts of the former German Reich.

14. That example illustrated his second point: the relevance of political factors to questions of debt division and debt settlement. Those factors had played a significant part in the London Agreement, one of the aims of which had been to establish the Federal Republic of Germany on a viable basis, and, he believed, in other cases too, such as that of Belgium and Holland. He raised the point because equity was a very mobile quantity: a political factor, in the loose sense, for one State might be regarded as a matter of equity by another. It was therefore necessary to recognize in the commentary that political factors that were not an obvious part of the equity of the situation—for instance, those not directly related to the benefit of the debt or to the paying capacity or natural resources of the State in question—must inevitably play a part in debt settlement in cases of dissolution. Their relevance to the equities of the situation must be assessed, since they might be just as important as other factors, if not more so, for one or other of the new States.

15. His third and last point was the need to protect the interests of creditors. It was essential that, when a State was dissolved, the creditors should not suffer, and to that extent there was an equity that concerned creditors as well as the newly established State. It was enough to think of only one aspect of the matter—currency and exchange rates—to see how easily the interests of creditors could be prejudiced in such cases. It should therefore be made quite clear that nothing in the provisions governing the settlement of outstanding debts between new States was intended to prejudice those interests, whether they were State or private interests.

16. Mr. DADZIE noted that the Special Rapporteur had cited a number of examples of dissolution of States that were of both historical and practical significance. In particular, his extensive treatment of the Belgian-Dutch union and of the part played in the negotiations by the Great Powers provided ample evidence of the complexity of the issues involved in the

passing of State debts. The fact that the matter had finally been settled by the parties themselves under the Belgian-Dutch Treaty signed in London in 1839 (A/CN.4/313, para. 34) was an impressive example of State practice and one deserving of recognition in the progressive development of that branch of international law. The case of the Belgian-Dutch union likewise drew attention to the principles that should be adopted by the parties concerned in any “break-up”—a term he was inclined to agree was the most appropriate in that context, although he could also accept the word “dissolution”. Those principles included the concept of equity to which the Forty-Eighth Protocol, of 6 October 1831, had referred as the guiding principle in the apportionment of debts between the two successor States. Reference had also been made to the importance of the element of justice and to the size and capacity to pay of the successor States (*ibid.*, paras. 65-67).

17. From the examples given by the Special Rapporteur, it seemed that the break-up of unions of European States—such as those between Norway and Sweden and between Denmark and Iceland—had given rise to no problems and that the passing of State debts had taken place harmoniously. The dissolution of unions between African States also seemed to have been a relatively simple matter, involving no more than a return to the *status quo ante* and thus obviating the need to provide for succession to State debts. That had been true of the short-lived union of Ghana, Guinea and Mali (1960), and of the United Arab Republic (1958). Little was known of the outcome in the case of the Federation of Mali, established in 1959 and dissolved in 1960, except that the Joint Senegalese-Malian Commission had issued a communiqué announcing that Mali would gradually pay its debts to Senegal. None of the unions of African States had survived, possibly because, owing to their long history of colonization, those States lacked the necessary stability to sustain such unions. The Federation of Rhodesia and Nyasaland had been both formed and dissolved by the metropolitan Power, which had also settled the apportionment of the federal debt. The settlement had been challenged, however, on the ground that, as the metropolitan Power had dissolved the Federation, it should assume responsibility for the debt.

18. With regard to the text of article 25, he had no difficulty in accepting the idea that, on its dissolution, a State disappeared as a unified entity. He also agreed that the apportionment of the State debts of the predecessor State should be the subject of agreement between the successor States. There was ample support for that approach in the case of the break-up of the Belgian-Dutch union when, after the expenditure of much effort, it had finally been the two States concerned that had arrived at an acceptable arrangement. The article also took account of the importance of equitable considerations, particularly in the absence of agreement between the parties, and of such factors as the capacity of the successor States to pay, and the property, rights and interests passing to

<sup>5</sup> Agreement relating to indebtedness of Germany for awards made by the Mixed Claims Commission, United States and Germany, signed in London on 27 February 1953.

them from the dismembered State. The rule would thus make a significant contribution to the progressive development of international law, and he recommended that article 25 should be referred to the Drafting Committee.

19. Mr. USHAKOV agreed with the substance of article 25, but wished to make some general comments first on the draft articles as a whole, and then on the wording of the article under discussion.

20. The Commission's task was to lay down in its draft articles general rules that would serve as directives for States in particular cases. They should be general rules, not only because they would be rules of general international law, but also because they must be capable of application in different specific situations. The problem, therefore, was to state general rules applicable to situations described in general terms.

21. In the first part of its draft, devoted to State property, the Commission had distinguished between the separation of a part or parts of the territory of a State, which was the subject of article 15,<sup>6</sup> and the dissolution of a State, which was the subject of article 16. In the Commission's own words, separation occurred "when a part or parts of the territory of a State separate from that State and form a State", and dissolution "when a predecessor State dissolves and disappears and the parts of its territory form two or more States". In his view, those general descriptions, which were reproduced in the corresponding articles on State debts, namely, articles 24 and 25, did not provide a basis for making any clear distinction between the two situations. In the case of separation, it might be asked what was the fate of the predecessor State. If large areas of its territory separated from it, it was manifestly no longer the same State as before and, in a way, become a new State. In the case of dissolution, the notion of "disappearance" was open to question. It sometimes seemed very difficult to apply the criterion of the survival or disappearance of the predecessor State in order to distinguish between the case provided for in article 24 and that provided for in article 25. For example, if a great part of the territory of the Soviet Union separated from it, or if 15 of the 23 federated states of Brazil broke away from that country, would that be separation or dissolution? Since it was very difficult to distinguish between those two types of State succession and to define them precisely, he thought the rules stated in articles 24 and 25 should be almost identical, so that they could be equally well applied in either case; for it was to be feared that choosing between articles 24 and 25 might pose a problem in practice.

22. With regard to the wording of article 25, he wondered why the Special Rapporteur had not reproduced in that article the introductory clause of article 16, just as he had reproduced in article 24 the introductory clause of article 15. He believed it would be better to follow the same course in article 25 as

in articles 15, 16 and 24, and say that, unless the predecessor State and the successor State agreed otherwise, the debt of the predecessor State would pass to the successor State in an equitable proportion. There was no need to mention the capacity of the successor State to pay, since that notion was already included in the concept of equitable proportion, which covered all the other conditions. The notion of capacity to pay should be mentioned either in all the articles or in none of them.

23. Mr. PINTO agreed with the content of article 25. With regard to the economy of the draft articles, however, it was clear that four basic principles were involved in each of the types of succession of States dealt with in articles 21 to 25 and in article W.<sup>7</sup> First, agreement should be reached between the States involved in a case of State succession. Secondly, the principle of equity must apply to the passing of debts to the successor State, although it should be noted that, for reasons that were not clear, the matter was sometimes viewed from the opposite angle, namely, that of the assumption, rather than the passing, of debts or obligations. The third principle related to the criteria to be adopted for the apportionment of State debts, the most common being that of the "property, rights and interests" connected with the debts. Lastly, it was necessary to protect the interests of creditors, and that principle should be reflected in the entire philosophy of the draft. It might be advisable for the Special Rapporteur or the Drafting Committee to consider whether it was necessary to distinguish between the various types of State succession and, with a view to more systematic presentation, to state in more economical fashion the four principles he had mentioned.

24. In addition, the term "tax-paying capacity" was rather difficult to understand in the context of article 25, for it might mean tax-levying capacity or the capacity to contribute to the formation of assets. If it were decided to retain the reference to that factor in article 25, it would require further explanation, and the Commission would also have to decide whether it should be included in other articles relating to different types of succession of States.

25. Mr. JAGOTA agreed with Sir Francis Vallat that the question of succession to State debts should be examined from the point of view of classification and that political factors should be taken into consideration. It was also important to protect the interests of creditors, in particular by ensuring effective methods of payment of the debts.

26. He could not, however, agree with the view that the case of India and Pakistan was one of the dissolution of a State. At the time India had formed part of the British Empire, treaties concluded by the United Kingdom had applied *ipso facto* to India. From about 1930 onwards, however, when concluding treaties, the United Kingdom had made a separate declaration that it was also signing the treaty on behalf

<sup>6</sup> See 1500th meeting, foot-note 8.

<sup>7</sup> *Ibid.*, para. 21.



of India, which had been a member of the League of Nations. Moreover, in 1945 a separate delegation had represented India at the San Francisco Conference at which the Charter of the United Nations had been drafted. Thus although it could be affirmed that at that time the Dominion of India had had separate international legal personality, its dominion status had been materially different from that of Canada, for example. In the negotiation of treaties entailing obligations for India, the spokesman for India had in almost every instance been a British national. Not until September 1946, when an interim Government had been established, had an Indian national become the minister responsible for India's external affairs. Consequently, although India had in some sense acquired treaty-making capacity, such capacity had not been that of a truly independent State. Until India's accession to independence, ultimate responsibility for its international relations had remained with the United Kingdom. In 1947, therefore, India would have come under the definition of a newly independent State contained in article 3(f) of the draft, although it must be remembered that that definition reflected a concept that had emerged only after 1955, largely as a result of the practice of African States.

27. Between the announcement of independence for India and the date of the transfer of power under the Indian Independence Act passed by the United Kingdom Parliament in July 1947, the Governor-General, with the assistance of representatives of India and of what was later to become Pakistan, had issued numerous Orders-in-Council specifying the obligations to be assumed by India and by Pakistan in such matters as treaty obligations, property, debts and other financial matters. No mention had been made, however, of the relations between the United Kingdom and India itself, and no separate devolution agreement had been concluded between the two countries, for the United Kingdom had maintained that India, upon accession to independence, would undergo a qualitative and quantitative change in its international legal personality, but that that personality could not be regarded as being newly acquired. The question had therefore arisen whether the State of India had been dissolved or whether Pakistan could be considered as territory that had separated from India. The United Nations Counsel had expressed the opinion that India continued to have international legal personality and, unlike Pakistan—a State that had come into being as a result of the separation of territory from India—it did not have to reapply for membership of the United Nations. Hence the case of India and Pakistan had not been a case of dissolution in 1947. India had respected that position until about 1968, despite the emergence of what might be termed the "clean-slate" concept of a newly independent State.

28. There had, however, been cases in which the parties to treaties concluded by the United Kingdom on behalf of India had claimed that, in view of the political changes that had occurred, the treaties were no longer in force and would have to be renegotiated

with India, which must be treated as a newly independent State. Such cases had occurred even though India had still considered itself a party to the treaties. India had not yet come to a firm conclusion on the matter, but it was clear that, on balance, although in practice they had observed treaty obligations incurred prior to 1947, India and Pakistan should be described as newly independent States rather than as successor States resulting from the dissolution of a State.

29. With regard to article 25, it was indeed difficult at times to differentiate between cases of separation of a part of the territory of a State and cases of dissolution of a State. Nevertheless, that was still a sound distinction and, although it gave rise to difficulties of interpretation, it should be maintained.

30. The two paragraphs of the article should be numbered and the wording of the second paragraph should be brought into line with that of paragraph 1 of article 24, which used the words "taking into account, *inter alia*", rather than the words "taking into account such factors". In addition, it might be advisable to determine whether paragraph 1 of article 24 included, by implication, the factor of the successor State's "tax-paying capacity", referred to in article 25. He shared Mr. Ushakov's view that the first paragraph of article 25 should be harmonized with the introductory paragraph of article 16; the positive formulation of article 25 imposed an obligation on the States concerned, and account should be taken of the fact that agreement was sometimes extremely difficult, if not impossible, in the case of the dissolution of a State, which was a painful affair. The use of the word "disappears" caused him no difficulties; nor, for that matter, did the use of the word "dissolution", although he would not object to its being replaced by the term "break-up". Lastly some members appeared to see a link between article 25 and article W. But since any form of State could be dissolved, and not only a union of States, it was desirable to retain the formula used at the beginning of article 25, which referred simply to "a State".

*The meeting rose at 6 p.m.*

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## 1504th MEETING

*Tuesday, 20 June 1978, at 10.05 a.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Ago, Mr. Bedjaoui, Mr. Castañeda, Mr. Dadzie, Mr. El-Erian, Mr. Francis, Mr. Jago, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

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Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/301 and Add.1,<sup>1</sup> A/CN.4/313)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR (*continued*)

ARTICLE 25 (Dissolution of a State)<sup>2</sup> (*continued*)

1. Mr. CASTAÑEDA said that the Special Rapporteur had been right to deal separately, in articles 24 (A/CN.4/313, para. 26) and 25, with the cases of separation of part of a State and dissolution of a State. He realized, however, that it was sometimes difficult to make any clear distinction between the two cases. The Special Rapporteur had had in mind, in drafting article 24, instances where only a relatively small part of a State's territory separated to form a new State, so that the basic identity of the predecessor State was preserved. Article 25 was intended to cover the very different case in which the predecessor State broke up into several States.

2. It would be difficult, however, to place firmly in either category a situation in which, for example, one of the constituent states left the United States of America; the union as recognized before the event would indeed be disrupted, but the United States as a country would in all probability continue to exist. Opinions might differ even with regard to historical events; for example, his own view concerning the demise of the Austro-Hungarian Empire was that, although the Empire had split into four roughly equal parts, there had been an element of continuity, for one of those parts had retained from the days of the Empire its name and capital, which international law viewed as important symbols of national identity. He believed that, from the legal point of view, the difference between separation and dissolution was not fundamental but a matter of degree.

3. He agreed with Sir Francis Vallat (1503rd meeting) that political factors must be taken into account in determining the passing of debt. Since it seemed impossible to mention all the relevant factors in the article, it would have to be tacitly understood that such factors were always present. Other elements that must be taken into account in assessing responsibility for State debt were, as the article already indicated, equity, capacity of the successor State to pay, and the property, rights and interests that passed to it. The Special Rapporteur had been justified in laying the emphasis in article 24 on the passing of debt in accordance with considerations of equity and in article 25 on its passing on the basis of agreement between the successor States. That distinction constituted the main difference between the two articles.

4. He approved the suggestions of Mr. Ushakov and Mr. Jagota<sup>3</sup> concerning the reconciliation of the

wording of article 25 with that of other articles. That task should be undertaken by the Drafting Committee, to which the article might now be referred.

5. Mr. VEROSTA pointed out that the Danubian Monarchy had been formed from the union, under international law, of three historical units: the Austrian Empire, including Slovenia and the city of Trieste; the Kingdom of Bohemia, including Moravia and Silesia; and the Kingdom of Hungary, including Croatia. A union had first been formed in the seventeenth century between Austria and Bohemia, which had come together after the Thirty Years' War in order to ward off the Ottoman danger and had adopted a common administration, centred in Vienna. Hungary had remained a separate entity. Its position had been confirmed in 1867, so that the Danubian Monarchy, dissolved in 1918, had consisted of two States: on the one hand the Austrian Empire, comprising Austria and Bohemia, part of Poland and Dalmatia, and on the other hand the Kingdom of Hungary. The Austrian Empire had been completely dissolved, for Bohemia had seceded and Austria had been established as a new State; the Poles of Galicia had joined Poland, while Dalmatia had been divided up between Yugoslavia and Italy. Hungary, however, although shorn of two thirds of its territory, had insisted on preserving its identity, a circumstance that showed clearly that the distinction to be made between cases of separation and cases of dissolution depended not only on the size of the territory concerned but also on the will of the parties.

6. It was therefore impossible to speak of dissolution of a State, within the meaning of article 25, in the case of the Austrian Empire, which had disappeared and given birth to two new States: Czechoslovakia, including a part of northern Hungary, and Austria, divested of its Slovene and Italian territories. The disappearance of the Austrian Empire had of course led to difficulties at the Peace Conference (Paris, 1919), where the Allies had been faced with two new States: the Czechoslovak Republic and the Republic of Austria. Under the Treaty of Saint-Germain-en-Laye, therefore, the Republic of Austria had been obliged, for form's sake, to cede territories which, as a new State, it no longer possessed. Unlike the dissolution of the Austrian Empire, the dissolution of the Danubian Monarchy was not the type of State succession referred to in article 25, for it had involved the dissolution not of a State but of a political union, a topic not covered by the draft articles. The Danubian Monarchy had in fact been a dual monarchy, consisting of two separate States, the Austrian Empire and the Kingdom of Hungary, which had been dissolved as a result of the disappearance of one of its members, namely, the Austrian Empire.

7. The wording of article 25 should be brought into line with that of the other articles and the reference to the capacity of the successor State to pay should be deleted. In mentioning that criterion, the Special Rapporteur had probably had in mind newly independent States. It might perhaps be mentioned in arti-

<sup>1</sup> *Yearbook...* 1977, vol. II (Part One), p. 45.

<sup>2</sup> For text, see 1503rd meeting, para. 1.

<sup>3</sup> 1503rd meeting, paras. 22 and 30 respectively.

cle 22<sup>4</sup> that, in cases where the successor State was a newly independent State, its capacity to pay should be taken into account for purposes of the passing of State debts.

8. Mr. ŠAHOVIĆ supported the position of the Special Rapporteur as reflected in article 25 and explained in chapter III of his tenth report (A/CN.4/313). The Special Rapporteur had been faced with a difficult situation, for he had been obliged to deduce general rules from highly diverse practice. He had rightly distinguished between separation of one or more parts of the territory of a State and dissolution of a State, because in the latter instance the predecessor State disappeared, whereas in the former it continued to exist.

9. The question arose, however, whether the Special Rapporteur had been right to emphasize in the report the distinction to be drawn between the situation of a unitary State and that of a federal State. The rule enunciated in article 25 should be broad enough to cover both situations, for in either case dissolution of a State was involved, and he hoped the Drafting Committee would formulate a sufficiently clear rule in that respect. The commentary, moreover, should indicate that the rule was a general one and applicable both to unitary and to federal States.

10. The problem posed by the application of the principle of equity had to be considered in the light of the Commission's report on the work of its twenty-eighth session,<sup>5</sup> which clearly indicated the direction to be followed in that respect. It might well be questioned whether emphasis should be placed on certain aspects of that principle, for example on the successor State's capacity to pay, to which the Special Rapporteur had referred in the second part of the article. Was it a matter of the principle of equity in general or of equitable principles, such as the International Court of Justice had sought to apply in certain cases? The Commission's intentions in that regard would have to be clarified.

11. In conclusion, he proposed that the wording of article 25 as a whole should be maintained, taking into account the comments of a purely drafting nature that had been made.

12. Mr. SUCHARITKUL wholeheartedly approved the wording of article 25. If a State were dissolved and disappeared without the formation of two or more States from the parts of its territory, there would be no succession of States, since there would be no successor State and the territory of the vanished State would become *terra nullius*. However, a case of that kind had never as yet occurred, and there was consequently no reason to provide for it.

13. In the case covered by article 25, where the parts of the territory of the predecessor State formed

two or more States, it was fitting that the apportionment of the State debts of the predecessor State should be settled by agreement among the successor States, without the intervention, approval or participation of the predecessor State or the creditor third State.

14. The Special Rapporteur had also been right to provide that, in the absence of agreement, "the State debts of the predecessor State shall be assumed by each successor State in an equitable proportion, taking into account such factors as its tax-paying capacity..."

15. A further point was that a change in the name or title of a State—a very common phenomenon in South-East Asia—did not alter the personality of the State if there was evidence of legal continuity in its international personality. That was true of Burma, which had changed its title a number of times since its accession to independence. It was also true of the newly independent States that had formerly made up French Indo-China, such as Cambodia and Laos, which were not covered by article 25; the case of the unification of Viet Nam in 1975 did not come under article 25 either, but under article W.<sup>6</sup>

16. However, there was a lacuna in the draft articles in connexion with the establishment of Malaysia in 1963. That State had not been a newly independent State, for it had consisted of the former Federation of Malaya, already independent, and the territories of Sabah and Sarawak. Nor had there been annexation or dissolution of a State within the meaning of article 25. The Federation of Malaya had been totally dissolved and had ceased to exist in law, but its parts had not formed two or more States, because the entire territory of Malaya had become part of the new State. Consequently, the case of the creation of Malaysia was not completely covered by the article. However, the problem posed by that case had not been difficult to resolve, for Malaysia had succeeded to all the State debts of the former Federation of Malaya.

17. Mr. NJENGA congratulated the Special Rapporteur on his introduction of article 25 and on his comprehensive commentary on the question of dissolution. As other speakers, particularly Sir Francis Vallat (1503rd meeting), had pointed out, the Commission should seek, in dealing with dissolution, to protect not only the successor States but also the creditors of the predecessor State. That was a very important point and, although the article took it into account to some extent, the Drafting Committee should try to allay still further the natural fear of a creditor that, in the event of the predecessor State "disappearing" creditors might find themselves at the mercy of a variety of successor States all seeking to evade their predecessor's obligations. In that connexion, he agreed with the comment made by Mr. Tabibi at the previous meeting concerning the use in the article of the word "disappears".

<sup>4</sup> See 1500th meeting, foot-note 8.

<sup>5</sup> See *Yearbook... 1976*, vol. II (Part Two), pp. 131-133, doc. A/31/10, chap. IV, sect. B, 2, introductory commentary to section 2, paras. (12)-(24).

<sup>6</sup> See 1500th meeting, para. 21.

18. The object he had in mind might be achieved by indicating more fully how the "factors" referred to in the second paragraph of the article would be related to the State debts concerned. The need for clear-cut rules on that point was a real one. If there had been no debt-sharing problems on the termination of the unions between Norway and Sweden and between Denmark and Iceland, that had no doubt been because most of the debts contracted by those unions had related to diplomatic activities. But if a State were dissolved as a result of civil war or external interference, the successor States would probably be as little disposed to agree amicably on their respective responsibilities for the obligations of their predecessor as—to borrow an analogy from the Special Rapporteur—the parties to a divorce. Similarly, if the break-up of the unions between African States to which the Special Rapporteur had referred in his report had not created any problem for the creditors of those unions, it was probably because the unions had not existed long enough to incur serious debts. But creditors might find that even major claims were ignored if the Commission did nothing to prevent a return to the *status quo ante* in the event of the dissolution of a State or union that had been in existence for some time. Moreover, the Special Rapporteur had drawn attention to the fact that the apportionment of debt in accordance with the principle of equity was complicated by differing views as to what was equitable. It would be helpful, therefore, if the article were made more detailed, along the lines of article 16.

19. It was ultimately a State's tax-payers who bore the burden of its financial obligations. While accepting the idea that, following dissolution, all those who had been tax-payers of the predecessor State might be asked to continue their contribution to the reimbursement of its general debt, he did not think it would be fair to charge them for debts incurred in connexion with the construction of facilities, such as dams or railways, which the drawing of the new boundaries placed in the territory of a successor State other than their own. The Commission should make it clear that debts of a particular character should pass to a particular successor State; it might do well in that respect to consider the inclusion in the article of a rule like the one suggested by Fauchille, and quoted by the Special Rapporteur in paragraph 73 of his tenth report (A/CN.4/313). Such a rule would benefit both successor States and creditors.

20. Mr. EL-ERIAN said that the Special Rapporteur's written and oral introductions to article 25 demonstrated the wealth of scholarship and painstaking research the Commission had come to expect from him. He agreed with the Special Rapporteur's contention that there should be two separate articles on the distinct situations of separation and dissolution, although admittedly the dividing line between those situations was not always clear. Because of that lack of clarity, it was necessary, when assessing the value of historical decisions as precedents for in-

stances of separation or dissolution, to ask why the rules underlying the decisions had been applied.

21. For several reasons, it was difficult to say whether the break-up of the United Arab Republic, mentioned by the Special Rapporteur (A/CN.4/313, para. 57), had been an instance of separation or of dissolution. First, the formal situation—the merging of Egypt and Syria to form a unitary State—had differed from the real situation, namely, that for all practical purposes, and despite the existence of a central government and parliament, the State had embraced two separate regions, Egyptian and Syrian. Three elements of particular relevance to the Commission's current work were those it had noted in connexion with its draft articles on succession of States in respect of treaties: (a) the fact that, prior to uniting, both regions had been internationally recognized as fully independent sovereign States; (b) the fact that the process of uniting had been regarded not as the creation of a wholly new sovereign State or as the incorporation of one State in the other but as the uniting of two existing sovereign States into one; (c) the explicit recognition by Egypt and Syria of the continuance in force of the pre-union treaties of both component States in relation to—and only to—their respective regions, unless otherwise agreed.<sup>7</sup> Against that background, the decision of the United Nations not to require the newly formed United Arab Republic to make its own application for membership of the Organization, but to consider the union as the successor to two earlier Members, Egypt and Syria, which had merged into one Member, must be seen as a pragmatic one. The decision reached by the Organization concerning the membership of Egypt and Syria upon the break-up of their union had also been pragmatic: Egypt, having declared that Syria had seceded from the United Arab Republic and that the latter remained in existence, had had no problem in obtaining recognition for its continued membership of the Organization, while Syria had been allowed to resume its former, separate seat, on the assumption that its original membership of the United Nations had been in abeyance during its participation in the union.

22. With regard to India's membership of the League of Nations and of the United Nations, to which Sir Francis Vallat had alluded at the previous meeting, it should be remembered that, under the League of Nations Covenant (art. 1, para. 2), membership of the League had been open to "any fully self-governing State, Dominion or Colony". Membership of the United Nations was admittedly restricted by the Charter to "States", and not only India but also the Philippines had doubtless been admitted as original Members in anticipation of their imminent accession to full independence. Furthermore, in 1952, in the *Case concerning rights of nationals of the United States of America in Morocco*,<sup>8</sup> the International

<sup>7</sup> *Yearbook...* 1974, vol. II (Part One), p. 258, doc. A/9610/Rev.1, chap. II, sect. D, articles 30, 31 and 32, para. (24) of the commentary.

<sup>8</sup> *I.C.J. Reports* 1952, p. 176.

Court of Justice had ruled that Morocco had been a State at the time it had been linked with France by a protectorate treaty. That seemed to confirm the view that an entity exhibiting all the internal, if not the external, characteristics of a State might be considered to be a State.

23. Since the word “disappears” had caused problems, the Commission might wish to reconsider its use in article 25 (and also in article 16), or to include in the commentary an invitation to governments to comment on the advisability of altering the word or deleting it. Meanwhile, he would ask the Special Rapporteur to explain why he had thought it necessary to use both the terms “is dissolved” and “disappears”. In any event, what disappeared was clearly the predecessor State’s structure, and not its people or territory. He doubted whether the expression “tax-paying capacity”, in the English version, was the most felicitous translation of the French term “capacité contributive”.

24. Mr. QUENTIN-BAXTER observed that the Commission’s draft so far displayed three separate approaches to the question of agreements, reflecting three different kinds of situation. In the case of newly independent States, the Commission had referred to the possibility of an agreement in a cautionary manner only, the aim being to maintain the “clean slate” principle, the right to self-determination and the notion that the new State should not be prejudiced by arrangements reached before or upon independence. In the case of the transfer of part of the territory of a State, the Commission had quite properly presumed that the States concerned would reach an agreement; where it was a question of a border adjustment involving no act of self-determination on the part of a group of people whose nationality changed, the conterminous States must be assumed to be making the adjustment by agreement, otherwise they would probably be acting in accordance with criteria no longer recognized as those of an ordered international society. In the cases of separation of part of a State and of dissolution of a State, the way had been left open for States to reach agreement in the hope that they would do so, the residuary provisions of the draft providing them with reasonable guidance; however, the Commission had not presumed that they would necessarily conclude an agreement, in view of the difficulties that might be inherent in a given situation. In article 25, therefore, he would prefer the Commission to use the formula adopted in articles 15, 16 and 24.

25. The difficulty in distinguishing between cases of separation and dissolution was generally recognized, and the various references made in that connexion, for instance to the precedent of the Austro-Hungarian Empire, showed that, other things being equal, the international community tended to defer to the choice made by the States directly concerned. The Commission had rightly seen fit, in articles 15 and 16, concerning succession to property, as well as in the articles under consideration, concerning debts, to maintain substantially the same rules for both kinds

of case, so that there were no artificial compulsions or inducements for States to prefer one form to the other. The possibility of hybrid cases, presenting some aspects of both, had to be recognized. In that connexion, he considered that the extension of Malaysia to include Sabah, i.e. North Borneo, would fall within paragraph 2 of article 24, since it involved the transfer of territory from one sovereign to another, not in simple terms of a frontier adjustment but primarily on the basis of the right to self-determination of the peoples affected. The system of categories evolved by the Special Rapporteur would thus appear to be sufficiently flexible to meet the different circumstances that might arise.

26. As would be seen from the articles on property, with which those under consideration were closely linked, the question of equity arose at two different levels. It was a governing rule, and one not involving the principle of equity, that certain property must pass to the successor State; for instance, there was a very strong presumption that immovables situated in the territory of the successor State belonged to that State. Movables indispensable to the activities of the successor State were likewise held to pass to that State. Where other movable property was concerned, however, the notion of equity—in the sense of an equitable proportion or apportionment—came into play, and at a second level the notion of equitable compensation. In other words, if the first pair of rules, relating to immovables and to movables connected with essential activities of the State, yielded a result particularly favourable to one successor State as opposed to another, or as opposed to the predecessor State, that must be taken into account when apportioning movable property not governed by those two rules. That seemed to him to be both reasonable and entirely in keeping with the Commission’s intention.

27. In the case of debts, it would seem that the reference to property, rights and interests was intended to convey the idea that those who reaped the benefits also assumed the related obligation. In a sense, therefore, that reference introduced the notion of equity at both levels. However, it left open the questions of capacity to pay, introduced in article 25 but not in article 24, and of the direct connexion of the debt with the property that passed. There again, it would seem that some flexibility was called for and that it must be recognized that the principle of equity applied both to debts and to property at the two levels. The contention that there could be no absolute relationship between immovable property or property necessarily passing to the State and the charges borne by that property, which was particularly compelling in the case of newly independent States, might also have some residual application in other cases of separation or dissolution. A successor State finding itself the possessor of property that it would not have considered worth the outlay should not be burdened with all the related charges. *Prima facie*, therefore, the proposition should be that the benefit of a particular piece of property that passed carried with it the obligations relating to that property, but that,

where there was no such relationship and the debt was a general one, the ordinary principles of equitable distribution should apply. There was much to be said for the view that the criterion of capacity to pay had a place not only in article 25 but also in article 24. Possibly the point could be met by further aligning article 15 with article 24 and article 16 with article 25, so that the nuances of equity would operate at both levels in relation not only to property but also to debts.

28. Lastly, he noted that the draft catered extensively for the position of creditors. It applied the principle that responsibilities and obligations would continue, and in article 20 (Effects of the passing of State debts with regard to creditors) it laid down the basic proposition of all succession law, namely, that the internal law continued until the new sovereign changed it; if it were so changed then, by implication, the new sovereign was bound by the principles of State responsibility. The draft also provided that an agreement between the predecessor and successor States would not be binding on the creditor unless the latter had participated in the settlement or unless the principles on which the agreement was based were so unexceptional and so much in accord with the rules laid down in the draft that they must be regarded as proper. All those provisions would be to no effect, however, if the basic relationship between debts and property and between internal and international law were not reviewed. That subject should be treated as a matter of priority at the Commission's thirty-first session.

29. Mr. SCHWEBEL approved the substance of article 25 and endorsed the comments made by previous speakers. In particular, he considered that, while Mr. Njenga's point was dealt with in some measure by the closing phrase of the article, relating the debts to the property, rights and interests that passed, more detailed wording might be desirable, as Mr. Njenga had suggested.

30. He also shared the view that the interests of creditors might be protected more emphatically, and to that end would suggest that the second paragraph of article 25 be reworded to read:

"In the absence of agreement, the State debt of the predecessor State shall pass to each successor State in an equitable proportion, taking into account such factors as the property, rights and interests passing to it in connexion with the said State debt and any exclusive or predominant benefit it derives from the said property, rights and interests."

The concluding phrase of that proposal was a possible response to Mr. Njenga's suggestion. He was not entirely certain that the reference to capacity to pay should be removed; there might in fact be some point in adding it elsewhere.

31. He considered it essential, if the draft articles on succession to State debts were to be at all constructive, that the Commission should delete the word "international", placed between square brackets in

article 18 (State debt), and also the square brackets in article 20 (Effects of the passing of State debts with regard to creditors). There was no other way of dealing with the core of the issue.

32. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur had rightly distinguished between the separation of a part or parts of the territory of a State and the dissolution of a State. In the former case, there was interaction of the interests of the successor and predecessor States; in the latter case, interaction of the interests of the successor States themselves.

33. It was important to bear in mind the relationship between article 25 and article 16, which categorized the modes of transfer of State property in a case of dissolution, and to maintain as far as possible the necessary parallels between the two. He did not think it feasible, however, given the structure of the draft, to categorize the various kinds of debts, including localized debts, namely, debts incurred by the central government or by the territories concerned for the purpose of expenditure on projects in those territories. It could not be assumed that a State that emerged from the dissolution of another State would take responsibility for debts directly connected with the territory of another State. It might suffice to mention that question in the commentary, a possibility that the Drafting Committee might be asked to consider.

34. He too thought that the word "disappears" was not really necessary, since its meaning was covered by the preceding words, "is dissolved"; it could therefore be deleted in articles 25 and 16. He also shared the view that, at the end of the first paragraph of article 25, it would be better to employ the phrase used throughout the draft, namely, "unless otherwise agreed", rather than the mandatory formula "shall be settled by agreement", in view of the difficulty of enforcing such a requirement.

35. He shared the doubts that had been expressed regarding the introduction of the concept of capacity to pay as an element of equitable apportionment. He had had occasion before to voice his misgivings about the wisdom of seeking to codify matters relating to equity—in his view a virtually impossible task.

36. Subject to those comments, he approved the article as submitted. The Drafting Committee would doubtless have no difficulty in clarifying the various questions raised by members.

37. Mr. USHAKOV, referring to his statement at the previous meeting, explained that he had confined himself to showing how difficult it sometimes was to distinguish between cases of separation and dissolution on the basis of the criterion of the disappearance of the predecessor State; that had not meant, however, that he opposed articles 24 and 25. The substance of those two articles must be maintained. If the word "disappears" were deleted from article 25, that provision would not be clear. In that connexion, it should be noted that articles 24 and 24 related respectively to an agreement between "the predecessor

State and the successor State” and between “the successor States”; in the first case the predecessor State subsisted but in the second it disappeared.

38. Mr. BEDJAOUI (Special Rapporteur) noted that all the members of the Commission who had participated in the fruitful debate on article 25 had dealt with two questions. The first concerned the scope of the provision, and more particularly the classification of the cases falling within the scope of articles 24 and 25 respectively. The second concerned the place to be given to the agreement of the parties and to equity in the basic rule set forth in the article under consideration. Some members of the Commission had spoken of the succession of certain States to membership of an international organization, but the examples they had given had of course been merely illustrative. The Commission had long ago decided not to deal, in the draft under preparation, with either succession of governments or succession to membership of an international organization.

39. As to the first question, he agreed that it was difficult to find a sufficiently reliable criterion for distinguishing cases of separation from those of dissolution. As several members of the Commission had pointed out, it should nevertheless be possible to overcome the difficulty by adopting a pragmatic approach. If the separation did not profoundly affect the structure of the State concerned, as well as its political physiognomy and constitutional form, the predecessor State might survive. On the other hand, if 15 of the 23 federated states of Brazil separated from that country, a situation postulated by Mr. Ushakov, there would be a genuine dissolution. As Mr. Verosta had shown, really astonishing cases existed. However, the distinction between separation and dissolution was in fact clear and intelligible, despite the difficulties of application it might present. He had not ignored those difficulties, since he had referred *inter alia* to the case of the Ottoman Empire, in which Turkey had regarded itself as one successor State among others. Mr. Verosta had given a masterly account of the dismemberment of the Austro-Hungarian Empire, which had given rise to a crop of new or resurrected States and to a complete reparceling of Danubian Europe. A point to remember was that a State might be so reluctant to regard itself as diminished as to prefer to undergo a genuine dissolution. That had been the case with Austria, which had regarded itself as a predecessor State. Conversely Hungary, although reduced by two thirds of its territory, had insisted on its continuity. It was important, therefore, also to take account of the will of the States concerned.

40. As the Commission had found when preparing the draft articles on succession of States in respect of treaties, and as it would find once again in preparing the draft articles under discussion, certain cases were unclassifiable. In the 18th and 19th centuries, Poland had several times been reconstituted through separation of parts of the territory of Russia, Prussia and Austria. For those States, that had not been separation, just as there had not been a genuine dissolution

when Poland had broken up, since the separated parts had not each formed a State, as provided for in the draft, but had combined with one of the three former States. Poland had been dismembered four times. After the third partition, it had lost its political existence for 124 years, until 1918. It had always refused the status of a successor State, claiming that it had not succeeded to the States that had dismembered it and that it had re-emerged through an act of its own sovereignty, thus resuming possession of all State property and repudiating all the State debts of the predecessor States. Reference had been made in that connexion to the former notion of “dormant sovereignty”, according to which sovereignty was not completely extinguished and could revive. That theory was comparable with the Roman law theory of *post liminium* or *jus post liminii*, according to which a Roman who was taken prisoner preserved his rights, which remained dormant in the Roman State until his liberation and return.

41. India's case had been admirably presented by Mr. Jagota at the previous meeting. The colonized countries had asserted a historical reality in claiming that they were the continuation of original States that had been “obliterated” by the colonizing States. The latter had then pushed that theory to the extreme, trying to give expression to that continuity in acts. Thus India had been prevented from starting with a “clean slate” and had been obliged to continue shouldering obligations inherited from the past. India had had the misfortune to accede to independence in an unfavourable regional and world climate. In that connexion, he referred to the dissenting opinion of Judge Moreno Quintana in the *Case concerning Right of Passage over Indian Territory*, according to which “India, as the territorial successor, was not acquiring the territory for the first time, but was recovering an independence lost long since”.<sup>9</sup> That, then, was another case of dormant sovereignty, revived in 1974.

42. Thus the question of the classification of certain situations arose not solely in cases of separation or dissolution, but also in the case of the creation of newly independent States. Ethiopia was an example of a newly independent State that had emerged after Italian fascist colonial annexation and exploitation. Yet the Ethiopian State had not regarded itself as a successor State: it had claimed a continuity that had been suspended from 1935 to 1947. Under the Treaty of Peace concluded with Italy in 1947,<sup>10</sup> the Ethiopian State had been restored. In the pertinent instruments of that period, it had been considered that the Italian expedition undertaken against the Ethiopian Empire in 1935, as well as the Italian occupation of Albania in 1939, had been improper acts that could not have any legal existence or impart legal consequences. The Franco-Italian Conciliation Commission established under the Treaty of Peace of 1947 had decided that Ethiopian sovereignty was retroactive to

<sup>9</sup> *I.C.J. Reports 1960*, p. 95.

<sup>10</sup> United Nations, *Treaty Series*, vol. 49, p. 3.

the date of the entry of Italian troops into Ethiopia.<sup>11</sup> With regard to the Federation of Rhodesia and Nyasaland, Sir Francis Vallat had been right to emphasize (1503rd meeting) that India, prior to independence, had enjoyed a more marked international personality than had the Federation. He himself had mentioned it purely as an example, and in particular because the case was reported in *Materials on Succession of States in Respect of Matters other than Treaties*,<sup>12</sup> because it had been mentioned in connexion with the draft articles on succession of States in respect of treaties, and because it had been analysed in the literature. Before speaking of federation or uniting in that case, it would in fact be necessary to prove the existence of successor States that had joined together, and neither Rhodesia nor Nyasaland had actually been States. Before speaking of dissolution, it would be necessary to show the existence of a State that had disappeared and the emergence of new States. However, the Federation had not been a State and no new State had emerged from its dismemberment. The case of the Federation of Malaya, to which Mr. Sucharitkul had referred, had posed similar problems. Malaysia had not been annexed, neither had it been an annexing State, so that the case did not really come under article 25. The case of Borneo came under article 24, paragraph 2, as Mr. Quentin-Baxter had pointed out.

43. Mr. Sucharitkul had rightly emphasized that changes in name did not warrant the conclusion that the predecessor State had disappeared. Not only countries of South-East Asia but also some African countries had changed their names. For instance, the name "United Arab Republic" had been maintained in Egypt after the disappearance of the union in law; that name symbolized the unity so ardently desired by the Arab nation.

44. Mr. Ushakov's conclusion concerning the cases contemplated in articles 24 and 25 was correct: the rules set forth in those two provisions should be fairly similar. Moreover, they were akin to other rules in the draft in that they were based both on the agreement of the parties and on the notion of equity. The difficulty consisted in striking the right balance between those two elements.

*The meeting rose at 1 p.m.*

<sup>11</sup> *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3), p. 648.

<sup>12</sup> United Nations publication, Sales No. E/F.77.V.9, p. 547.

## 1505th MEETING

*Wednesday, 21 June 1978, at 10.05 a.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Ago, Mr. Bedjaoui, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šaho-

vic, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

### Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/301 and Add.1, A/CN.4/313)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR (*continued*)

#### ARTICLE 25 (Dissolution of a State)<sup>2</sup> (*concluded*)

1. Mr. BEDJAOUI (Special Rapporteur) explained that the question of classifying certain situations under one type of succession rather than another arose not only in connexion with article 25 and the preceding article; it had also arisen in an even more difficult form when the Commission had decided to apply two different régimes to a part of the territory of a State according to whether that part was transferred by the State to another State or separated from it and united with another State. The two cases were dealt with in article 21<sup>3</sup> and in paragraph 2 of article 24 (A/CN.4/313, para. 26) respectively, the emphasis in the first case being placed on agreement between the States concerned. Having drawn that fine distinction, the Commission could *a fortiori* distinguish between separation of a part of a State and dissolution of a State.

2. As in a number of other draft articles, it was important in the rule laid down in article 25 to accord their due place to agreement between the parties and to equity. In that connexion, Mr. Pinto had raised the question (1503rd meeting) whether it would be possible to consolidate the draft articles, omitting certain provisions and even some types of succession. Without altogether excluding that possibility, he would stress the need to maintain for the time being the existing structure of the draft, which had been painstakingly thought out. The advantage of the classification of types of succession adopted in the draft was that it set out ideas in a form that governments could readily understand. Perhaps the Commission could revert to the matter on the second reading of the draft. At the current stage it would suffice to note that, in the circumstances of separation dealt with in article 24, agreement between the parties was usually quite difficult to achieve, since the separation was often violent since since the predecessor State survived. On the other hand, in the case of dissolution dealt with in article 25, the successor States had very conflicting interests and therefore in general could only benefit from an agreement. That was why he had placed more emphasis on agreement in article 25 than in article 24. It should also be noted that the agreement referred to in article 24 was between

<sup>1</sup> *Yearbook...* 1977, vol. II (Part One), p. 45.

<sup>2</sup> For text, see 1503rd meeting, para. 1.

<sup>3</sup> See 1500th meeting, foot-note 8.



the predecessor State and the successor State, whereas the agreement referred to in article 25 was between the successor States only.

3. Despite the concern expressed by Mr. Jagota (1503rd meeting) and the Chairman (1504th meeting), there was no question of imposing an agreement on the parties. Article 25 did not lay down that succession to State debts must be settled by agreement; it went no further than to state that the matter was left to the agreement of the parties. A similar formula was used in article 12, concerning the passing of State property in the case of transfer of part of the territory of a State. In the *North Sea Continental Shelf Cases*, however, the International Court of Justice had gone so far as to place on States an obligation to negotiate in good faith.<sup>4</sup> In article 25, the Commission simply recognized the facts: agreement between the parties was far more frequent in the case covered by that article than in the circumstances covered by article 24. It would therefore be inadvisable to introduce into article 25, as Mr. Quentin-Baxter had suggested (1504th meeting), wording similar to that of article 24, which would merely reserve the possibility of an agreement between the successor States.

4. Many members of the Commission had expressed their concern for safeguarding the interests of creditors. It was precisely with a view to ensuring the latter's rights, which deserved protection on the same footing as those of successor States, that he had accorded pride of place to agreement between the parties in the article under consideration. In the absence of agreement, a creditor would no longer know where to turn to obtain satisfaction.

5. Both Mr. Njenga and the Chairman had said (1504th meeting) that it might be advisable to specify the nature of the State debts covered by article 25. In his own view, the important place given in the provision to equity made that unnecessary. If a debt were localized, equity required that the territory that had benefited from the proceeds of the loan should assume the debt in its entirety.

6. It had been proposed that the wording of article 25 should be brought strictly into line with that of the corresponding article on State property namely, article 16, and in particular that the opening words of article 25—"where a State is dissolved and disappears"—should be replaced by the words "when a predecessor State is dissolved and disappears". The latter wording appeared in article 16 but was not altogether appropriate, since a State that dissolved and disappeared was not yet, at that point, a predecessor State.

7. Some members had proposed that the Commission should be guided by the wording used in article 24 and replace the expression "the apportionment of the State debts", in the first paragraph of article 25, by the words "the passing of the State debts". However, in the case covered by article 24, the debts really passed from the predecessor State to

the successor State whereas, in the case covered by article 25, the predecessor State had disappeared and accordingly the question was rather one of apportioning the debts among the successor States.

8. The notion of the "disappearance" of the predecessor State was not without point, since it showed clearly the difference between the situations dealt with in articles 24 and 25 respectively. Also, as Mr. El-Erian had said (1504th meeting), the disappearance of a State did not involve the disappearance of its people and territory.

9. The comments on the notion of "capacité contributive" stemmed perhaps from the fact that the term had been translated into English as "tax-paying capacity". "Capacité contributive", however, covered not only fiscal capacity but also capacity to pay. Unlike Mr. Quentin-Baxter, he considered that the notion of those kinds of capacity had its place in article 25 rather than in article 24; article 25 contemplated the case of disagreement among the successor States, when the State debts would have to be apportioned among them on the basis, in particular, of their "capacité contributive".

10. Lastly, for the guidance of Mr. Šahović and Mr. Jagota, he reiterated that the article under consideration applied equally to the dissolution of a union of States and to that of a unitary State. However, as the Commission had already noted in the preparation of the draft articles on succession of States in respect of treaties, cases of dissolution of unions were by far the most frequent.

11. The CHAIRMAN thanked the Special Rapporteur for his very pertinent replies to the various questions raised during the discussion of article 25. He was gratified to note that the three articles proposed by the Special Rapporteur at the current session had received the support of the Commission and that it had been possible to consider them far more quickly than had been anticipated.

12. If there were no objections, he would take it that the Commission decided to refer article 25 to the Drafting Committee for consideration in the light of the comments and suggestions made during the debate.

*It was so agreed.*<sup>5</sup>

**The most-favoured-nation clause (*continued*)\* (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2, A/CN.4/L.270)**

[Item 1 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (*continued*)

**ARTICLE 24 (Cases of State succession, State responsibility and outbreak of hostilities)**

<sup>5</sup> For consideration of the text proposed by the Drafting Committee, see 1515th meeting, paras. 65 *et seq.*, and 1516th meeting, paras. 1-3.

\* Resumed from the 1500th meeting.

<sup>4</sup> *I.C.J. Reports 1969*, para. 85, p. 47.

13. The CHAIRMAN invited the Special Rapporteur to introduce article 24, which read:

*Article 24. Cases of State succession, State responsibility and outbreak of hostilities*

The provisions of the present articles shall not prejudice any question that may arise in regard to a most-favoured-nation clause from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

14. Mr. USHAKOV (Special Rapporteur) said that article 24 was a safeguard clause modelled on the corresponding provision of the Vienna Convention on the Law of Treaties.<sup>6</sup> It had been well received by the Sixth Committee and had given rise to no written observation except on the part of the Netherlands, which had pointed out that, should it be decided to treat certain international organizations on an equal footing with States, the article would have to be extended to cover the adherence of a State to an organization placed on the same footing as a State. The Netherlands Government had added that, since the general rules governing succession of States in respect of treaties could not be applied in a case where an international organization thus succeeded to a State, it would be necessary to provide separately in the draft for the effects of such a succession on any most-favoured-nation clause (A/CN.4/308 and Add.1/Corr.1, sect. A).

15. In his opinion, article 24 should stand as drafted and might be referred forthwith to the Drafting Committee.

16. Mr. TSURUOKA was also in favour of referring the article to the Drafting Committee.

17. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 24 to the Drafting Committee.

*It was so agreed.*<sup>7</sup>

ARTICLE 25 (Non-retroactivity of the present articles)

18. The CHAIRMAN invited the Special Rapporteur to introduce article 25, which read:

*Article 25. Non-retroactivity of the present articles*

Without prejudice to the application of any rule set forth in the present articles to which most-favoured-nation clauses would be subject under international law independently of the articles, the articles apply only to most-favoured-nation clauses in treaties which are concluded by States after the entry into force of the present articles with regard to such States.

19. Mr. USHAKOV (Special Rapporteur) said that article 25 was another safeguard clause and was likewise to be found in the Vienna Convention on the Law of Treaties. The article was needed both because the Vienna Convention had not yet come into force and because the States that would be bound by the articles would not necessarily be parties to the Convention.

<sup>6</sup> See 1483rd meeting, foot-note 2.

<sup>7</sup> For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 92 and 93.

20. In the Sixth Committee, some representatives had approved article 25; others had questioned its usefulness, bearing in mind the general rule laid down in article 28 of the Vienna Convention, but they had not requested its deletion (A/CN.4/309 and Add.1 and 2, para. 315). In its written comments, the Netherlands Government had expressed the view that article 25 duplicated article 28 of the Vienna Convention and was therefore superfluous (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A).

21. His own opinion was that article 25 was necessary; as it had not been the subject of negative comment, it might be referred forthwith to the Drafting Committee.

22. Mr. VEROSTA, while agreeing that article 25 might be referred to the Drafting Committee, pointed out that some members of the Sixth Committee, and indeed of the Commission, had asked why certain articles of the Vienna Convention had been transposed to the draft, but not others.

23. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 25 to the Drafting Committee.

*It was so agreed.*<sup>8</sup>

ARTICLE 26 (Freedom of the parties to agree to different provisions)

24. The CHAIRMAN invited the Special Rapporteur to introduce article 26, which read:

*Article 26. Freedom of the parties to agree to different provisions*

The present articles are without prejudice to the provisions to which the granting State and the beneficiary State may agree regarding the application of the most-favoured-nation clause in the treaty containing the clause or otherwise.

25. Mr. USHAKOV (Special Rapporteur) stressed the importance of the article. At the time the draft articles had been prepared, the Commission had on several occasions considered whether the rules it was drafting were peremptory or residual and had come to the conclusion that nearly all of them were residual. It was therefore possible to derogate from them by agreement. The granting State and the beneficiary State could negotiate any most-favoured-nation clause, together with any exceptions or limitations, and apply to them any rule of interpretation other than those stated in the draft. Article 26 made it unnecessary for the Commission to include in each article the words "unless the parties otherwise agree".

26. The Sixth Committee had given a wide measure of support to article 26. Some representatives had said that the draft provisions would undoubtedly be of interpretative value, even in the circumstances provided for in article 26, whereas other had expressed the view that article 26 should be amended if it were not to be used as a pretext for discrimination (A/CN.4/309 and Add.1 and 2, paras. 317 and 318). In regard to discrimination, Mr. Jagota had pointed out (1495th meeting), during the Commis-

<sup>8</sup> *Ibid.*, paras. 94 and 95.

sion's consideration of article 21, relating to treatment under a generalized system of preferences, that non-discrimination was not mentioned in that article, although it was mentioned in the Charter of Economic Rights and Duties of States.<sup>9</sup> His own view was that the principle of non-discrimination was a peremptory rule of international law that was applicable in all relations between States and not only within the framework of a generalized system of preferences, and that, as a rule of *jus cogens*, it was at the basis of all the draft articles. If that rule were laid down expressly in one article, it could be inferred that it did not apply to the others.

27. In its written comments, the Netherlands Government had stated that article 26 lent an optional nature to all the articles and that, on any point of material interest, the parties to an agreement containing a most-favoured-nation clause could deviate from it. The Netherlands Government had added that, even if the articles were included in a treaty ratified by a large number of States, their significance would probably be relatively minor and frequent use would probably be made of the option to deviate therefrom (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A).

28. Mr. SUCHARITKUL considered that article 26 should be referred to the Drafting Committee, in view of the unquestionable need to protect the freedom of the parties to agree on different provisions. However, neither article 26 nor any other provided an adequate safeguard in that respect, since in practice a number of factors limited the freedom of States to negotiate. For example, when developing countries negotiated a most-favoured-nation clause, they very often sought to safeguard their interests by introducing an exception in favour of an association for regional economic co-operation, but the other party was unwilling to accept such an exception since, unlike the exceptions for customs unions and free-trade areas, it was not generally recognized. Sometimes a third State or even an organization, such as GATT, objected to an exception that had been agreed on by the parties.

29. Mr. TSURUOKA said that the safeguard clauses in articles 25 and 26 were extremely important and should be retained. The Commission had in any case envisaged their inclusion in the draft from the commencement of its work.

30. With regard to the drafting of the French version of article 26, the formula "les présents articles sont sans effet" was not particularly felicitous; he proposed that it should be replaced by the words "les présents articles ne préjudicient pas", which appeared in the following article.

31. Mr. REUTER observed that on that point the French version of article 26 differed from the English and Spanish versions. He personally preferred the formula used in the French text because it was more

vigorous. The articles would have effect only in the form of a convention and only in respect of States that accepted them. What gave them weight was the fact that negotiations differed entirely according to whether they were entered into with a weak State or a strong State. In the face of a strong State, for example in the economic or nuclear sphere, freedom of negotiation was very limited. Many States, therefore, would be unable to accept the draft if some of its provisions were retained in their existing form. None the less, even for those that did not accept them, the provisions of the draft could be regarded as reflecting a common line of thinking and as having interpretative value.

32. The Special Rapporteur had said that the rule of non-discrimination was a rule of *jus cogens*. But what did the rule prescribe? It prescribed that absolutely identical situations should be treated identically. Doubtless, therefore, the rule could be said to be one of *jus cogens* as far as human rights were concerned, although even then everyone would have to recognize certain basic principles, such as equality of the sexes. In the economic sphere, however, non-discrimination applied as between identical entities, in which regard one aspect of the problem had been totally ignored: that, since the concept of developing countries had not been defined in international law, those countries would inevitably be treated unequally. Consequently, the fact that the principle of non-discrimination was not mentioned in the draft would not imply that, under a rule of *jus cogens*, developing countries should be treated identically whatever their stage of development.

33. In that connexion, article 27, entitled "The relationship of the present articles to new rules of international law in favour of developing countries", referred in the French and English versions to rules in favour "of" developing countries, but in the Spanish version to rules in favour "of the" developing countries. That was precisely the difference he wished to emphasize.

34. Mr. JAGOTA agreed as to the unequal bargaining power of parties negotiating the terms of an agreement, but considered that the exception provided in article 26, like the one in article 25, was of crucial importance for the quality of the rules set forth in the draft as a whole and for their future from a procedural point of view. After all, the rules were not primary rules, in other words, imperative rules from which no derogation was possible, but residual rules for the guidance of parties, from which they could derogate by agreement. It would doubtless be argued that a convention was therefore unnecessary and that the draft articles could stand as a set of guiding principles in some other form. In any event, article 26 would lose none of its value because the subject-matter of the articles would substantially affect the interests of developing countries, particularly in trade matters. No article should therefore be interpreted as a peremptory rule to the detriment of any major section of the world community, and to that of developing countries in particular.

<sup>9</sup> General Assembly resolution 3281 (XXIX).

35. In that connexion, he noted that the multilateral trade negotiations were making little progress. He understood, from reports in the Indian press, that in the period 1974-1978 the adverse effects of the most-favoured-nation clause, with its exceptions, on the interests of developing countries had amounted in monetary terms to several billion dollars. He therefore considered that, of all the articles, article 26 would best protect the legitimate interests of developing countries. It would also serve to mitigate any adverse effects on their trade that might ensue from the operation of the other exceptions.

36. The purpose of his earlier suggestion that article 21, relating to a generalized system of preferences, should provide for preferential treatment to be extended not only on a non-reciprocal but also on a non-discriminatory basis, had been to ensure that no distinction was made among developing countries regarding the level of tariffs applied. He had had in mind the interpretation given to the words "established by that granting State", at the end of article 21, namely, that no such State might decide at will to grant certain preferences to some developing countries while denying them to others. The principle of non-discrimination, on which great stress had been laid since 1964, was at the very heart of the concept of preferential treatment and, in his view, served the best interests of developing countries. Possibly the Special Rapporteur had considered it unnecessary to reflect that principle in article 21, since article 26 gave the parties the right to make certain demands that would not otherwise be allowed under article 21. But that was a rather awkward approach; it would be much better to express in straightforward terms any benefits to be accorded to developing countries so that those countries would not have to resort to residual provisions. Notwithstanding the terms of article 26, therefore, the Drafting Committee might consider the possibility of reflecting in it the principle of non-discrimination set forth in article 21.

37. Mr. SCHWEBEL expressed strong support for articles 25 and 26 as proposed by the Special Rapporteur. With reference to the Special Rapporteur's remarks on non-discrimination, he had little to add to what had been said by Mr. Reuter, but nevertheless wish to place on record his doubts as to whether non-discrimination could be regarded as a rule of *jus cogens*, as the Special Rapporteur had submitted. International law had always allowed States a wide measure of freedom, as was evidenced by the classic statement of the Permanent Court of International Justice in the *Case of the S.S. "Lotus"*, namely, that States were free to do whatever international law did not forbid them to do.<sup>10</sup> Discrimination would therefore seem to be a part of international relations, and indeed was inherent in the very concept of an alliance. The Commission itself had admitted that customary international law did not bind States to grant most-favoured-nation treatment. He also doubted whether, as the law now stood, there was a legal ob-

ligation on States to grant generalized preferences at all or to grant such preferences on a non-discriminatory basis.

38. Mr. FRANCIS supported the Special Rapporteur's contention that article 26 had a special place in the draft; it stated an independent principle and was also related in some degree to the rule set out in article 8. He agreed that the article might be referred forthwith to the Drafting Committee.

39. Mr. DADZIE reiterated the support for article 26 that he had expressed during the discussion of other articles and agreed that the provision might be referring to the Drafting Committee.

40. Mr. USHAKOV (Special Rapporteur) observed that non-discrimination was a principle of general international law. In its report on the work of its twenty-eighth session, the Commission had recognized that the rule of non-discrimination was "a general rule inherent in the sovereign equality of States".<sup>11</sup> But it had also observed "that the close relationship between the most-favoured-nation clause and the general principle of non-discrimination should not blur the differences between the two notions". The Commission had referred, in that connexion, to article 47 of the Vienna Convention on Diplomatic Relations and to article 72 of the Vienna Convention on Consular Relations, which reflected "the obvious rule that, while States are bound by the duty arising from the principle of non-discrimination, they are nevertheless free to grant special favours to other States on the ground of some special relationship of a geographic, economic, political or other nature". It had pointed out that a State "cannot normally invoke the principle against another State which has extended particularly favourable treatment to a third State, provided that the State concerned has itself received the general non-discriminatory treatment on a par with other States".<sup>12</sup> The granting of most-favoured-nation treatment did not therefore constitute an act of discrimination, provided that all States benefiting by it were treated alike.

41. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 26 to the Drafting Committee.

*It was so agreed.*<sup>13</sup>

ARTICLE 27 (The relationship of the present articles to new rules of international law in favour of developing countries)

42. The CHAIRMAN invited the Special Rapporteur to introduce article 27, which read:

*Article 27. The relationship of the present articles to new rules of international law in favour of developing countries*

The present articles are without prejudice to the establishment of new rules of international law in favour of developing countries.

<sup>11</sup> *Yearbook... 1976*, vol. II (Part Two), p. 7, doc. A/31/10, para. 38.

<sup>12</sup> *Ibid.*, para. 40.

<sup>13</sup> For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 96-98.

43. Mr. USHAKOV (Special Rapporteur) said that, in their oral comments, representatives on the Sixth Committee had generally expressed satisfaction with article 27, although some of them had thought that its wording could be improved and might be supplemented by guarantees in favour of developing countries (A/CN.4/309 and Add.1 and 2, paras. 320 and 321). He therefore proposed that article 27 should be included in the draft as it stood and referred to the Drafting Committee.

44. Mr. REUTER said that the Drafting Committee should harmonize the English, French and Spanish texts of article 27, which did not tally with each other.

45. He noted, moreover, that the draft articles had not exhausted the content of all the existing rules in favour of developing countries. He therefore wondered whether it was wise, in the interests of developing countries themselves, to refer expressly to "the establishment of new rules of international law" in their favour.

46. Mr. TSURUOKA agreed that article 27 should be included in the draft. He proposed, however, that the text should be made more specific by the addition of the words "concerning the most-favoured-nation clause" after the words "new rules of international law".

47. Mr. ŠAHOVIĆ said that article 27 should be referred to the Drafting Committee, since its final wording would depend on the decisions to be taken by the Drafting Committee concerning previous articles, particularly articles 21 and 21 *bis*. The main problems posed by article 27 had already been discussed at length and the Commission could do no more at the current stage. It must therefore leave the matter to the Drafting Committee.

48. Mr. DADZIE supported the amendment proposed by Mr. Tsuruoka, since it would have the effect of binding article 27 more closely to the rules of international law concerning most-favoured-nation clauses. He agreed that the article should be referred to the Drafting Committee.

49. Mr. VEROSTA supported Mr. Tsuruoka's proposal, because he considered that article 27 was too general and should be limited in scope to the area of the most-favoured-nation clause.

50. Mr. USHAKOV (Special Rapporteur) thought Mr. Tsuruoka's proposal limited the scope of article 27 too much.

51. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 27 to the Drafting Committee.

*It was so agreed.*<sup>14</sup>

THE PROBLEM OF THE PROCEDURE FOR THE SETTLEMENT OF DISPUTES RELATING TO THE INTERPRETATION AND APPLICATION OF A CONVENTION BASED ON THE DRAFT ARTICLES

52. The CHAIRMAN invited the Special Rapporteur

to introduce section IV of this report, which dealt with the problem of the procedure for the settlement of disputes relating to the interpretation and application of a convention based on the draft articles (A/CN.4/309 and Add.1 and 2, paras. 324-332).

53. Mr. USHAKOV (Special Rapporteur) said that the adoption of an article relating to the settlement of disputes would be justified only if the articles were to become a convention. It was not, however, for the Commission but for the General Assembly to decide whether the articles should take the form of a convention or merely of a resolution. As long, therefore, as the General Assembly had not taken a decision on that point it would be premature to introduce into the articles a clause concerning the settlement of disputes.

54. In any case, the Commission did not have to draft a provision for the settlement of disputes in advance, because there were many precedents on the subject and, should the need arise, States would merely have to choose a model from among them.

55. Furthermore, even if the General Assembly decided that the articles should take the form of a convention, the latter would not necessarily have to provide for the settlement of disputes since it would contain rules relating to the interpretation of most-favoured-nation clauses that would facilitate settlement of any disputes to which the interpretation of those clauses might give rise. Any dispute arising in connexion with the interpretation of the convention would therefore have two facets, since it would relate both to the rule of interpretation and to the clause itself, and would accordingly be very difficult to settle.

56. Finally, he reminded members that the Commission's general practice when preparing a draft convention was not to provide for procedures for the settlement of disputes but to leave it to States to introduce the necessary article into the convention; the Commission should abide by that tradition. He recognized, however, that Mr. Tsuruoka's proposal (A/CN.4/L.270) deserved consideration and thought the Commission should draw States' attention to the proposal in its report, so that they could bear it in mind when adopting the convention.

*New article 28 (Settlement of disputes)*

57. The CHAIRMAN invited Mr. Tsuruoka, who had proposed the insertion in the draft of a new article 28, on settlement of disputes (A/CN.4/L.270), to introduce the article.

58. Mr. TSURUOKA said that he had not been entirely convinced by the Special Rapporteur's arguments in section IV of his report (A/CN.4/309 and Add.1 and 2), but to avoid delaying the Commission's work he would not insist on a debate on the question of settlement of disputes at the current stage. However, the Commission was entitled to express its opinion on the subject and he hoped that it would devote the necessary time to it in the future.

59. He would be satisfied if for the moment his proposal were merely mentioned in the Commis-

<sup>14</sup> *Ibid.*, paras. 99-101.

sion's report, so that the attention of the General Assembly would be drawn to the importance of the matter of settlement of disputes.

60. Mr. SCHWEBEL said that the Special Rapporteur had been right to raise the question of the form the articles would ultimately take. In his opinion, the articles should not necessarily be embodied in a convention; it might be better to consider them as a set of guidelines for States wishing to conclude most-favoured-nation clauses. However, the predominant, if not definitive, view in the Commission seemed to be that the articles should become a convention, and he had therefore been puzzled by the Special Rapporteur's suggestion that it was premature to take up the question of settlement of disputes.

61. He realized that, in view of pressure of time and the improbability of reaching an agreement, it would not be prudent to undertake a lengthy discussion of the new article proposed by Mr. Tsuruoka, and it would therefore be best to proceed as Mr. Tsuruoka had suggested.

62. With regard to the wording of the proposed article, paragraph 2 might make it clearer that a party could at its sole instance seize the International Court of Justice of a dispute and that the Court would have compulsory jurisdiction. Also, paragraph 5 of the annex to the proposal might usefully mention the very valuable Model Rules on Arbitral Procedure that the Commission itself had prepared.<sup>15</sup>

63. Mr. Tsuruoka's proposal might be appended to the existing draft articles in parentheses or, if such were the general wish, simply be included in the Commission's report together with a summary of the discussion to which it had given rise.

64. Mr. VEROSTA said that the Commission would be acting inconsistently if it did not include an arbitration clause in the draft articles, since it had from the outset stated that the draft was a supplement to the Vienna Convention on the Law of Treaties and had, in articles 24 and 25, reproduced the provisions of articles 73 and 28 respectively of the Vienna Convention. If the Commission made no mention at all of the question of settlement of disputes, governments might conclude that it was convinced that the articles would never become a convention. He therefore found great merit in Mr. Tsuruoka's proposal.

65. Mr. DADZIE agreed with the Special Rapporteur that the final form of the articles must be known before provision could be made for the settlement of disputes, and that any article on that subject should be based on the existing models. The Commission was perhaps entitled to suggest that its articles should become a convention, but the decision on that matter lay with the General Assembly. He was grateful for the gesture Mr. Tsuruoka had made with regard to his proposal and considered that the proposal should be commented on in the Commission's report.

66. Mr. JAGOTA agreed entirely with the Special Rapporteur's statement. The Commission should confine itself to producing the best set of articles it could and leave it to the General Assembly to decide what form they should eventually take. That decision would have important implications for the future work of the Commission. If the General Assembly thought that the articles should constitute a protocol to the Vienna Convention on the Law of Treaties, the Commission would not have to concern itself with drafting final clauses or provisions on settlement of disputes, since the relevant provisions of the Vienna Convention would suffice. If the Assembly decided that the articles should form a separate convention, the choice of the method of settling disputes would rest with the plenipotentiary conference or other body that finalized the convention. If the Assembly decided that the articles should be treated merely as a set of guidelines, it would probably be neither desirable nor necessary to add anything on the settlement of disputes.

67. He had raised those points because the settlement of disputes was a divisive question for the world community and had caused considerable problems at the United Nations Conference on the Law of Treaties. Furthermore, if Mr. Tsuruoka's proposal were adopted, there would be not merely a dual problem of interpretation, as the Special Rapporteur had pointed out, but a triple one, because there would also be the question whether the articles should apply to the agreements referred to in article 26.

*The meeting rose at 1 p.m.*

## 1506th MEETING

*Thursday, 22 June 1978, at 10.50 a.m.*

*Chairman* : Mr. José SETTE CÂMARA

*Members present* : Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

**The most-favoured-nation clause (*continued*) (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2, A/CN.4/L.270)**

[Item 1 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (*concluded*)

THE PROBLEM OF THE PROCEDURE FOR THE SETTLEMENT OF DISPUTES RELATING TO THE INTERPRETATION AND APPLICATION OF A CONVENTION BASED ON THE DRAFT ARTICLES (*concluded*)

<sup>15</sup> *Yearbook*... 1958, vol. II, p. 83, doc. A/3859, para. 22.

*New article 28 (Settlement of disputes) (concluded)*

1. Mr. FRANCIS said he shared what seemed to be the general opinion that the Commission should not embark on a substantive discussion of the question of the settlement of disputes. Mr. Jagota had already reminded the Commission at the previous meeting that that question had almost proved the downfall of the United Nations Conference on the Law of Treaties, and he could indeed think of no subject quite so likely to cause problems in multilateral negotiations.

2. He therefore approved the suggestion that a reference to Mr. Tsuruoka's proposal for a new article 28 (A/CN.4/270) should be included in the Commission's report, for that would show the General Assembly that the Commission was aware both of the existence of the problem and of the need to avoid going too far in proposing solutions to it at the current stage.

3. Sir Francis VALLAT and Mr. SUCHARITKUL were prepared to give general support to an article on the settlement of disputes such as that proposed by Mr. Tsuruoka. They recognized, however, that consideration of the proposal would entail a long debate that might not lead to agreement. They therefore supported the suggestion that a reference to the proposal and a summary of the discussion on it should be included in the Commission's report.

4. Mr. USHAKOV (Special Rapporteur) noted that members appeared to agree that the draft articles should not include a provision on the settlement of disputes and that the Commission should simply indicate in its report that a proposal had been submitted on that question. In his opinion, it would be premature to draw up a provision on the settlement of disputes before the General Assembly had taken a final decision on what was to become of the draft articles. If the General Assembly decided that the draft should take the form of a convention, States could insert a provision on the settlement of disputes during the conference held to draw up the convention, as they had recently in the case of the draft articles on succession of States in respect of treaties, which had contained no arbitration clause.

5. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to include in its report a reference to the proposal made by Mr. Tsuruoka in document A/CN.4/L.270 and an outline of the discussion that had taken place concerning it.

*It was so agreed.*

## ARTICLE 2 (Use of terms)

6. The CHAIRMAN invited the Special Rapporteur to introduce, paragraph by paragraph, article 2, which read:

*Article 2. Use of terms*

For the purposes of the present articles:

(a) "treaty" means an international agreement concluded between States in written form and governed by international law,

whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "granting State" means a State which grants most-favoured-nation treatment;

(c) "beneficiary State" means a State which has been granted more-favoured-nation treatment;

(d) "third State" means any State other than the granting State or the beneficiary State;

(e) "material reciprocity" means that the beneficiary State is entitled to the treatment provided for under a most-favoured-nation clause only if it accords equivalent treatment to the granting State in the agreed sphere of relations.

*Paragraph (a)*

7. Mr. USHAKOV (Special Rapporteur) said that the definition of the term "treaty" given in article 2 (a) was the generally accepted definition. It appeared in the Vienna Convention on the Law of Treaties,<sup>1</sup> and the Commission had already reproduced it, without expansion, in the draft articles on succession of States in respect of treaties.<sup>2</sup>

8. Some representatives in the Sixth Committee, and the Government of Luxembourg in its written comments, had considered that paragraph (a) duplicated the corresponding provision of the Vienna Convention on the Law of Treaties (A/CN.4/309 and Add.1 and 2, para. 76; A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A). He did not share that view, for in the draft articles, as in the Vienna Convention, the terms were defined solely for the purposes of the instrument in which they were used. He therefore proposed that paragraph (a) should be retained as it stood.

9. Mr. TSURUOKA was in favour of referring paragraph (a) to the Drafting Committee forthwith.

10. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer paragraph (a) of article 2 to the Drafting Committee.

*It was so agreed.*<sup>3</sup>

*Paragraphs (b), (c) and (d)*

11. Mr. USHAKOV (Special Rapporteur) said that all the comments made on paragraphs (b), (c) and (d), which defined the terms "granting State", "beneficiary State" and "third State", had been favourable. He therefore proposed that those three paragraphs should be retained as they stood.

12. Mr. REUTER observed that the English version of paragraph (c) used the past tense where the French and Spanish versions used the present.

13. The CHAIRMAN said that, if there were no objections, he would take it that the Commission

<sup>1</sup> See 1483rd meeting, foot-note 2.

<sup>2</sup> *Yearbook...* 1974, vol. II (Part One), p. 175, doc. A/9610/Rev.1, chap. II, sect. D, art. 2.

<sup>3</sup> For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 102 *et seq.* and 1522nd meeting, paras. 1-9.

decided to refer paragraphs (b), (c) and (d) to the Drafting Committee.

*It was so agreed.*<sup>3</sup>

*Paragraph (e)*

14. Mr. USHAKOV (Special Rapporteur) said that paragraph (e), which defined the term "material reciprocity", had given rise to reservations by a number of governments, which had expressed doubts about its usefulness and proposed that it should be dropped from the definitions in article 2. Admittedly, the term "material reciprocity" was not entirely satisfactory, but, as he had indicated in his report (A/CN.4/309 and Add.1 and 2, para. 94), he could not suggest anything better. Two problems arose: the use of the term in the draft and its definition in article 2.

15. It was indeed open to question whether the term "material reciprocity" should be used in the draft articles or whether it should be replaced by another expression. Some governments, including those of Luxembourg, the Byelorussian SSR and the USSR, had considered that the term was not clear and had cast serious doubt on the advisability of using it in the draft (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A). It was not particularly felicitous, but it would be difficult to replace, because the notion of reciprocity, contrary to the view of the Government of Luxembourg, was not "a secondary and even atypical aspect of the clause", but an absolutely essential element for its application. As he had pointed out in his report (A/CN.4/309 and Add.1 and 2, para. 93), although material reciprocity was simply impossible in the most traditional sphere of application of the clause, namely, trade, in certain other spheres of relations between States, such as consular and diplomatic relations and establishment treaties—in other words, those in which material reciprocity was possible in practice—it was appropriate and logical to use clauses that were conditional on material reciprocity.

16. In commenting on the definition of "material reciprocity" in paragraph (e), some governments had criticized the term "equivalent treatment" and proposed that it should be replaced by an expression such as "the same treatment" or "similar treatment". But although in the sphere of diplomatic and consular relations, which were governed by international law, a State might grant another State the same privileges and immunities as were accorded to itself, the same was not true in the matter of establishment, which came under internal law. Hence in the latter sphere it was impossible to speak of "the same treatment", but only of "equivalent treatment".

17. For lack of anything better, the term "material reciprocity" should be retained in the draft and consequently defined in article 2. He therefore proposed that paragraph (e) should be referred to the Drafting Committee, in the hope that it would be able to find a more satisfactory form of words.

18. Sir Francis VALLAT agreed that the definition of the term "material reciprocity" should be referred to the Drafting Committee. Strictly speaking, the text proposed in paragraph (e) was not a definition of that term, and it was in any case so ambiguous that it raised more problems than it resolved. In the first place, it was unclear to what, and how far, the "equivalent treatment" must be equivalent. But it was the last part of the paragraph that caused him the most concern and was in greatest need of revision: he did not see why, when most-favoured-nation clauses were drafted with reference to States, people and things and to the treatment of them, mention had been made of "relations", and he could not understand what was meant by an "agreed sphere".

19. Mr. ŠAHOVIĆ was not sure that it was necessary to define "material reciprocity"; if that term were defined, other and perhaps more important notions would have to be defined as well. He thought it would be better to draft article 10 in such clear terms that a definition of the notion of material reciprocity would not be required. In French, the expression "réciprocité trait pour trait" ("point for point") would be preferable. The Drafting Committee should reconsider the definition in paragraph (e) in the light of the provisions of article 10, for the definition might raise problems for governments.

20. Mr. REUTER thought it would be wise to retain, in article 2, a definition that adumbrated article 10. It should be remembered that the draft related to application of the most-favoured-nation clause in general, not only in the sphere of trade, as articles 21, 22 and 23 might suggest. But although material reciprocity played no part in customs matters, it played a very important part in the sphere of diplomatic and consular relations and in that of the right of establishment. It should therefore be brought out, as early as article 2, that the draft covered very diverse matters in which the most-favoured-nation clause did not necessarily operate in the same way.

21. With regard to the terminology to be used, one might hesitate between the terms "material" and "trait pour trait", but the term "reciprocity" must certainly be retained. Admittedly, the word "equivalent" was ambiguous, but its ambiguity was absolutely necessary.

22. As to the phrase "agreed sphere of relations", current international practice required that the matters to which the most-favoured-nation clause applied should be defined with extreme precision. For example, article 2, paragraph 1, of a trade agreement concluded by EEC provided that:

1. In their trade relations the two Contracting Parties shall accord each other most-favoured-nation treatment in all matters regarding:

(a) customs duties and charges of all kinds applied to the import, export, re-export or transit of products, including the procedures for the collection of such duties or charges;

(b) regulations, procedures and formalities concerning customs clearance, transit, warehousing and transshipment of products imported or exported;

<sup>4</sup> *Ibid.*



(c) taxes and other internal charges levied directly or indirectly on products or services imported or exported;

(d) administrative formalities for the issue of import or export licences.<sup>5</sup>

23. He wondered, therefore, whether the words “in the agreed sphere of relations” should not be replaced by the words “on an agreed matter”. The use of an expression that was too general would dangerously expand the notion of reciprocity in the direction of general conditionality. It was not a mere question of terminology to be dealt with by the Drafting Committee, but a question of principle on which the Commission must take a position. If the Commission decided on a precise expression, it would limit the sphere of material reciprocity. On the other hand, if it chose a fairly broad expression, it would give considerable importance to the idea of conditionality in the most-favoured-nation clause. It was his impression that the Special Rapporteur favoured a precise formulation that would limit the sphere of material reciprocity. If that view were accepted, it would be necessary to find a less general expression than “agreed sphere of relations”.

24. Mr. JAGOTA believed it had been found necessary to include a definition of “material reciprocity” in the draft because that term appeared in article 10 (Effect of a most-favoured-nation clause conditional on material reciprocity) and article 19 (Termination or suspension of enjoyment of rights under a most-favoured-nation clause), where most-favoured-nation treatment was described in general terms to cover not only matters relating to trade, but also other matters. The Special Rapporteur had explained that article 8 (Unconditionality of most-favoured-nation clauses), article 9 (Effect of an unconditional most-favoured-nation clause) and article 10 had been drafted on the basis of the idea that most-favoured-nation clauses were to be classified either as unconditional or as subject to a condition of material reciprocity.

25. Whether the expression “material reciprocity” were defined in the draft or not, it would be understood in its normal sense of “equivalent treatment”. In the context, it meant reciprocity that was material, as against unrelated, to the subject-matter of the clause. The term also imported an element of flexibility, so that the treatment in question did not necessarily have to be the same, but only equivalent. Consequently, it was a matter of choice whether to define the term in the body of the draft articles or to leave it to be interpreted in the context of articles 10 and 19. His own view was that a definition would be useful if the distinction between the two types of clauses were maintained. During the discussion on draft articles 8, 9 and 10, however, Mr. Tsuruoka had introduced a proposal relating to a most-favoured-nation clause made subject to a condition other than material reciprocity.<sup>6</sup> If that proposal were accepted, the Commission would have to reconsider whether a

definition of “material reciprocity” was necessary. He thought the Drafting Committee should take that point into account when it considered Mr. Tsuruoka’s proposal in the context of articles 8, 9 and 10.

26. He could not agree that the phrase “in the agreed sphere of relations”, in article 2 (e), was vague; it clearly referred to the scope of the most-favoured-nation clause and would be interpreted to mean that the clause did not apply only to trade, but could also be extended to other matters.

27. Mr. FRANCIS urged the need for caution. The Commission should not, at that stage, seek to go beyond the definition of material reciprocity appearing in article 2 (e). The meaning of that term was, in any event, made quite clear in the commentary to article 2, according to which “material reciprocity” had been defined as an identical consideration executed by a party and as the mutual consideration stipulated by States in a treaty.

28. To his mind, “material reciprocity” clearly denoted equivalent treatment: one reason why the latter term had not been used in place of “material reciprocity” might be because article 4 (Most-favoured-nation clause) already dealt with most-favoured-nation treatment. Moreover, material reciprocity occupied a predominant place in the structure of article 9 (Effect of an unconditional most-favoured-nation clause), article 10 (Effect of a most-favoured-nation clause conditional on material reciprocity), article 18 (Commencement of enjoyment of rights under a most-favoured-nation clause) and article 19 (Termination or suspension of enjoyment of rights under a most-favoured-nation clause). He therefore considered that the definition should stand, and that it should be left to the General Assembly or some other body to find a more appropriate expression. It should not be forgotten that the Special Rapporteur had recognized that the term “material reciprocity” was not entirely satisfactory, but had recommended it for want of anything better.

29. Mr. TSURUOKA said he had submitted to the Drafting Committee an amendment to article 4 that would replace the words “in an agreed sphere of relations” by the words “with respect to a subject-matter specified in such provision”. That amendment also applied to article 2 (e).

30. In the Drafting Committee, he had also proposed the addition to article 2 of two new paragraphs, (f) and (g), containing definitions of the terms “persons” and “things”. Those terms, which appeared in articles 5 and 7, required clarification, and it would be better to define them in article 2 than unnecessarily to encumber the text of the provisions containing them.

31. Mr. USHAKOV (Special Rapporteur) said it was essential to define the term “material reciprocity”, which appeared in several provisions of the draft, since its meaning was not obvious. Under a clause conditional on simple reciprocity, the treatments accorded to each other by the granting State and the

<sup>5</sup> *Official Journal of the European Communities*, Luxembourg, 11 May 1978, vol. 21, No. L 123, p. 2.

<sup>6</sup> See 1490th meeting, para. 6.

beneficiary State were not identical. Each undertook to accord to the other the most favourable treatment it accorded to a third State; hence everything depended on the treatment of third States. Under a clause conditional on material reciprocity, on the other hand, the beneficiary State was entitled to the most favourable treatment accorded by the granting State to a third State only if it accorded that treatment, or equivalent treatment, to the granting State.

32. In the light of the comments and suggestions made during the discussion on article 2 (e) and of the draft definition he proposed to submit to the Drafting Committee, that Committee should be able to work out a satisfactory definition.

33. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 2 (e) to the Drafting Committee.

*It was so agreed.<sup>7</sup>*

34. Mr. USHAKOV (Special Rapporteur) pointed out that the Drafting Committee would also have to consider the definitions proposed for the terms "persons" and "things". The Committee might also consider it necessary to define other terms used in the draft.

35. Sir Francis VALLAT said that some thought should be given to defining the term "State", and he wished in that connexion to refer the Commission to the suggestion submitted by EEC in its written comments:

The expression "State" shall also include any entity exercising powers in spheres which fall within the field of application of these articles by virtue of a transfer of power made in favour of that entity by the sovereign States of which it is composed (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 7).

36. A provision along those lines was necessary if the draft articles were to be viable and to form the basis for a convention. He appreciated that such a definition, although technically simple, would offend some members in their understanding of the term "State", and that its inclusion in article 2 would effectively alter the scope of the draft articles. It would, moreover, have implications for the formal articles. If a "State" were so defined for the purposes of a convention, the implication would be that the definition applied both to the formal and to the substantive articles of the convention, with the result that an organization could become a party to the convention in the same way as a State—which would inevitably give rise to considerable political problems. There were, however, a number of ways in which the objective could be attained. The definition did not necessarily have to provide that an organization should be regarded as a State, which implied that it was entitled to become a party to the convention. Instead, it could be provided that the convention would be open to certain kinds of organizations which, if they became parties, would be treated as States for the purposes of

the convention. Politically, that was a very different proposition from saying that an organization was, in effect, a State for the purpose of the draft articles.

37. He was not pressing for the inclusion of a definition of a "State" in the draft articles at that stage, but he considered that the Commission should make it clear in its report that it had taken cognizance of the problem that arose where the powers of the State had been conferred on a central organization.

38. He requested that the substance of his statement be included in the Commission's report.

39. Mr. REUTER thought that, in a matter of such far-reaching effect, the Commission could not simply refer to a draft provision submitted by a regional group of States. Nor was it possible to pass over the matter in silence. Article 12, paragraph 2, of the Charter of Economic Rights and Duties of States<sup>8</sup> contained a passage upon which the Commission might draw, without reproducing it word for word in the draft, and which should be mentioned in the Commission's report to the General Assembly. That passage read:

In the case of groupings to which the States concerned have transferred or may transfer certain competences as regards matters that come within the scope of the present Charter, its provisions shall also apply to those groupings in regard to such matters, consistent with the responsibilities of such States as members of such groupings.

40. In its report, the Commission should also refer to the explanatory note to article 1 of the Definition of Aggression,<sup>9</sup> under which the term "State" included the concept of a "group of States", where appropriate.

41. Mr. EL-ERIAN said that the question raised by Sir Francis Vallat concerned an international phenomenon of great importance that called for the most careful consideration. He would, however, hesitate to include a definition of a "State" in the draft articles, since that question was closely related to the scope of the draft articles. It was worth noting that Professor Lauterpacht, in his report on the law of treaties, had preferred the term "organization of States" to that of "international organization".<sup>10</sup> There was also the question whether the will of States persisted after an international organization had been established or whether, as the International Court of Justice had held in its advisory opinion in the *Reparation for injuries suffered in the service of the United Nations* case,<sup>11</sup> international organizations had a separate legal personality. The main point, of course, was to ensure that the application and relevance of the draft articles were not prejudiced.

42. The CHAIRMAN said that the statements of Sir Francis Vallat and Mr. Reuter would be reflected in the Commission's report.

<sup>8</sup> General Assembly resolution 3281 (XXIX).

<sup>9</sup> General Assembly resolution 3314 (XXIX), annex.

<sup>10</sup> *Yearbook... 1953*, vol. II, pp. 93 *et seq.*, doc. A/CN.4/63, art. 1 and para. 3 of the commentary thereto.

<sup>11</sup> *I.C.J. Reports 1949*, p. 174.

<sup>7</sup> For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 102 *et seq.*, and 1522nd meeting, paras. 1-9.

43. He reminded members that the Commission still had to consider the form in which the draft articles would finally appear.

*The meeting rose at 12.55 p.m.*

## 1507th MEETING

*Tuesday, 27 June 1978, at 10.15 a.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Ago, Mr. Castañeda, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

### Question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/312, A/CN.4/L.269)

[Item 4 of the agenda]

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

#### ARTICLE 39 (General rule regarding the amendment of treaties)

1. The CHAIRMAN invited the Special Rapporteur to introduce his seventh report on the question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/312), and in particular his draft article 39, which read:

##### *Article 39. General rule regarding the amendment of treaties*

A treaty may be amended by agreement between the parties. The rules laid down in part II apply to such an agreement except in so far as the treaty may otherwise provide.

2. Mr. REUTER (Special Rapporteur) said that his seventh report dealt with part IV of the draft articles, entitled "Amendment and modification of treaties". It contained three articles, which corresponded to three articles of the Vienna Convention on the Law of Treaties:<sup>1</sup> the first laid down a general rule on the amendment of treaties while the other two dealt with multilateral treaties only. The Commission must now consider how far it wished to extend to treaties concluded between States and international organizations or between two or more international organizations the consensual approach adopted in the Vienna Convention. That question had already arisen at the time

the Commission had considered other articles of the draft, particularly those on reservations.

3. In regard to the general rule laid down in article 39, it certainly seemed that the Commission should keep to the consensual approach. On the other hand, for multilateral treaties, dealt with in articles 40 and 41 (A/CN.4/312), that approach was less indicated. It was clear from international practice that multilateral treaties were not often open to international organizations. Multilateral treaties concluded solely between international organizations were rare, while multilateral treaties concluded between States and international organizations, although more frequent, were not usually open treaties. Since the Commission had not excluded the case, however, particularly in article 9,<sup>2</sup> he had thought that he could submit provisions on multilateral treaties. His proposed text for article 40 was modelled on the corresponding article of the Vienna Convention, while for article 41 he proposed two variants that derived from two different approaches.

4. One member of the Commission had already told him privately that he was totally opposed to the provisions of article 39. To forestall those objections, he would point out that, in the case of amendment of treaties, the United Nations Conference on the Law of Treaties had made a point of excluding the application of a rule that had never existed in international law but that had often been invoked, namely, that of the *acte contraire*. That was why the expression "by agreement" had been preferred to the words "by treaty" in article 39 of the Vienna Convention. Moreover, the Vienna Conference had rejected a draft article providing for the possibility of modifying a treaty by subsequent practice.<sup>3</sup> Limits had thus been set on the rule laid down in article 39 of the Vienna Convention.

5. Under the second sentence of article 39, the rules in part II of the draft applied to the agreement by which a treaty might be amended unless the treaty provided otherwise. The procedure for amending treaties was thus made subject to all those rules and, in particular, to the rule in article 6 concerning the capacity of international organizations to conclude treaties. Article 39 might seem inappropriate in so far as it would mean, if taken literally, that an international organization could derogate from article 6 when it concluded an agreement amending a treaty. In his view, such an interpretation would be contrary to elementary common sense. Since capacity always preceded the conclusion of agreements, there could be no question of an agreement modifying the capacity by virtue of which the agreement was concluded. Should the Commission consider that common sense was not enough, it would perhaps be advisable to in-

<sup>1</sup> For the text of the Convention (hereinafter referred to as the "Vienna Convention"), see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

<sup>2</sup> For the text of the articles so far adopted by the Commission, see *Yearbook... 1977*, vol. II (Part Two), pp. 96 *et seq.*, doc. A/32/10, chap. IV, sect. B, 1.

<sup>3</sup> *Yearbook... 1966*, vol. II, p. 187, doc. A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties, with commentaries, art. 38.

clude a reference to article 6 in article 39. It would also be noted, in regard to the second sentence of article 39, that the reference to the rules laid down in part II meant in fact a reference to agreements that did not necessarily respect the rule of the *acte contraire*. Indeed, several articles in that part of the draft contained saving clauses such as "unless the treaty otherwise provides", "unless it is otherwise agreed" or "by any other means if so agreed". It was therefore clear that international organizations parties to a treaty could agree on rules other than those laid down in part II of the draft.

6. If the Commission were to consider that the rules of consensus should not apply to international organizations, despite the flexibility that must be preserved in the provisions of the draft, article 39 would be doomed. Many other articles would be doomed as well if that view were carried to extremes.

7. The CHAIRMAN, on behalf of the Commission, thanked Mr. Reuter for his excellent written report and lucid oral presentation. The draft articles and commentaries thereto were remarkable for their clear and concise treatment of a highly complex subject.

8. Mr. USHAKOV said that article 39 should not be modelled on the corresponding article of the Vienna Convention. Generally speaking, the provisions of that Convention could not be applied unaltered to the treaties with which the Commission was now dealing, except where complete assimilation was possible. The basic idea underlying article 39 of the Vienna Convention was that, as the rules in part IV of that instrument were residual rules for the States that had adopted them, the latter were free to derogate from them by agreement. The States that so derogated were those that had drafted and accepted the rules. It should be noted that the term "agreement" was far broader than the term "treaty", which applied only to an agreement concluded between States in written form and governed by particular rules of international law. Accordingly, under the Vienna Convention, a treaty might be amended by oral, or even tacit, agreement between the parties.

9. There was nothing to show that treaties to which international organizations were parties might be amended by the oral agreement of those organizations. Indeed, what oral procedure would an international organization have to follow in such a case? Could an organization orally amend a treaty by which it was bound by consent given in accordance with its own rules and formally confirmed by a decision of its competent organ? Might that organ or another organ amend a treaty so concluded by derogating from the rules laid down in part II of the draft? The second sentence of article 39 answered that question in the affirmative, but he very much doubted whether that was right. The draft articles were intended for States: States took part in drafting them and would subsequently sign and apply the convention to which they might give rise. International organizations might also be parties to the convention, but if so, would they be able to derogate from rules thus drawn up and, in particular, from

article 6, concerning their capacity to conclude treaties?

10. In his view, an international organization could not derogate, by agreement, from the rules of its own constituent instruments. If it could, proof of the fact should be given in the commentary, for example by reference to practice or doctrine. It would in any case be necessary to show first that, as postulated in the first sentence of article 39, international organizations parties to a treaty might amend it by agreement. The Special Rapporteur stated in his commentary to that article that "the flexibility of the provisions of the Vienna Convention is unchallenged and is fully safeguarded in the present draft articles". That mere assertion was not sufficient to prove that such flexibility was possible in the case of treaties to which international organizations were parties. A State could always conclude an international agreement that derogated from its constitution and then modify the latter to meet the case, whereas an international organization would have to alter its constituent instrument before concluding a treaty that it would not otherwise be competent to conclude.

11. Sir Francis VALLAT observed that, throughout the draft articles, an attempt was being made to place restrictions on international organizations. That, to his mind, was misguided. International organizations, which were composed of States, were not children, to be told at every turn what they should or should not do. They should be left to do what they thought was right, in accordance with the powers and duties conferred upon them. Consequently, there seemed to be no fundamental reason why provision should not be made for international organizations to conclude agreements informally, in the same way as States were permitted to do. For example, an international organization might wish to modify a treaty and, for that purpose, adopt in its plenary body a resolution which, with the authority of that body, was communicated by its administrative head to the other party or parties to the treaty, together with an inquiry as to whether the change was acceptable. By that straightforward procedure, a treaty could be amended without the need to go through all the formalities for the conclusion of a new treaty in the strict sense. He failed to see why that should not be permissible.

12. He agreed entirely with Mr. Ushakov that an agreement was different from a treaty—intentionally so, if his recollection of the discussions leading up to the Vienna Convention was correct. In that connexion, it would be useful if the Special Rapporteur would explain why article 39 of the Vienna Convention provided that an agreement rather than a treaty should be the vehicle for amendment of treaties.

13. Mr. REUTER (Special Rapporteur) replied that in 1966 the Commission had chosen to be very flexible on the subject of treaties concluded between States; that was why it had used the term "agreement" in preference to the term "treaty". It should not be forgotten in that connexion that the Commission's draft articles on the law of treaties had contained an article 38 entitled "Modification of treaties by subse-

quent practice".<sup>4</sup> That article had been based on the finding of a tribunal, which had arbitrated in a dispute between France and the United States of America, that the practice of States might modify a treaty. The majority of the States participating in the United Nations Conference on the Law of Treaties had opposed article 38 for fear that officials responsible for the application of a treaty might yield to pressure and apply it in a way differing from that originally envisaged. In view of the disappearance of that article, the term "agreement" as it now appeared in article 39 of the Vienna Convention had a more limited meaning than that which the Commission had originally assigned to it. To judge from the preparatory work of the Commission and of the Conference on the Law of Treaties, the term "agreement" now applied only to a written agreement.

14. If the Commission shared his view, it should say so in its commentary. He had refrained from raising that point in his seventh report because he had not wished to give a personal interpretation of the Vienna Convention.

15. As to the reasons why the Commission had prepared its article 38 on the law of treaties, they would be found in the commentary to article 35 on the same topic.<sup>5</sup>

16. Mr. USHAKOV said that the explanation given by the Special Rapporteur showed that the mere conduct of States might amend a treaty. He questioned whether the same was true of the conduct of international organizations. It was especially important to be clear what was meant by "conduct" in such a case, and whether the conduct might be that of a particular organ. For the moment, there was no evidence to suggest that a written treaty might be amended by the conduct of an international organization. The article under consideration should not be based on the preparatory work for the corresponding article of the Vienna Convention.

17. Mr. DÍAZ GONZÁLEZ said that if the Vienna Convention was to prevail, the article under study was fully justified. The fact that article 39 had been included in the Vienna Convention meant that States had accepted its wording. They would therefore be unlikely to change their point of view when the draft articles were discussed, particularly in view of the residual nature of the draft.

18. As the Special Rapporteur had pointed out, article 6 (Capacity of international organizations to conclude treaties) had already been approved and was the corner-stone of the draft. The exercise of that capacity was of course prior in time to the conclusion of a treaty; it also involved a constitutional issue, since such capacity was governed by the rules of the organization in question.

19. International organizations were a living reality and one of the most active elements in international

life. They were composed of sovereign States and, subject to their constitutional rules, were able not only to conclude treaties and agreements but also to amend them. In his view, the activities of international organizations in their relations with States should not be limited; on the contrary, a somewhat more flexible approach should be adopted.

20. He therefore agreed fully with the Special Rapporteur's reasoning and also with article 30 as drafted.

21. Mr. RIPHAGEN said it was clear from the discussion that article 39 of the Vienna Convention was open to different interpretations in the light of the preparatory work for the Convention and the rejection by the Conference of the draft article 38 submitted by the Commission. That created some difficulty, for the Commission was not in a position to interpret the Vienna Convention, nor could it pass over the matter in silence. Of necessity, therefore, it seemed that it would have to follow the Convention.

22. In his view, the second sentence, in particular, of article 39 of the Vienna Convention was not very happily phrased, since it probably provided not so much for derogation from part II of the Convention as for derogation from the first sentence of that article. Provision might be included in a treaty for that treaty to be amended without the express agreement of all the parties, by means of an "opting-out" procedure: any party that did not opt out within a certain period would be deemed to agree to the amendment. That would be a derogation from the first sentence of article 39. It was the kind of provision that often caused difficulty for countries with written constitutions; in the case of the Netherlands, for example, the constitution provided that no treaty would have binding force unless approved by Parliament. Consequently, some way would have to be found of adapting the provisions of the treaty to those of the national constitution. The same problem could arise in connexion with the constitutions of international organizations, although it might well be resolved in practice.

23. In the circumstances, therefore, while appreciating the difficulties to which Mr. Ushakov had referred, he considered that the Commission could only accept the article as it stood, with all its inherent ambiguity.

24. The CHAIRMAN, speaking as a member of the Commission, fully endorsed the remarks made by Mr. Díaz González, Mr. Riphagen and Sir Francis Vallat and was in favour of leaving the article as it stood. It had been the Commission's understanding from the outset that as far as possible the draft articles should be aligned with the Vienna Convention. If the Commission were now to depart from the Convention, it should have a very good reason for doing so—a reason grounded in State practice or some convincing doctrine. He knew of no such reason and therefore considered that the Commission should abide by the terms of the Vienna Convention.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, pp. 232 and 233.

25. Mr. CASTAÑEDA said he had been convinced by the arguments put forward by the Special Rapporteur in favour of keeping draft article 39 in its existing form. He could see no essential legal reasons why the parties to a treaty should not be able to amend it by means of an agreement between themselves that had a form different from that of the treaty or why they should not be able to include in the treaty a provision to the effect that part II of the draft articles would not apply in specified cases.

26. He thought Mr. Ushakov had been right in saying that the situation with regard to treaties between international organizations or between international organizations and States was *a priori* very different from the situation with regard to treaties between States alone: decision-making by an international organization was always a collective process. Nevertheless, he agreed with the Special Rapporteur that the difference was not so great as to require separate régimes for States and international organizations, and that the provisions of the Vienna Convention could be applied in both cases.

27. The Commission should state clearly in its commentary to article 39—and, if possible, illustrate by a practical example—the reasons the Special Rapporteur had given for holding that view, and it should emphasize in particular his reference to article 6. While it would be permissible for the agreement of an international organization to the amendment of a treaty to which it was a party to be expressed in a form or by a means different from those employed for the original treaty, it was essential that the organization's agreement should comply with its relevant rules.

28. Mr. JAGOTA approved article 39 in its existing form. However, it was a text that required interpretation, and he wished to make some comments on that aspect of it.

29. The Special Rapporteur had said that he had chosen the term "agreement" deliberately, to show that consent to the amendment of the treaty could be expressed through some less formal means than consent to be bound by the treaty itself. But what was meant by "agreement"? Article 39 itself implied that there must be some element of formality in the expression of agreement, since it referred in its second sentence to the rules contained in part II of the draft articles. Furthermore, there was mention of the "negotiation and conclusion" of an agreement in article 40, paragraph 2 (b), the provisions of which must, in regard to the particular case of multilateral treaties, be subsumed in the general rule set out in article 39. He agreed with Mr. Ushakov that the term "agreement" could be taken to include oral agreement, if only because, unlike article 35, paragraphs 1 and 3, adopted by the Drafting Committee (A/CN.4/L.269), article 39 did not expressly refer to consent "in writing". On the other hand, the term "agreement" should presumably not be interpreted as applying to consent by mere conduct or acquiescence, for the Conference had rejected draft article 38, in which the Commission had proposed that an agreement might be amended by the subsequent practice of the parties

to it. Nevertheless, the inclusion in article 39 of the words "except in so far as the treaty may otherwise provide" suggested that the parties to a treaty retained some freedom of choice as to the means of expressing their acceptance of amendments to it.

30. If the Commission did not say in its commentary that consent expressed otherwise than by absence of protest was necessary, the problem of the interpretation of the word "agreement" would persist. The best solution might be for each treaty to contain an amendments provision, but that was a matter on which a decision should be left to the General Assembly or to the conference responsible for giving final form to the text of a convention based on the draft articles.

31. Mr. FRANCIS asked whether he was right in thinking that article 39 would apply between two international organizations in the same way as between two States, and that article 40 would apply in the case of treaties between, for example, one State and two or more international organizations or between one international organization and two or more States.

32. Mr. REUTER (Special Rapporteur), replying to the question raised by Mr. Francis, said that a treaty between three entities was a multilateral treaty; it therefore came under the general rule laid down in article 39 and, where necessary, under articles 40 and 41.

33. The members of the Commission seemed to be in agreement on three points. To begin with, they agreed that it was necessary that article 39 should stand. They also agreed that an international organization was bound by its constituent instrument, in conformity with the principle laid down in article 6. But the same was true for States. However, in its commentary to article 51 of the draft articles on the law of treaties (Termination of or withdrawal from a treaty by consent of the parties), the Commission had taken the view that

The States concerned are always free to choose the form in which they arrive at their agreement to terminate the treaty. In doing so, they will doubtless take into account their own constitutional requirements, but international law requires no more than that they should consent to the treaty's termination.<sup>6</sup>

What was true for States was true *a fortiori* for international organizations. The members of the Commission therefore seemed to agree that article 39 did not constitute a derogation from article 6.

34. They also seemed to agree on a third point, namely, that article 39 of the Vienna Convention required interpretation. Mr. Jagota had clearly shown that, in that article, the term "agreement" involved some minimum of formality, because of the terms of article 40, and that even if the term were to be interpreted as precluding agreement by mere acquiescence, it should none the less be retained, since article 40, paragraph 2 (b), made provision for the negotiation and conclusion of "any agreement for the amendment of the treaty".

<sup>6</sup> *Ibid.*, p. 249, art. 51, para. (3) of the commentary.

35. Some members of the Commission were in favour of reproducing article 39 of the Vienna Convention word for word, whereas others, like Mr. Ushakov, deemed it necessary to make certain changes in the wording. More particularly, they thought it should be emphasized that the rule laid down in article 6 was a basic rule and that nothing in article 39 was to be understood as derogating from it.

36. How was that idea to be expressed in the text of the article itself? A number of solutions were possible. It could be stated, as the Drafting Committee had stated in article 36, paragraph 3 (A/CN.4/L.269), that, in the case of an international organization, the agreement between the parties was to be governed by the relevant rules of that organization. Also, the phrase "the rules laid down in part II" could be replaced by the words "the rules laid down in articles 7 to 33" and the commentary could show that the express purpose of that change was to exclude article 6.

37. Mr. Ushakov had criticized the second sentence of article 39 on the ground that, among the rules laid down in part II, there was one—the rule in article 6—from which there could be no derogation, and he had therefore suggested that a reservation should perhaps be made for article 6. However, all the rules laid down in part II of the draft gave international organizations considerable freedom, as evidenced by the phrases "or agreed upon by the States and international organizations" (article 10, para. 1 (a)), "or by any other means if so agreed" (article 11, paras. 1 and 2), "when ... the participants in the negotiation were agreed" (article 12, para. 1 (b)), etc. Thus the second sentence of article 39 in fact indicated that the parties might stipulate stricter rules than those in part II of the draft.

38. In conclusion, he wondered whether the Commission should not make the term "agreement" clearer by saying that a treaty might be amended "by express agreement between the parties". Such express agreement could be verbal but it could not be an agreement by acquiescence. The point was whether the Commission wished to depart from the Vienna Convention in that respect. It could choose to do so by advancing a twofold argument: first, that, by discarding draft article 38, the Conference on the Law of Treaties had already excluded agreement by acquiescence in the case of agreements between States; secondly, that, even if the Conference had not categorically decided to exclude agreement by acquiescence in that case, it was necessary to do so in the case of agreements concluded with international organizations. However, the Commission might confine itself to a single argument, without embarking on an interpretation of the Vienna Convention, and point out that, in the case of international organizations, agreement by acquiescence was a dangerous formula and that for that reason alone, it was better to stipulate an express agreement, without however going so far as requiring a written agreement.

39. Mr. USHAKOV proposed that draft article 39 should be replaced by a text reading:

"1. A treaty may be amended by the consent

of the parties. The rules laid down in part II apply to the establishment of that consent.

"2. The consent of an international organization party to the treaty is governed by the relevant rules of that organization."

40. That text was based on article 39 of the Vienna Convention but took account of the fact that international organizations were not States and, in regard to the conclusion of treaties, were bound by their constituent instruments and any other relevant rules of the organization concerned.

41. Mr. SCHWEBEL understood Mr. Ushakov to have taken the view that an international organization lacked the power to conclude a treaty unless its constituent instrument expressly authorized it to do so. Admittedly, the constituent instrument of an international organization usually mentioned the specific agreements that the organization might conclude, but he considered it reasonable to extrapolate from that a general power to conclude treaties. Moreover, he doubted whether, even if it had not been endowed with the power to conclude particular treaties, an intergovernmental organization could be said not to be entitled to conclude international agreements; it seemed to him that, as a body composed of States and enjoying international personality, an international organization had such power by reason of the customary international law of international organizations.

42. Mr. SUCHARITKUL recalled that the Commission had not yet included in its draft articles a provision that catered for the existence of many forms of international organizations and for the diversity of their constituent instruments. Mr. Ushakov had been right to point out that there were differences between States and international organizations, particularly with regard to capacity to conclude treaties, and that those differences sometimes extended to amendment of treaties. The Drafting Committee might wish to reflect on the fact that proposals to amend the constituent instruments of some international organizations were considered to have been accepted merely if there were no opposition to them.

43. Mr. Ushakov had also said, in a comment conflicting with the rule in the Vienna Convention and with the rule proposed by the Special Rapporteur, that the requirement for the approval of an amendment to a treaty might be downgraded from "agreement" to mere "consent". "Consent" however, might mean something far less formal than what was required by part II of the Vienna Convention or of the Commission's draft articles, and the Commission should therefore take account, when drafting its final version of article 39, of the historical examples of amendment by acquiescence, waiver of treaty requirements, estoppel, and modification of written agreements by conduct. He was inclined to envisage the question of treaty amendment in the same way as the Special Rapporteur.

44. Mr. USHAKOV pointed out that he had not asserted that the capacity of an international organiza-

tion to conclude treaties was governed by the organization's constituent instrument. He had simply pointed out what was stated in article 6, namely, that the capacity of an international organization to conclude treaties was governed by the relevant rules of that organization. However, under the definition given in article 2, paragraph 1 (j), "rules of the organization" meant, "in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization". Accordingly, an organization might conclude treaties only if its relevant rules permitted it to do so. It was not for the Commission but for international organizations themselves to decide whether, under their relevant rules, they could conclude treaties.

45. Mr. SCHWEBEL said that Mr. Ushakov's clarification had been very cogent and perfectly correct. However, if an international organization that had not been expressly endowed by its constituent instrument with the power to conclude a treaty found itself faced for the first time with the question whether it could subscribe to such an instrument, it would have no practice of its own to guide it. In the light of the manner in which international organizations generally behaved, he thought that an organization composed of States would have the power to conclude a treaty in such a case.

46. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 39 to the Drafting Committee.

*It was so agreed.*

*The meeting rose at 1 p.m.*

## 1508th MEETING

*Wednesday, 28 June 1978, at 10.15 a.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Castañeda, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

### Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/312, A/CN.4/L.269)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR (*continued*)

#### ARTICLE 40 (Amendment of multilateral treaties)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 40 (A/CN.4/312), which read:

#### *Article 40. Amendment of multilateral treaties*

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States and international organizations, each one of which shall have the right to take part in:

(a) the decision as to the action to be taken in regard to such proposal;

(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State and every organization entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State or international organization already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(b), applies in relation to such State or organization.

5. Any State or organization which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State or organization:

(a) be considered as a party to the treaty as amended; and

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

2. Mr. REUTER (Special Rapporteur) said that the main purpose of article 40 of the Vienna Convention,<sup>1</sup> which corresponded to the article under consideration, was to enable all the parties to a multilateral treaty to participate in the amendment procedure, to afford them an opportunity to become parties to the amended treaty on terms of equality and to provide for cases of States that did not accept the amendment and of those that became parties to the treaty after its amendment. Since all the principles set forth in that provision seemed applicable to treaties between States and international organizations or between international organizations, he had considered that he could propose a text which, except for drafting changes, was the same as that of article 40 of the Vienna Convention.

3. Mr. USHAKOV said that, generally speaking, he had much the same difficulties with article 40 as with the preceding article. Referring to the first phrase of article 40, paragraph 1, he wondered whether international organizations could really agree by treaty to rules concerning them that differed from the rules set forth in the draft articles. For example, could an international organization derogate by treaty from the rules of its own constituent instrument, such as those concerning its capacity to conclude treaties?

4. With respect to paragraph 2(b), he wondered whether international organizations could take part in the negotiation and conclusion of any agreement for the amendment of a multilateral treaty. Could they really conclude such an agreement, even tacitly?

5. The term "agreement", which appeared, *inter alia*, in paragraphs 4 and 5 of the article, could be in-

<sup>1</sup> See 1507th meeting, foot-note 1.



terpreted in different ways, as had been shown by the discussion on article 39. To ensure that the term did not cover tacit agreement, he had at the previous meeting made a suggestion in relation to article 39,<sup>2</sup> which should be taken into consideration.

6. Finally, the form of article 40 should be modified. As in the case of the articles relating to reservations, the Commission should distinguish between treaties concluded between States and organizations and treaties concluded between organizations only. Paragraphs 2, 4 and 5 should be divided accordingly. Under the existing wording of paragraph 2, for example, any proposal to amend a multilateral treaty as between all the parties must be notified "to all the contracting States and international organizations". It was obvious that, in the case of a multilateral treaty concluded between international organizations only, such notification should not be made to States.

7. Mr. ŠAHOVIĆ approved the rules proposed by the Special Rapporteur in the article under consideration. From the standpoint of content, those rules could not differ from the rules set forth in the corresponding article of the Vienna Convention.

8. The points raised by Mr. Ushakov, particularly concerning the special situation of international organizations as parties to multilateral treaties, were of course pertinent. Most of those points, however, had already been discussed during the consideration of article 39. Such being the case, the Drafting Committee should now seek formulations acceptable to all members of the Commission.

9. Mr. SCHWEBEL also endorsed article 40 as proposed by the Special Rapporteur and considered that it could be referred to the Drafting Committee. Such problems as the text might pose seemed to him to be not so much substantive as the consequence of a distinctive philosophical approach to international organizations.

10. With regard to the presentation of the article, he was opposed, as he had been when the Commission had discussed other articles, to the subdivision and duplication of paragraphs, which would make the text too cumbersome. He did not think that paragraph 5, for example, required elaboration, since its existing wording seemed to him already to take account of the possibility that there might be treaties to which only international organizations were parties.

11. Mr. SUCHARITKUL found article 40 acceptable, subject to a few drafting changes. Paragraph 1 of the article safeguarded the freedom of the contracting parties, whether States or international organizations, to conclude multilateral treaties and to agree on any kind of amendment procedure. There did not seem to exist, in that sphere, principles so essential as to limit the freedom of the contracting parties. It was therefore in the absence of contrary

provisions of the treaty that the provisions of paragraphs 2 to 5 of article 40 were applicable.

12. Mr. JAGOTA observed that Mr. Ushakov had once again drawn attention to what he believed to be a basic difference between treaties concluded between States and international organizations and treaties concluded between international organizations alone. The Commission itself had already distinguished between those two types of treaties in articles 24 and 24 *bis* and 25 and 25 *bis*,<sup>3</sup> and, with regard to the articles contained in his seventh report, the Special Rapporteur had acknowledged at least the possibility of the existence of such a distinction by proposing two versions of article 41 (A/CN.4/312). If the Commission chose variant I of article 41, it would be obliged, for the sake of consistency, to treat the two types of treaties separately in article 40 as well. It was therefore important to determine whether the distinction itself was sound and why the Special Rapporteur considered that it was unnecessary in article 40, but might be necessary in article 41.

13. For Mr. Ushakov, the basis for the distinction between the two types of treaty in question lay in the fact that international organizations were governed by their own rules and, unlike States, did not have an independent personality. Hence, the main point Mr. Ushakov had made in relation to both article 39 and article 40 was that the rules of an international organization were paramount: they governed the capacity of the organization to conclude treaties—as the Commission itself had recognized in article 6—and the organization should not be able, through the amendment of a treaty, to alter those rules, and hence that capacity. Mr. Ushakov had also been concerned that an international organization should not be able to accept such an amendment tacitly or by mere conduct.

14. In considering Mr. Ushakov's points, the Commission should bear in mind its own article 27, paragraph 2, and article 46 of the Vienna Convention, to which it would presumably wish to prepare a parallel provision. In its article, the Commission provided that, if the rules of an international organization gave it competence to conclude treaties, the organization must perform in full any treaty to which it became a party, unless the treaty itself acknowledged possible limitations on that performance deriving from the rules. He believed that, after drafting that provision, and including a reference to the rules of international organizations in the article corresponding to article 46 of the Vienna Convention, the Commission should cease to distinguish between the parties to a treaty according to whether they were States and international organizations, or international organizations alone.

15. Subject to the need to consider splitting the article in the light of the decision on article 41, he found article 40 as proposed by the Special Rapporteur generally satisfactory. In particular, the fact that

<sup>2</sup> *Ibid.*, para. 39.

<sup>3</sup> *Ibid.*, foot-note 2.

it spoke of "agreement" for the amendment of the treaty, rather than "consent" to amendments, seemed, as in article 39, to preclude the acceptance of amendments by implication.

16. Sir Francis VALLAT agreed with the remarks made by Mr. Jagota.

17. Mr. REUTER (Special Rapporteur) noted that the discussion had revealed both substantive and drafting problems, although it was not always easy to distinguish between the two, certain changes having been presented sometimes as mere drafting matters and at other times as questions of substance.

18. As Mr. Ushakov had pointed out, it was clear that, since the term "agreement" appeared several times in article 40, the Commission must decide, in article 39, whether that term should be maintained as it stood or, as he himself had suggested orally,<sup>4</sup> expanded into "express agreement", thereby precluding acquiescence, as the United Nations Conference on the Law of Treaties seemed to have done by rejecting draft article 38,<sup>5</sup> or whether, as Mr. Ushakov had proposed, that term should be deleted and replaced by a reference to the consent of the parties.

19. Clearly article 39 was a key article and the positions adopted on that article would therefore determine the positions to be adopted on article 40, not only with respect to the term "agreement" but also, as Mr. Ushakov, Mr. Jagota and Sir Francis Vallat had emphasized, with respect to the question whether it was necessary to refer to the principle laid down in article 6, under which "the capacity of an international organization to conclude treaties is governed by the relevant rules of that organization". That question arose in the case of article 40 as it had already arisen and would arise again in the case of other articles.

20. If, as Mr. Ushakov had proposed, an alternative wording were accepted for article 39, that wording should also apply to article 40, and even to article 41. In the latter case, the matter might be slightly more complex, because articles 39 and 40 spoke of the amendment of treaties, whereas article 41 referred to the modification of treaties. That did not mean that the wording adopted in article 39 should be repeated in articles 40 and 41; it meant that, if article 39 contained a provision referring to the fact that the agreement of an international organization party to a treaty was governed by the relevant rules of that organization, that provision should be formulated in such a way as to apply to articles 40 and 41.

21. With respect to the phrase "unless the treaty otherwise provides", in paragraph 1 of article 40, Mr. Ushakov had wondered whether it could be accepted that, in a particular treaty, an organization should be exempted from applying the provisions of article 40. While understanding Mr. Ushakov's concern, he considered it excessive. In its existing form, article 40 as-

simulated international organizations to States and gave them the same rights. Therefore the reservation "unless the treaty otherwise provides" could operate only to limit the rights of international organizations. In that respect, it could have a more important function than in article 40 of the Vienna Convention, because it could prevent an international organization from participating in the negotiation of the agreement amending the treaty. It was quite conceivable that an international organization should be admitted as a party to a treaty but with slightly more restricted rights than the States parties.

22. He noted that Mr. Ushakov and, after him, Mr. Jagota and Sir Francis Vallat, had wondered whether a distinction should not be made, in article 40 and in the other articles, between treaties concluded between international organizations alone and treaties concluded between one or more States and one or more international organizations; Mr. Ushakov had made the point as one of a drafting nature, whereas Mr. Jagota and Sir Francis Vallat had considered that it was more a question of substance. He pointed out that, wherever possible, he had avoided making a distinction between treaties between international organizations only and treaties between States and international organizations, so that the text should not be unduly cumbersome. Moreover, he agreed with Mr. Schwebel that there was no danger of confusion in article 40. Obviously, however, it could be argued, as had Mr. Ushakov, that the Commission should not be afraid to encumber the text if that served to avoid any ambiguity. That was a problem that would have to be settled by the Drafting Committee.

23. However, that drafting problem might conceal a problem of substance which, although not arising in the case of article 40, might arise in the case of other articles, such as article 41. It was for reasons not of drafting but of substance that article 41 drew a distinction between treaties concluded between international organizations only and treaties concluded between States and international organizations. As far as substance was concerned, two different positions could be adopted. It could be considered that, with very rare exceptions, international organizations were assimilated to States. It could also be considered, however, that treaties concluded between international organizations only could be assimilated to treaties concluded between States only because, when international organizations negotiated with each other, they negotiated on an equal footing whereas they did not negotiate on an equal footing when they negotiated with States.

24. If the second position were adopted, a distinction would have to be made in nearly all the articles between treaties concluded between international organizations only and treaties concluded between States and international organizations. The rules applicable to treaties between States—the rules of the Vienna Convention—could simply be transposed in respect of treaties between international organizations only. A problem of adaptation would arise only in the case of treaties between international organiza-

<sup>4</sup> *Ibid.*, para. 38.

<sup>5</sup> *Ibid.*, foot-note 3.

tions and States, because it might be necessary to subject international organizations to special treatment.

25. For his part, he had at the outset adopted the first position. He had considered that, since the Vienna Convention was based on the principle of consensus, international organizations in general should, with very rare exceptions, be assimilated to States and that, accordingly, the same rules held good for treaties between States only, between international organizations only, and between States and international organizations. He had also considered that, if special treatment were to be given to international organizations, it rested with States to make provision for such treatment in the treaty. He had, however, taken account of the different opinions expressed in the Commission.

26. In conclusion, he said that it would be unwise to adopt a general theoretical position at the outset and that it was better to proceed empirically, examining, in the case of each article, whether the distinction between the two categories of treaties was justified for reasons of drafting or for reasons of substance.

27. The CHAIRMAN said that, if there were no objections, he would take it that the Commission wished to refer article 40 to the Drafting Committee.

*It was so agreed.*

ARTICLE 41 (Agreements to modify multilateral treaties between certain of the parties only)

28. The CHAIRMAN invited the Special Rapporteur to introduce article 41 (A/CN.4/312), which read:

*Article 41. Agreements to modify multilateral treaties between certain of the parties only*

*Variant I*

1. Two or more of the parties to a multilateral treaty between international organizations may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Two or more States parties to a treaty between States and one or more international organizations may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

3. One or more States and one or more international organizations parties to a treaty between States and international organizations may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) it is so agreed between all parties to the treaty.

4. Unless, in the case provided for in subparagraph (a) of paragraphs 1, 2 and 3, the treaty stipulates otherwise, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modifications made in the treaty by the agreement.

*Variant II*

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

29. Mr. REUTER (Special Rapporteur) said that the position adopted in article 41 differed from that taken in articles 39 and 40, since the subject-matter of article 41 was more sensitive than that of the two preceding articles.

30. Article 41 of the Vienna Convention dealt with the problem of *inter se* agreements. In the case of States, the Conference on the Law of Treaties had placed very strict conditions on the modification of multilateral treaties in relations *inter se*. There was naturally no problem if the possibility of such modification was provided for by the treaty. The Commission had proposed three conditions to apply in the absence of such a possibility, and they had been maintained, in amended form, in article 41, paragraph 1 (b), of the Vienna Convention: the modification in question must not be prohibited by the treaty, must not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations, and must not relate to a provision, derogation from which was incompatible with the effective execution of the object and purpose of the treaty as a whole.

31. He had submitted two variants of article 41. Although he preferred the simpler variant, which reproduced the text of the article of the Vienna Convention, he had placed it second, in deference to the view, which several members of the Commission had upheld, that international organizations, by their very

nature, often required treatment differing from that reserved for States.

32. Variant I, which was based on that view, referred to three separate cases: that of treaties between international organizations alone and, in the case of treaties between States and international organizations, that in which the *inter se* agreement was concluded between States alone and that in which it was concluded between one or more States and one or more international organizations.

33. In the case of treaties concluded between international organizations alone, he had simply transposed the rule laid down in article 41 of the Vienna Convention for treaties between States, on the grounds that international organizations, like States, were bodies that were equal as between themselves.

34. He had also followed the course taken in the Vienna Convention in the case of treaties between States and international organizations where the *inter se* agreement concerned only States, for the fact that States were parties to a treaty to which international organizations were also parties did not diminish their rights.

35. In the third case, however, he had departed from the text of the Vienna Convention, for he had thought that, in a treaty between States and international organizations, the possibility of an *inter se* agreement between one or more States and one or more international organizations could be admitted only if one of two conditions were met: if such a possibility was provided for by the treaty, or if it was agreed between all parties to the treaty. The basis for his proposal of that rule was the belief that, in agreements of that kind, the situation of international organizations was always specific and they could not be given the same freedom as States. Although the Commission had not ruled out such a case, there were as yet no examples of general treaties between States to which international organizations might also be permitted to become parties. Such treaties as currently existed between States and international organizations were specific and tightly closed—for instance, the treaty between IAEA, EURATOM and the States members of EURATOM, which was designed to ensure the application of the Treaty on the Non-Proliferation of Nuclear Weapons and in which careful thought had been given to the respective roles of the international organizations and the States concerned. It was therefore conceivable that, in treaties of that kind, the possibility of an *inter se* agreement might be provided for in the text of the treaty itself.

36. Since variant I employed the term “agreement”, all the comments that had been made on that subject were applicable to it.

37. Variant II reproduced article 41 of the Vienna Convention without change. His own view was that that variant would be sufficient, for the triple barrier established by the Convention was already very solid and he could see no reason for laying down stricter requirements for international organizations. He had

submitted variant I merely in response to certain legitimate concerns.

38. Mr. USHAKOV saw no reason to cater for the cases referred to in paragraphs 1 and 3 of variant I. He therefore proposed that those two paragraphs should be deleted and that only paragraphs 2 and 4 should be retained.

*The meeting rose at 11.35 a.m.*

## 1509th MEETING

*Thursday, 29 June 1978, at 10.50 a.m.*

*Chairman: Mr. Milan ŠAHOVIĆ*

*Members present: Mr. Ago, Mr. Castañeda, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.*

### Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/312, A/CN.4/L.269)

[Item 4 of the agenda]

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPporteur (*concluded*)

#### ARTICLE 41 (Agreements to modify multilateral treaties between certain of the parties only)<sup>1</sup> (*concluded*)

1. Mr. RIPHAGEN noted the statement in paragraph (6) of the Special Rapporteur's commentary (A/CN.4/312) to the effect that variant I of article 41 raised a kind of presumption that “modifications affecting international organizations are assumed *a priori* to upset the balance established by the treaty”. He failed to see how such an assumption could be justified and, for that reason, preferred variant II.

2. There seemed to be a certain parallelism between article 41 and article 19 *bis*,<sup>2</sup> paragraph 2 of which laid down a special rule regarding the formulation of reservations by international organizations. It might perhaps be logical to include a similar provision in variant II of article 41.

3. The Commission should not be unduly restrictive in regard to the treaty-making powers of international organizations and, above all, should not make it too difficult for organizations that were not of a universal character to enter into treaty relations

<sup>1</sup> For text, see 1508th meeting, para. 28.

<sup>2</sup> See 1507th meeting, foot-note 2.

with the outside world. In that connexion, he would point out that article 12 of the Charter of Economic Rights and Duties of States<sup>3</sup> recommended that the policies of groupings of States should be “outward-looking”.

4. Mr. JAGOTA considered that the basic difference between the two variants lay in paragraph 3 (b) of variant I, which stipulated that any modification of a treaty concluded between one or more States and one or more international organizations required the agreement of all the parties to the treaty. Given the new capacity of international organizations to enter into treaties, that was a desirable requirement. It would provide for an objective test, which would ensure that the balance established by the treaty was not disturbed, and was to be preferred to the subjective test of incompatibility with the effective execution of the object and purpose of the treaty. The Drafting Committee might wish to consider whether that requirement should be retained in variant I, should be embodied in variant II or should form the subject of a third variant.

5. In his commentary to variant I, the Special Rapporteur had dealt with two categories of treaties: treaties between international organizations and treaties between States and international organizations. Modifications to the first category of treaties were covered by paragraph 1 of variant I, and to the second category by paragraphs 2 and 3. Paragraph 2 would apply where two or more States parties wished to modify a treaty, and paragraph 3, where one or more States and one or more international organizations wished to do so.

6. None of those three paragraphs, however, covered the case where the parties to a treaty between States and international organizations wishing to modify the treaty were international organizations only. He would therefore suggest that, to meet that point, a drafting change should be introduced in paragraph 3 of variant I or a new paragraph added to that variant.

7. Mr. FRANCIS recalled that, during the discussion at the Commission's twenty-ninth session on the question of reservations to a treaty concluded between States and international organizations or between international organizations, he had taken the view that, from the contractual standpoint, no distinction should be drawn between the parties, whether they were States or international organizations.<sup>4</sup> It had, however, been decided to make such a distinction, as attested by the provisions of articles 19 to 23 *bis*. He regarded that point as significant because articles 39 and 40 provided for equality between international organizations and States for the purposes of amending a treaty. Thus all parties to a treaty, whether bilateral or multilateral, must consent to its amendment. As far as multilateral treaties were concerned, modification by reservation differed from

modification by agreement between certain of the parties only in that the former was a unilateral act, which was subsequently approved by the other parties to the treaty, whereas the latter was an act confined to the parties concerned. For the sake of uniformity, however, he could agree that the approach adopted in articles 19 to 23 *bis* should be reflected in article 41.

8. Of the two variants, he preferred the first, but thought that paragraph 3 should perhaps be clarified to take account of the situation covered by paragraph 2. He therefore suggested that variant I should be referred to the Drafting Committee.

9. Sir Francis VALLAT found it difficult to accept the presumption that variant I was said to raise, namely, that modifications affecting international organizations were likely *a priori* to upset the balance established by the treaty. He did not see why a modification as between international organizations should upset the balance of the treaty or indeed affect the rights and obligations of the States parties to the treaty. It was perfectly possible to provide in a treaty for consultation and exchange of information as between the organizations, and for certain procedures that were in accordance with the wishes of those organizations. In that way, a change in procedure, although of importance to the international organizations, would not necessarily upset the balance of the treaty. It would be a much wiser approach to assume that international organizations would not act irresponsibly and that any question of modifying the object or purpose of the treaty would be dealt with in the same way as under the law of treaties generally.

10. With regard to Mr. Riphagen's comments concerning article 19 *bis*, there was to his mind a difference between reservations and modifications. A reservation was a unilateral act, whereas in article 41 the Commission was dealing with modification of a treaty by agreement between the parties concerned. He was therefore in favour of variant II, which followed the Vienna Convention<sup>5</sup> in that respect; however, if that variant were altered, the drafting of the preceding articles would have to be reconsidered.

11. Mr. TSURUOKA was prepared to join the majority if it opted for variant I, but he preferred variant II because it was more flexible, and flexibility was essential when a time element was involved. In fact, there was little difference between the two variants proposed. Nevertheless, variant II embodied fairly strict conditions, and it was for the parties to a multilateral treaty wishing to make modifications to it to ensure that those conditions were fulfilled. There was therefore little cause for apprehension that an agreement to modify a treaty as between certain parties would affect the other parties. In certain very special situations it might be necessary to introduce in a multilateral treaty, such as the Convention on the Privileges and Immunities of the United Nations,

<sup>3</sup> General Assembly resolution 3281 (XXIX).

<sup>4</sup> *Yearbook... 1977*, vol. I, p. 177, 1448th meeting, paras. 2-4.

<sup>5</sup> See 1507th meeting, foot-note 1.

modifications applicable to relations between certain parties to that treaty only. Such would be the case, for example, if staff members of the United Nations were to be sent to a State where the prevailing situation rendered the accomplishment of their mission particularly difficult.

12. Mr. SUCHARITKUL also preferred variant II, which was both simpler and more flexible than variant I. He saw nothing to prevent international organizations from being assimilated to States in the matter of agreements to modify multilateral treaties between certain of the parties only.

13. Mr. REUTER (Special Rapporteur), reviewing the points raised during the discussion, noted first that paragraph 3 of variant I would have to be modified to cover the case to which Mr. Jagota and Mr. Francis had drawn his attention. Whichever way it was interpreted, that provision could lead only to an inconsistency or an omission. The case omitted was that where a multilateral treaty concluded between one or more States and two or more international organizations was modified as between two international organizations only. It was all the more necessary to provide for that case as it was mentioned in the commentary and there were specific examples of it. Sometimes, after a treaty had been concluded between several international organizations and a single State, more particularly for the purpose of rendering assistance to that State, two of those organizations would wish to rearrange among themselves their participation in such assistance or in its financing.

14. The choice between variants I and II might be governed by considerations of principle such as those set forth in paragraph (6) of the commentary to article 41 (A/CN.4/312). It was also possible, while preferring variant II, to maintain that it was better to follow variant I for reasons of logic and in order to remain consistent with positions adopted previously. A good number of the members of the Commission who had spoken on the question had favoured variant II, but in some cases had observed that account must nevertheless be taken of the approach adopted to a problem very similar to that of article 41, namely, the problem of reservations. One member had suggested combining paragraph 3 of variant I with variant II. Mr. Francis had emphasized that the approach adopted by the Commission in the case of reservations should bind it in respect of article 41; he had noted, however, that a reservation was unilateral in nature whereas modification of a treaty was bilateral or multilateral in nature. In that connexion, it should be pointed out that, although a reservation was indeed unilateral in origin, it nevertheless became conventional and bilateral, or multilateral, as soon as it was accepted. He hoped that the members of the Commission would reflect further on that problem and that the Drafting Committee would try to incorporate certain elements of variant I in variant II.

15. Mr. Ushakov's position (1508th meeting) was that variant II should be discarded, mainly for rea-

sons of principle, and that only paragraphs 2 and 4 of variant I should be retained. Mr. Ushakov's proposal to delete paragraph 1 of variant I was apparently motivated by the rarity and specificity of multilateral treaties concluded between international organizations only; he was not, therefore, raising an objection of principle to that provision. It should, however, be pointed out in that connexion that, to the extent that there was a similarity between article 41 and the articles concerning reservations, the Commission could not ignore the existence of article 19, relating to the formulation of reservations in the case of treaties between several international organizations. However, that would seem to be a matter for the Drafting Committee.

16. Mr. Ushakov's proposal to delete paragraph 3 of variant I was doubtless based more on practical considerations than on considerations of principle. That provision introduced the condition that modifications might be made in a treaty only if it were so agreed between all parties to the treaty. Mr. Ushakov seemed to consider that that condition duplicated the content of article 40, relating to the amendment of multilateral treaties. The amendment procedure provided for in that article already required the consent of all the parties. To meet that objection, he would give a practical example, that of a treaty whereby a group of international organizations provided financial assistance to a group of States. After the conclusion of the treaty, two of those organizations decided that their relations with each other should be modified. Under paragraph 3 of variant I, and if the possibility of such modification were not provided for by the treaty, those two organizations would have to obtain the consent of all the parties to the treaty. That condition was expressed by the formula "if it is so agreed between all parties to the treaty", which could be applied to an agreement in a highly simplified form. Once that consent had been obtained, which might be an easy matter, the two organizations concerned could proceed to conclude an "agreement". Everything would then depend on the meaning given to the term "agreement", which appeared in article 39. If it were specified that it was an express agreement or a written agreement, the modification procedure could nevertheless be rapid. If, however, the Commission deleted paragraph 3 of variant I in the belief that the general amendment procedure of article 40 sufficed, the consent of each of the States and international organizations parties could be obtained only under a constitutional procedure, which in certain cases might be very lengthy. It followed that the practical reasons that Mr. Ushakov seemed to invoke were not really pertinent. In the circumstances, paragraph 3 was probably useful.

17. In conclusion, he suggested that the two variants of article 41 should be referred to the Drafting Committee for consideration in the light of the preference expressed by the majority of the members of the Commission for variant II and of the possibility of introducing in that variant some of the elements of variant I. The solution finally adopted would de-

pend in particular on the meaning attributed to the term "agreement".

18. Sir Francis VALLAT explained that the point he had been trying to make was that, as he saw it, there was a fundamental difference between the system of reservations and that of *inter se* modifications. Under the system applied in the Vienna Convention, which the Commission had adopted for its draft articles, a reservation might and, in principle, did operate against all the parties to a treaty, whereas an *inter se* modification by definition operated only as between the parties. He did not wish to elaborate on the matter, but it would be easy to show, by referring to the provisions on objections and non-objections and the effects thereof and on the unilateral withdrawal of reservations, how different the system adopted for reservations was from a system based essentially on agreement.

19. He had misinterpreted Mr. Riphagen's statement, thinking Mr. Riphagen had said that there was a certain similarity between the system of reservations and the system of *inter se* modifications. He now understood Mr. Riphagen's real point to have been that the rule stated in paragraph 2 of article 19 *bis* might be taken as a practical example of the kind of rule that might be included in article 41. Any decision on that point was naturally a matter for the Drafting Committee.

20. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 41 to the Drafting Committee.

*It was so agreed.*

#### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

##### ARTICLES 35, 36, 36 *bis*, 37 AND 38, AND ARTICLE 2, PARA. 1 (*h*)

21. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the texts adopted by the Committee (A/CN.4/L.269), namely, articles 35, 36, 36 *bis*, 37 and 38, as well as paragraph 1 (*h*) of article 2.

22. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that articles 35, 36, 36 *bis*, 37 and 38 had been submitted by the Special Rapporteur in his sixth report,<sup>6</sup> and had been discussed and referred to the Drafting Committee by the Commission at its twenty-ninth session. Owing to its awareness of the delicate nature of the questions involved in those articles and a lack of time, the Drafting Committee had deferred consideration of those provisions until the current session. The five articles concerned were intended to complete part III, section 4, of the draft. In addition to those articles, document A/CN.4/L.269

contained definitions of two terms for inclusion in article 2 (Use of terms).

23. In dealing with the articles referred to it, the Drafting Committee had been concerned to meet the Commission's wish to undertake the codification of the law relating to treaties concluded between States and international organizations or between two or more international organizations in the spirit of the Vienna Convention and, in particular, to maintain, with respect to wording, both the precision and the flexibility of that instrument, while giving due consideration to the specific character of international organizations participating in treaties. To emphasize the parallelism which naturally existed between the Commission's draft articles and the Vienna Convention, the Committee had used the numbering of the articles of the Vienna Convention as far as possible and, in order to preserve the correspondence between the two sets of provisions, had given the article that had no counterpart in the Vienna Convention the number 36 *bis*.

24. Having regard to the fact that the title of part III, section 4, of the Commission's draft corresponded to that of the same section of the Vienna Convention and that that title and article 34, both of which the Commission had approved at its previous session, employed the term "third State", the Drafting Committee had decided to use throughout the section the expression "third States or third international organizations", rather than the expression "non-party States or international organizations", as proposed by the Special Rapporteur in his sixth report. The Committee offered definitions of the component parts of that expression in a subparagraph (*h*) that it proposed for inclusion in paragraph 1 of article 2, the text of which corresponded to that of paragraph 1 (*h*) of article 2 of the Vienna Convention.

25. The solutions proposed by the Drafting Committee generally reflected consensus. The Committee believed that its articles were as valid for international organizations as were those of the Vienna Convention for States. It was naturally very much aware that, with regard to the formal expression of consent, there were requirements arising from the need to protect the independence of States that were not necessarily applicable in the case of international organizations, where the governing concept was the performance of a function. In order to give expression to the distinction between third States and third international organizations, the Committee had decided to devote separate paragraphs, the substance of which had been contained in the articles submitted by the Special Rapporteur, to the rules concerning acceptance, assent or consent on the part of international organizations. In all those paragraphs, namely, paragraph 3 of articles 35 and 36 and paragraph 7 of article 37, subparagraph (*a*) of article 36 *bis* and paragraph 5 of article 37, the Committee had employed the term "rules of that organization", as defined by the Commission in article 2, paragraph 1 (*j*). In all the draft articles, the Committee had used the term "international organization" in the first reference to

<sup>6</sup> *Yearbook... 1977*, vol. II (part One), p. 119, doc. A/CN.4/298.

such a body in any given paragraph and the term "organization" alone in all subsequent references in the same paragraph.

26. With regard to the individual articles, the Drafting Committee had decided to revert in article 35 to the language of the Vienna Convention and to state in paragraph 3 of the article that a third international organization must signify its acceptance of an obligation "in writing". The Committee had considered that expression appropriate in the context of treaties providing for obligations for international organizations and preferable to the phrase "unambiguous manner" that had been used by the Special Rapporteur. However, in order to maintain the necessary distinction between third States and third international organizations, the Committee had decided to include in paragraph 2 the phrase "in the sphere of its activities". That phrase indicated that an obligation which, in the intention of the parties to a treaty, was to be assumed by an international organization, should not be unrelated to the functions of that organization. In the English text of article 35, the Committee had considered that the expression "shall be given", in paragraph 3, corresponded closely to the French phrase "doit être faite". In paragraph 1, the words "Without prejudice" had been replaced by the word "Subject", which was the expression that had been used in recent international conventions.

27. Subject to the changes he had already mentioned, the Drafting Committee had maintained the text of article 36 referred to it. However, in order to reflect the distinction between third States and third international organizations, it had decided not to provide expressly, in paragraph 2, for the presumption of assent in the absence of an indication to the contrary, which had appeared in the original text, and to refer in a new paragraph 3 to the relevant rules of the organization. The Committee believed that no reference to such a presumption was necessary in the case of third international organizations, since the text it now proposed did not preclude the possibility of the treaty's admitting that presumption if it was in accordance with the relevant rules of the organization. To preserve the parallelism between paragraphs 1 and 2 as far as possible, the Committee had introduced in paragraph 2 the words "or to a group of organizations to which it belongs, or to all organizations".

28. The Committee had decided to retain article 36 *bis*, in conformity with what it had regarded as the terms of the referral of the article to it by the Commission. However, one member of the Committee had reserved his position concerning the need for the inclusion in the draft articles of article 36 *bis* and the consequential references to that article in the other provisions. The article covered a situation that actually arose in practice. The Committee had nevertheless modified the text proposed by the Special Rapporteur, in order to convey more clearly and succinctly the meaning of the rules embodied in the article. To that end, it had combined the two paragraphs of the original text, while preserving in subparagraphs (a) and (b) of the new version the distinc-

tion between the two cases dealt with in paragraphs 1 and 2 of the Special Rapporteur's version. The new text emphasized in its title and introductory sentence that it related to the specific case of third States that were members of an international organization and the effects that arose for them from a treaty to which that organization was a party. The article was therefore in harmony with the remaining provisions of section 4. It should be noted that, as drafted, article 36 *bis* made no mention of express or implied acceptance of the rights and duties arising from the provisions of the treaty in question. It placed the emphasis on the duty of third States that were members of an international organization to observe the obligations that arose for them from the provisions of a treaty to which that organization was a party and left it to the States themselves to decide whether or not to exercise the rights that arose from such a treaty. In subparagraph (a), the reference to the "constituent instrument" of an international organization had been replaced by a reference to the "relevant rules of the organization", as the Commission had defined them. The Committee had also added the clarifying phrase "applicable at the moment of the conclusion of the treaty".

29. In the case of article 37, the Committee had basically retained the text referred to it. However, it had decided to align the paragraphs dealing with obligations and rights arising for third international organizations with those dealing with obligations and rights arising for third States. Paragraphs 5 and 6 of the article had been reworded to take account of the redrafting of article 36 *bis*.

30. The Committee had made no change in article 38, other than to replace the term "non-party" by the term "third". The reference to articles 34 to 37 was intended as a reference to those articles alone and not as a generic reference. The text for article 38 proposed by the Committee did not prejudice the question how international organizations were bound by customary international law and it was certainly not intended to deal with the question how they contributed to the creation of such law.

ARTICLE 2 (Use of terms), PARA. 1 (h) ("third State", "third international organization")

31. The CHAIRMAN read out the text of paragraph 1 (h) of article 2 as proposed by the Drafting Committee:

*Article 2. Use of terms*

[1. For the purposes of the present articles:  
...]

(h) "third State" or "third international organization" means a State or an international organization not a party to the treaty.

32. In the absence of objections, he would consider that the Commission agreed to adopt the text proposed by the Drafting Committee.

*It was so agreed.*

*The meeting rose at 12.55 p.m.*



## 1510th MEETING

Friday, 30 June 1978, at 10.05 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Castañeda, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

### Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/312, A/CN.4/L.269)

[Item 4 of the agenda]

#### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

#### ARTICLES 35, 36, 36 *bis*, 37 AND 38 AND ARTICLE 2, PARA. 1 (*h*) (*continued*)

#### ARTICLE 35<sup>1</sup> (Treaties providing for obligations for third States or third international organizations)

1. The CHAIRMAN read out the text of article 35 as proposed by the Drafting Committee (A/CN.4/L.269):

##### *Article 35. Treaties providing for obligations for third States or third international organizations*

1. Subject to article 36 *bis*, an obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

2. An obligation arises for a third international organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation in the sphere of its activities and the third organization expressly accepts that obligation.

3. Acceptance by a third international organization of the obligation referred to in paragraph 2 shall be governed by the relevant rules of that organization and shall be given in writing.

2. Mr. USHAKOV approved of the text of article 35, except for the phrase "subject to article 36 *bis*", at the beginning of paragraph 1. He considered that reservation entirely unacceptable, not only because he was firmly opposed to article 36 *bis*, but also because he thought that, quite apart from that article, the reservation would completely change the system established by the Vienna Convention.<sup>2</sup> Under article 35 of the Vienna Convention, a third

State could expressly accept in writing an obligation arising from a treaty, whereas, under paragraph 1 of the article 35, under consideration, the same third State, if it were a member of an international organization, could not expressly accept in writing an obligation arising from a treaty to which that organization was a party, for as a member of the organization it had lost the right to conclude treaties. Article 36 *bis* obviously related to supranational organizations, such as EEC, which had the right to conclude treaties on behalf of its members.

3. The question of the effects of a treaty to which an international organization was party with respect to third States members of that organization, which was the subject-matter of article 36 *bis*, was one that concerned States members of the organization exclusively, and came under their internal law. He could not agree to altering the system established by the Vienna Convention in order to take account of the case of supranational organizations such as EEC. He was therefore strongly opposed to the reservation at the beginning of article 35, paragraph 1.

4. Mr. QUENTIN-BAXTER expressed doubts about the propriety of the use, in articles 35 and 36, of the phrase "subject to article 36 *bis*", for he had always understood the words "subject to" to imply an order of precedence between two provisions that applied to the same circumstances. He did not think there was such a hierarchical relationship between article 35 and article 36 *bis* or between article 36 and article 36 *bis*. Article 36 *bis* dealt specifically with the rights and obligations of third States in their capacity as members of an international organization party to the treaty, whereas articles 35 and 36 dealt with the rights and obligations of third States, quite independently of whether they were members of an organization or not. He could see no point at which articles 35 and 36 intersected article 36 *bis*, for he believed that the rights and obligations that third States might acquire as strangers to a treaty existed in quite a different context from, and were in no way modified by, the rights and obligations they might acquire as members of an international organization that was a party to the same treaty. If his hypothesis was correct, the use of the phrase "subject to" was wrong and needlessly aggravated Mr. Ushakov's difficulties with the draft articles. If on the other hand, there was some point at which articles 35 and 36 intersected article 36 *bis*, it would be helpful if its nature were clearly explained.

5. Mr. REUTER (Special Rapporteur) said that the Headquarters Agreement concluded between the United States of America and the United Nations was a case in which a treaty concluded between a State and an international organization had effects on the States members of that organization, which were third States, since they were not parties to the treaty. He did not think, however, that the States Members of the United Nations, which had from the outset invoked the provisions of that treaty, had expressly accepted in writing the obligations it might impose on them; they had merely indicated, by their conduct,

<sup>1</sup> For consideration of the text initially submitted by the Special Rapporteur, see *Yearbook... 1977*, vol. 1, pp. 128-132, 1439th meeting, paras. 24-40, and 1440th meeting, paras. 1-12.

<sup>2</sup> See 1507th meeting, foot-note 1.

that they accepted those obligations. The phrase "subject to article 36 *bis*" was intended only to draw attention to the particular case in which third States were members of an international organization that was a party to the treaty.

6. Hence, in view of the objections made to the words "subject to article 36 *bis*", that phrase could easily be replaced by the words "without prejudice to article 36 *bis*", which could be placed at the end of paragraph 1.

7. Mr. USHAKOV strongly disputed the proposition that States Members of the United Nations were bound by the treaties concluded by that Organization. In his opinion, the Members of the United Nations remained third States in relation to such treaties and were therefore free to accept or reject the rights and obligations deriving from them.

8. Mr. REUTER (Special Rapporteur) pointed out that, in the case of treaties concluded by the United Nations, it was not subparagraph (a) of article 36 *bis* that applied, but subparagraph (b), for the States Members of the United Nations had acknowledged, in the case of the Headquarters Agreement concluded between the United Nations and the United States of America, that the agreement necessarily entailed rights and obligations for them. That was an effect of their sovereign will. They had acknowledged it in practice, without expressly accepting it in writing.

9. Mr. USHAKOV disputed that interpretation of subparagraph (b) of article 36 *bis* also, since he did not see by what instrument the United States of America and the United Nations could have acknowledged that the Headquarters Agreement concluded between them was binding on States Members of the United Nations.

10. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that, like most of the other members of the Drafting Committee, he found articles 35, 36 and 36 *bis* quite acceptable. He recognized, however, that the words "subject to" might be interpreted as indicated by Mr. Quentin-Baxter, and he therefore supported the Special Rapporteur's suggestion that they be replaced by the phrase "without prejudice to".

11. On the question of the effects of the Headquarters Agreement on Members of the United Nations, his view was substantially in accordance with that of the Special Rapporteur. It appeared quite reasonable to him to say that, under the terms of a headquarters agreement negotiated and signed on behalf of the United Nations by the Secretary-General and unanimously approved by the General Assembly, the Members of the Organization were bound to observe the obligations and might exercise the rights laid down by that agreement.

12. Mr. JAGOTA agreed with the interpretation given to the phrase "subject to" by Mr. Quentin-Baxter, and feared that expressions such as "without prejudice to" or "without affecting in any way"

would be interpreted in the same way. The relationship of article 35 and 36 to 36 *bis* was that of a general clause to a special clause. All three articles referred to third States, but articles 35 and 36 related to all third States, whereas article 36 *bis* concerned a subcategory of third States, namely, those that were members of an international organization that was party to a treaty. What the Commission had to do was to make it clear that, in the special case of that subcategory, article 36 *bis* would apply.

13. That object might be best achieved by deleting the reference to article 36 *bis* from articles 35 and 36 and beginning article 36 *bis* by some such phrase as "notwithstanding the provisions of articles 35 and 36".

14. Mr. USHAKOV said that, when an international organization concluded a treaty, that treaty always had to be formally approved by an organ of the organization, whose decision, taken by a vote, was equivalent to an act of ratification by a State. Accordingly, when a State Member of the United Nations voted in the General Assembly in favour of a treaty concluded by the Organization, it approved a treaty that was binding on the Organization only, and did not, by its vote, undertake to accept the obligations arising from the treaty.

15. Sir Francis VALLAT, referring to the statements of Mr. Quentin-Baxter and Mr. Jagota, said that the problem facing the Commission was linked with the definitions it had adopted, according to which a "third State" was a State "not a party to the treaty" (article 2, para. 1 (h)),<sup>3</sup> and a "party" was a State "which has consented to be bound by the treaty and for which the treaty is in force (article 2, para. 1 (g))."<sup>4</sup> It was fairly obvious, in the case the Commission was considering, that, under the terms of those definitions, a State that was a member of an international organization that was a party to a treaty was not itself a party to that treaty; strictly speaking, such a State was a third State within the meaning of paragraph 1 of articles 35 and 36. If the Commission wished to retain article 36 *bis*, it must find wording that made it clear that, despite what was said in articles 35 and 36 about third States, there were circumstances in which such States might acquire rights or obligations as the result of a treaty.

16. While he was inclined to favour the suggestion made on that point by Mr. Jagota, he thought it would be best to leave the question how to treat the phrase "subject to article 36 *bis*" in abeyance until a final decision had been reached on article 36 *bis*.

17. Mr. SUCHARITKUL shared the views of Mr. Jagota and Sir Francis Vallat on the phrase "subject to article 36 *bis*".

18. With respect to subparagraph (b) of article 36 *bis*, he observed that there had been many examples in his region of headquarters agreements in the negotia-

<sup>3</sup> See 1509th meeting, para. 31.

<sup>4</sup> See 1507th meeting, foot-note 2.

tion of which all the members of a regional organization had taken part. In the case of the agreement of that type between the Government of Indonesia and ASEAN, which was currently in preparation, the Secretary-General of the Association had been required to circulate the draft text to all States members of the Association for their comments, and would have to obtain their formal approval of the final text before he could sign it. Subparagraph (b) of article 36 *bis* could therefore be considered as representative of an existing state of fact.

19. The CHAIRMAN suggested that the Commission should provisionally approve articles 35 and 36, placing the words “subject to article 36 *bis*” in square brackets, and defer its decision on that phrase until it had considered article 36 *bis*.

20. If there were no objections, he would take it that the Commission decided to approve provisionally article 35 submitted by the Drafting Committee.

*It was so agreed.*

ARTICLE 36<sup>5</sup> (Treaties providing for rights for third States or third international organizations)

21. The CHAIRMAN said that the Drafting Committee proposed the following wording for article 36 (A/CN.4/L.269):

*Article 36. Treaties providing for rights for third States or third international organizations*

1. Subject to article 36 *bis*, a right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and if the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A right arises for a third international organization from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third organization, or to a group of organizations to which it belongs, or to all organizations, and if the third organization assents thereto.

3. The assent of the third international organization, as provided for in paragraph 2, shall be governed by the relevant rules of that organization.

4. A State or an international organization exercising a right in accordance with paragraphs 1 and 2 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

22. Mr. USHAKOV proposed that the words “in accordance with paragraphs 1 and 2”, in paragraph 4, should be replaced by the words “in accordance with paragraph 1 or 2”, since a State would exercise a right in accordance with paragraph 1 and an international organization in accordance with paragraph 2.

23. Mr. SCHWEBEL (Chairman of the Drafting Committee) agreed to that amendment.

24. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to approve provisionally article 36 submitted by

the Drafting Committee, the phrase “subject to article 36 *bis*” being placed in square brackets.

*It was so agreed.*

ARTICLE 36 *bis*<sup>6</sup> (Effects of a treaty to which an international organization is party with respect to third States members of that organization)

25. The CHAIRMAN said that the Drafting Committee proposed the following text for article 36 *bis* (A/CN.4/L.269):

*Article 36 bis. Effects of a treaty to which an international organization is party with respect to third States members of that organization*

Third States which are members of an international organization shall observe the obligations, and may exercise the rights, which arise for them from the provisions of a treaty to which that organization is a party if:

(a) the relevant rules of the organization applicable at the moment of the conclusion of the treaty provide that the States members of the organization are bound by the treaties concluded by it; or

(b) the States and organizations participating in the negotiation of the treaty as well as the States members of the organization acknowledged that the application of the treaty necessarily entails such effects.

26. Mr. USHAKOV strongly opposed article 36 *bis*, for both political and legal reasons. From the political point of view, he opposed the attempt made in article 36 *bis* to cover the activities of supranational organizations such as EEC. From the legal point of view, he considered that article 36 *bis* openly contradicted the principle stated in article 34 that “a treaty between international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization”.

27. That principle was respected in article 35 for obligations, and in article 36 for rights. Under article 35, an obligation could arise for a third State or a third organization from a provision of a treaty only if that third State or third organization “expressly accepts that obligation in writing”. Similarly, under article 36, a right arose for a third State or a third organization from a provision of a treaty only if the third State or third organization “assents thereto”. In the latter case, under paragraph 3 of article 36, the “assent of the third international organization” was “governed by the relevant rules of that organization”. In his opinion, the assent had to be given by the competent organ of the organization, namely, in the case of the United Nations, by the General Assembly. The assent could be tacit only if the relevant rules of the organization so provided.

28. Under article 36 *bis*, on the other hand, third States that were members of an international organ-

<sup>5</sup> For consideration of the text initially submitted by the Special Rapporteur, see *Yearbook... 1977*, vol. I, pp. 132-134, 1440th meeting, paras. 13-30.

<sup>6</sup> For consideration of the text initially submitted by the Special Rapporteur, see *Yearbook... 1977*, vol. I, pp. 134-136, 1440th meeting, paras. 31-47, 1441st meeting, and 1442nd meeting, paras. 1-12.

ization must fulfil the obligations arising for them from a treaty to which that organization was party without having expressly accepted those obligations in writing, as provided in article 35, paragraph 1. Consequently that provision was in conflict with the general rule concerning third States laid down in article 34.

29. The general rule, however, must apply to all third states, including those that were members of an international organization party to the treaty. For, in the case of ordinary international organizations like those to which the draft articles referred, the member States were always third States in relation to treaties concluded by the organization. In the case of a supranational organization like EEC, however, the member States were no longer third States in relation to treaties concluded by the organization in the exercise of its supranational functions, for they had delegated to the organization the power to conclude treaties on their behalf. They were therefore automatically bound by the treaties concluded by the organization, without any need to accept expressly in writing the obligations arising from those treaties. The case of the United Nations was quite different, because the Charter did not provide that the States Members of the United Nations surrendered to the Organization their sovereign right to conclude treaties. Hence the States Members of the United Nations were not bound by treaties concluded by the Organization.

30. Article 36 *bis* was unacceptable in that it sought to apply rules on international organizations to an entity that was not an international organization but a supranational organization. Special rules should be formulated for supranational organizations, since ordinary international organizations, such as the United Nations, could not be treated in the same way as supranational organizations such as EEC.

31. According to article 36 *bis*, "Third States which are members of an international organization... may exercise the rights which arise for them from the provisions of a treaty to which that organization is a party if the relevant rules of the organization... provide that the States members of the organization are bound by treaties concluded by it". But the creation of rights for third States members of an organization entailed the creation of obligations for the States parties to the treaty. And while it could be accepted that States members of an organization were bound by the relevant rules of that organization, it could not be accepted that non-member States were bound by the same rules. For example, in the case of a treaty concluded by EEC, it could not be accepted that the other States parties to the treaty, which were not members of EEC, were bound by the Treaty of Rome, to which they were not parties. It was equally difficult to accept that States parties to the treaty agreed to be so bound during the negotiation of the treaty, as envisaged in subparagraph (b) of article 36 *bis*. It could also be asked whether the "States members" referred to in subparagraph (b) included only the States that had been members of the organization at the time of the conclusion of the treaty, or

also included States that became members of the organization later.

32. Mr. TSURUOKA thought article 36 *bis* was unnecessary, since the question of the effects of a treaty to which an international organization was party, with respect to third States members of that organization, was not of direct concern to the parties to the treaty and could very well be settled by the States members of the organization in question.

*The meeting rose at 11.30 a.m.*

## 1511th MEETING

*Tuesday, 4 July 1978, at 10.10 a.m.*

*Chairman* : Mr. José SETTE CÂMARA

*Members present* : Mr. Calle y Calle, Mr. Dadzie, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

### Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/312, A/CN.4/L.269)

[Item 4 of the agenda]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE (*continued*)

ARTICLES 35, 36, 36 *bis*, 37 AND 38,  
AND ARTICLE 2, PARA. 1 (*h*) (*continued*)

ARTICLE 36 *bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization)<sup>1</sup> (*continued*)

1. Mr. JAGOTA noted that subparagraphs (a) and (b) of article 36 *bis* provided that third States that were members of an international organization could acquire rights and obligations under a treaty to which that organization was a party in one of two ways: either if the relevant rules of the organization so provided, or if the States and organizations participating in the negotiation of the treaty, as well as the States members of the organization, acknowledged that the application of the treaty necessarily entailed such effects. He considered that the two conditions prescribed should be combined instead of separated, as in the draft article. Moreover, something more than the relevant rules of the organization was needed to determine the effect of the treaty with respect to the member of an international organization and, bearing in mind emergent practice in the matter, the emphasis should be on the aspect of consent. He would also

<sup>1</sup> For text, see 1510th meeting, para. 25.

remind the Commission that the “rules of the organization” were broadly defined in paragraph 1 (*j*) of article 2<sup>2</sup> to include the constituent instruments, relevant decisions and resolutions, and established practice of the organization. If those rules were to be the only factor determining whether a treaty to which an international organization was a party gave rise to rights and obligations for a third State that was a member of that organization, the parties to the treaty would have to engage in a detailed examination of those rules, and that, in his view, would be undesirable. Lastly, he could not agree to the use of the word “acknowledged”, in subparagraph (*b*), since neither the manner of such acknowledgement nor its timing was clear.

2. For those reasons he would suggest that, at the end of subparagraph (*a*), the semicolon should be replaced by a comma, and the word “or” by “and”, and that subparagraph (*b*) should be redrafted to read: “the parties to the treaty as well as the States members of the organization give their express consent thereto”.

3. One very important point that had not been settled in articles 35, 36 and 36 *bis* concerned the relationship between an international organization and its members when both the organization and its individual members were parties to a treaty. For example, EEC was acquiring increasing competence in many spheres and, at the forthcoming session of the United Nations Conference on the Law of the Sea, the Conference would undoubtedly consider whether EEC competent to become a party to the new convention on the law of the sea, independently of its nine member States. There had been occasions when EEC, as a party to GATT, had expressed on the same subject views different from those of its members, which were also parties to GATT. A similar situation might well arise in connexion with the convention on the law of the sea.

4. Any dispute between a member State and an international organization in regard to their respective rights and obligations under a treaty, where both were parties to the treaty, was of course an internal matter to be decided by the terms of the constituent instrument of the organization. But some provision would have to be made for the guidance of third States so that they would know which party would have rights and obligations in an agreed sphere of activity and whether possible disputes would be determined by the terms of the treaty, by the relevant rules of the organization or by some other mode.

5. The question would arise in an even more acute form with regard to reservations, for the content of a reservation made by EEC, for example, might differ from the content of reservations made by its members. Some guidelines were also required for that question. The whole matter was a reflection of the current trend in regard to the treaty-making capacity of international organizations, and the Commission could not afford to ignore it.

6. Mr. USHAKOV, referring to subparagraph (*b*) of the article under consideration, observed that what the States and organizations participating in the negotiation of the treaty as well as the States members of the organization acknowledged—or, to use the wording suggested by Mr. Jagota, what they gave their “express consent” to—was the constituent instrument of the organization, and in particular the rule that the States members of the organization were bound by the treaties concluded by it. The sole purpose of the proposed provision was to safeguard the interests of EEC. For treaties concluded by any other international organization such a provision was unwarranted. For instance, in the case of treaties to which the United Nations was a party, there was no need for express acceptance of the Charter of the United Nations, since that instrument did not provide that Member States were bound by the treaties concluded by the Organization. Member States might, of course, be parties to a treaty jointly with the United Nations, but in that case the United Nations was bound as an organization, and the Member States were bound as sovereign States. Consequently the question dealt with in subparagraph (*b*) arose only in the case of the States members of EEC, owing to the fact that they had relinquished part of their treaty-making capacity.

7. The Commission had encountered similar difficulties during its consideration of the articles relating to reservations and those, too, had derived solely from the fact that EEC was a supranational organization. The reservations that an international organization such as the United Nations might make to a treaty bound only that organization, and not its member States; however, the latter could make their own reservations, which were altogether independent of those of the organization. At the previous session, some members of the Commission had insisted that international organizations should be assimilated to States in the matter of reservations and, in particular, that they should enjoy the same rights in that regard. It was on the basis of that approach that the section of the draft relating to reservations had been prepared. He personally considered that an international organization should not have the possibility of making a reservation relating to rules concerning States. In his view, the provisions relating to reservations, although ostensibly applicable to all international organizations, in fact applied only to EEC. Thus the Commission had been led to draft the somewhat odd rule that an international organization party to a treaty was considered to have accepted a reservation if it had raised no objection thereto either by the end of a period of 12 months after being notified of the reservation or by the date on which it had expressed its consent to be bound by the treaty, whichever was later. That rule defied all logic; an international organization could not implicitly accept a reservation.

8. It was not only in regard to the subject under consideration that the Commission was taking account of the special interests of EEC. In the case of the draft articles on the most-favoured-nation clause, it had been suggested that an exception should be

<sup>2</sup> See 1507th meeting, foot-note 2.

made for customs unions. In its written comments, EEC had even maintained that it should be assimilated to a State for the purposes of the draft (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 7). For purely political reasons, therefore, some members of the Commission were pressing for the formulation of provisions which, far from being applicable to international organizations in general, were in fact directed exclusively at EEC.

9. Mr. QUENTIN-BAXTER said that most members of the Commission would probably have some reservations about the final wording of a provision of the kind embodied in article 36 *bis* and he would not be surprised if it were somewhat modified in the course of the second reading. Members had a very clear idea of third States as strangers to a treaty, and it was a little difficult to accommodate that view to something which, although described as a third State, was for all intents and purposes as much bound by a treaty as if it were a party. They also had a natural reluctance to intrude into the relations between an organization such as EEC and its members.

10. If there were areas where the respective competences of the international organization and its member States were in some doubt, it was not for third States to attempt to assist in deciding where the dividing line lay, always provided that the member States did not make reservations in differing terms. That would be likely to stir up a debate within the organization and might give States that were not members of the organization good grounds for hesitating to accept all or any of the reservations. It should rather be assumed that the parties to such an arrangement would themselves settle such questions with all due care and would not confront the international community with a situation that required it to become involved in the internal affairs of the organization in question.

11. With regard to the drafting of article 36 *bis*, it seemed to him that to make the obligations and rights arising from a treaty subject to the fulfilment of the conditions governed by the word "if" was, in a sense, putting the cart before the horse. On the other hand, the word "acknowledged" caused him no concern. At the time the Vienna Convention<sup>3</sup> had been prepared, certain cases had arisen where it had been necessary to speak with some generality in matters of that kind, for example in connexion with the doctrine of the legal effect of unilateral acts. To express the idea more precisely would not impose additional obligations on the members of the organization but would instead introduce additional hazards for third States dealing with that organization. That was the point that should guide the Commission.

12. The Special Rapporteur had been entirely right not to take the easy course of ignoring a situation that presented difficulties in exposition. The United Nations General Assembly had the right to consider

whether the wealth of State practice now arising from dealings with EEC, and the possibility that the same situation might occur in other contexts, did not demand a provision of the kind embodied in article 36 *bis* for the security of third States. He was not concerned whether the members of that organization felt the need for such a provision. The main question was whether other members of the international community that had to deal with that organization felt such a need. That was the point that it was proper for the Commission to put before States.

13. Mr. ŠAHOVIĆ noted that the new wording for article 36 *bis* proposed by the Drafting Committee differed considerably from the wording proposed by the Special Rapporteur in 1977. In its current form, the article under consideration should be accompanied by a particularly detailed commentary making the origin of that provision clear. The version of article 36 *bis* proposed by the Special Rapporteur had been entitled "Effects of a treaty to which an international organization is party with respect to States members of that organization".<sup>4</sup> Several members of the Commission had considered that, in view of the title and content of that provision, an article on a question as general as that of relations between an international organization and its member States should be dealt with in some other part of the draft. The version of article 36 *bis* now being considered by the Commission was entitled "Effects of a treaty to which an international organization is party with respect to third States members of that organization". The problem was being tackled from a different angle—that of third States members of the organization. The term "third States members" was unsatisfactory. It was not immediately apparent what case article 36 *bis* was designed to cover, and an attempt should be made to find a better expression.

14. The question of the link between article 36 *bis* and articles 35 and 36 had been left in abeyance for the time being. It should be pointed out that articles 35 and 36 were based on the Vienna Convention and laid down basic principles. Article 36 *bis*, on the other hand, related to a particular category of third States, calling for special rules that should derive from the rules laid down in articles 35 and 36.

15. With regard to the wording, he considered the text proposed by the Special Rapporteur to be better than that adopted by the Drafting Committee, in the light of the Commission's discussions. The two situations referred to in paragraphs 1 and 2 of the article prepared by the Special Rapporteur had been combined and dealt with in a single paragraph. The main substantive question raised by the new text was that of the link between its subparagraphs (a) and (b).

16. However, since a number of problems of terminology subsisted, it might be appropriate to refer article 36 *bis* to the Drafting Committee once again. Perhaps, too, the Commission should place the article in square brackets, since the main point was to in-

<sup>3</sup> See 1507th meeting, foot-note 1.

<sup>4</sup> See *Yearbook... 1977*, vol. II (Part One), p. 119, doc. A/CN.4/298.

dicating to governments that the situation dealt with in article 36 *bis* had been envisaged. In its new wording, and limited as it was to third States members of an international organization, article 36 *bis* was less general in character.

17. Mr. CALLE Y CALLE would on the whole have preferred the earlier version of article 36 *bis*,<sup>5</sup> which provided that a treaty concluded by an international organization gave rise “directly” for States members of an international organization to rights and obligations in respect of other parties to that treaty if the constituent instrument of that organization expressly gave such effects to the treaty. There would thus be no requirement that each and every State member of the organization should signify its express acceptance of an obligation in writing, since the matter was already covered by the terms of the constituent instrument of the organization. As far as rights were concerned, they would be exercised only within the limits laid down in the treaty, which must itself take account of the relevant rules and constituent instrument of the organization.

18. An important element of both article 35 and article 36 was that the parties, and not the States members of the organization, had to have the intention of creating obligations and rights under the treaty. Paragraph 2 of the earlier version of article 36 *bis* had provided that such an intention was to be inferred from the subject-matter of the treaty and the assignment of the areas of competence involved in that subject-matter between the organization and its member States, whereas, in the current draft, the element of intention had been replaced by the requirement that the States and organizations participating in the negotiation of the treaty and, in addition, the States members of the organization, should have acknowledged that the application of the treaty necessarily entailed such effects. That presupposed that the States members of the organization knew that it was negotiating a treaty having the effect of creating rights and obligations in respect of them.

19. However, he was prepared to accept the new article 36 *bis*, but considered that the two conditions laid down in subparagraphs (a) and (b) should be combined.

20. He would also suggest that, in subparagraph (b), the words “as well as the States members of the organization” should be deleted and that, in subparagraph (a), the word “expressly” should be added after “provide”.

21. Mr. TSURUOKA observed that article 36 *bis* related to a highly sensitive question on which no settled ideas yet existed. He therefore wondered whether it was really necessary to deal with that question at the current stage of development of international law. He saw some difficulty in referring to third States members of an international organization party to a treaty, for he was not sure whether States

members of an international organization should be considered as third States in relation to treaties concluded by the organization to which they belonged. The capacity of an organization to conclude treaties had its origin in the constituent instrument of that organization, in other words, in the will of the sovereign States that composed it. In that sense, the States members of an organization were not really third States in respect of treaties concluded by that organization. Nor were they third States in the same sense as were non-members of the organization, to the extent that they participated in the negotiation of the treaty and decided upon its conclusion.

22. With regard to EEC, the question dealt with in article 36 *bis* was settled in each individual case. He therefore thought it more prudent not to settle that matter in the article and to leave it to be dealt with by the natural development of international law, which followed the development of the political and economic situation.

23. If the Commission nevertheless decided to deal with that matter, it should be careful, first, not to paralyse emergent practice in regard to the questions for which article 36 *bis* attempted to provide solutions and, secondly, to maintain a fair balance between the interests of the States members of the international organization party to the treaty and those of the States parties to the treaty that were not members of the international organization.

24. That balance was not properly safeguarded by the text of subparagraph (a) of the article as currently drafted. In the event of a dispute between a State member of the organization party to the treaty and a State party not a member of the organization concerning the interpretation or application of the treaty, the question arose whether, as provided in the constituent instrument of EEC, the non-member State should appear before the Court of Justice of the European Communities. If the expression “relevant rules of the organization” were construed in that manner, it was clear that the interests of non-member States would not be respected in the same way as those of the States members of the organization, since the Court of Justice, as an institution to which one of the parties belonged, was *ipso facto* opposed to the interests of the other party. Care should therefore be taken to safeguard the interests of States parties to the treaty that were not members of the organization.

25. Mr. FRANCIS said that he had spoken on article 36 *bis* at the Commission’s twenty-ninth session,<sup>6</sup> and that he still believed that the provision had a place in the draft articles as a statement of a general principle. When making his earlier statement, he had not found it necessary to refer to the particular case of EEC to demonstrate that obligations might arise for the States members of an international organization from a treaty to which that organization was a

<sup>5</sup> *Ibid.*

<sup>6</sup> See *Yearbook... 1977*, vol. I, p. 138, 1441st meeting, paras. 11-14.

party; instead, he had chosen an example concerning the United Nations, and had said that it would be unthinkable for members of the Security Council to claim that they had no responsibility for treaties concluded by the Security Council pursuant to the Charter of the United Nations. The situation of States members of an international organization that concluded a treaty was very different from that of "third States", in the strict sense of the word, in respect of that treaty. An international organization could not act otherwise than through the will of its member States, and those members had a certain responsibility, which was greater than that of the shareholders in a limited liability company, with respect to "contracts" entered into by the organization.

26. While the final decision concerning article 36 *bis* must be left to the General Assembly, the Commission must consider the question in as much detail as possible, for otherwise it would have failed to contemplate the possibility that a number of States might form themselves into an international body and empower it to enter into treaty obligations. Could the Commission suggest, for example, that States should not be liable to the creditor when, as in the case of the Caribbean Development Bank, they dissolved a regional bank that they themselves had formed and had authorized to enter into an agreement to obtain the major part of its capital from a source other than themselves?

27. He agreed that subparagraph (b) of the text proposed by the Drafting Committee might require re-drafting, but thought that the ideas it contained should be retained. In that connexion, he pointed out that the acknowledgement of the effects of a treaty by an international organization would be governed by the relevant rules of that organization. He did not think there could be any quarrel with the idea that the States members of an international organization might agree in advance that a treaty concluded by that organization would be binding on them, for those States were in a position to ensure that the treaty was in conformity with the powers they had given the organization. Nor should there be any problem with responsibilities devolving upon members of an organization as a result of decisions or resolutions of that organization; if it were accepted that States could enter reservations to a treaty, it would surely also be accepted that they might enter "reservations" to a decision.

28. Mr. REUTER (Special Rapporteur) was prepared to agree that article 36 *bis* had no place in the draft articles if Mr. Ushakov's view were adopted: that the article referred solely to EEC and that EEC was no ordinary international organization, for the draft articles concerned international organizations in general, and not special cases. The question was whether article 36 *bis* was relevant only to EEC, or whether it was broader in scope.

29. He recognized that the case covered by subparagraph (a) of the article applied only to EEC, since EEC was the sole organization whose constituent instrument contained a provision concerning the effects

of agreements concluded by that organization with respect to its member States. He would therefore readily agree to the deletion of subparagraph (a).

30. If it was true that an international organization could be regarded as a screen in so far as it entered into commitments as a legal entity, it was also true that, in certain cases, national legal systems gave a degree of transparency to that screen.

31. The question referred to in article 36 *bis* could therefore be dealt with in one of three ways. It was possible to argue that it was not the organization itself but its member States that were parties to the treaty, as in the case of the 1972 Convention on International Liability for Damage Caused by Space Objects.<sup>7</sup> It could also be considered, as Mr. Jagota had suggested, that both the organization and its members were parties to the treaty; however, that case applied only to EEC, and the Commission should not establish rules for exceptional cases. Lastly, it was possible to consider that it was the organization, and not its members, that was a party to the treaty. That third case was the only one covered by article 36 *bis*, where the States members of an international organization that were parties to a treaty were considered as third States in relation to that treaty. That approach had been adopted in the case of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations (1947),<sup>8</sup> and it was also the approach that had to be taken in the case of agreements concerning the establishment of a United Nations emergency force.

32. It might of course be decided that the United Nations, like EEC, should be excluded from the scope of the draft articles and that only small "ordinary" organizations that did not have the right to conclude treaties should be dealt with. The draft articles carried two risks between which the Commission must choose: they might arrest the current development of the subject, as Mr. Tsuruoka had said, or they might confirm practices that existed but that were bad or open to criticism. The Commission had therefore to make a policy decision on that matter.

33. From the technical point of view, it should be considered whether article 36 *bis* had something to add or whether it merely duplicated articles 35 and 36. The question that arose was thus that of the relationship between that article and articles 35 and 36.

34. Under the existing text of article 36 *bis*, the consent of third States members of the organization was not excluded, but the reference to it was fairly flexible—or vague, depending on whether one favoured or opposed the formulation adopted. It would of course be possible to opt for a more precise wording. However, if the word "acknowledged", in subparagraph (b), were replaced by the words "expressly accepted", article 36 *bis* would lose much of its useful-

<sup>7</sup> General Assembly resolution 2777 (XXVI), annex.

<sup>8</sup> General Assembly resolution 169 (II).



ness, and it would be of no use at all if the phrase “expressly accepted in writing” were adopted, for that wording was already to be found in article 35.

35. He reminded the Commission that, when it had drawn up the draft that was to become the Vienna Convention, it had adopted a very flexible formula with regard to the creation of rights for third States<sup>9</sup> and a fairly flexible formula with regard to the creation of obligations for such States,<sup>10</sup> for in the latter case it had required only express consent. However, the United Nations Conference on the Law of Treaties had adopted a stricter formula, based on an amendment,<sup>11</sup> requiring that, in the case of obligations, consent must be given expressly and in writing.

36. The point at issue was therefore whether a more flexible form of consent should be adopted in the case of international organizations than had been adopted by the Conference on the Law of Treaties in the case of States. The assumption of the Drafting Committee had been that the States members of the organization party to the treaty would have given their consent in advance and that the States parties to the treaty would agree to that form of consent or would require the participation of the member States. The term “acknowledged”, in subparagraph (b), was fairly vague, but it maintained the idea of consent. It was of course possible to express a preference, as had some members, for the initial version of article 36 *bis*, which had described the precise circumstances in which consent was admitted.

37. As a member of the Commission, he would be willing to agree that the case of EEC should not be taken into account, for it was an organization of a limited character that had no responsibility for peace. On the other hand, he would find it highly regrettable if no account were taken of organizations of a universal character such as the United Nations, in whose case he did not consider it reasonable to lay down a procedure requiring formal, express and written consent in all cases, even in emergencies and even when it was clear that no State had raised objections. The Commission was of course free to decide not to take any account of the practice of the United Nations in that regard, for it was by virtue of practice and not of the Charter that the Organization had capacity to conclude international agreements.

38. Mr. USHAKOV considered that there was no connexion between the United Nations and article 36 *bis*, since an agreement concluded between the United Nations and a State could not bind the States Members of the United Nations without their consent. Under the general rule laid down in article 34,

a treaty between a State and an international organization created neither obligations nor rights for a third State without the consent of that State. In the case of a headquarters agreement concluded by the United Nations, rights accorded to States Members of the United Nations could be accepted implicitly, but obligations must be accepted expressly and in writing.

*The meeting rose at 1 p.m.*

## 1512th MEETING

*Wednesday, 5 July 1978, at 10.05 a.m.*

*Chairman* : Mr. José SETTE CÂMARA

*Members present* : Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yan-  
kov.

**Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*)**  
(A/CN.4/312, A/CN.4/L.269)

[Item 4 of the agenda]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE (*continued*)

ARTICLES 35, 36, 36 *bis*, 37 AND 38,  
AND ARTICLE 2, PARA. 1 (*h*) (*concluded*)

ARTICLE 36 *bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization)<sup>1</sup> (*concluded*)

1. Mr. USHAKOV said that if it were decided to delete subparagraph (a), which, as the Special Rapporteur had himself acknowledged at the previous meeting, applied only to supranational organizations such as EEC, article 36 *bis* would be pointless, since it would duplicate articles 35 and 36.<sup>2</sup> Those two articles applied to all third States, including States members of an international organization party to a treaty, which were also covered by article 36 *bis*. If the words “subject to article 36 *bis*”, which had been placed in square brackets, were deleted from articles 35 and 36, States members of an international organization such as the United Nations would be subject to contradictory rules, as the rule in article 36 *bis* did not correspond to the rules stated in articles 35 and 36.

<sup>9</sup> See *Yearbook... 1966*, vol. II, pp. 227 and 228, doc. A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties, art. 32.

<sup>10</sup> *Ibid.*, p. 227, art. 31.

<sup>11</sup> See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 268, doc. A/CONF.39/L.25.

<sup>1</sup> For text, see 1510th meeting, para. 25.

<sup>2</sup> *Ibid.*, paras. 1 and 21.

2. Articles 35 and 36 made the arising of rights and obligations for third States subject to much more specific conditions than those established in article 36 *bis*. Article 35, paragraph 1, provided that "an obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing". Similarly, article 36, paragraph 1, provided that "a right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and if the third State assents thereto". Those conditions were not be found in article 36 *bis*, subparagraph (b), the wording in which was much vaguer.

3. Moreover, with regard to rights, article 36, paragraph 1, provided that the assent of third States "shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides", but that presumption was not contained in article 36 *bis*, subparagraph (b).

4. It was absurd to try to justify the retention of that subparagraph by claiming that it would help universal organizations such as the United Nations to defend world peace; the United Nations contributed to the maintenance of peace through its activities, not through the conclusion of treaties such as headquarters agreements. Thus the only purpose of subparagraph (b) was to enhance the acceptability of subparagraph (a), which, as the Special Rapporteur had acknowledged, concerned only supranational organizations such as EEC.

5. EEC, moreover, was the only supranational organization currently in existence. As stated in its constituent instrument, CMEA was not a supranational organization, for socialist internationalism respected the sovereignty of States. The third world States, for their part, were not likely to set up supranational organizations in the near future; having only recently acquired their sovereignty, they would hardly agree to give it up to supranational organizations. Thus article 36 *bis* really concerned only the member States of EEC and other Western States.

6. He was strongly opposed to the retention of that article, because it was inadmissible to introduce into draft articles applying to international organizations in general a rule applying to a supranational organization. If the Commission considered it necessary to establish rules relating to treaties to which EEC would be a party, it should do so in the form of special rules, outside the framework of the draft articles, to be adopted only at the express request of the General Assembly.

7. Sir Francis VALLAT said that the liveliness of the debate showed that the text proposed by the Drafting Committee was very useful for a first reading. That text had made it clear that there were real problems connected with the effects of treaties concluded by international organizations, as between the members of such organizations and the other parties.

8. In his view, however, much of the debate had been based on a misunderstanding, for article 36 *bis* had not been tailored exclusively for EEC. As he had already said when EEC entered into a treaty it did so on its own behalf, as an entity, and the Commission of the European Communities would object, in those circumstances, to direct dealings between the members of EEC and the other parties to the treaty. That, at least, was how he understood the operation of the customs union, in particular. If that view was correct, article 36 *bis* would be of only marginal interest to EEC. Admittedly, the situation in regard to agreements such as the proposed convention on the law of the sea would be different; there, as in the case of the EEC common fisheries policy, the essential problem would be the sharing of competence between EEC and its members. That, however, was a practical difficulty to be tackled by EEC, its members and such other States as might be concerned; it was not pertinent to the work of the Commission at that stage.

9. He considered article 36 *bis* to be a very valuable sounding box that the Commission should use, as it had used other controversial articles in the past, to obtain the views of governments and international organizations.

10. He therefore suggested that the text of the article should be included in the Commission's report without change, but with references to its controversial character and to the fact that some members of the Commission had supported and others opposed it; and that the Commission should indicate that it would take its final decision on the article in the light of the reactions of governments and international organizations to it.

11. Personally, he had doubts about various details of the article, but considered it pointless to comment on them at that stage.

12. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that article 36 *bis* had been fully debated and carefully elaborated by the Drafting Committee, where the predominant sentiment had been one of support for the text. Although varying views had been expressed on the article in the Commission, a majority of the members seemed to be in favour of dealing with the substance of the questions it raised.

13. Personally, he doubted the advisability of omitting it and so avoiding problems that were real features of international law and life as they were evolving. Indeed, it would seem unwise to omit such an article from a draft that was specifically intended to elicit the view of States and international organizations. He therefore supported the suggestion that article 36 *bis* should be included in the Commission's report, together with a commentary that fully reflected the animated and extensive debate thereon. The Commission would be able to decide what should finally become of the article in the light of the comments submitted to it by governments and international organizations.

14. The Drafting Committee had not put the article in square brackets, because it had assumed that the commentary would draw attention to the marked differences of opinion on it that had become apparent during the first reading in the Commission, and then in the Committee. Since the text was only provisional, it might reasonably be adopted as it stood. Alternatively, the fact that it had been the subject of differing opinions might be emphasized by placing it in square brackets.

15. Mr. YANKOV said that, since the views expressed on article 36 *bis* differed so widely, he did not think the Commission could submit the text with only a routine commentary. While he did not wish to dwell on the question whether the article had been drafted especially for EEC or similar supranational institutions, he felt bound to say that the consequences of the double participation of such an institution and of its member States in an agreement such as the proposed convention on the law of the sea had been oversimplified. That was true in regard not only to the complex subject of fisheries, but also to the sections of the proposed convention dealing with environmental matters and with reservations and their legal effects. Parties to that convention and, possibly, arbitral tribunals, would find themselves faced with a most unusual situation if a supranational institution formulated a reservation that its own members did not accept, or vice versa. He could see a clear possibility of such a situation arising in regard to environmental matters and also to industrial development and technical assistance.

16. In view of those considerations, he had reservations concerning both the wisdom and the necessity of putting forward, at the current stage, a text that might cause confusion in the majority of cases in which questions might arise regarding the effects, for third States, of a treaty to which an international organization was party. The most he would be willing to accept would be the submission of article 36 *bis* in square brackets and the insertion of a full explanation in the commentary. To allow the text to appear in the report without square brackets would give governments the false impression that it represented a compromise between the different views expressed in the Commission.

17. Mr. VEROSTA said that if article 36 *bis*, with all its merits and all its possible shortcomings, appeared in the report otherwise than in square brackets, the General Assembly would be led wrongly to conclude that the text was one on which the Commission had reached a consensus. For the reasons advanced by Mr. Tsuruoka at the previous meeting, the article should be placed in square brackets.

18. Mr. NJENGA did not altogether share the opinions that had been expressed concerning the merits of article 36 *bis* and was not convinced that the article was necessary. He had considered going so far as to suggest that the text should appear only in a foot-note to the report, but he agreed that, in order to reflect the attitude of the members of the Commission in a balanced way, it should be placed in

square brackets and accompanied by a full account of the discussion.

19. Mr. ŠAHOVIĆ proposed that, in view of what the Chairman of the Drafting Committee had said, article 36 *bis* should be placed in square brackets, and that it should be stated in the commentary that the members of the Commission had not been able to reach agreement on the text.

20. Mr. CASTAÑEDA believed that article 36 *bis* was useful and that its basic thesis was correct. But since opinions obviously differed even on its substance, he would have no objection to the article being included in the Commission's report in square brackets and accompanied by a full account of the debate thereon.

21. Mr. USHAKOV formally proposed the deletion of article 36 *bis*.

22. Mr. TSURUOKA said it was difficult to adopt an article in square brackets, since adoption implied approval. The reasons why article 36 *bis* had been placed in square brackets should therefore be clearly explained in the commentary.

23. Mr. YANKOV suggested that the Commission should avoid using any terminology suggesting that it had adopted the article. Instead, it should do as other United Nations bodies did in similar circumstances, and simply decide to submit the text for consideration to the recipients of its report, and to place it in square brackets in view of the differing opinions, which would be recorded in the commentary.

24. Mr. USHAKOV was opposed to the retention of article 36 *bis*, even in square brackets. In his opinion, the words "provisionally adopted" were meaningless, for articles were always adopted provisionally on first reading.

25. Mr. JAGOTA suggested that the best course might be to include the article in the report in square brackets and to state, in a foot-note to the introduction to the relevant section, that the Commission had decided to consider the article further in the light of the comments it would receive from the General Assembly, from governments and from international organizations. The foot-note might also refer to the account given in the commentary of the Commission's discussion on the article.

26. If article 36 *bis* were to be placed in square brackets, the same would have to be done with the references to it in paragraph 1 of articles 35 and 36 and paragraphs 5 and 6 of article 37.

27. Mr. SCHWEBEL (Chairman of the Drafting Committee) agreed with Mr. Ushakov that any decision by the Commission concerning articles examined on first reading was, in a sense, provisional. But some decisions were more provisional than others, and the Commission had therefore adopted, in the past, the system of placing in square brackets elements of a text that required special attention because opinions on them had differed. For example, Mr. Ushakov himself had asked that certain provi-

sions of the draft on succession of States in respect of matters other than treaties should be placed in square brackets. It seemed appropriate to adopt the same solution in the case of article 36 *bis*, although he had no objection to the inclusion in the report of a foot-note of the kind suggested by Mr. Jagota.

28. Mr. QUENTIN-BAXTER said that there would be a qualitative difference between the effects of placing the article in square brackets and the action suggested by Mr. Jagota; the former action would suggest no more than that the Commission had adopted the article provisionally, whereas the latter would show that the Commission intended to revert to the article during its final assessment of the draft on first reading, as he believed it must.

29. He wondered, however, whether Mr. Jagota's proposal removed the need for a separate decision on Mr. Ushakov's motion. If the Commission's intention was definitively to adopt article 36 *bis*, without square brackets, on first reading, he could see some point in Mr. Ushakov's proposal. If, on the other hand, the members of the Commission were agreed that they must revert to the article on first reading in any case, Mr. Ushakov's proposal took on a different character and, if maintained, could only be construed as indicating a desire that the General Assembly should not focus on the Commission's discussion of the article.

30. Mr. USHAKOV pointed out that, in the case of the draft articles on succession of States in respect of matters other than treaties, the articles that had been placed in square brackets had been articles of which the Commission had accepted the principle, if not the form, whereas article 36 *bis* was an article whose principle was absolutely unacceptable.

31. Mr. VEROSTA said that the problems underlying article 36 *bis* were real and that the Commission would be failing in its duty if it did not draw the General Assembly's attention to them. That being so, he appealed to Mr. Ushakov not to press his proposal, but to accept the suggestion made by Mr. Jagota.

32. Mr. CASTAÑEDA said that, since the Commission was not bound by precedent, it could overcome its current difficulties by using a less formal procedure: it could state in its report that it had referred to the Drafting Committee the text of article 36 *bis* submitted by the Special Rapporteur and had subsequently received from the Drafting Committee an amended text, which it had discussed at length without reaching any decision, except to reconsider the article in the light of the comments of governments.

33. Mr. FRANCIS did not think the Commission would create any false impression if it placed the article in square brackets, since that was a practice that was well known to, and had a clear meaning for, the Commission and the General Assembly. But care must be taken to avoid suggesting in any other way that the Commission had adopted the text of the article. For example, a vote against Mr. Ushakov's

proposal that the article be deleted might be construed as implying acceptance of the text, unless the Chairman's invitation to the Commission to vote on the motion were very carefully phrased.

34. Mr. USHAKOV did not think Mr. Verosta's suggestion resolved the problem, for if article 36 *bis* were submitted to the Sixth Committee, States would probably be divided on the text.

35. Mr. TABIBI observed that the current situation was perhaps one where the Commission might usefully follow its practice of mentioning, in a foot-note, the names of members who had raised particularly strong objections to a draft article. He agreed that the discussions on article 36 *bis* should be reflected in the commentary and that the article itself should be placed in square brackets.

36. Mr. JAGOTA did not think a negative vote on Mr. Ushakov's proposal to delete article 36 *bis* would imply the adoption of the text. Such a vote would merely signify the rejection of the proposal itself, and it would remain for the Commission to take a separate decision on the fate of the article. He wished to suggest to Mr. Ushakov, however, that it might be unnecessary, and perhaps even undesirable, to maintain his formal motion for deletion of the article, if all the Commission intended to say was that the text committed none of its members and that the article would be reviewed in the light of the reactions to it of the General Assembly and international organizations. It should be noted that, whereas Mr. Ushakov suggested that the Commission should consider the subject-matter of the article only if States requested it to do so, the subject was a live one, which was already being discussed in other forums and which came within the scope of the Commission's work. He hoped that Mr. Ushakov and any other members of the Commission who were opposed to the article would agree to have their views recorded in the commentary or brought to the attention of readers of the Commission's report in the manner suggested by Mr. Tabibi.

37. Mr. TSURUOKA proposed that the Commission should decide to submit article 36 *bis* to the General Assembly and to reconsider it later in the light of the comments made by representatives in the Sixth Committee. The Commission should give a true picture of the situation in its commentary, by indicating that it had not been able to reach any decision on the content of the article and had even been seized of a proposal to delete it. He pointed out that the Commission had sometimes adopted a solution of that kind in the past, in similar circumstances.

38. Mr. USHAKOV was prepared to support the solution proposed by Mr. Tsuruoka, provided that article 36 *bis* was placed in square brackets and that the Commission clearly stated in its commentary that it had not come to any conclusion on the article.

39. Sir Francis VALLAT was of the opinion that it would be useless to reconsider article 36 *bis* without having the views not only of Governments and mem-

bers of the Sixth Committee, but also of international organizations, since they were the most knowledgeable on the subject-matter of the provision.

40. He also wished to draw attention to the suggestion that had already been made, namely, that the Commission should seek the views of governments and international organizations on its draft articles once it had completed those portions of its draft that corresponded to the first four parts of the Vienna Convention,<sup>3</sup> a point it was fast approaching.

41. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided that article 36 *bis* should appear in its report in square brackets, and that the report should reflect the comments made on the subject-matter of the article and indicate clearly that no decision had been taken on the text other than to reconsider it in the light of the comments made by governments and international organizations.

*It was so agreed.*

42. Mr. SCHWEBEL (Chairman of the Drafting Committee) speaking as a member of the Commission, said that the outcome of the procedural discussion had been a decision to accommodate, as far as possible, the views of one or two of the members of the Commission. He trusted that, should the question arise, on another occasion, of so accommodating the minority views of one or two other members, the same attitude would prevail in all quarters.

ARTICLE 37<sup>4</sup> (Revocation or modification of obligations or rights of third States or third international organizations)

43. The CHAIRMAN read out the text of article 37 proposed by the Drafting Committee (A/CN.4/L.269):

**Article 37. Revocation or modification of obligations or rights of third States or third international organizations**

1. When an obligation has arisen for a third State in conformity with paragraph 1 of article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When an obligation has arisen for a third international organization in conformity with paragraph 2 of article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third organization, unless it is established that they had otherwise agreed.

3. When a right has arisen for a third State in conformity with paragraph 1 of article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

4. When a right has arisen for a third international organization in conformity with paragraph 2 of article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third organization.

<sup>3</sup> See 1507th meeting, foot-note 1.

<sup>4</sup> For consideration of the text initially submitted by the Special Rapporteur, see *Yearbook... 1977*, vol 1, pp. 143-145, 1442nd meeting, paras. 13-28.

5. When an obligation or a right has arisen for third States which are members of an international organization under the conditions provided for in sub-paragraph (a) of article 36 *bis*, the obligation or the right may be revoked or modified only with the consent of the parties to the treaty, unless the relevant rules of the organization applicable at the moment of the conclusion of the treaty otherwise provide or unless it is established that the parties to the treaty had otherwise agreed.

6. When an obligation or a right has arisen for third States which are members of an international organization under the conditions provided for in sub-paragraph (b) of article 36 *bis*, the obligation or the right may be revoked or modified only with the consent of the parties to the treaty and of the States members of the organization, unless it is established that they had otherwise agreed.

7. The consent of an international organization party to the treaty or of a third international organization, as provided for in the foregoing paragraphs, shall be governed by the relevant rules of that organization.

44. Mr. USHAKOV pointed out that, in consequence of the decision taken on article 36 *bis*, paragraphs 5 and 6 of article 37, which related to the situations contemplated in article 36 *bis*, should also be placed in square brackets.

45. The existing wording of paragraph 5 of article 37 was far from satisfactory. According to that provision, an obligation or a right which had arisen for third States members of an international organization under the conditions provided for in subparagraph (a) of article 36 *bis* could be revoked or modified only with the consent of the parties to the treaty "unless the relevant rules of the organization applicable at the moment of the conclusion of the treaty otherwise provide". In that case, the rules in question would apply to all the parties to the treaty, not only to the organization itself, which was very strange. The rule stated in paragraph 5 was accompanied by another safeguard clause, according to which the parties to the treaty could agree otherwise. It thus followed that an international organization such as EEC could agree on provisions that were contrary to its own relevant rules.

46. Paragraph 6 of article 37 related to the revocation or modification of an obligation or a right that had "arisen for third States which are members of an international organization under the conditions provided for in subparagraph (b) of article 36 *bis*". He was not sure whether, for the purposes of subparagraph (b) of article 36 *bis*, it was necessary for all the States members of the organization to acknowledge that the application of the treaty necessarily entailed the effects referred to in that provision and whether, if that were not the case, the States that had not acknowledged such effects would not be bound by the rule stated in article 36 *bis*. In the former case, any State could exercise a veto. The words "third States which are members of an international organization", and "the States members of the organization", contained in article 37, paragraph 6, could thus be interpreted as applying either to all the States members of the organization or only to some of them.

47. It should also be stated exactly when the third States referred to in paragraph 6 had to be members

of the organization and whether they must be among those that had acknowledged that the application of the treaty necessarily entailed the effects referred to in article 36 *bis*. Lastly, it should be made clear which of those States were referred to by the pronoun "they" in the last phrase of that paragraph.

48. Since paragraphs 5 and 6 would probably be placed in square brackets, he would not dwell on the drawbacks of their defective wording. Personally, he thought those provisions should not even be submitted to governments.

49. In paragraph 7, it would be advisable to replace the words "as provided for in the foregoing paragraphs" by the words "as referred to in the foregoing paragraphs", and to specify those paragraphs, since only some of them concerned international organizations.

50. Mr. ŠAHOVIĆ said it might be advisable to show the links between article 41 (Agreements to modify multilateral treaties between certain of the parties only) (A/CN.4/312) and article 37, since both dealt with the modification of treaties.

51. It would be logical to place paragraphs 5 and 6 of article 37 in square brackets, as Mr. Ushakov had proposed, since the Commission had taken no final decision on article 36 *bis*. However, since many members of the Commission had taken the view that the situations referred to by article 36 *bis* should be considered, the Commission could not now omit to consider them.

52. Sir Francis VALLAT said that paragraphs 5 and 6 of article 37 were the corollary to article 36 *bis* and logically, therefore, should also be placed between square brackets. Subject to that change, he would suggest that article 37 be approved for the current purposes of the Commission.

53. Mr. JAGOTA noted that article 36 *bis* and paragraphs 5 and 6 of article 37 referred to "third States" in the plural, whereas the other provisions of article 37, and articles 35 and 36, referred to "a third State" in the singular. As he understood it, the rationale of article 36 *bis* was that States members of an international organization should be treated as a whole, without making any distinction according to whether they did or did not accept the rights and obligations arising under the treaty. Such a distinction would only make it more difficult to decide whether articles 35, 36 or 36 *bis* applied. Possibly the Chairman of the Drafting Committee or the Special Rapporteur could confirm that his understanding was correct.

54. Mr. REUTER (Special Rapporteur) explained that the Drafting Committee had purposely used the plural, since it was its understanding that States acted collectively. To accept dissension among States in such a complex matter would lead to enormous complications. The Drafting Committee had accordingly been careful to give the principle of consensus its proper place in article 36 *bis*. Mr. Jagota's interpretation of the use of the plural was thus correct.

55. Mr. USHAKOV said that if the Drafting Committee had had all States in mind, it should have used the words "all States", and that the word "States" applied only to certain States. If all the States members of an organization had to acknowledge that the application of the treaty necessarily entailed certain effects, as provided for in subparagraph (b) of article 36 *bis*, it could be concluded that each State had a right of veto. It would be desirable for the Special Rapporteur to state his view on that point and to say whether States that became members of the organization after the entry into force of the treaty could also exercise a veto. In his opinion, those two questions called for affirmative replies.

56. Mr. TSURUOKA wondered whether paragraph 7 of article 37 referred to an international organization that was a party to the treaty and to a third international organization alternatively or cumulatively.

57. Mr. REUTER (Special Rapporteur), in reply to Mr. Tsuruoka, said that, depending on the case, paragraph 7 of article 37 could refer not only to an organization that was party to the treaty and to a third organization.

58. Referring to the comments made by Mr. Ushakov, he said that an international organization was established at a given time and that, in order to stress the role of consensus in article 36 *bis*, the Drafting Committee had provided that all States members of the organization must give their consent—a practice, incidentally, that had never given rise to difficulties. Evidence of that was to be found in the provision, in the 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the Organization,<sup>5</sup> relating to the privileges and immunities enjoyed in the territory of the United States by certain categories of representatives of States Members of the United Nations. When a State became a member of an international organization, it must accept the organization as it was; otherwise, insurmountable difficulties would arise.

59. Mr. RIPHAGEN did not think that Mr. Ushakov's interpretation regarding the right of veto of a new member of an international organization would be shared by all members of the Commission. On joining an organization, a new member accepted that organization as it was, with its rights and obligations, and hence could have no right of veto in regard to events that had taken place before it had become a member.

60. Mr. REUTER (Special Rapporteur) could agree to Mr. Ushakov's proposal that the words "as provided for", in paragraph 7 of article 37, should be replaced by the words "as referred to", provided that those words were followed by the words "in paragraphs 2, 4 and [6]".

<sup>5</sup> General Assembly resolution 169 (II).

61. Mr. USHAKOV said that, on reflection, it would be preferable not to change the wording of paragraph 7.

62. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that, apart from the doubts expressed by a few members about certain provisions in article 37 that were connected with article 36 *bis*, there had been no major criticism of the article.

63. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to approve article 37, paragraphs 5 and 6 being placed in square brackets.

*It was so agreed.*

ARTICLE 38<sup>6</sup> (Rules in a treaty becoming binding on third States or third international organizations through international custom)

64. The CHAIRMAN said that the Drafting Committee had proposed the following text for article 38 (A/CN.4/L.269):

*Article 38. Rules in a treaty becoming binding on third States or third international organizations through international custom*

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State or a third international organization as a customary rule of international law, recognized as such.

65. Mr. USHAKOV stressed the great importance of article 38, which provided that a conventional rule could become a customary rule binding on a third international organization, not as a result of a decision of an organ of that organization, but merely by reason of its conduct. The idea of tacit conduct signifying acceptance of a conventional rule, which was well established in regard to States, was far from having been accepted by the international community in regard to international organizations. There were no practical examples confirming the rule stated in the article. It would therefore be wiser to confine that rule to third States, as provided in the corresponding article of the Vienna Convention.

66. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the prevailing view in the Drafting Committee had been that article 38 was a safeguard clause that dealt with the possibility of customary international law becoming binding on international organizations. It did not, however, deal with the question whether, or in what way, such organizations contributed to the development of customary international law.

67. Mr. REUTER (Special Rapporteur) said that, in any case, that was how article 38 of the Vienna Convention had been conceived in regard to States. The question of what a custom was, how it was established and how States became bound by a customary rule had not been resolved in the Vienna Convention. He was not sure that, according to that in-

strument, the tacit conduct of a State was enough to bind it by a customary rule. Perhaps it would be enough to specify, in the commentary to article 38, that a member of the Commission had stressed that aspect of the problem.

68. Mr. YANKOV asked whether he was correct in understanding that, under article 38, third States and third international organizations, although not directly bound by the rules set out in a treaty, could recognize and accept those rules as rules of customary international law. If so, the article was in conformity with article 38 of the Vienna Convention and should present no difficulties. Otherwise, he would reserve his position.

69. Mr. CASTEÑEDA shared the doubts about the article expressed by Mr. Ushakov. As it stood, it clearly gave the impression that the Commission had accepted the thesis that customary rules could be established for international organizations that had not participated in their establishment. That, in his view, would be going rather too far. Although it was well established that customary rules could be created by the practice of States within an international organization, it was another matter to provide that a treaty between international organizations or between international organizations and States could create a customary rule that was binding on a third international organization—which might be of a character very different from that of the international organizations parties to the treaty—without the express consent of its governing organs. He thought the matter required further consideration.

70. Mr. USHAKOV considered that Mr. Yankov's interpretation was unfortunately not acceptable. For an international organization, it was one thing expressly to accept a customary rule by a decision of one of its organs, but quite another to accept, by its conduct, a rule contained in a treaty to which it was not a party. According to article 38 of the Vienna Convention, a rule set forth in a treaty could become binding upon a third State by reason of its conduct. However, a rule set forth in a treaty could not become binding on a third international organization by reason of its conduct, by virtue of the article under consideration. The notion of the conduct of States had been defined, in particular at the United Nations Conference on the Law of Treaties, whereas the notion of the conduct of an international organization—conduct that might make a rule in a treaty to which it was not a party binding upon it—had not been defined.

71. Mr. SCHWEBEL (Chairman of the Drafting Committee) believed Mr. Yankov had correctly interpreted the intentions of the members of the Drafting Committee. The article spoke of a customary rule of international law "recognized as such", but did not stipulate how the rule had come to be recognized, since that was a matter falling outside the scope of the draft articles. The article assumed that an international organization was, or could be, bound by customary international law. There were many examples to support that assumption, for example, the advisory

<sup>6</sup> For consideration of the text initially submitted by the Special Rapporteur, see *Yearbook... 1977*, vol. 1, pp. 145 and 146, 1442nd meeting, paras. 29-45.

opinion of the International Court of Justice in the *Reparation for injuries suffered in the service of the United Nations* case,<sup>7</sup> in which international organizations had been treated as having rights and obligations under customary international law, and the application of elements of the customary law of war to the United Nations peace-keeping forces.

72. Mr. VEROSTA had no hesitation in recommending the approval of the article which, in his view, was perfectly straightforward. It was also very necessary, since some of the customary law that came into existence after an international organization became a party to a treaty might well be applicable to that organization, and such a possibility should not be excluded. He thought there was no need to go into the question of the conduct of international organizations, since nothing had been said about the conduct of States.

73. The CHAIRMAN, noting that there were no further comments, proposed that the Commission should approve article 38.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

<sup>7</sup> *I.C.J. Reports 1949*, p. 174.

## 1513th MEETING

*Thursday, 6 July 1978, at 10 a.m.*

*Chairman* : Mr. José SETTE CÂMARA

*Members present* : Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

### State responsibility (*continued*)\* (A/CN.4/307 and Add.1, A/CN.4/L.271)

[Item 2 of the agenda]

#### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 23-26 as adopted by the Drafting Committee (A/CN.4/L.271). The articles read:

##### *Article 23. Breach of an international obligation to prevent a given event*

When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of

a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.

##### *Article 24. Breach of an international obligation by an act of the State not extending in time*

The breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed. The time of commission of the breach does not extend beyond that moment, independently of the fact that the effects of the act of the State may continue subsequently.

##### *Article 25. Breach of an international obligation by an act of the State extending in time*

1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation.

2. The breach of an international obligation by an act of the State, composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated.

3. The breach of an international obligation by a complex act of the State, consisting of a succession of actions or omissions by the same or different organs of the State in respect of the same case, occurs at the moment when the last constituent element of that complex act is accomplished. Nevertheless, the time of commission of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it.

##### *Article 26. Time of the breach of an international obligation to prevent a given event*

The breach of an international obligation requiring a State to prevent a given event occurs when the event begins. Nevertheless, the time of commission of the breach extends over the entire period during which the event continues.

2. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that articles 23, 24, 25 and 26 as adopted by the Drafting Committee were based on articles 23 and 24 proposed by the Special Rapporteur in his seventh report (A/CN.4/307 and Add.1, paras. 19 and 50), and subsequently referred to the Drafting Committee for consideration.

3. In wording article 23, the Drafting Committee had taken particular account of the relationship of the article to articles 20 and 21,<sup>1</sup> which dealt respectively with obligations requiring the adoption of a particular course of conduct and with obligations requiring the achievement of a specified result. The purpose of the new formulation was to make it clear that article 23 constituted an application of article 21 to the case of a particular class of obligations of result that was dealt with in general terms in article 21. Thus, whereas the original text had provided that there was no breach unless "the event in question

<sup>1</sup> For the text of the articles adopted so far by the Commission, see *Yearbook... 1977*, vol. II (Part Two), pp. 9 *et seq.*, doc. A/32/10, chap. II, sect. B, 1.

\* Resumed from the 1482nd meeting.



occurs”, the proposed text, using wording from article 21, indicated that it was the combination of the “result required” of a State by an international obligation and the failure of the State to “achieve that result” that gave rise to the breach of the international obligation. The change in emphasis was further underlined by certain drafting alterations, including the use of the word “when” at the beginning of the article and the replacement, in the English text, of the phrase “there is no breach” by the words “there is a breach”. Those amendments, together with the introduction of the words “only if”, also served to align the text of article 23 with paragraph 2 of article 21 and with article 22. The phrase “by means of its own choice” had been added in order to emphasize more strongly the fact that the article represented a particular instance of article 21.

4. In addition, the nature of the particular kind of obligation of result envisaged in article 23 had been clarified. Some misgivings had been expressed in the Commission about an article that seemingly laid down an absolute rule whereby States would be held responsible if the given event in fact took place, regardless of any action or inaction on their part. It had also been suggested that, in the original text, the phrase “following a lack of prevention on the part of the State” placed undue emphasis on the actual occurrence of the event instead of focusing attention on the result required by the international obligation—i.e. on the primary rule—the content of which would determine the level of vigilance or the steps required of the State to prevent such an occurrence. The proposed text therefore referred to “prevention ... of the occurrence of a given event”, while the qualifying clause reading “unless, following a lack of prevention on the part of the State, the event in question occurs” had been replaced by the words “if, by the conduct adopted, the State does not achieve that result”. Thus the “conduct” of the State, which in the cases covered by the article was normally constituted by an omission, would include possible action by the State that prevented it from achieving the required result, namely, the non-occurrence of the given event. Viewed in that context, the Drafting Committee had thought that the article was in its natural place after articles 21 and 22.

5. Articles 24, 25 and 26 as proposed by the Drafting Committee were based on the former article 24 and took account of a suggestion made in the Commission that the five paragraphs of that article should become separate articles.<sup>2</sup> The three proposed articles, which dealt with the *tempus commissi delicti*, were to be distinguished from article 18, which expressed the basic principle that the time the obligation was in force and the time of the conduct of the State must be contemporaneous for such conduct to be considered as constituting a breach of the obligation. Articles 24, 25 and 26, on the other hand, dealt with the time and duration of the breach itself.

6. Article 24 was based on paragraph 1 of the original article and related to the breach of an international obligation by an act of the State not extending in time. The expression “instantaneous act” had been replaced by the words “act ... not extending in time”, in order to take account of the observations made in the Commission. Article 25, which was based on paragraphs 2, 4 and 5 of the original article 24, dealt with three situations, namely, the various cases of the breach of an international obligation by an act of the State extending in time—an act having a continuing character, an act composed of a series of actions or omissions, and a complex act. Article 26 was based on paragraph 3 of the original article and concerned the time of the breach of an international obligation to prevent a given event.

7. In the light of the views expressed in the Commission, articles 24, 25 and 26 had been drafted with a view to making it clear that they dealt with the *tempus commissi delicti* from two standpoints: first, the time when the breach occurred and, secondly, the extent of the time of commission of the breach.

8. Lastly, the Drafting Committee had decided not to recommend that articles 24, 25 and 26 should form a separate chapter, at that stage at least, since it had taken the view that the time element should not be separated from the question of the breach of an international obligation in general, which was the subject of chapter III of the draft articles.

9. The CHAIRMAN invited members to consider, one by one, the articles proposed by the Drafting Committee.

ARTICLE 23<sup>3</sup> (Breach of an international obligation to prevent a given event)<sup>4</sup>

10. Mr. VEROSTA said that the words “prevent a given event” in the title of article 23, and even more the words “prevention ... of the occurrence of a given event” in the text of the article, were not very felicitous, at least in the French version.

11. Mr. REUTER considered the words quite correct in French. For the sake of simplification, the words “prevention ... of the occurrence of a given event” might be replaced by “prevention ... of an event”, but that would be more than a mere drafting change.

12. Mr. AGO (Special Rapporteur) pointed out that the French word “donné” was the exact equivalent of the English word “given”. He would like to retain the word “occurrence” in view of the nuance which it introduced.

13. Sir Francis VALLAT pointed out that the question had already been discussed at length in the Drafting Committee, and suggested that it should be left for the second reading of the draft articles.

<sup>3</sup> For consideration of the text initially submitted by the Special Rapporteur, see 1476th to 1478th meetings.

<sup>4</sup> For text, see para. 1 above.

<sup>2</sup> See 1481st meeting, para. 29.

14. Mr. USHAKOV said that a "given" event was the event covered by the international obligation in question.

15. Mr. TSURUOKA, referring to the closing words of article 23, suggested that the words "the State does not achieve" should perhaps be replaced by the words "the State has not achieved".

16. Mr. AGO (Special Rapporteur) proposed that Mr. Tsuruoka's comment be held over for consideration on the second reading.

17. Mr. CASTAÑEDA observed that there was no equivalent for the word "occurrence" in the Spanish version of article 23. He suggested that the omission should be made good by the insertion of the words "que surja" after the words "por el medio que elija".

18. The CHAIRMAN said that, if there were no objection, he would take it that the Commission decided to adopt the title and text of article 23 referred to it by the Drafting Committee, subject to the amendment proposed by Mr. Castañeda to the Spanish version of the text.

*It was so agreed.*

ARTICLE 24<sup>5</sup> (Breach of an international obligation by an act of the State not extending in time)<sup>6</sup>

19. Mr. REUTER, referring to the French version of article 24, suggested that the somewhat inelegant words "indépendamment du fait que les effets du fait de l'Etat" should be replaced by the words "indépendamment de ce que les effets du fait de l'Etat".

20. Mr. USHAKOV would prefer those words to be replaced by the words "even if the effects of the act of the State [may continue subsequently]".

21. Mr. QUENTIN-BAXTER thought that the wording proposed by Mr. Ushakov would be clearer. The wording used by the Drafting Committee was so abstract that it was difficult to grasp its meaning. Moreover, the words "even if" appeared in the former wording of article 24 and in article 18, paragraph 5, in a very similar context.

22. Mr. AGO (Special Rapporteur) failed to see the difference between the formula "independently of the fact that" and the formula "even if", but could agree that the second should be substituted for the first.

23. Mr. VEROSTA and Sir Francis VALLAT favoured the substitution.

24. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to adopt the title and text of article 24 referred to it by the Drafting Committee, subject to the words "even if the effects of the act of the State continue subsequently" being substituted for the words "inde-

pendently of the fact that the effects of the act of the State may continue subsequently".

*It was so agreed.*

ARTICLE 25<sup>7</sup> (Breach of an international obligation by an act of the State extending in time)<sup>8</sup>

25. Mr. USHAKOV, referring to the first sentence of paragraph 1 of the article, suggested that the French and Spanish versions should be brought into line with the English version, and that the words "à exister" and "a existir" should accordingly be deleted.

26. Mr. TSURUOKA asked whether the Drafting Committee had sought in article 25 to bring out the continuing character spoken of in the provision.

27. Mr. AGO (Special Rapporteur) said that the Drafting Committee had discussed the matter at length but had eventually adhered to the words used in article 18.

28. Mr. VEROSTA said that if the amendment suggested by Mr. Ushakov were made to the first sentence of paragraph 1, the word "existence" might be deleted from the first sentence of paragraph 2 as well.

29. Mr. AGO (Special Rapporteur) pointed out that it was essential in that provision to emphasize the existence of the composite act; the existence of the composite act was in fact established when, for example, a succession of discriminatory acts was found to constitute a discriminatory practice.

30. The CHAIRMAN said that, if there were no objection, he would take it that the Commission decided to adopt the title and text of article 25 referred to it by the Drafting Committee, with the drafting change suggested by Mr. Ushakov.

*It was so agreed.*

ARTICLE 26<sup>9</sup> (Time of the breach of an international obligation to prevent a given event)<sup>10</sup>

31. Mr. USHAKOV, referring to the first sentence of the article, observed that the breach of an international obligation did not necessarily occur when the event began; it could occur during the occurrence of the event or even afterwards. However, that question could be left for the second reading of the draft.

32. The word "time" in the title of the article gave rise to translation difficulties in Russian. It might be necessary to seek another term in French.

33. Mr. AGO (Special Rapporteur) suggested that the word "time" should be replaced by the words "moment and duration", which would refer to the first and second sentences of article 26 respectively.

34. Mr. CALLE y CALLE, referring to the Spanish version of the text, proposed that for the sake of uni-

<sup>5</sup> For consideration of the text initially submitted by the Special Rapporteur, see 1479th to 1482nd meetings.

<sup>6</sup> For text, see para. 1 above.

<sup>7</sup> For consideration of the text initially submitted by the Special Rapporteur, see 1479th to 1482nd meetings (article 24).

<sup>8</sup> For text, see para. 1 above.

<sup>9</sup> For consideration of the text initially submitted by the Special Rapporteur, see 1479th to 1482nd meetings (article 24).

<sup>10</sup> For text, see para. 1 above.

formity the words “se inicie” should be replaced by the word “comience”.

35. Sir Francis VALLAT suggested that, in review of the amendment proposed to the title of the article, the word “time”, in the second sentence should be replaced by the word “duration”.

36. Mr. USHAKOV thought that only the title of the article should be so amended.

37. Mr. AGO (Special Rapporteur) said that the word “time” in the body of the article was to be read in the context of the expression “time of commission”, which appeared repeatedly throughout the draft articles. It would therefore be better not to alter it.

38. Mr. YANKOV also considered that the word “time” should be retained. In any case, the idea of duration was conveyed by the phrase “extends over the entire period”.

39. Sir Francis VALLAT said that the title and content of an article could normally be expected to correspond. He could accept the amendment to the title for the time being, but thought that the matter should receive closer consideration on the second reading.

40. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to adopt the title and text of article 26 referred to it by the Drafting Committee, subject to the amendment proposed by the Special Rapporteur to the title of the article and by Mr. Calle y Calle to the Spanish version of the text.

*It was so agreed.*

*The meeting rose at 11 a.m.*

## 1514th MEETING

*Monday, 10 July 1978, at 3.10 p.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

**Succession of States in respect of matters other than treaties (*continued*)\* (A/CN.4/301 and Add.1,<sup>1</sup> A/CN.4/313, A/CN.4/L.272)**

[Item 3 of the agenda]

\* Resumed from the 1505th meeting.

<sup>1</sup> *Yearbook... 1977*, vol. II (Part One), p. 45.

## DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

### ARTICLES 23, 24 AND 25

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the texts adopted by the Drafting Committee for articles 23, 24 and 25 (A/CN.4/L.272).

2. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that articles 23, 24 and 25 proposed by the Drafting Committee were intended to complete part II, section 2, of the draft articles. In working on the articles, the Drafting Committee had borne in mind the main trend of opinion expressed during the Commission's discussion of the texts submitted by the Special Rapporteur, and had attempted, in particular, to preserve as much parallelism as practicable with the corresponding articles adopted by the Commission on the passing of State property (articles 14, 15 and 16).<sup>2</sup>

3. Article 23 was based on article W, proposed by the Special Rapporteur in his ninth report (A/CN.4/301 and Add.1, para. 456), although the Drafting Committee had reverted to the form used in article 14 by dividing the text into two paragraphs. The first of those paragraphs stated the basic rule in positive form and in wording closely resembling that employed in article 14. It placed the emphasis on the passing of the State debt. With regard to paragraph 2 of the article, the Committee had decided, in the light of the Commission's discussion, not to retain the two cases set out in paragraphs (a) and (b) of article W, but to include a second paragraph on the lines of paragraph 2 of article 14. In drafting that paragraph, it had borne in mind the doubts expressed in the Commission concerning the appropriateness of referring to the internal law of a State, as in article 14, paragraph 2. In discussing article 14, the Commission had been unable to reach agreement on a reference to internal law, and had therefore left the article in square brackets.<sup>3</sup> The Committee believed that the wording it had proposed for article 23, paragraph 2, was a more appropriate solution to the problem of such a reference. Unlike article 14, where the rule stated in paragraph 1 was made “subject to paragraph 2”, article 23 provided that the rule stated in paragraph 1 was “without prejudice” to the provisions of paragraph 2. In addition, the reference in article 14, paragraph 2, to the “allocation of the State property... as belonging to the successor State or, as the case may be, to its component parts” had been amended to read, in the context of State debt, “the attribution... of the State debt... to the component parts of the successor State”. And whereas article 14 provided that the allocation of State property “shall

<sup>2</sup> For the text of the articles adopted so far by the Commission, see *Yearbook... 1977*, vol. II (Part Two), pp. 56 *et seq.*, doc. A/32/10, chap. III, sect. B, 1.

<sup>3</sup> See *Yearbook... 1976*, vol. I, pp. 217 *et seq.*, 1398th meeting, and pp. 265 and 266, 1405th meeting, paras. 43-53.

be governed" by the internal law of the successor State, article 23 provided only that "paragraph 1 is without prejudice to the attribution... of the State debt... in accordance with" the internal law of the successor State. Finally, paragraph 2 of article 23 referred, for the sake of clarity, to the attributing "of the whole or any part" of the State debt. That paragraph, as proposed, had received wide support in the Drafting Committee and was therefore presented without square brackets.

4. The Committee suggested that, if the Commission found the wording of paragraph 2 of article 23 acceptable, it should take time, before completing its first reading of the draft as a whole, or during the second reading, to re-examine the text of article 14 with a view to deleting the square brackets.

5. The text of article 24 proposed by the Drafting Committee was essentially the same as that submitted by the Special Rapporteur (A/CN.4/313, para. 26) and referred to the Committee. There was, however, an important difference, in that the Committee's text referred, at the end of paragraph 1, to "all relevant factors", whereas the Special Rapporteur's text had spoken of "the property, rights and interests which pass". The Committee proposed the same change in article 25. Only after a long debate on article 25 had the Committee decided to adopt the new phrase, as a compromise between the differing opinions of its members as to whether express mention should be made, as one of the factors to be taken into account, of what the Special Rapporteur had termed the "capacité contributive" of the successor States. Some members of the Committee had thought that, if the term "tax-paying capacity"—or some other, perhaps better, translation of the French expression—were used in article 25, it should also be used in article 24, since the capacity in question was undeniably one of the most important factors to be considered when dealing with the passing of State debt. Other members had taken the view that such capacity should not be mentioned anywhere, because once one factor had been singled out, others, which might not be so easily identifiable, would also have to be mentioned. It had also been said that the phrase was too vague to be uniformly interpreted, and that the "tax-paying" or "contributing" capacity might vary with time.

6. The phrase now proposed by the Drafting Committee was intended to encompass all the factors that might be relevant to an equitable distribution of the State debt in a particular case of succession, including the "contributing capacity", the debt-servicing capacity and the like, and the property, rights and interests that passed to the successor State in connexion with the State debt in question. The members of the Drafting Committee had accepted the phrase on the understanding that, if it were also approved by the Commission, its meaning would be explained in the commentary. The adoption of the phrase in articles 24 and 25 might necessitate the revision, on second reading, of other articles that had already been approved.

7. The first part of article 25 reproduced the wording of the introductory part of article 16, paragraph 1, except that the word "concerned" no longer appeared after the words "successor States". That change, which implied that article 25 referred to all the successor States, was justified because the article concerned the passing of State debt, rather than of State property. There must be no possibility of responsibility for State debt being transferred to one successor State by agreement between the other successor States alone. The Committee suggested that the opportunity be taken, on second reading, to amend the phrase "two or more States", in the introductory part of both article 16, paragraph 1, and article 25, to read "two or more successor States". The wording of the second part of article 25 followed exactly that of the second part of paragraph 1 of article 24, except for the obviously necessary addition of the word "each" before the words "successor State".

#### ARTICLE 23<sup>4</sup> (Uniting of States)

8. The CHAIRMAN invited the members of the Commission to comment on article 23 as proposed by the Drafting Committee, which read:

##### *Article 23. Uniting of States*

1. When two or more States unite and thus form a successor State, the State debt of the predecessor States shall pass to the successor State.

2. Paragraph 1 is without prejudice to the attribution of the whole or any part of the State debt of the predecessor States to the component parts of the successor State in accordance with the internal law of the successor State.

9. Mr. DÍAZ GONZÁLES said that he had no difficulty in accepting the English and Spanish versions of paragraph 1 and the English version of paragraph 2 of article 23, as proposed by the Drafting Committee. The Spanish text of paragraph 2, however, was unacceptable because it employed the words "sin perjuicio de" to translate the English expression "without prejudice to". There had clearly been confusion—inadmissible in legal Spanish, which was very precise—between the words "perjudicar" and "prejujzar". The English phrase could be accurately rendered only by the use of the latter word, and he therefore proposed that the Spanish text of article 23, paragraph 2, be amended to read:

"Las disposiciones del párrafo 1 no prejuzgarán de la atribución que pueda hacerse de la totalidad o de parte de la deuda de Estado de los Estados predecesores a las partes componentes del Estado sucesor de conformidad con el derecho interno de dicho Estado."

10. Mr. NJENGA said that the text proposed by the Drafting Committee was a substantial improvement on that originally submitted by the Special Rapporteur in article W, in that it provided balanced protec-

<sup>4</sup> For consideration of the text initially submitted by the Special Rapporteur, see 1500th meeting, paras. 21-47, and 1501st meeting, paras. 1-32.

tion for the interests of successor States and creditors alike. Creditors would no longer be dependent on agreement by the component parts of the successor State to assume the debts of the predecessor State. Paragraph 2 of the article took account of the reality in such apparently unitary States as the United Republic of Tanzania, where the central government had not in fact had competence in all fields in respect of the component parts of the country during the transitional period.

11. It might be preferable to replace the words “internal law”, in paragraph 2, by the words “constitutional elements”, or to explain in the commentary that “internal law” meant not only the written law, if any, of the successor State, but also its constitution and the practice of the component parts of that State. That would take care of cases such as that of the United Arab Republic, where there had been no written provision in a constitution or elsewhere concerning succession to State debt. Subject to that remark, he found the text of the article proposed by the Drafting Committee generally acceptable.

12. Mr. USHAKOV pointed out that, in cases of uniting of States, the position in regard to State debts was entirely different from that in regard to State property, referred to in article 14. For whereas the successor State was entirely free to divide up among its component parts, as it wished, the State property that had passed to it, as provided in article 14, paragraph 2, it was not, contrary to what was provided in article 23, paragraph 2, free to attribute to its component parts the whole or any part of the State debt of the predecessor States, for it was the interests of the creditor States that were at stake.

13. Article 23 stated two contradictory rules: according to paragraph 1, the successor State was responsible for the State debts of the predecessor States, but according to paragraph 2, that responsibility fell on the component parts of the successor State. Hence it was not clear whether a creditor State should apply to the successor State, under paragraph 1, or to the component parts of the successor State, under paragraph 2. The successor State could refer the creditor State to its component parts by invoking paragraph 2, and the component parts could refer the creditor State to the successor State on the basis of paragraph 1.

14. He considered that the successor State was solely responsible for the debts of the predecessor States and that it could not attribute the whole or any part of those debts to its component parts unless the creditor State so agreed.

15. Mr. VEROSTA did not think that the situation was as confused as Mr. Ushakov thought. The fundamental rule that the successor State was responsible for the debts of the predecessor States was set out in paragraph 1; the rule stated in paragraph 2 was only a residual rule. Hence the creditor State could apply only to the successor State.

16. Mr. CALLE Y CALLE found the article proposed by the Drafting Committee clear and well

drafted, and a considerable improvement on article W, as originally submitted by the Special Rapporteur. A drafting change was required in the Spanish and French texts of paragraph 2, however, since it was illogical to refer to the “provisions” of paragraph 1 when that paragraph contained only one rule.

17. As for the phrase “sin perjuicio” (without prejudice), to which Mr. Díaz González had objected, it was used in the same way in articles 15 and 16 and, indeed, in the Vienna Convention on the Law of Treaties. There seemed to be no need to replace it, for there was no question in paragraph 2 of any “prejudgement” of the decision of the successor State, as Mr. Díaz González had suggested. All that the paragraph meant was that the rule that the State debt of the predecessor States passed to the successor State would apply irrespective of any proportional distribution of that debt among the component parts of the successor State, which was a matter solely within the purview of the internal law of that State.

18. Mr. TSURUOKA was not sure whether article 23 really took account of the legitimate interests of creditor States. Paragraph 2 allowed the successor State to attribute the whole or any part of its debts to its component parts without the consent of the creditor State, and a change of debtor made in that way, without the consent of the creditor, was not permissible in civil law.

19. Mr. YANKOV had been unable to tell from the Special Rapporteur’s article W how the interests of a creditor State would be protected in the event of succession, whereas the Drafting Committee’s article 23 clearly provided protection for the creditor State in all situations. Paragraph 1 established a simple relationship between the successor State and the creditor State, while paragraph 2 elaborated on the relationship between the predecessor States and the successor State, but made it clear that, however the debt was apportioned among the component parts of the successor State, the interests of the creditors would be protected. He appreciated Mr. Ushakov’s point that the reference in paragraph 2 to the “internal law” of the successor State might cause problems in practice, but found the article worthy of support if its paragraphs were read in conjunction.

20. Mr. CASTAÑEDA said that the Drafting Committee’s article was a significant improvement on article W. In particular, the fact that it stated positively the general rule that the State debt would pass to the successor State provided better guarantees for creditors and was preferable from the point of view of legal technique. He agreed with Mr. Verosta that the rule stated in paragraph 1 of article 23 was fundamental; it was only natural that the debts of the component parts of the successor State should pass to that State, for it was the only subject of international law that remained after the component parts lost their individual identity.

21. He also agreed with Mr. Ushakov that paragraph 2 of the article might cause confusion, but believed that difficulty could be avoided if it were made

clearer that the paragraph referred solely to measures that might be taken for the internal purposes of the successor State and that would in no way affect its responsibility, as a subject of international law, towards a creditor. To that end, he suggested the insertion in paragraph 2, after the words "component parts of the successor State", of some such phrase as "as an internal arrangement" ("en el orden interno").

22. Mr. TABIBI said that, although the Drafting Committee's text was a great improvement on the text originally submitted by the Special Rapporteur, he was concerned that, by reason of its reference to the "internal law of the successor State", it might expose both creditors and the weaker component parts of a successor State to danger. For example, creditors might find themselves faced with an arrangement for the reimbursement of a loan which, although in conformity with the internal law of the successor State, did not correspond to the arrangement they had had with the original debtor. A poor and sparsely populated region that became part of a successor State might find itself saddled with responsibility, under the internal law of that State, for the reimbursement of an inequitable portion of a debt incurred by a more populous and advanced region that had also become part of that State.

23. Those risks could be avoided by the inclusion in paragraph 2 of article 23 of the phrase "taking into account all relevant factors", which the Drafting Committee had already inserted in articles 24 and 25.

24. Mr. USHAKOV proposed that, in paragraph 2, the words "paragraph 1 is without prejudice to the attribution of the whole or any part" should be replaced by the words "subject to paragraph 1, the successor State is entitled to attribute the whole or any part", in order to show clearly that the fundamental rule was the one stated in paragraph 1.

25. Mr. DADZIE said that the general rule stated in paragraph 1 of article 23, that State debts of the component parts of a successor State would all pass to that State, was a wise one. It provided proper protection for creditors, who would always know that, even if their particular claim was apportioned, under the internal law of the successor State, to a component part of that State that proved unable to pay, primary responsibility for reimbursement would lie with the State itself. He had no difficulty in accepting the article as proposed by the Drafting Committee.

26. Mr. TSURUOKA thought Mr. Ushakov's proposal improved the text submitted by the Drafting Committee. As it stood, paragraph 2 seemed to mean that, despite paragraph 1, the successor State could do what it liked with the State debts of the predecessor States.

27. If the Drafting Committee had in fact intended to make the successor State responsible for the reimbursement of the debts of the predecessor States, did not paragraph 2 mean that paragraph 1 did not rule out the possibility of attributing the whole or any part of the State debts of the predecessor States to

the component parts of the successor State under an agreement between it and the creditor State? He thought that point should be clarified before a final decision was taken on the text of article 23.

28. Mr. FRANCIS was sure that the intention behind article 23 was to protect the interests of creditors no less than those of the component parts of successor States. He hoped that the richer parts of such States would show generosity in the application of paragraph 2 of the article, and would allow a poor country that had incurred large debts before merging with them to bear responsibility for only a part of its liabilities after the date of succession. He believed that the solution to the problem raised by the first part of paragraph 2—if, indeed, there were a problem—lay in the suggestion made by Mr. Ushakov. What Mr. Ushakov had said was, in effect, that the fundamental rule laid down in paragraph 1 of the article stood, and that, subject to that, the component parts of a successor State might make private arrangements for the allocation of the State debt among themselves.

29. Sir Francis VALLAT drew the Commission's attention to the fact that, unlike article 14, article 23 had not been placed in square brackets, which indicated that the Drafting Committee had accepted the text. The main purpose of the article, which was accomplished in paragraph 1, was to lay down as a general rule of international law that, on the uniting of States, the State debt of the predecessor States would pass to the successor State. To have left paragraph 1 in isolation, however, would have been to exclude the possibility of apportionment of the debt among the component parts of the successor State—a situation which, although of no importance in the case of the formation of a unitary State, would not be acceptable in the case of a federation. That explained the presence of paragraph 2, which simply said that it was left to the internal law of the successor State to determine which of its component parts should continue to bear the burden of the debt of the predecessor States. To make the operation of paragraph 2 "subject to paragraph 1", as suggested by Mr. Ushakov, would produce an article that was self-contradictory, for the rule in paragraph 1 was that everything went to the new State. While the drafting of paragraph 2 could no doubt be improved, he was utterly opposed to any amendment such as that proposed by Mr. Ushakov, which went directly against what had been agreed upon by the Drafting Committee.

30. Situations that were quite likely to arise in practice, and for which the Commission must therefore make provision in its articles, included that in which an existing State asked to join a federation while keeping its own State property, and whose request was granted on condition that it retained responsibility for its own State debt. He could see no problem for the creditor in having, in accordance with the internal law of the enlarged federation, to look first for reimbursement to the new member of that entity. Allowance must also be made for arrangements concerning the apportionment of powers, such as those

under which taxing powers were shared between the federal and provincial governments in Canada. The purpose of paragraph 2 was to show that such arrangements were not prohibited by paragraph 1. To turn the article round would be to suggest that they were prohibited, and that was something he was completely unable to accept.

31. Mr. SUCHARITKUL said that paragraph 1 of article 23 laid down the fundamental principle of international law that the debts of the predecessor State passed to the successor State. Paragraph 2, however, dealt with the practical question of the modalities of debt collection. It had little to do with the protection of the creditor, which was already assured by articles 18, 19 and 20. The reference to internal law was paralleled in article 14, paragraph 2, which provided that the allocation of State property should be governed by the internal law of the successor State. There were several instances in which, on the separation of a part or parts of the territory of a State, the allocation of State property and the apportionment of State debts had been governed by the internal law of the successor State. The separation of Singapore from Malaysia was a case in point. In his view, paragraph 2 was clearly drafted, and he had no objection to the phrase "without prejudice to". He believed, however, that an amendment on the lines proposed by Mr. Tsuruoka might meet the point raised by Mr. Ushakov.

32. Mr. ŠAHOVIĆ considered that Mr. Ushakov had been right to contrast the situations dealt with in article 14, concerning State property, and article 23, concerning State debts in cases of uniting of States. It was true that the Commission had expressed the wish that the Drafting Committee should align article 23 with article 14, as far as possible, but the similarity between those two provisions could be only limited. The reasons in favour of the wording of article 14, paragraph 2, were more convincing than those justifying the text of article 23, paragraph 2. In the first case, the Commission had merely stated the principle that the allocation of State property to the successor State or to its component parts was governed by the internal law of the successor State. The rule stated in article 23, paragraph 2, went further. Accordingly, it might be asked what importance should be given to paragraph 2 in relation to paragraph 1. In his opinion, the general rule of international law was stated in paragraph 1; paragraph 2 referred only to the possible allocation of debts among the component parts of the successor State, in accordance with the latter's internal law. It was obvious that the rule of international law must take precedence over the solutions adopted in the internal legal order of the successor State.

33. He would not go so far as to propose that paragraph 2 of the article under consideration should be deleted or placed in square brackets—for it did not appear indispensable from the standpoint of international law; he would suggest, however, that the article should be so drafted as to show clearly that the general rule was stated in paragraph 1. To that end,

paragraph 2 might begin with the words "subject to the provisions of paragraph 1". But a full account should also be given, in the commentary to article 23, of the opinions and doubts expressed during the discussion.

34. Mr. SCHWEBEL said that the inclusion of paragraph 2 was necessary if article 23 were to be a realistic reflection of State practice on the passing of State debts. Paragraph 2 did not derogate from the rule laid down in paragraph 1, but simply provided that paragraph 1 did not disallow the attribution of the State debt to the component parts of the successor State. If the component parts were unable to meet the debt, however, the successor State would remain responsible for it. The Drafting Committee had considered that the article was clear, but the meaning of the article could, of course, be further clarified in the commentary. In his view, the existing draft struck the right balance between two extremes: the original article W and the wording proposed by Mr. Ushakov.

35. Mr. USHAKOV pointed out that the provision in article 20, to the effect that agreements between predecessor and successor States, or between successor States, concerning State debts could not be invoked against a creditor third State, made no mention of internal law. Article 23, paragraph 2, also did not indicate whether the creditor State was bound to accept the internal law of the successor State and, if necessary, apply to the component parts of the successor State for reimbursement. If Liechtenstein and Switzerland united to form a new State in which the former lost all financial autonomy, would the new State be able to decide that Liechtenstein's creditors must apply to Liechtenstein for payment? Moreover, paragraph 2 did not apply only to cases of uniting of States, but also to cases of merging that gave rise to a unitary State. It followed that a unitary State would be free to attribute debts to any municipality, however insolvent, to which creditors would have to apply for payment.

36. It should be made clear that the rule stated in paragraph 1 of article 23 remained valid in all cases. That result could be achieved if paragraph 2 began with the words "subject to paragraph 1" or "without prejudice to paragraph 1". It would also be possible to make the rule in paragraph 2 subject to the consent of the creditor—which would meet the wishes of Mr. Tsuruoka. But that would be a strange solution, since it would be tantamount to requiring creditors to consent to the internal law of the successor State, and it was hard to see how they could object.

37. The rule stated in paragraph 1 should therefore take precedence in all cases: the creditor State should be able to apply to the successor State. Consequently, he had serious reservations about paragraph 2.

38. Mr. FRANCIS understood the intention of the Drafting Committee to have been to provide in paragraph 2 that the component parts of a united State could come to an internal arrangement regarding the allocation of the State debt among themselves. That

rule was not meant to be on the same level as the rule in paragraph 1, but subsidiary to it. If that was indeed the intention, the wording proposed by Mr. Ushakov was to be preferred to the existing drafting.

39. Mr. DÍAZ GONZÁLEZ pointed out that paragraph 1 provided that the State debt of the predecessor State should pass "to the successor State". Thus the successor State was the subject of international law, not its component parts. The articles did not have to regulate the manner in which the debt was attributed to the component parts of the successor State; that was a matter for the internal law of the successor State, and was of no concern to the creditor. In those circumstances, paragraph 2 was pointless and should be deleted.

40. Mr. TSURUOKA thought it was the Commission's task to improve, if need be, the texts of the articles proposed by the Drafting Committee, whether they had been placed in square brackets or not. Article 23 could be improved in two respects. The words "paragraph 1 is without prejudice to" could be interpreted to mean that that provision did not have the legal effect of preventing the attribution referred to in the rest of the sentence, whereas most of the members of the Commission took it to mean that the internal law of the successor State must be in conformity with the principle set out in paragraph 1. It was therefore important to make the meaning clear, for example by beginning paragraph 2 with the words "subject to the provisions of paragraph 1".

41. On reading article 23, paragraph 2, it might also be wondered whether the consent of the creditor State was necessary. If paragraphs 1 and 2 of article 23 were to be considered as being on the same level, it would be necessary to refer to the link that must exist between the provision of the internal law of the successor State and the consent of the creditor State to that provision.

42. Mr. DADZIE said he was quite clear in his own mind that the Drafting Committee had intended to lay down only one rule, namely, the rule set out in paragraph 1. The purpose of paragraph 2 was simply to enable the component parts of the successor State to enter into a domestic arrangement for the attribution of the State debt. However, since that paragraph seemed to raise difficulties, and did not add much to paragraph 1, he supported the proposal to delete it.

43. Mr. CASTAÑEDA said his first impression had been that the intention was to lay down in paragraph 1 a single rule having international legal effect, and to include in paragraph 2 a provision dealing with a purely internal matter. If that were so, the intention should have been made quite clear, possibly by the inclusion, as he had already suggested, of a reference to the internal arrangements of the successor State. If that suggestion was not acceptable, the best solution might perhaps be to delete paragraph 2, since it added nothing to the article, had no legal effect and raised difficulties of interpretation.

44. From some of the comments made, however, it

now appeared that some members believed that the rule in paragraph 2 ought to have some measure of international legal effect. It had been suggested that the creditor State could apply first to the former legal entity and then, if it failed to recover its debt, to the successor State. He was not at all certain whether that was in fact possible, but if it were indeed the intention, then, again, it should be stated clearly in the rule. He therefore suggested the addition of a provision to the effect that the rule could operate only with the consent of the creditor State, since otherwise it would involve a breach of the general principle of law that the subrogation of the debtor necessarily required the consent of the creditor.

45. He also suggested that the opening words of paragraph 2 should be amended to read "nothing in paragraph 1 excludes the possibility of". With those amendments, paragraph 2 would express clearly what most members had in mind.

46. Sir FRANCIS VALLAT thought that the underlying difficulty stemmed from article 18 and from the fact that the word "international", in that article, remained in square brackets. The majority of members believed that the articles should apply not only to a debt owed by one State to another State, but also to a debt of a State to a private creditor. That being so, the addition in paragraph 2 of a reference to agreement between the successor State and the creditor State would be quite inappropriate, since a variety of debts would be involved. If the articles dealt with creditor States only, the situation might be different.

47. While he recognized that paragraph 2 could be improved, he thought it would be unwise to leave paragraph 1 to stand alone. Very often, a component part of a successor State continued to be responsible for servicing a debt of the former State. If that possibility were not provided for in paragraph 2, it would place the private creditor in a very difficult position, for he would not know where to go to collect his debt. Consequently, something on the lines of paragraph 2 was absolutely essential for private creditors, although it did not matter so much in the case of inter-State debts, which virtually fell within the realm of the law of treaties.

48. Article 23, as drafted, showed that the problem was to be approached at two levels, paragraph 1 laying down an international rule, and paragraph 2 recognizing that a different legal situation might obtain under the internal law of the successor State and was not precluded by the terms of paragraph 1.

49. He therefore suggested that paragraph 2 should be retained, with the amendment to the opening phrase proposed by Mr. Tsuruoka, and that a full account of the discussion should be given in the commentary, bearing in mind that the Commission would undoubtedly have to revert to the matter at the second reading.

50. Mr. RIPHAGEN agreed that article 23 sought to make it clear that the problem was to be approached at two levels. Indeed, he had had occasion, at the



previous session,<sup>5</sup> to observe that articles 19 and 20 failed to take account of those two levels. The same remark could be made of article 18.

51. He suggested that article 23 should be approved, with Mr. Tsuruoka's amendment to the opening phrase of paragraph 2; that a full account of the discussion should be given in the commentary; and that the Commission should reconsider the article on second reading in conjunction with articles 18, 19 and 20.

52. Mr. USHAKOV, referring to the comments made by Sir Francis Vallat, wondered whether the Commission intended to allow the successor State to require creditor States to apply not to that State, but to one or other of its component parts, in accordance with its internal law. If, after contracting a loan from a foreign private bank, the Soviet Union united with Poland and the successor State thus formed decided that that bank must henceforth apply to Poland for repayment, that decision would be in accordance with article 23, paragraph 2. Did the Commission really intend to permit such a situation?

*The meeting rose at 6.05 p.m.*

<sup>5</sup> *Yearbook... 1977*, vol. I, p. 287, 1471st meeting, paras. 1 and 2.

## 1515th MEETING

*Tuesday, 11 July 1978, at 10.10 a.m.*

*Chairman*: Mr. José SETTE CÂMARA

*Members present*: Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

**Succession of States in respect of matters other than treaties (continued) (A/CN.4/301 and Add.1,<sup>1</sup> A/CN.4/313, A/CN.4/L.272)**

[Item 3 of the agenda]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE (continued)

ARTICLES 23, 24 AND 25 (continued)

ARTICLE 23 (Uniting of States)<sup>2</sup> (concluded)

1. Mr. QUENTIN-BAXTER agreed that the difficulties with article 23, as indeed with other articles,

stemmed from the basic definition of "State debt" given in article 18.<sup>3</sup> He also agreed that paragraph 2 was important, particularly if deemed to cover both private and State debts. He would not, however, go so far as to suggest that the exclusion of private debts would remove the difficulty and that paragraph 2 could therefore be deleted.

2. At the previous meeting, Sir Francis Vallat had very rightly stressed that the more the Commission endeavoured to divorce the articles from internal law, the closer it came to entering the sphere of the law of succession to treaties. In the event of a succession of States, for example, a bilateral treaty by which one government contracted with another for a loan would lapse unless both parties chose to keep it alive. Thus, if the subject-matter of the articles were anchored in the law of treaties, the rule would be exactly the opposite of that now stated in paragraph 1: the debt would not be repaid, since the treaty securing it would have disappeared. That was a conclusion that he was quite unable to accept. Again, an important exception was made in the law of treaties for dispositive or localized treaties. If the article treated State debts as though they were divorced from internal law, was that to be taken as a tacit assumption that a new kind of localized or dispositive treaty could be created? If so, it was unknown to customary international law, and would conflict with the rules the Commission had drawn up in regard to succession to treaties.

3. Those considerations led him to the conclusion that, in order to secure the rights of predecessor, successor and creditor States, it was necessary to return to the point of departure and to anchor the provisions in internal law. After all, it was taken for granted that State property existed only because its existence was recognized within the ambit of a particular internal law. If there were no private rights or interests in land under the law of a State, it was clearly impossible for aliens or others to have such rights or interests, for there was nothing to which the international duty of State responsibility could attach. The same applied to the law of copyright, for example. The law of succession attached only to property that existed and the basic rule was that a succession of States did not of itself disturb the continuation of the internal law. Thus the new sovereign, like the old, was accountable to aliens, under the law of State responsibility, for the rights that the law of the area gave them.

4. Consequently, debts could not be viewed in a context separate from that of property. Indeed, in a complicated case of succession, debts in the hands of one successor State might well be property in the hands of another, and the notion that one transaction was firmly anchored in internal law and the other divorced from that law was, in his view, entirely erroneous. The main purpose of the articles was to provide that an event that gave rise to a succession of

<sup>1</sup> *Yearbook... 1977*, vol. II (Part One), p. 45.

<sup>2</sup> For text, see 1514th meeting, para. 8.

<sup>3</sup> See 1514th meeting, foot-note 2.

States should not of itself deprive a creditor of any existing right. But it would be wholly artificial to suggest—taking the example cited earlier of a merger between Switzerland and Liechtenstein—that the property or debts in the hands of Liechtenstein became, by virtue of a rule of international law, the debts of the new federation of Switzerland and Liechtenstein. That new federation would be responsible for ensuring that the local law continued and, if the new sovereign changed that law, it would be answerable under the law of State responsibility.

5. For those reasons, he had serious misgivings about allowing paragraph 1 of article 23 to stand alone. Both paragraphs should be retained in order to reflect, on the one hand, the international law element, and on the other, the internal law element. He would have no objection to the change proposed by Mr. Tsuruoka,<sup>4</sup> but considered that, as drafted, the article provided a reasonable balance, bearing in mind that the Commission had thus far failed to agree on a definition of the subject-matter of the articles.

6. A further point of direct relevance to the subject under discussion concerned the position of creditors, which was particularly important in view of the recognized need for a safe climate of investment throughout the world. Such factors as the doctrine of national sovereignty over natural resources, and the inhibitions felt by many States and international lawyers regarding the existing state of the law of State responsibility towards aliens, reflected the conviction that debt obligations should not be the means of depriving States of their sovereignty. The ultimate aim of international law was not to establish a law of usury. The sovereignty of States, and their exercise of that sovereignty in deciding to unify or separate, should not be made too rigidly subject to a rule governing repayment of debts. The articles could provide the creditor State with greater protection and could lay down that a change of sovereignty was not in itself an excuse for failure to honour debts; but they could not go so far as to say that the duty owed was higher than that owed by States under the ordinary doctrine of State responsibility. It was a different duty—a duty not to affect adversely the creditor under internal law and not to use the power of the sovereign in ways that defeated the legitimate interests of the creditor State.

7. Mr. TSURUOKA proposed that paragraph 2 of article 23 should be replaced by the following text:

“2. Nothing in the provision of paragraph 1 excludes the possibility of attributing, with the consent of the creditors concerned, the whole or any part of the State debt of the predecessor States to the component parts of the successor State in accordance with the internal law of the successor State.”

8. He pointed out that the words “with the consent of the creditors concerned” referred both to creditor States and to other creditors, but without expressly

saying so, because the Commission had not yet settled the question whether creditors other than States should be included within the scope of the articles.

9. Mr. SCHWEBEL (Chairman of the Drafting Committee), summing up the discussion, noted that paragraph 1 was generally acceptable to the Commission. One view expressed in regard to paragraph 2 was that it was subordinate to paragraph 1 and that that fact should be expressly stated in the article; alternatively, since the paragraph was not of fundamental importance, being concerned solely with a matter of internal law, it could be deleted.

10. A contrary view was that paragraph 2 was necessary, and that it should be included in order to take account of international reality and of the position of creditors, broadly construed. To delete that paragraph or reduce its force would only obscure the need to cast the articles in such a way that they covered debts owed by predecessor States to a wide range of creditors. The advocates of that approach believed that, despite certain imperfections, article 23 struck a fair balance between the Special Rapporteur's initial proposal and the views of those who believed that paragraph 2 should be redrafted or deleted.

11. In his view, Mr. Tsuruoka's latest proposal would make it even clearer that paragraph 1 laid down the main rule.

12. Mr. USHAKOV supported Mr. Tsuruoka's proposal. Since the possibility of attributing the whole or any part of the State debts of the predecessor States to the component parts of the successor State was contrary to the rule laid down in paragraph 1, it must be stipulated that there could be no derogation from that rule without the consent of the creditors concerned.

13. Mr. CASTAÑEDA, supporting Mr. Tsuruoka's proposal, said that, for the reasons he had already explained, it was essential to include in paragraph 2 a reference to the consent of the creditors. That would simply be confirming a recognized principle of all civil law, namely, that a debt could not be assigned without the agreement of the creditor.

14. Sir Francis VALLAT said that the reference in Mr. Tsuruoka's proposal to the consent of the creditors would seem to enable them to veto the exercise of the sovereignty of a State in deciding how a debt should be met. In his view, that was wrong in principle. However, to help the Commission out of the impasse it had apparently reached, he was prepared to acquiesce in the proposal, provided that the inappropriateness of the reference to the consent of the creditors were made absolutely clear in the Commission's report.

15. Mr. VEROSTA accepted Mr. Tsuruoka's proposal.

16. Mr. ŠAHOVIĆ agreed with Sir Francis Vallat that, by stressing the consent of the creditors, Mr. Tsuruoka's proposal radically changed the sense of article 23 and departed from the principle laid down

<sup>4</sup> *Ibid.*, paras. 40 and 41.

in paragraph 2 of article 14. He was therefore opposed to the words “with the consent of the creditors concerned”, although he found the remainder of the amendment acceptable.

17. In his opinion, article 20 was not as far removed from article 23 as some members of the Commission thought. Admittedly, article 20 did not deal directly with the question covered by article 23, but it was placed in section 1, containing general provisions, and he saw it as a general safeguard clause intended to guarantee the creditor's basic rights. Reference could therefore be made to article 20 to resolve the problem raised by article 23.

18. Mr. NJENGA, endorsing Sir Francis Vallat's remarks, said that a creditor State was interested only in being paid and was in no way concerned with the modalities of payment, which were a matter for the successor State alone. He therefore saw no useful purpose in introducing the requirement of consent of the creditor State in a matter that came under the internal law of the successor State. To do so would lead to direct interference in the domestic affairs of that State. In the circumstances, he could agree to the inclusion of such a reference in the article only if it were placed in square brackets.

19. Mr. FRANCIS was prepared to accept Mr. Tsuruoka's proposal in order to resolve the Commission's difficulty, although he shared the doubts expressed about the phrase “with the consent of the creditors concerned”. At the same time, he wondered whether, in the specific case in which two predecessor States disappeared and a new State was formed, the creditor in fact had any choice in the matter. His own view was that the creditor's consent would not affect the discretion of the component parts to regulate the situation under the internal law of the successor State.

20. Mr. QUENTIN-BAXTER associated himself with the remarks made by Sir Francis Vallat and subsequent speakers.

21. Mr. RIPHAGEN agreed entirely that it would be wrong to include in the article a reference to the consent of the creditors. The protection of creditors was in any event a general consideration that applied not only to article 23, but to the articles as a whole. There was also the problem of the practical impossibility of obtaining the consent of all the creditors, particularly if private creditors were to be included.

22. He continued to think that the two levels at which the problem of succession to State debts should be regulated, and the relationship between those levels, was not made sufficiently clear in the draft articles as a whole, and in articles 18, 19 and 20 in particular.

23. Since it was impossible at that stage to resolve the problem by laying down a special rule that was in fact based on an idea applying to the draft as a whole, he thought the best solution for the time being would be to place the article in square brackets.

24. Mr. SUCHARITKUL, endorsing the remarks made by Mr. Njenga, Mr. Quentin Baxter, Mr. Riphagen and Sir Francis Vallat, expressed the view that it would only add to the burden on the debtor State, and particularly on the successor State, if further protection were provided for creditors.

25. Mr. SCHWEBEL (Chairman of the Drafting Committee), speaking as a member of the Commission, found Mr. Tsuruoka's proposal constructive, but shared the doubts expressed about the reference to the consent of the creditors, especially as it was possible to envisage circumstances in which it would be practically impossible to envisage circumstances in which it would be practically impossible to obtain the consent of all the creditors or even to notify them. He was prepared to accept the proposal, however, if it were thought that wider agreement could be reached on that basis, but he considered that the reference in question should be placed in square brackets.

26. An alternative solution was that suggested by Mr. Riphagen, namely, to place the whole article in square brackets, although he himself would be more inclined to place only paragraph 2 in square brackets, since there had been no difference of opinion on paragraph 1.

27. As a further possible solution, the Commission might wish to consider retaining paragraph 1 as it stood and drafting paragraph 2 in the following terms:

“Without prejudice to the foregoing provision, the successor State may, in accordance with its internal law, attribute the whole or any part of the State debt of the predecessor States to the component parts of the successor State.”

That proposal, which he was not submitting formally at that stage, would make it clear that paragraph 2 could not weaken the force of the rule laid down in paragraph 1.

28. Mr. DADZIE, agreeing with Sir Francis Vallat, was unable to accept the part of Mr. Tsuruoka's proposal which, in his view, would cause the creditor State to interfere in the internal affairs of the successor State. The creditor State was interested only in being paid, and was not concerned with the arrangements made by the successor State in that connexion. It should, however, have knowledge of those arrangements, and he would therefore propose that the phrase “with the consent of the creditors concerned” might be amended to read “with the knowledge of the creditors concerned”.

29. Mr. USHAKOV accepted the amendment proposed by Mr. Schwebel, which was very close to the amendment he had himself submitted at the previous meeting,<sup>5</sup> but he was still opposed to the Drafting Committee's text, because he did not agree that the successor State could evade its international obligations by invoking its internal law.

<sup>5</sup> *Ibid.*, para. 24.

30. Mr. CALLE y CALLE pointed out that article 23 dealt with a uniting of States following the disappearance of the predecessor States, leaving a single subject of international law. A third creditor State was in no way involved in that process, but was merely confronted with the fact that the former debtor State had been replaced by a single successor State. Furthermore, the effect of paragraph 2, if read without the opening phrase, was that the attribution of the State debt to the component parts of the successor State—like the allocation of State property under paragraph 2 of article 14—would be governed by the internal law of the successor State. Paragraph 2 was not concerned with the protection of a third creditor State or of a private creditor, but with the protection of the successor State. To that end, it provided that the manner in which the successor State attributed the burden of its debts lay exclusively within its own competence. He therefore agreed entirely that a creditor State had no say whatsoever in the matter, and that the successor State, being a single subject of international law, could make its own internal administrative arrangements. Nor, for the same reason, could there be any question of an agreement between the predecessor States and the successor State.

31. He would suggest, however, that the deletion of the opening words of paragraph 2 might make it clear that the attribution of the State debt to the component parts of the successor State was to be governed by the internal law of that State.

32. Mr. CASTEÑEDA said that, to illustrate his view that the consent of creditors to the assignment of a debt was essential, he would take as an example the case of a debt contracted, say, by Switzerland to the United Kingdom, the latter being the creditor State. Assuming that Switzerland and Liechtenstein then merged to form a single State, Liechtenstein becoming a Swiss canton, and the two predecessor States reached agreement that the Swiss debt should pass, under the internal law of the successor State, to the new canton of Liechtenstein, he did not think that the interests of the United Kingdom would be sufficiently protected, or, indeed, that it could be legally obliged to accept that its debtor was no longer Switzerland, but the canton of Liechtenstein. It had been said that the main point was that the debt should be paid, not who paid it. He could not agree with that view, since the financial capacity of the canton of Liechtenstein could hardly be equated with that of Switzerland.

33. That was why he maintained, in accordance with the recognized principle of law in the matter, that a debt could not be assigned without the consent of the creditor, and why he considered that a reference to the requirement of consent should be included in article 23 to clarify the intention, failing which the article would be inoperative. If the intention of paragraph 1 was that the successor State should in any event be responsible for the debt, the paragraph would be acceptable to him, but that intention was not clear from the text. He was quite unable to agree that, if a debt passed by virtue of the inter-

nal law of the new State, that would *ipso jure* impose an obligation on the creditor State. Nor could he agree that the requirement of consent by the creditor State was tantamount to interference in the domestic affairs of the new State or to a right of veto by the creditor.

34. Consequently, of the various formulae proposed, he would prefer Mr. Tsuruoka's. Alternatively, he was prepared to accept Mr. Schwebel's proposal, which provided a closer link between the two paragraphs and established the primacy of paragraph 1.

35. Mr. TSURUOKA said he had proposed an amendment to paragraph 2 because some members of the Commission thought that that paragraph did not take sufficient account of the legitimate interests of State or other creditors. Other members of the Commission held that the interests of creditors were already adequately protected by the rule in article 20. But article 20 laid down a general rule, whereas article 23 dealt with a special case, and in practice the special rule prevailed over the general rule. The rule laid down in article 23, paragraph 2, might thus be misinterpreted, for it might be thought that, from the standpoint of international law, the successor State was free, as a sovereign State, to deal with the debts of the predecessor States as it saw fit.

36. The phrase "with the consent of the creditors concerned" was very vague, because the Commission had not yet decided whether creditors other than States should be included within the sphere of application of the articles. Sir Francis Vallat and Mr. Ripphagen had said that the reference to consent was tantamount to giving a right of veto to creditors. But creditors would have their say only in regard to loans they had granted themselves; they would have no right of veto in regard to loans contracted with other creditors.

37. He believed it was preferable, at that stage, not to deal with the question of the definition of State debt. As Mr. Njenga had suggested, therefore, the Commission could place the words "with the consent of the creditors concerned", or only the words "creditors concerned", in square brackets, as it had in the case of the word "international" in article 18.

38. Mr. REUTER observed that the Commission was seeking a tolerable ambiguity, which was already created by article 18, in which the word "international" had been placed in square brackets, as Mr. Tsuruoka had noted, and by article 23, paragraph 1, in which the words "pass to" could be interpreted in several ways.

39. From the point of view of the interests at stake, it was not always easy to determine where those interests lay. For example, although a creditor having an international claim against a State might, in some cases, think that its claims would no longer have the same value if it became a claim against a province, in other cases it might consider that to be an advantage, since its courts would no longer be bound by the rule of immunity of the foreign State and, if the province concerned was a prosperous one that valued

its international credit, it would pay more easily than a State. It was therefore impossible to know who would benefit from the rule stated in article 23, paragraph 2. He was, however, prepared to accept the ambiguity proposed by Mr. Tsuruoka.

40. Article 23 seemed to him to present a further ambiguity, to which Mr. Calle y Calle had drawn attention by referring to “the burden” of the debt. For a clear distinction must be drawn between the obligation itself and the ultimate burden of the debt. It might be considered that the words “pass to”, in paragraph 1, referred to the obligation, and that paragraph 2 referred only to the ultimate burden of the debt. But if that were so there was no problem, for it would be enough to say

“Paragraph 1 is without prejudice to the attribution of the whole or any part of the *ultimate burden* of the State debt of the predecessor States to the component parts of the successor State in accordance with the internal law of the successor State”.

That would amount to saying that the financial arrangement between the successor State and its component parts was a purely internal matter and that, as to the obligation, the rule stated in paragraph 1 remained unchanged. If that was really what the Commission meant, he would willingly accept the amendment proposed by Mr. Tsuruoka. But he was not sure that article 23 applied only to international debts, since the Commission had placed the word “international” in square brackets in article 18, nor was he sure where the interests of the creditors lay, since it was not always to their advantage to maintain an international claim by one State against another.

41. Mr. YANKOV noted that article 23 had given rise to different opinions not only as to interpretation, but also as to substance, and he did not think that its defects could be remedied even by a drastic alteration of the text. His first impression had been that paragraph 1 laid down a general rule concerning the international responsibility of the successor State to meet the obligations that had previously existed with respect to the creditor State, whereas paragraph 2 provided, through an option available under the internal law of the successor State, for the recovery of debts that had passed from the predecessor States to the successor State. He wished to ask Mr. Schwebel to elaborate further on his proposal, since that might provide a way out of the Commission's difficulties regarding the nature of the debt and the subject of law involved.

42. Sir Francis VALLAT, referring to Mr. Castañeda's remarks, said that if a State debt were created between the United Kingdom and Liechtenstein, the terms and conditions of that debt would undoubtedly be included in a treaty, so that the matter would be governed by the law of succession in respect of treaties. Hence he did not think that that example applied to the case in point. The loan, however, would probably be made by a bank or by private bond holders. If the latter, it was likely that they would arrange for the Liechtenstein authorities to pay the interest

and instalments of capital into bank accounts in Liechtenstein. It was precisely for that reason that paragraph 2 was so important: the chances were that the bond holders would infinitely prefer to continue with the existing arrangements rather than be compelled to make a fresh application to the Swiss Government, which would be the effect of paragraph 1.

43. One thing was clear from the discussion, namely, the need for paragraph 2. The drafting could, of course, be improved, but the paragraph pointed in the right direction. It mattered little which formulation was finally adopted, provided that the Commission's discussion was adequately reflected in the report.

44. Mr. ŠAHOVIĆ agreed with Mr. Tankov that Mr. Schwebel's proposal expressed the view of the majority of the members of the Commission, namely, that paragraph 1 stated the basic rule. If that proposal were made formally, it would certainly be approved by the Commission. If it were not, he could nevertheless accept article 23 without square brackets, as submitted by the Drafting Committee, provided that the situation were explained in the commentary and the proposed amendments were cited therein.

45. Mr. SCHWEBEL (Chairman of the Drafting Committee), speaking as a member of the Commission, said that, in response to the comments of various members of the Commission, he wished formally to introduce his proposal for article 23, which read:

“Article 23. *Uniting of States*

“1. When two or more States unite and thus form a successor State, the State debt of the predecessor States shall pass to the successor State.

“2. Without prejudice to the foregoing provision, the successor State may, in accordance with its internal law, attribute the whole or any part of the State debt of the predecessor States to the component parts of the successor State.”

Paragraph 1 was identical with the corresponding paragraph of the Drafting Committee's article and stated what was intended to be the paramount rule. Paragraph 2 reproduced the essence of the corresponding paragraph of the Drafting Committee's article. It did not suggest that the action it mentioned was subject to the paramount rule, but showed that such action could not prejudice the application of that rule.

46. If the Commission found the text he proposed unacceptable, he would suggest that it adopt the Drafting Committee's text in square brackets and include in the commentary the amendments proposed by Mr. Tsuruoka, Mr. Dadzie and himself, together with an account of the discussion thereon.

47. Mr. TSURUOKA was prepared to accept the text proposed by Mr. Schwebel, but would like the words “without prejudice” to be replaced by the word “subject”. The text nevertheless called for clarification in two respects. First, once the debts had been attributed, in whole or in part, to the component parts of the successor State, must the creditor

State consider that the ultimate burden of the debt rested on the successor State, or on its component parts? Secondly, was not the successor State free to attribute the debts not only to its component parts but also to municipalities, banks or other institutions?

48. Mr. SCHWEBEL (Chairman of the Drafting Committee), speaking as a member of the Commission, replied that he would prefer to retain the phrase "Without prejudice to", which showed that the application of paragraph 2 would leave the paramount rule stated in paragraph 1 unaffected. With regard to the operation of the article as a whole, he presumed that, if a successor State arranged for one or more of its component parts to service a debt, it would naturally be to that part or parts that a creditor—be it a State, an international organization or a private bond holder—would look first for repayment. But a creditor, of whatever kind, would most definitely be entitled to look to the successor State as the ultimate obliged party, should the component part concerned fail at any juncture to meet its obligation.

49. He did not feel competent to answer definitively Mr. Tsuruoka's second question, concerning the operation of paragraph 2 of his proposal, but he thought it unlikely that a successor State would actually attribute its debt to a bank; it would be more likely to appoint a bank as an agent to handle reimbursement. The type of debts with which the article was concerned were those contracted by territories that had once been States. He presumed that, in the event of succession, such debts would, in the first instance, either continue to be the responsibility of the territories that had contracted them, or be assumed by the successor State.

50. Mr. VEROSTA pointed out that, according to article 19, a succession of States entailed the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as passed to the successor State; thus there was novation of those obligations. In his opinion, article 23, paragraph 1, must be interpreted in accordance with article 19, and he would therefore like to know whether paragraph 2 of article 23 constituted an exception to paragraph 1, and also to article 19. Legally, the situation could be seen in two ways. It could be held, contrary to article 19, that Liechtenstein's obligation would continue to exist if it united with Switzerland; but it could also be considered that, after the novation of the obligation, the new State would decide to reassign the debt to Liechtenstein or to make it chargeable to a Swiss canton.

51. Mr. SCHWEBEL (Chairman of the Drafting Committee) was not at all sure that he, rather than the Special Rapporteur, could give the explanations Mr. Verosta had requested. In his estimation, however, article 19 and article 23, paragraph 1, were entirely compatible. Although article 19 was perhaps more broadly cast, both provisions set out the principle that the successor State was responsible for the debts of the predecessor States. The text he proposed

for article 23, paragraph 2, merely reflected existing practice in regard to State debt: when a federal State succeeded two or more independent States, it was not uncommon for the debt of the component parts of the new State to continue, at least initially, to be the responsibility of those component parts. None the less, the paramount responsibility for such debt lay with the successor State, and Mr. Verosta had therefore been right to draw attention to article 19, which emphasized that fact.

52. Mr. USHAKOV suggested that, since the opening part of the text proposed by Mr. Schwebel for article 23, paragraph 2, contained the words "the successor State", the last eight words of that paragraph might be replaced by the words "to its component parts".

53. Sir Francis VALLAT said that, inasmuch as it emphasized the extinction of the debt of the component parts of the successor State, article 19 clearly showed the need for a provision such as that proposed for article 23, paragraph 2.

54. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to approve article 23 as proposed by Mr. Schwebel and amended by Mr. Ushakov.

*It was so agreed.*

ARTICLE 24<sup>6</sup> (Separation of part or parts of the territory of a State)

55. The CHAIRMAN read out article 24 as adopted by the Drafting Committee:

*Article 24. Separation of part or parts of the territory of a State*

1. When a part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account all relevant factors.

2. The provisions of paragraph 1 apply when a part of the territory of a State separates from that State and unites with another State.

56. Mr. DÍAZ GONZÁLEZ suggested that, at the end of paragraph 1, the word "factors" should be replaced by the word "circumstances", so as to adhere as closely as possible to the wording used by the International Court of Justice in setting out, in its judgment in the *North Sea Continental Shelf Cases*,<sup>7</sup> the equitable considerations applicable to the delimitation.

57. Mr. USHAKOV could accept article 24 and was in favour of the drafting amendment proposed by Mr. Díaz González.

58. The links between that article and article 20 should, however, be explained in the commentary. There were two salient elements in paragraph 1 of ar-

<sup>6</sup> For consideration of the text initially submitted by the Special Rapporteur, see 1501st meeting, paras. 33-44, and 1502nd meeting, paras. 10-43.

<sup>7</sup> *I.C.J. Reports 1969*, p. 53.

article 24: “an equitable proportion” of the State debt of the predecessor State passed to the successor State unless the predecessor State and the successor State “otherwise agree”. If the debt passed in an equitable proportion, it would seem that all the creditors were required to agree to the way in which it had been allocated. But if the predecessor State and the successor State agreed otherwise, the creditors could oppose the arrangement, in accordance with article 20, paragraph 2, which provided that an agreement between predecessor and successor States concerning the passing of the debts could not, in principle, be invoked against a third creditor. By virtue of that provision, a perfectly valid international agreement by which the predecessor and successor States derogated from the principle of equitable distribution could thus be rejected by the creditor.

59. In his opinion, the provision in article 20, paragraph 2, was not justified, whereas the rule stated in article 24, paragraph 1, was correct. Indeed, it was useless on the one hand to allow the predecessor State and the successor State to conclude an agreement derogating from the principle of equitable proportion, and on the other hand to allow the creditor State to act contrary to that rule of international law. The rule stated in article 24, paragraph 1, should not be made subject to the creditor’s veto. It was in the commentary to article 24 that the relationship between article 20 and article 24 should be explained. Moreover, article 20, which had been adopted on first reading, might subsequently be amended.

60. Mr. REUTER shared the views expressed by Mr. Ushakov. He wished to stress the distinction that should be made between the obligation itself and the ultimate burden of the debt. As far as the obligation was concerned, an equitable proportion of the debt passed to the successor State. Hence the clause “unless the predecessor State and the successor State otherwise agree” was valid only if it applied to the ultimate burden of the debt. The international obligation must be specified in the light of article 19, which clearly defined the notion of the passing of the debt. He saw no other solution than to distinguish between the obligation, which concerned the creditors, and the ultimate burden of the debt, which concerned the personal relations between the predecessor State and the successor State.

61. Mr. SUCHARITKUL said that article 24 was acceptable, but stressed the need expressly to mention capacity to pay, as a relevant factor in the equitable distribution of debts between the predecessor State and the successor State. Tax-paying capacity, or capacity to pay, potential or real, was of primary importance for the protection of the interests of creditor States, for it was possible that the debtors, particularly if they were less developed States, might ask the creditors to cancel their debts or defer servicing.

62. Sir Francis VALLAT, without rejecting article 24, because that would be impracticable at the current stage, had very serious doubts about the article as it stood. To express those doubts in a single

word, the article was unworkable. He had already referred, like Mr. Reuter, to the need to distinguish clearly between the obligation or the servicing of the debt and the ultimate responsibility for the burden. But there was also the fact that it was totally impractical to provide that an “equitable proportion” of the State debt of the predecessor State should pass to the successor State, since that might entail the splitting of certain debts. Who would determine what constituted “an equitable proportion” of the State debt if the predecessor and successor States were unable to agree on that point themselves? Still further problems arose if the article were read in conjunction with article 19: when would the “equitable proportion” pass to the successor State, and how would it be determined? The process of deciding what was equitable might possibly take so long that an elderly private creditor would die before it was completed and never be reimbursed. The Commission ought to take that situation into account and find some solution whereby the servicing of the debt would continue even while the size of the “equitable proportion” remained in dispute.

63. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to approve article 24 as proposed by the Drafting Committee and amended by Mr. Díaz González, the reservations made by members being recorded in the commentary.

*It was so agreed.*

ARTICLE 25<sup>8</sup> (Dissolution of a State)

64. The CHAIRMAN read out article 25 as proposed by the Drafting Committee:

*Article 25. Dissolution of a State*

When a predecessor State dissolves and disappears and the parts of its territory form two or more States, and unless the successor States otherwise agree, an equitable proportion of the State debt of the predecessor State shall pass to each successor State, taking into account all relevant factors.

65. Mr. DÍAZ GONZÁLEZ said that the word “predecessor” should be deleted from the opening part of the article, since a State did not become a predecessor State until after it had dissolved and disappeared. As in article 24, paragraph 1, the words “all relevant factors” should be replaced by the words “all relevant circumstances”.

66. Mr. USHAKOV was quite prepared to accept article 25, but two questions arose. First, he noted that the words “and unless the successor States otherwise agree”, in that article, clearly referred to all the successor States. Those words corresponded to the words “and unless the predecessor State and the successor State otherwise agree” in article 24, paragraph 1. In the latter case, however, several successor States might in fact be involved if several parts of the territory of a State separated from that State and formed

<sup>8</sup> For consideration of the text initially submitted by the Special Rapporteur, see 1503rd and 1504th meetings, and 1505th meeting, paras. 1-12.

several States, and if those successor States "otherwise agreed" with the predecessor State.

67. If then, under article 25, all the successor States could agree on a certain distribution of debts, could not some of them subsequently agree on a further distribution of debts among themselves? In his opinion, there was no reason why they should not, and article 25 should therefore be supplemented by a new paragraph on the following lines:

"The provisions of paragraph 1 are without prejudice to the redistribution by the successor States concerned of their respective shares of the State debt of the predecessor State."

68. The two questions he had raised should be reflected in the commentary to article 25 and discussed on second reading.

69. Mr. TABIBI had no difficulty in accepting the article as proposed by the Drafting Committee, since it was a great improvement on the text originally submitted by the Special Rapporteur. He was particularly gratified by the reference to "all relevant factors" (or "all relevant circumstances"). It was most important, however, that the Commission should accompany article 25, and also articles 23 and 24, by a carefully written commentary showing how those provisions might be applied in practice. The discussion on article 23 had shown that many points required elaboration, while the difficulties that might be caused by the references in articles 24 and 25 to "an equitable proportion" of the State debt could be judged from the financial problems that had followed the partition of India and, later, the partition of Pakistan, some of which were still unresolved.

70. Mr. REUTER pointed out that he had accepted articles 23 and 24, and could accept article 25, only on condition that their provisions were interpreted in the light of article 20. Agreements between predecessor and successor States could not be invoked against creditors unless the conditions laid down in article 20 were met.

71. In article 25, the words "and unless the successor States otherwise agree" should be replaced by the words "and unless some successor States otherwise agree", since such an agreement could relate only to the ultimate burden of the debt, not to the obligation itself. With regard to the obligation, an equitable proportion of the debt of the predecessor State must pass to each successor State. There might, of course, be disagreement between successor States; although each successor State acknowledged that it was responsible for a certain share of the debt, it would unilaterally determine that share itself, and it could hardly be expected that the sum of all the shares thus determined would be equal to the whole. In general, States did not have a very generous conception of equity and were quick to invoke all manner of relevant circumstances, whereas creditors were usually satisfied with what they could obtain on the basis of the successor States' sense of equity. If the Commission did not lay down the rule of equitable distribution, creditors might receive nothing at all.

As to the settlements that the successor States might arrange among themselves, they could be made by virtue of article 20, if the creditors accepted them, or by virtue of the principle of equitable distribution, if the creditors acknowledged that the successor States had made an equitable distribution. It should therefore be made clear, if not in the text of article 25, at least in the commentary, that article 20 remained applicable.

*The meeting rose at 1.10 p.m.*

## 1516th MEETING

*Wednesday, 12 July 1978, at 10.10 a.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

**Succession of States in respect of matters other than treaties (concluded) (A/CN.4/301 and Add.1,<sup>1</sup> A/CN.4/313, A/CN.4/L.272)**

[Item 3 of the agenda]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE (concluded)

ARTICLES 23, 24 AND 25 (concluded)

ARTICLE 25 (Dissolution of a State)<sup>2</sup> (concluded)

1. Sir Francis VALLAT expressed agreement with the comments made on the article at the previous meeting by Mr. Tabibi and Mr. Reuter.

2. Mr. FRANCIS believed that the texts of articles 24<sup>3</sup> and 25 now before the Commission represented the maximum degree of consensus that could be achieved in the Drafting Committee, and he was therefore prepared to accept them as they stood. Like Mr. Sucharitkul, however, he would have preferred to see references in both articles not merely to equitable considerations, but also, as in article 21,<sup>4</sup> to the "property, rights and interests" which passed to the successor State. He would also have preferred article 25 to contain a reference to the "contributory capacity" or, failing that, the "debt-servicing capacity" of each successor State.

3. The CHAIRMAN said that, if there were no objections, he would take it that the Commission de-

<sup>1</sup> *Yearbook... 1977*, vol. II (Part One), p. 45.

<sup>2</sup> For text, see 1515th meeting, para. 64.

<sup>3</sup> *Ibid.*, para. 55.

<sup>4</sup> See 1514th meeting, foot-note 2.



cided to approve article 25 as proposed by the Drafting Committee and amended by Mr. Díaz González,<sup>5</sup> on the understanding that the Commission's discussion on the article would be summarized in the commentary.

*It was so agreed.*

**State responsibility (continued)\***  
(A/CN.4/307 and Add.1 and 2 and Add.1/Corr.1)  
[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR (continued)\*\*

ARTICLE 25 (Complicity of a State in the internationally wrongful act of another State)

4. The CHAIRMAN invited the Special Rapporteur to introduce chapter IV of his draft articles, entitled "Implication of a State in the internationally wrongful act of another State" and in particular article 25, which was set out in the seventh report on State responsibility (A/CN.4/307 and Add.1 and 2 and Add.2/Corr.1) and which read:

*Article 25. Complicity of a State in the internationally wrongful act of another State*

The fact that a State renders assistance to another State by its conduct in order to enable or help that State to commit an international offence against a third State, constitutes an internationally wrongful act of the State, which thus becomes an accessory to the commission of the offence and incurs international responsibility thereby, even if the conduct in question would not otherwise be internationally wrongful.

5. Mr. AGO (Special Rapporteur) reminded the Commission that chapters II and III of the draft articles on State responsibility dealt, respectively, with the subjective and objective elements of an internationally wrongful act. There remained to be considered, in chapter IV, the problems raised by the implication of a State in the internationally wrongful act of another State. The Sixth Committee of the General Assembly had on several occasions stressed the need to study those problems and the International Law Commission had undertaken to do so.

6. Cases of implication of a State in the internationally wrongful act of another State could be divided into two categories. First, the internationally wrongful act of a State, which was attributable to it and engaged its international responsibility, might have been committed with the participation of another State, in the form of aid or assistance in its commission. Secondly, there might be a relationship between two States whose existence led to one of those States being made to answer for an internationally wrongful act of the other. In other words, the State that had

committed the wrongful act and the State that answered for it were dissociated. That was the case of responsibility for the act of another, or vicarious responsibility. The two sections of chapter IV examined those two cases successively.

7. The first case did not cover any and every kind of implication of a State in the internationally wrongful act of another State, but only its participation in that act in the form of aid or assistance in the commission of the act by the other State. Cases of that kind were common, and they were often of great political importance. For a proper understanding of the situation under consideration, a number of other situations should be eliminated. In connexion with the attribution of certain acts to a State, the Commission had considered, in draft article 9,<sup>6</sup> the case in which an organ of a State was placed at the disposal of another State. If an organ of a State had not really been placed at the disposal of another State, but was acting in the exercise of the prerogatives of the governmental authority of the State to which it belonged, any breach of an international obligation by that organ constituted an internationally wrongful act of the State to which it belonged. On the other hand, if an organ of a State had been placed at the disposal of another State in such a way that it was acting under the control and in the exercise of the prerogatives of the governmental authority of that other State, any internationally wrongful act it might commit constituted an act of the State at whose disposal it was placed. In such a case, there was clearly no participation of one State in the internationally wrongful act of another. If State A placed one of its organs at the disposal of State B, any act of that organ was an act of State B, without any participation by State A. The situation might appear to become more complicated if State B committed an internationally wrongful act through an action of one of its own organs, in which an organ placed at its disposal by State A participated; but in reality there would then be collaboration of two organs, both acting in the exercise of the prerogatives of the governmental authority of State B, and there would still be no participation by State A.

8. Another situation that should be eliminated was that of conduct in the territory of one State by an organ of another State acting as such, which was detrimental to a foreign State or to its nationals. For as article 12 showed, such conduct was not an act of the "territorial" State and did not constitute an internationally wrongful act by that State. Nevertheless, as article 12 also made clear, such conduct could bring about the breach of an international obligation by the "territorial" State, if, for example, that State had not taken the preventive or punitive measures required. But failure to take such measures was a separate wrongful act and in no way constituted participation by the "territorial" State in the internationally wrongful act of the State to which the organ be-

<sup>5</sup> See 1515th meeting, para. 65.

\* Resumed from the 1513th meeting.

\*\* Resumed from the 1482nd meeting.

<sup>6</sup> For the text of the articles adopted so far by the Commission, see *Yearbook... 1977*, vol. II (Part Two), pp. 9 *et seq.*, doc. A/32/10, chap. II, sect. B, 1.

longed. Thus such failure to take action was not a form of complicity.

9. The case in which an internationally wrongful act was committed by an organ common to two or more States must also be eliminated. If, for example, the sole commander of allied armed forces committed an internationally wrongful act, his action would in reality be split up into several internationally wrongful acts, attributable concurrently to each of the States having that organ in common. But in that case there was no participation by one State in the internationally wrongful act of another.

10. The last case to be eliminated was that in which States acted in concert and, in so doing, committed two parallel offences. When two States committed an act of aggression together, there was no participation of one in the internationally wrongful act of the other, but two simultaneously committed wrongful acts.

11. It followed that there was participation by a State in the internationally wrongful act of another State only if one State, and one State alone, committed an internationally wrongful act and the other merely took part, in some way or other, in its commission. That concept of participation in the commission of an internationally wrongful act covered a certain number of situations. Facile analogies with internal law, especially criminal law, must be avoided, for the situation was quite different at the level of inter-State relations.

12. It might at first be supposed that there existed, in international law, a notion similar to that of "incitement" to commit an offence, since it was not unusual for a State to advise or incite another State to commit an internationally wrongful act. He, personally, remained convinced that mere incitement or instigation to commit an internationally wrongful act did not as such constitute a breach of an international obligation and did not give rise to international responsibility on that ground. The history of international relations might abound with examples of protests following such acts of incitement, but no State had ever charged any other with international responsibility merely for having incited a third State to commit an internationally wrongful act. The inter-State relations in the context of which the question of incitement to commit a wrongful act arose were relations between sovereign States, which were free to determine their own actions. A State could certainly be advised or incited by another State, but when it decided to act, it did so freely and as a sovereign State.

13. It would also be wrong to think that the nature of "incitement" to commit an internationally wrongful act was different if the object of the incitement was not a sovereign State but a "puppet" State. That point was illustrated by the decision of the American Board of Commissioners set up to distribute the sum allocated by France, under the Convention of 4 July 1831 between the United States of America and France, as reparation for the confiscation measures

taken by certain States under the influence of Napoleonic France. For instance, Denmark, which had been a sovereign State, had seized American ships bringing goods to that country. The Commission had decided that those measures, although they had been taken to please the French Emperor, were exclusively an act of Denmark, and that France was not internationally responsible. Holland, on the other hand, had been placed under the rule of a brother of Napoleon, Louis Bonaparte, and had been so dependent on France that the latter had gradually annexed it. The Commission had decided that before its annexation Holland had been placed in a position of total dependence and that its decisions had not been taken freely, so that responsibility for them rested with France. Consequently, the American claimants against Holland had been allowed to share in the sum allocated by France.<sup>7</sup>

14. The history of the Second World War provided further examples of "puppet" States which had been at the origin of international disputes caused by their violation of an international obligation. In such cases, however, the decisive factor was not the instigation or incitement of the "puppet" State to commit an internationally wrongful act. What counted was the relationship established between the "puppet" State and the State that had created it. The "puppet" State did not act as a sovereign State, since it was in a position of dependence on the other State. Consequently, that other State would not bear separate international responsibility for its incitement of the "puppet" State, but full responsibility for the wrongful act committed by the latter. Such cases of responsibility for the act of another, or vicarious responsibility, were discussed in chapter IV, section 2.

15. It might be asked what the situation was when a State did not confine itself to inciting another to act in breach of an international obligation, but used coercion to that end. Coercion, when applied to a State to make it commit an internationally wrongful act, was a very much more serious matter than mere incitement and necessarily produced legal effects. If State A used coercion to make State B commit an internationally wrongful act against State C, it was very likely, at least in the current state of international law, that the use of coercion would constitute an internationally wrongful act of State A against State B; as such, it might engage A's international responsibility towards B, and even, in an extreme case, towards all the other members of the international community. Of course, if coercion involved the use of armed force, it was wrongful both under general international law and under the special legal system of the United Nations. The wrongfulness might be more open to question if coercion took the form of mere economic pressure, but the important point was not whether, by using coercion, State A had committed an internationally wrongful act against State B. What had to be determined was whether, by exercis-

<sup>7</sup> See A/CN.4/307 and Add. 1 and 2 and Add. 2/Corr. 1, paras. 62 and 64.

ing coercion on State B, State A participated in the internationally wrongful act committed, under coercion, by State B against State C. In his view, that case both fell short of and went beyond such "participation". It fell short because, although State A had exercised coercion on State B, it had done nothing to State C; it had taken no active part in the act committed by State B against State C and had given no aid or assistance for its commission. But at the same time, its involvement in the affair went far beyond "participation", since by its action State A had deprived the State subjected to coercion of its sovereign capacity of decision. If that were so, the situation would once again be that already mentioned of incitement of a puppet State. The decisive factor was then not the incitement, but the situation of dependence in which the incitement took place. And the responsibility that the coercing State might have to assume, as vicarious responsibility, would be responsibility for the act committed by the coerced State, not direct responsibility for its own act.

16. An example of that situation was to be found in the case of Persia, which, at the beginning of the twentieth century, had been divided by an Anglo-Russian treaty into three zones: a neutral zone, a northern zone under Russian influence and a southern zone under British influence. The Persian Government, which had been in desperate financial straits, had asked the Government of the United States of America to send it an expert. The expert appointed, Mr. Shuster, had worked for some time at Teheran, to the entire satisfaction of the Persian Government. The Tsarist Empire, displeased at the situation, had sent an ultimatum to the Persian Government calling upon it to dismiss the expert. On Persia's refusal to do so, a Russian army had invaded its territory. The Persian Government had thus been forced to dismiss the expert, but it had compensated him to the best of its ability. The United States Government, noting that its national had been duly compensated, had abstained from making any claim, but had declared that, in the absence of adequate compensation, it would have called upon the Tsarist Empire to make good the loss inflicted upon the American expert. That case had obviously gone far beyond participation by one State in the internationally wrongful act of another. The Russian Government had not participated in the dismissal of the American expert. Moreover, the Persian Government had admitted that it had acted of its own free will—although it could hardly have acted otherwise. Had it claimed that it had been placed in a situation of dependence on Russia, the United States would have claimed from the Russian Government, not reparation for alleged "participation" in the internationally wrongful act committed by Persia, but full reparation for the internationally wrongful act committed by the Persian State. As would be seen in section 2 of chapter IV, there would then have been vicarious responsibility, that was to say, dissociation of the author of the internationally wrongful act from the entity responsible for it.

17. Participation by a State in the commission of an internationally wrongful act by another State really occurred when the first State actively gave the second aid or assistance in committing the act. It was essentially that situation, the case of "complicity", that the members of the Commission and of the Sixth Committee had had in mind when they had stressed the need to consider the question of participation by a State in the internationally wrongful act of another State. The most frequently cited example of participation in the form of complicity had been that of a State placing its territory at the disposal of another State to help it to commit an offence against a third State. For instance, a State might allow the troops of another State to pass through its territory in order to commit an act of aggression. According to article 3(f) of the 1974 Definition of Aggression,<sup>8</sup> "The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State" qualified as an "act of aggression".

18. Other examples of complicity could be cited, such as supplying a State with weapons to attack another State, providing it with means of transport to facilitate an act of aggression, or placing military organs at its disposal to advise or guide it. Furthermore, complicity might be aimed not at committing an act of aggression, but at committing genocide, supporting a régime of *apartheid* or maintaining colonial domination by force. There might also be complicity of a State in the commission of offences that were not international crimes, such as providing means for the closure of an international waterway, facilitating the abduction of persons on foreign soil or assisting the destruction of property belonging to a third State.

19. Cases of action involving complicity in the internationally wrongful act of another called for a distinction. The action of the accessory State might not in itself be wrongful. For instance, there was no general prohibition of the provision of arms to another State. The provision of arms was not wrongful in itself, but it became tainted with wrongfulness if it was intended to facilitate an act of aggression by another. The accessory State might also commit an act which, taken in isolation, was also internationally wrongful, such as currently supplying arms to South Africa in breach of Security Council resolution 418 (1977). But such an internationally wrongful act in relation to that resolution would be coupled with another wrong if the arms in question were intended for the perpetration of a wrongful act such as aggression or genocide.

20. That apart, it was obvious that, for participation in an internationally wrongful act to be asserted, there must be not only aid or material assistance but also the intention to collaborate thereby in the commission of an internationally wrongful act by another;

<sup>8</sup> General Assembly resolution 3314 (XXIX), annex.

the accessory State must have acted knowingly. There was no complicity, for example, if a State sent means of transport to another State without being in any way aware that they were to be used for the commission of an internationally wrongful act. The situation could be made clearer by examples. In 1958, Yemen, which had been supplied with arms by certain countries, had attacked the city of Aden, at that time a British protectorate. In reply to a question in the House of Commons, the spokesman for the United Kingdom Government had said he considered that the arms deliveries to Yemen had not been unlawful in themselves and did not justify any protest. Hence the Government had only protested to Yemen and reported the matter to the United Nations. In his comment on that reply, E. Lauterpacht had stressed: (a) that, in the absence of any specific prohibition, the supply of arms by one State to another was quite lawful in itself; (b) that responsibility for the unlawful use of those arms rested primarily with the State that received them; (c) that, those facts notwithstanding, a State that knowingly supplied arms to another State for the purpose of assisting it to act in a manner inconsistent with its international obligations could not escape responsibility for complicity in that unlawful conduct.<sup>9</sup>

21. In 1958, also, the Soviet Union had addressed a note to the Government of the Federal Republic of Germany, which had allowed United States and United Kingdom military aircraft to use its airports for action in Lebanon. The Soviet Union had accused the Federal Republic of Germany of participating in an internationally wrongful act by the United States and the United Kingdom. While not denying that its airports had been used to facilitate the operation of the United States and the United Kingdom, the Government of the Federal Republic of Germany had argued that the operation had not been internationally wrongful in any way, but had merely been a measure to protect the nationals of those countries, who had been endangered by civil strife. As the principal act had not been wrongful, the fact of placing airports at the disposal of the authors of that act could not have been wrongful either. Thus the Government of the Federal Republic of Germany had apparently considered that, if the foreign armed forces had used its territory to commit acts of aggression, there would have been "participation" on its part in the wrongful act of another.<sup>10</sup>

22. Finally, it should be noted that the act of the accessory State was not necessarily of the same nature as the principal act. An argument to the contrary could be drawn from the Definition of Aggression, which treated participation in an act of aggression as an act of aggression itself. However, the wording in question should not be taken too literally. The act of supplying arms to a State which used them to commit genocide need not necessarily be characterized as

an act of genocide. In each case, the gravity of the participation must be considered. It was obvious that for a State to place its territory at the disposal of another State for the purpose of committing an act of aggression was more serious than for it to provide another State with means of transport. It could therefore be concluded that: (a) to take the form of "complicity" in the commission of an internationally wrongful act by another, conduct by a State consisting in giving aid or assistance to another State which committed or was preparing to commit an international offence must be backed by the intention thereby to facilitate the commission of that offence; (b) the conduct by which a State thus participated in the commission of an internationally wrongful act of another State was wrongful precisely by reason of participation in the international offence committed by another, even if that conduct were lawful when considered in isolation; (c) the offence consisting in complicity or participation in the offence of another must not be confused with the latter offence, just as the responsibility arising from participation must not be confused with the responsibility arising from the principal offence.

#### Co-operation with other bodies (*continued*)\* [Item 11 of the agenda]

##### STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

23. The CHAIRMAN invited Mr. Furrer, observer for the European Committee on Legal Co-operation, to address the Commission.

24. Mr. FURRER (Observer for the European Committee on Legal Co-operation) said that, on the occasion of the twenty-fifth anniversary of the entry into force of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>11</sup> [known as the European Convention on Human Rights], the Committee of Ministers of the Council of Europe had adopted, on 27 April 1978, a declaration on human rights. The Council had stressed that, through its arrangements for supervision on the basis of objective criteria and by independent organs, the Convention provided a collective guarantee for a number of the rights stipulated in the Universal Declaration on Human Rights.<sup>12</sup> The Council had considered that the protection of human rights at both the national and international levels was a continuing task and that those individual rights remained of vital importance through all the mutations and evolution of society. It had also considered that there were close links between the protection and promotion of human rights within States and the strengthening of justice and peace in the world.

<sup>9</sup> See A/CN.4/307 and Add.1 and 2 and Add.2/Corr.1, para. 73.

<sup>10</sup> *Ibid.*

\* Resumed from the 1497th meeting.

<sup>11</sup> United Nations, *Treaty Series*, vol. 213, p. 221.

<sup>12</sup> General Assembly resolution 217 A (III).

25. On the basis of those premises, the States members of the Council of Europe had decided to give priority to the work being done by the Council with a view to expanding the list of individual rights to be protected, including social, economic and cultural rights, and had undertaken to participate actively in safeguarding those rights in order to help strengthen international peace and security.

26. With regard to the application of the supervisory system set up by the European Convention on Human Rights, the European Court of Human Rights had recently delivered two judgments that were likely to prove particularly pertinent to the theory and practice of public international law: the first relating to State responsibility, the second to the interpretation of treaties.

27. In its judgment of 18 January 1978, in the Northern Ireland case, the Court had given its opinion on the responsibility of a State for what it had termed a "practice" attributable to the organs of that State. It should be noted, in regard to that case, that neither the acts complained of, nor their characterization as inhuman and degrading treatment, had been contested before the Court, and that the respondent government had in fact already undertaken to end them.

28. In its judgment, the Court had first defined the practice concerned, holding it to consist of a series of omissions of similar character, sufficiently numerous and sufficiently closely linked to have been more than isolated incidents or exceptions and to have formed a systematic whole. The practice, however, did not constitute an offence separate from the omissions. The Court had taken the view that the State authorities concerned had not been unaware of, or at least had not had the right to overlook, the existence of such practices, that they bore objective responsibility for the conduct of their subordinates, and that they had a duty to impose their will on their subordinates and should not take refuge behind their inability to ensure compliance with it. The Court had concluded by saying that the notion of practice was of particular importance for the operation of the rule of the exhaustion of local remedies. According to the Court, that rule applied not only to appeals by individuals to the Court's supervisory organs, but also to petitions by States in which the applicant State merely denounced one or more offences allegedly committed against individuals whom it, in a way, replaced. In principle, however, the rule did not apply if a State attacked a practice in order to prevent its continuation or recurrence, without asking the Court to rule on each of the cases it put forward as evidence, or as an example, of that practice.

29. In its judgment of 28 June 1978, in the case of König versus the Federal Republic of Germany, the Court had been required to interpret the phrase "determination of ... civil rights and obligations" contained in article 6 of the European Convention on Human Rights, which, in matters of that kind, recognized the right of any person to a decision by a court within a reasonable time. The decisions involved in

that case had been decisions which, under the internal law of the respondent State, were the responsibility of the administrative authorities. The Court had nevertheless applied to them the rule laid down in article 6 of the Convention. It had justified that action on the basis, first, of the meaning of the terms of the Convention, as being independent of the meaning attributed to them in internal law; secondly, of an analysis of the material content of the rights which, in the case in question, seemed to be private; thirdly, of the object and purpose of the Convention, which referred, in article 6, to disputes concerning such rights, even if the internal law of the State concerned placed responsibility for the settlement of such matters on administrative tribunals.

30. That latest link in the jurisprudence of the two bodies responsible for monitoring the application of the European Convention on Human Rights showed how the rule of protection of human rights and fundamental freedoms, which the Council of Europe guaranteed internationally, was being strengthened and developed. That rule had stimulated co-operation between member States in the sphere of criminal law, with respect to crime prevention and the treatment of offenders. Several multilateral instruments had already been concluded on such matters as mutual judicial assistance, extradition, international transmission of criminal proceedings, and recognition and execution of foreign sentences; and efforts were now being made, as requested by the ministers of justice of the States members of the Council of Europe at a meeting held on 21-22 June 1978 in Copenhagen, to draw up, on the basis of those instruments, a common code of European co-operation in criminal matters, which would form the groundwork for what might be termed a "European legal area", to match the European human rights area already established.

31. The existence of international guarantees for human rights had been an indispensable precondition for the conclusion of the European Convention on the Suppression of Terrorism of 26 January 1977.<sup>13</sup> Under that Convention, acts of terrorism such as unlawful acts against the safety of civil aviation, which came within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 1970) and of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 1971), attacks against the life, physical integrity or liberty of internationally protected persons, kidnapping, the taking of hostages and unlawful detention, and the use of bombs, grenades etc., if such use endangered persons, could not be regarded as political offences for the purposes of extradition.

32. The European Committee on Legal Co-operation, an intergovernmental body set up in 1963 to promote the legal activities of the Council of Europe outside the specific spheres of human rights and criminal

<sup>13</sup> Council of Europe, Parliamentary Assembly, *Documents Working Papers, Twenty-eighth ordinary session (third part)*, vol. VIII, p. 9, doc. 3912.

law, had three aims: first, the safeguarding and further development of relations between member States in accordance with international law; secondly, the approximation and harmonization of member States' legislation and legislative policies; thirdly, the adjustment of their laws to the needs of an evolving democratic society.

33. Among the subjects on the Committee's programme more particularly connected with public international law were the question of the privileges and immunities of international organizations, currently being studied from the specific angle of the tax privileges of international officials, and, most important, the European Convention on State Immunity, which had been opened for signature in June 1972 and had entered into force on 11 June 1976, after being ratified by Austria, Belgium and Cyprus. A recent exchange of views arranged by the Committee had shown that the United Kingdom would soon be able to ratify the Convention. In addition, the United States Congress had recently passed a new act on the subject that was entirely compatible with the solutions adopted in the 1972 Convention. Those developments showed the interest which that instrument would not fail to arouse, not only at the European regional level but all over the world, in the development of international law applicable to the important and delicate question of the jurisdictional immunities of foreign States.

34. Also in the sphere of public international law, the Committee had just decided, at the request of members of the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe, to proceed, at its next session, in November/December 1978, to an exchange of views with parliamentary representatives on the 1957 European Convention for the Peaceful Settlement of Disputes<sup>14</sup> and, more particularly, on ways of improving the machinery for the settlement of disputes arising between States members of the Council of Europe. The Parliamentary Assembly considered that the Convention was not adequate, since it had so far been of use in only two cases: that of the North Sea continental shelf and that of the negotiations on the question of the South Tyrol (Alto Adige).

35. Finally, he drew attention to two recent European conventions, signed in November 1977 and in March 1978, which were aimed at organizing mutual assistance in administrative matters between States members of the Council of Europe. The first concerned the service abroad of documents relating to administrative matters, and the second the obtaining abroad of information and evidence in administrative matters. Those conventions would fill an important gap in co-operation between States, for unlike co-operation in civil, commercial and criminal cases, mutual assistance in administrative matters had so far been based almost exclusively on *ad hoc* arrangements, with all the drawbacks they entailed for legal

security. Naturally, those two conventions took into account the diversity not only of the administrative structures of member States, but also of the matters covered by administrative law; they had to allow each contracting State to define unilaterally their field of application to itself, while encouraging it gradually to lift such restrictions.

36. The Committee had also undertaken an extensive programme of harmonization of the internal law of States members of the Council of Europe. The basic interest of that programme lay in the particular viewpoint from which it had been planned and was being carried out. The object was, notwithstanding the co-existence of different national legal systems, to strengthen and protect the legal position and rights of individuals—nationals as well as foreigners—*vis-à-vis* the public authorities and the various pressures exerted on them by society.

37. Among the items on that programme were the protection of the individual against administrative action, including the modalities of the exercise of the discretionary power of administrative authorities and the responsibility of the State for the acts of its agents; measures to facilitate access to the courts, in other words, legal aid and advice, together with the simplification of judicial procedures and reduction of their cost; protection of privacy having regard to electronic data banks, particularly in regard to the transmission of personal data beyond national frontiers; consumer protection; and reform of family law.

38. The European Committee on Legal Co-operation would hold its next meeting at the headquarters of the Council of Europe, in Strasbourg, from 27 November to 1 December 1978, and would be happy to welcome a representative of the International Law Commission.

39. The CHAIRMAN thanked the observer for the European Committee on Legal Co-operation for his statement, which had clearly brought out the various aspects of the fruitful co-operation established between the Commission and the Council of Europe in the sphere of the codification and progressive development of international law.

*The meeting rose at 1 p.m.*

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## 1517th MEETING

*Thursday, 13 July 1978, at 10.10 a.m.*

*Chairman* : Mr. José SETTE CÂMARA

*Members present* : Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

<sup>14</sup> United Nations, *Treaty Series*, vol. 320, p. 243.

**State responsibility (continued)**  
(A/CN.4/307 and Add.1 and 2 and Add.2/Corr.1)  
[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR (continued)

ARTICLE 25 (Complicity of a State in the internationally wrongful act of another State)<sup>1</sup> (continued)

1. Mr. REUTER said that the question dealt with in article 25 was relatively simple. It arose from the fact that, in certain cases, a State committing an internationally wrongful act was completely foreign to that act; another State was then recognized as the real author of the act in question. In other cases, a State that had not itself committed an internationally wrongful act might be in some way connected with that act. The nature of the connexion varied widely. In article 25, the Special Rapporteur had tried to determine the elements defining an association with an internationally wrongful act that was sufficiently close to be generally characterized as complicity. There were, of course, special rules covering particular international offences, and participation in some of those offences was so serious a matter as to be regarded in the relevant instruments as an offence equivalent to the main act. For instance, the fact that a State placed its territory at the disposal of another State, and allowed it to be used by that State to commit an act of aggression against a third State, in itself constituted aggression. In order to establish a general rule applicable to all cases, the Special Rapporteur had proceeded by eliminating certain cases. While fully approving of the Special Rapporteur's conclusions, he wished to draw his attention, and that of members of the Commission, to two of their consequences.

2. The case dealt with in article 25 was clear enough. The Special Rapporteur had rightly rejected the case of instigation; but he had also refrained from attaching consequences to the distinction made by the Commission, in article 19,<sup>2</sup> between international crimes and international delicts. At the time, the Commission had indicated that the effects of that distinction would be perceptible in later articles of the draft. During the consideration of the text that had become article 19, he had himself pointed out that, if that provision were adopted, the Commission would be committed to establishing a differentiated régime of responsibility based on the distinction made.<sup>3</sup> It would have been possible, in article 25, to make a distinction between international delicts and international crimes. For the former, mere instigation could have been considered insufficient, whereas for the latter, instigation could have been considered to justify a sanction. Personally, he would have deplored the attachment of such consequences to that distinc-

tion. On the other hand, he would agree, for example, that only international delicts should be subject to prescription, to the exclusion of international crimes. On all other questions, however, the Commission should refrain from formulating general rules applicable to international crimes, and consider them case by case.

3. In his written<sup>4</sup> and oral<sup>5</sup> presentations of article 25, the Special Rapporteur had been discreet on another point. If the Commission based the theory of responsibility on the classical conception that damage was a fundamental element of responsibility, with settlement of cases of responsibility lying in reparation, it would be necessary to decide whether, when there were several authors, they should share the burden of responsibility and the obligation to make reparation. To that end, it would be necessary to distinguish, as in other contexts, between the obligation and the ultimate burden of the obligation. In particular, it might perhaps be necessary to provide for some form of joint responsibility of the authors of an internationally wrongful act and for actions to recover from each other. How was complicity to be sanctioned? Would the accessory be associated with the principal author of the act, and would it be liable, like the latter, to a penalty? How was that penalty, if any, to be determined? Admittedly, the Commission was not called upon to answer those questions at that time, but members should already be considering them. If any member believed that the Commission was not in a position to tackle those questions, he should not accept the general rule stated in article 25, which he, for his part, was able to accept.

4. With regard to the content of article 25, he could accept the term "complicity", but only provided that it was used in a special sense peculiar to international law, and with no analogy with internal law. Otherwise, the Commission would have to engage in subtle distinctions, for which it would find no satisfactory equivalents in the different working languages. If the notion of complicity referred to in article 25 was an independent notion, it would have to be defined.

5. On reading the Special Rapporteur's report and hearing his oral presentation of the article, he had gained the impression that complicity, for the Special Rapporteur, had both a material and an intellectual element. With regard to the material element, the Special Rapporteur had been very brief, confining himself to pointing out the more or less serious nature of participation by a State in the internationally wrongful act of another State. Personally, he doubted whether assistance that was materially too remote could be regarded as complicity. With regard to the intellectual element, mere knowledge might be enough. It would then be sufficient for the author of the wrongful act to know that its assistance would be

<sup>1</sup> For text, see 1516th meeting, para. 4.

<sup>2</sup> See 1516th meeting, foot-note 6.

<sup>3</sup> *Yearbook... 1976*, vol. I, p. 245, 1402nd meeting, para. 61.

<sup>4</sup> A/CN.4/307 and Add.1 and 2 and Add.2/Corr.1, paras. 51 *et seq.*

<sup>5</sup> 1516th meeting.

used for wrongful purposes. If the Commission confined itself to knowledge, that could take it very far, for from the moral point of view the mere fact of knowing that the assistance provided might be used for a wrongful purpose was reprehensible.

6. By using the words "in order to enable" in the text of the article, the Special Rapporteur seemed to be requiring intention in addition to knowledge. Material participation would thus have to be accompanied by guilty intent. That was the first time that wrongful intent had come into play in defining an international delict. He wondered whether the Commission really meant to define the material element of participation and whether it was necessary to distinguish that element from the intellectual element. If the Commission considered that the material element should consist of aid or direct assistance in the wrongful act, it followed that it would be adopting not only the element of knowledge, but also the element of intent. That was another point that should be given mature consideration.

7. Mr. CASTAÑEDA endorsed the general approach adopted in article 25 and, bearing in mind the political nature of its provisions, particularly welcomed the scientific precision with which it had been drafted.

8. The Special Rapporteur had been right, in his view, to make a basic distinction between participation in the form of direct assistance by one State to another, and participation arising out of the existence of a particular relationship between two States. He had also been right to exclude certain different, albeit related, situations that did not, however, amount to participation. For example, when two States, acting in concert, attacked a third State, there were two separate acts of aggression, but no participation.

9. Similarly, mere incitement to commit an internationally wrongful act did not amount to participation: as the Special Rapporteur had said in his report, it would be wrong to draw an analogy with internal criminal law, because the concept of incitement in that law had "its origin and justification in the psychological motives determining individual conduct",<sup>6</sup> which obviously did not apply to relations between States. He agreed with the Special Rapporteur's analysis of the problem of "puppet" States, and considered that the decision of the Board of Commissioners set up under the Convention of 1831 between the United States and France, which he had cited in that connexion,<sup>7</sup> underlined the relevance of the distinction drawn.

10. He also agreed that the use or threat of use of armed force by a State to make another State breach its international obligations should be considered, under modern international law, as having the effect of placing the second State in a position of dependence on the first that was incompatible with a situation of

complicity. The same applied in general to coercion, which, although it obviously had legal consequences, could not be assimilated to complicity. Those cases came within the sphere of vicarious responsibility.

11. The formula adopted in article 25 was therefore correct; it emphasized the objective element of aid and assistance, while also taking account of the subjective intent to "enable or help" a State to commit an international offence. Nevertheless, its application was bound to raise serious problems, because of the complexity of the subject and the state of international law in general.

12. One of the most difficult problems was that of intent, which had already arisen when the Commission had been trying to define aggression. For instance, if one State supplied another with small arms solely as replacements, and those arms were subsequently used in an attack on a third State, it would be very hard to determine whether or not there had been any intention to participate in, or prior knowledge of, that act. There again it might prove difficult in practice to classify situations as clearly as the Special Rapporteur had classified them in his report. Very complex situations could arise, such as civil wars, concerning which it would be necessary to take account of the various international rules on the conduct of States in the event of civil strife. Lastly, the Commission would also have to consider the important question whether a separate legal régime should be established for complicity, apart from the régimes established for related questions.

#### Co-operation with other bodies (*concluded*)

[Item 11 of the agenda]

#### STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

13. The CHAIRMAN invited Mr. López Maldonado, Observer for the Inter-American Juridical Committee, to address the Commission.

14. Mr. LÓPEZ MALDONADO (Observer for the Inter-American Juridical Committee) said that the Committee had recently had the honour of welcoming Mr. El-Erian, who had given a very interesting account of the work of the International Law Commission.

15. He noted from the Commission's report to the General Assembly on the work of its twenty-ninth session that it intended to pay due attention to topics on the agenda of, *inter alia*, the Inter-American Juridical Committee, when reviewing its own programme of work.<sup>8</sup> In that connexion, he wished to refer, first, to the items that the Committee would be considering at its forthcoming session, to be held in Rio de Janeiro in July and August 1978. The agenda

<sup>6</sup> A/CN.4/307 and Add.1 and 2 and Add.2/Corr.1, para. 63.

<sup>7</sup> *Ibid.*, para. 64.

<sup>8</sup> *Yearbook... 1977*, vol. II (Part Two), p. 133, doc. A/32/10, para. 131.



for that session was divided into two main groups of subjects. The first group consisted of three priority items: the principle of self-determination of peoples and its sphere of application; the legal aspects of co-operation in the transfer of technology, a question closely connected with that of multinational corporations; revision of the inter-American conventions on industrial property, with particular reference to patent and trademark law. The last of those items had been under consideration for more than 10 years and it was hoped to draft an instrument that would reflect the principles of the 1967 Paris Convention for the Protection of Industrial Property, and embody the new principles laid down in treaties concluded between the countries of the Carthage Agreement [known as the Andean Pact].

16. The second group of subjects that the Committee would be discussing at its forthcoming session, which had no priority, included, first, the question of the classification of international economic and commercial offences. Under that item, which was closely related to the study the Committee was preparing on multinational corporations, the question of bribery and related offences would be considered. It was hoped to prepare an instrument that would provide guidance in drafting legislation on that question. Other subjects in the second group included nationalization and expropriation of foreign property under international law; jurisdictional immunity of States; settlement of international disputes relating to the law of the sea; territorial colonialism in the Americas; the role of law in social change; measures to promote the accession of non-autonomous territories to independence within the American system; and, lastly—more an administrative than a legal matter—revision of the Committee's rules of procedure.

17. Referring next to the work accomplished by the Committee during the two-year period 1976-1978, he said that, in the sphere of public international law, a draft inter-American convention on extradition was under consideration, pursuant to resolution 107 adopted by the Tenth Inter-American Conference (Caracas, 1954). That was a delicate matter, given its political implications, and the aim was to prepare a single instrument—taking account of the close connexion between the right of asylum and the institution of extradition—that would promote international legal co-operation in that sphere in the Americas. Existing multilateral conventions and bilateral treaties had proved to be ineffective in practice owing to the differences in the various national legal systems.

18. With regard to international judicial co-operation, a first specialized Inter-American Conference on Private International Law, held in Panama in January 1975, had resulted in six conventions, most of which had since been ratified. The General Assembly of OAS, at its fifth regular session, held the same year, had decided to convene a second Inter-American Conference on Private International Law. To that end, the Committee had drafted conventions on the following subjects: enforcement of foreign awards and judgements; evidence in foreign law; conflict of

laws in regard to cheques; conservation measures in civil, mercantile and labour cases; and general rules of private international law. Two main trends of opinion had emerged from the Committee's discussion on the last question. One was that there should be only a single convention, dealing with the nationality, civil status, capacity and legal domicile of foreigners. The other was that, in accordance with the modern trend, separate conventions should be prepared and their ratification facilitated; the Convention on Private International Law (known as the "Bustamente Code"), drawn up for the Americas at the Sixth International Conference of American States (Havana, 1928), had unfortunately been ratified by only a few States. It had therefore been decided to draft three separate conventions on the subject in the immediate future. The Committee had also adopted a resolution on the transport of goods by road and by sea, with particular reference to bills of lading.

19. In addition, the eighth General Assembly of OAS had entrusted the Committee with two tasks. The first concerned the question of terrorism, which had been considered by a working group of the Committee on Juridical and Political Affairs and by the Permanent Council of OAS. Although the matter was being examined in the United Nations, it had been considered that the political differences in the American system were less irreconcilable, and it had therefore been concluded that the General Assembly of OAS should establish guidelines for the drafting of instruments to deal with the growing threat of terrorism throughout the continent. On that basis, the General Assembly of OAS had recommended that the Permanent Council, in co-operation with the Inter-American Juridical Committee, should prepare a series of draft conventions on aspects of international terrorism, in particular the taking of hostages, which were not covered in the Washington Convention of 1971.<sup>9</sup> It had further recommended that a socio-economic study should be made of the underlying causes of terrorism, and that governments should be consulted on the possibility of convening conferences for the adoption of the proposed instruments.

20. The second task entrusted to the Committee by the General Assembly of OAS had been to prepare, in co-operation with the Inter-American Commission on Human Rights, a draft convention defining torture as an international crime. The contributions made by Mr. Ago and Mr. Reuter would be extremely useful to the Committee in that work.

21. Lastly, a course in international law, attended by leading professors and legal experts from all over the continent, was held annually under the auspices of OAS and of the Committee. Each member country was awarded one fellowship, and the Committee contributed to travel and subsistence costs. He would be pleased to provide the Chairman with a copy of the

<sup>9</sup> Convention to Prevent and Punish the Acts of Terrorism taking the form of Crimes against Persons and related Extortion that are of International Significance, signed at Washington, D.C., 2 February 1971.

publication issued at the end of each course. In addition, a centre was being established for the exchange of information on the teaching of subjects connected with international relations in the Americas.

22. He thanked members for their attention, and expressed the hope that the Commission would be represented at the forthcoming session of the Committee.

23. The CHAIRMAN thanked the observer for the Inter-American Juridical Committee, on behalf of the Commission, for his interesting account of the Committee's numerous activities, of which the Latin American members of the Commission, in particular, had reason to be proud. Unfortunately, it would be difficult for the Commission to be represented at the Committee's next session, which was to be held very shortly, but the Commission would certainly send an observer to the following session.

24. He had noted the many important subjects on which the Committee was working, including the question of the jurisdictional immunities of States. The Commission had set up a working group on that question, which it would probably consider at one of its future sessions. The Committee's work on the law of the sea would be of particular interest to those members of the Commission who were taking part in the session of the United Nations Conference on the Law of the Sea. As for the preparation of a draft inter-American convention on extradition, that was a particularly fitting project, in view of the tradition of asylum established on the Latin American continent.

25. He had been most interested to learn of the work in progress on a number of draft conventions dealing with private international law, and of the measures being taken to combat terrorism. Although the efforts of the United Nations to conclude a general convention on terrorism had not met with success, the General Assembly had established an *Ad Hoc* Committee on the Drafting of an International Convention against the Taking of Hostages,<sup>10</sup> and had adopted the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.<sup>11</sup>

26. With regard to the proposed convention defining torture as an international crime, he pointed out that, under the terms of article 19 of the draft articles on State responsibility<sup>12</sup> prepared by Mr. Ago, "a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being" was an international crime.

27. In conclusion, he expressed his appreciation of the high level of the co-operation established between the Commission and the Inter-American Juridical Committee.

*The meeting rose at 11.55 a.m.*

<sup>10</sup> General Assembly resolution 31/103.

<sup>11</sup> General Assembly resolution 3166 (XXVIII), annex.

<sup>12</sup> See foot-note 2 above.

## 1518th MEETING

*Monday, 17 July 1978, at 3.05 p.m.*

*Chairman* : Mr. José SETTE CÂMARA

*Members present* : Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Uskakov, Mr. Verosta, Mr. Yankov.

State responsibility (*continued*)  
(A/CN.4/307 and Add.1 and 2 and Add.2/ Corr.1)  
[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE (*continued*)\*

ARTICLE 24 (Breach of an international obligation by an act of the State not extending in time)<sup>1</sup> (*concluded*) and

ARTICLE 25 (Breach of an international obligation by an act of the State extending in time)<sup>2</sup> (*concluded*)

1. Mr. AGO (Special Rapporteur) recalled that the Commission had decided, at its 1513th meeting, in the title of article 26, that the word "time", should be replaced by the words "moment and duration". In order to indicate clearly that articles 24 and 25 also related to the *tempus commissi delicti*, those two provisions should be entitled respectively "Moment and duration of the breach of an international obligation by an act of the State not extending in time" and "Moment and duration of the breach of an international obligation by an act of the State extending in time".

2. In the French text of article 25, paragraph 3, the words "une succession de comportements" should be replaced by the words "une succession d'actions ou omissions", in view of the English version of that provision and the fact that the words "actions or omissions" had already been used by the Commission in other provisions of the draft.

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR (*continued*)

ARTICLE 25 (Complicity of a State in the internationally wrongful act of another State)<sup>3</sup> (*continued*)

3. Mr. USHAKOV approved the substance of article 25, but had some comments to make on its draft-

\* Resumed from the 1513th meeting.

<sup>1</sup> For text, see 1513th meeting, para. 1.

<sup>2</sup> *Ibid.*

<sup>3</sup> For text, see 1516th meeting, para. 4.

ing. He did not think that the term “complicity” should be used because it was very difficult to see how a State could be an accessory. The concept of complicity gave rise to difficulties even in internal law. In particular, it was not easy to determine the moment when a person became another’s accessory. The word “complicity” should be avoided not only in the article under consideration, but also in the commentary. It would be better to speak of “participation” in an internationally wrongful act, although that word should be used with caution and placed in quotation marks. Several States might, for example, commit an act of aggression jointly, in which case reference could certainly be made to “participation” in the broad sense of the term. Moreover, in the definition of aggression, the term “State” covered the notion of a “group of States”. Perhaps the Commission should even consider the possibility of including an equally broad definition of a State in the draft under preparation.

4. It did not really seem necessary to emphasize the element of intent, as did the words “in order to enable or help that State to commit an international offence against a third State”. The Commission had never so far taken intent into consideration. By definition, a State took its decisions knowingly and there could be no question of responsibility for negligence, as in internal law. It was enough to establish that aid or assistance had been provided by one State to another for the former to incur responsibility. In addition, the words “international offence” had not been used in any other provision of the draft. In article 19,<sup>4</sup> the Commission had divided internationally wrongful acts into international crimes and international delicts, but so far it had never referred to international offences. The words “third State” were also inappropriate because the internationally wrongful act in question could be directed against a subject of international law other than a State, such as an international organization or even a national liberation movement. Finally, the word “otherwise”, at the end of article 25, also required explanation. It seemed to indicate that there was an internationally wrongful act even if the conduct in question, taken alone, would not be internationally wrongful.

5. The Drafting Committee might recast article 25 along the following lines:

“If it is established that a State, by its act, has rendered assistance to another State in the commission by the latter State of an internationally wrongful act, the act of the first State constitutes an internationally wrongful act, even if that act, taken alone, would not constitute an internationally wrongful act.”

6. That definition referred neither to complicity nor to intent and did not introduce any new notions into the draft. The essential condition was that the fact of aid or assistance rendered by the State should have been established.

7. Mr. RIPHAGEN, referring to the foot-note to paragraph 74 of the Special Rapporteur’s seventh report (A/CN.4/307 and Add.1 and 2 and Add.2/Corr.1), said that the international law of the past had recognized the existence of sovereign States only, having exclusively bilateral relations with other sovereign States, and there had been no place in it for the idea that the conduct of State A, not in itself wrongful, towards State C might become wrongful by reason of its connexion with a wrongful act committed by State B against State C. The international law of that time had recognized that State A might perform a wrongful act directly against State C, and that the conduct of State A might be considered directly wrongful to State C if the latter were injured by a State B that was in fact no more than a puppet State of State A. The proposed article 25, however, dealt with neither of those situations, but rather with what might be termed “intermediate” situations. He had no doubt that such “intermediate” situations did occur in contemporary international life, but he wondered whether the old concept, according to which such situations did not exist, was already completely obsolete. He asked that question because the proposed article seemed to cover all the internationally wrongful acts of a State B, irrespective of the source, content or importance of the obligation they breached.

8. Under the proposed article, State A might incur responsibility towards State C for having rendered “assistance”, which might not in itself be wrongful, to State B in the commission of a wrongful act. It was therefore important to know what conduct constituted “assistance”. In principle, the relationships between States B and C were of no concern to State A, and State A could therefore ignore them for the purposes of its own relations with State B. Would the situation be any different if State A were aware that State B had certain obligations towards State C, but hoped that its assistance to State B would enable the latter to evade those obligations or did not mind if its assistance had that effect? In his opinion, the answer to that question would be in the negative unless one of two conditions were met. The first of those conditions was that the assistance given by State A to State B must be of an “abnormal”, although not an illegal, character. That was because bilateral relations between States, including assistance from one to another, normally concerned only the two States involved. In such cases, the possible side-effects of the relations between States A and B on the conduct of State B towards State C would not entail the responsibility of State A unless the second of the conditions he had in mind were fulfilled. That condition was that the relationship between States B and C must be such that it involved not only the individual and mutual interests of those two States themselves but also, as in matters affecting international peace and security, the interests of the international community in general. That was the only case in which State A could not ignore the relationship between States B and C and was obliged to take ac-

<sup>4</sup> See 1516th meeting, foot-note 6.

count of the effect its assistance to State B would have on the latter's conduct towards State C.

9. In his view, the reference by the Special Rapporteur, in the foot-note to paragraph 64 of his report, to the *Dispute between the Postal Administrations of Portugal and Yugoslavia*, was misplaced; as the award had shown, the question at issue had been one not of responsibility for an international offence in the normal sense of the expression, but rather of succession to debts of Croatia towards Portugal within the system of the Universal Postal Union.

10. Mr. ŠAHOVIĆ found the article under consideration generally acceptable. The article was the first provision of chapter IV which was to be devoted to a question that the Commission had on more than one occasion agreed to study: that of the implication of a State in the internationally wrongful act of another State. In connexion with that question, the Commission had at previous sessions discussed the concepts of incitement, assistance, complicity and indirect responsibility. In embarking on chapter IV, it should perhaps have explained the relationship between those different concepts. The Special Rapporteur had of course referred to them, but in a negative manner, by proceeding to eliminate the cases that were not covered by the article under consideration. It would be preferable, however, to draft the commentary to article 25 from another point of view, by stating and discussing the elements of the rule itself. The method followed by the Special Rapporteur did not in fact seem suitable for a commentary; the content and wording of the article under consideration would carry more conviction had they been the product of a positive analysis.

11. The Special Rapporteur's conclusions, as stated in paragraph 76 of his seventh report, did not seem to have been fully taken into consideration in the wording of article 25, which should perhaps be made fuller. Moreover, the Special Rapporteur sometimes seemed to use the term "complicity" in a way that made certain references to internal criminal law inevitable. That was probably why several members of the Commission had expressed doubts about the advisability of using that term. He himself would not object to it, however, if only in order to see whether governments considered it acceptable. The Commission might nevertheless be criticized for using a term borrowed from internal criminal law.

12. Mr. PINTO agreed with all the basic ideas in the article. With regard to its wording, however, he shared the objection raised by Mr. Šahović to the use of the terms "complicity" and "accessory". Perhaps the idea behind those terms could be rendered by a phrase such as "wrongful collaboration" or "wrongful association", in line with the reference throughout the draft articles to "internationally wrongful" acts. Unless the Special Rapporteur had some special reason for retaining the term "international offence", to which Mr. Ushakov had drawn attention, that term itself might be replaced by the words "internationally wrongful act".

13. The existing wording was inadequate to show the importance of the intention of the assisting State for establishing its responsibility in the commission by another State of an internationally wrongful act. It should be made clear, as stated in paragraph 76 of the Special Rapporteur's report, that, for the conduct of the assisting State to be wrongful, it "must be adopted knowingly and with intent to facilitate the commission of the offence". That point was important, even though it might not always be easy to prove such intent in circumstances different from those mentioned by the Special Rapporteur in paragraph 71 of his report, for example, where the aid was given in the form of funds and the State that received those funds committed no direct act of aggression. In view of the examples of offences given by the Special Rapporteur in that paragraph, it seemed unduly restrictive, as Mr. Ushakov had already pointed out, to refer in the article only to the commission of international offences "against a third State".

14. Mr. VEROSTA said that, for the reasons he had already given at the Commission's previous session, he had some difficulty in accepting the article under consideration. Referring to the words "assistance to another State", he was not sure, in particular what the circumstances of that other State must be. It appeared from the various possibilities eliminated by the Special Rapporteur that article 25 related only to the case in which that other State was a sovereign State. It might nevertheless be asked whether that State must enjoy full freedom of action. That was not, in any event, the case of "puppet States", of which history provided several examples. In 1938, the Members of the League of Nations had accepted the absorption of Austria by Germany and the annexation by the Third Reich of part of Czechoslovakia, the remainder of the territory of that country receiving the title of a protectorate—a protectorate that had not been in conformity with international law. It might be asked whether, in that historical context, Hungary, Romania and Yugoslavia had really been sovereign States enjoying full freedom of action. In order to take account of cases of that kind, it should perhaps be made clear that the assistance referred to in article 25 was that rendered "to another State enjoying freedom of international action".

15. With regard to the wording proposed by Mr. Ushakov, it did not seem necessary to provide expressly that the fact of assistance by the State must be established. Many other rules of the draft were applicable only if certain facts were established, but the Commission had not so far considered it necessary to spell that out. He found the term "complicity" entirely acceptable, but not indispensable, since the idea of complicity was fairly clearly expressed by the words "in order to enable or help that State to commit an international offence".

16. Mr. TABIBI said that the article under discussion was vital to the draft as a whole. The question of "complicity" was as important in the context of the Commission's work as it was in the context of

criminal law. "Complicity" of the kind dealt with in article 25 occurred frequently in international life.

17. The Special Rapporteur had been right to exclude from the notion of "complicity", in international law, the fact of one State inciting another to commit an internationally wrongful act, for, as he had pointed out in his report, all States were equal and sovereign. Also, to cover situations of dependence, the Special Rapporteur intended to deal in a separate section of chapter IV with the question of indirect responsibility or responsibility for the act of another. Article 25 concerned cases in which one State, by its conduct, and with deliberate intent, helped another to commit a breach of an international obligation. The importance of the element of intent should be brought out more clearly, perhaps by the adoption of wording such as that proposed by Mr. Ushakov. Otherwise the Commission would fail to take account of the possibility that aid given by one State to another for the legitimate purpose of protecting the latter's territory might later be characterized, in a different political context, as having been given for the purpose of promoting the commission of a wrongful act against a third State.

18. As in previous years, he disagreed with the distinction drawn by the Special Rapporteur between the threat or use of armed force and the threat or use of economic coercion (A/CN.4/307 and Add.1 and 2 and Add.2/Corr.1, para. 66). In his own view, an economic blockade or economic pressure could cripple a State as effectively as an atomic bomb. He hoped, therefore, that threat of economic action would be treated on a par with threat of military action in the section of the report to be devoted to indirect participation in the commission of internationally wrongful acts.

19. Mr. DÍAZ GONZÁLEZ could accept the use of the word "complicity" in article 25, for the Special Rapporteur had clearly explained that "complicity" existed when one State, acting in the exercise of its free will as a sovereign entity, chose to give aid to another State in order to enable the latter to commit an internationally wrongful act. Nor did he have any quarrel with the article as a whole, although some drafting changes were required in the Spanish version.

20. Mr. EL-ERIAN said that, in chapter IV of his report, the Special Rapporteur had most skilfully led the Commission through a subject beset with difficulties, including the most delicate question of deciding whether the three main forms of complicity recognized in internal law, namely, instigation, concurrence and assistance, could be catered for in international law. He agreed with the Special Rapporteur that the Commission should concentrate its attention on assistance in making possible or facilitating the perpetration of a wrongful act. He also agreed with the Special Rapporteur's view on a second basic point, namely, that, as stated in paragraph 76, "the internationally wrongful act of the State which becomes an accessory to the international offence of an-

other State must not be confused with this 'principal' offence".

21. None the less, the article raised a number of problems. It was possible, for example in certain cases, that even instigation or incitement might be regarded as "assistance". Similarly, the mere fact that one State concluded an agreement with another for the purpose of helping the latter to commit an internationally wrongful act might be considered "assistance", even if no material aid were given. In addition, there was the question of deciding what was "assistance" and what was a "principal" offence: in some cases, the "assistance" might play such a role in the commission of the offence that the wrongful act was, in effect, committed by the aiding State. Finally, the question whether the responsibility of the aiding State should be the same as that of the principal offender depended on the circumstances of the case. Perhaps many of the questions he had mentioned would be resolved when the Commission came to the section of the draft dealing with indirect responsibility. Meanwhile, he hoped that the Drafting Committee would be able to recast the article to take account of the points he had raised.

22. Mr. REUTER was not sure whether the Commission wanted the draft to embody a very narrow or, on the contrary, a very broad definition of complicity. The question was whether complicity should be reduced to its material element or whether account should also be taken of the element of intent involved.

23. Unlike Mr. Ushakov, he did not think it was impossible to take account of intent, provided intent had been established. Indeed, in matters of responsibility for injury resulting from an internationally wrongful act, international jurisprudence assessed the injury differently according to whether or not there had actually been intent to cause injury. However, it would be quite conceivable for article 25 not to refer to the element of intent in responsibility, but the material element would then have to be very clearly specified; it would be unnecessary to speak of intent if it were made clear that there was a material link between complicity and the wrongful act. If, for example, it were stated that assistance must have been rendered *in* the commission of the wrongful act, that would mean that the way in which the conduct was materially related to the wrongful act implied intent to participate in the offence.

24. If that narrow definition were accepted, complicity would exist only in the case of acts directly related to the commission of the wrongful act. In those circumstances, it would not be necessary to refer to intent. If, however, a broader definition were adopted and the fact of a State giving another State assistance not directly related to the commission of the wrongful act were considered to be a case of complicity, there would have to be a link other than the material link, and that link would be intent.

25. Consequently, if account were taken in article 25 both of the material element and of the ele-

ment of intent, complicity would be defined more broadly, whereas, if the element of intent were ruled out and only the material element retained, that material element would have to form part of the actual commission of the wrongful act—which was tantamount to adopting a narrower definition. The Commission must choose between those two definitions if it wanted the rule enunciated in article 25 to be sufficiently clear, for it was a general rule that would apply to all international crimes and delicts. He was prepared to accept either of those two interpretations. Unlike Mr. Ushakov, however, he did not think that there could be full participation in the offence, for the two States would then be co-perpetrators of one and the same offence. In his opinion, the Commission must first decide whether it wished to state the condition of intent. If it did so, it could adopt a less strict position with regard to the material condition of assistance in the commission of the wrongful act.

26. Mr. NJENGA said that the article under consideration followed logically on the previous articles, particularly articles 9 and 19; without it the draft would be incomplete.

27. Some members had questioned the appropriateness of the term “complicity”. He had no difficulty in accepting that term. If a more neutral word were required, consideration might be given to the word “participation”, but the meaning of the word “complicity”, as explained in the commentary to the article, was clear. It was evident from the articles already approved and from the manner in which international law had developed since the establishment of the United Nations that the question of State responsibility went beyond that of the relationship between States A and B. For instance, by adopting the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,<sup>6</sup> the General Assembly had placed a duty on States not to help other States to deny peoples the right to self-determination and independence. In that context, it should be noted that, were it not for the complicity of certain States in the colonialist activities of other States, colonialism would not exist. Similarly, the practice of *apartheid* was possible only because of the complicity, direct or indirect, of certain important States in the activities of another State. It was therefore proper for the Commission to draw attention to the question of complicity.

28. Turning to the question of the definition of the concept of intent, he said that too narrow a definition would nullify the scope of the article. No State would admit that it was helping another State to commit a wrongful act. For example, a State supplying arms to another State always argued that the arms were intended for self-defence; it never admitted that its intent was to help the other State to commit acts of colonialism or aggression.

29. The scope of the article had been limited by the Special Rapporteur to the case of a State rendering assistance to another State to enable or help the latter to commit an international offence against a third State. It seemed to him, however, that the scope of the article should be expanded to take account of the concept of peoples, which was now accepted in the context of self-determination, and of the concept of liberation movements, which had been recognized in recent conventions on humanitarian law. The rule should cover offences against peoples and liberation movements as well as offences against States.

30. Nevertheless, the article was fully acceptable. He thought, however, that it would be simpler and clearer if it read:

“The fact that a State renders assistance to another State to commit an international offence constitutes an internationally wrongful act of the State even if the conduct in question would not otherwise be internationally wrongful. Such a State becomes an accessory to the commission of the offence and incurs international responsibility.”

31. Mr. QUENTIN-BAXTER shared the doubts that had been expressed about the use of the word “complicity”. For a lawyer in the common law system that word had very broad and imprecise connotations. It covered at least three notions: that of accessory before the fact, that of the aiding and abetting of an offence and that of accessory after the fact. The third notion was outside the scope of the draft article. To any lawyer in the common law system, however, the word “complicity” would cover both the notion of an accessory before the fact—who was really a principal—and the notion of someone who, although not a principal, was rendering material help in the commission of an offence. The Special Rapporteur’s report, and the article he proposed, dealt only with the second case of complicity, namely, where a State made it possible for another State to commit an internationally wrongful act by giving it active support.

32. The article as it stood, more than any article the Commission had adopted, seemed to leap the barrier between secondary and primary rules. Nowhere else in the draft had the Commission said that a particular kind of action constituted an internationally wrongful act of a State. Superficially at least, that statement looked like the identification of a primary rule. The word “constitutes” had been used in article 19, but essentially in the context of defining an internationally wrongful act, delict or crime. It was true that the boundary between secondary and primary rules was somewhat vague, but in its secondary rules the Commission had always implied a certain view of the nature of the primary rules that were to be related to its drafts. In article 19 it was not unimportant, from the standpoint of primary rules, that the Commission had identified two kinds of internationally wrongful acts, namely, crimes and delicts. It had not, however, attempted to deal with the content of those acts beyond indicating their nature. He wondered whether the real purpose of the article

<sup>6</sup> General Assembly resolution 2625 (XXV), annex.

under discussion was not to say that, even if a State could not itself be said to have committed a given internationally wrongful act, it might have committed a separate internationally wrongful act by facilitating the commission of the first. That was clearly within the essential ambit of the secondary rules formulated by the Commission.

33. He did not agree with Mr. Njenga that the word "participation" could be substituted for the word "complicity", because a State that participated fully in the internationally wrongful act of another State was a co-perpetrator of that act. There were circumstances in which States might be responsible as principals for wrongful actions in which other States had been equally or more prominently involved. There were also, however, actions that could not easily be described as being part of the principal wrongful act, yet that were essential to the commission of that act and were therefore in themselves a separate internationally wrongful act, even though they would not have been wrongful had they not been related to the principal act. Most members of the Commission seemed to be agreed on the broad purpose of the article and on the need for it; its wording, however, gave rise to some difficulty.

34. In conclusion, he asked what was the legal value of the phrase "which thus becomes an accessory to the commission of the offence and incurs international responsibility thereby". The implications were complete, as far as the secondary rules were concerned, when it was said, in the first half of the article, that the mere act of helping a State to commit an internationally wrongful act might itself constitute an internationally wrongful act. He believed, however, that it might be necessary to emphasize the concept set forth in the final clause of the draft article.

35. Mr. SCHWEBEL regarded the proposed article as basically sound. He shared the doubts expressed about the words "complicity" and "accessory", but the substance of the matter left little room for debate.

36. Referring to the statements made by Mr. Reuter and Mr. Njenga, he said that the article should take account of the element of intent. For example, if State A in all innocence supplied arms to State B and those arms were later used by State B to commit an act of aggression, could State A fairly be charged with a breach of international law? He very much doubted, on the basis of State practice, that it could. The need to take account of the elements of knowledge and intent was to be found in E. Lauterpacht's comment on the United Kingdom Government's reply to a parliamentary question concerning the supply of arms and military equipment by certain countries to Yemen, which had subsequently used them in an attack against Aden (A/CN.4/307 and Add.1 and 2 and Add.2/Corr.1, para. 73).

37. It was not true, as Mr. Njenga contended, that States would never admit illegal intent. The worst aggressors of the age had flagrantly broadcast their

intent. Hitler's plans of aggression had been published in explicit detail. In the draft article, however, the Commission was dealing with acts by the assisting State which by definition were not of themselves unlawful. To suggest that such acts would become unlawful because of the action of the State receiving the assistance, even though the assisting State had no knowledge of the unlawful intent of the assisted State and had no unlawful intent itself, seemed to be going too far.

38. Mr. USHAKOV thought that Mr. Reuter had clearly understood his position, which was that the State had to render assistance *in* the commission of the internationally wrongful act, for otherwise there would be no link other than that of intent. It was very difficult to establish intent, however, particularly for minor offences, and it should not be forgotten that the rule enunciated in article 25 was a general rule that applied not only to crimes such as aggression, but also to any other offence. In his opinion, intent was an aggravating circumstance, but it did not have to be established for responsibility to exist. The Commission should therefore mention only assistance in the commission of the internationally wrongful act, and refrain from introducing the notion of wrongful intent into a rule having general scope.

39. Mr. FRANCIS said that, in view of the prominence given to the notion of "participation" in the commentary to the article, and having regard to the text of the article itself, a reader might easily be trapped into assimilating participation in the act with the act itself. Perhaps the Special Rapporteur would consider the possibility of expanding the commentary to make it clear that the term "participation" embraced active or passive involvement, but fell short of actual participation in the wrongful act itself.

*The meeting rose at 6 p.m.*

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## 1519th MEETING

*Tuesday, 18 July 1978, at 11.20 a.m.*

*Chairman* : Mr. José SETTE CÂMARA

*Members present* : Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Yankov.

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**State responsibility (continued)**  
(A/CN.4/307 and Add.1 and 2 and Add.2/Corr.1)  
[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR (*concluded*)

ARTICLE 25 (Complicity of a State in the internationally wrongful act of another State)<sup>1</sup> (*concluded*)

1. Mr. YANKOV commended the Special Rapporteur for the intellectual courage he had shown in presenting a difficult and politically complex problem, and for his cautious approach to possible analogies with the notion of incitement in criminal law.

2. According to the Special Rapporteur, neither advice or incitement nor pressure or coercion came within the scope of complicity as contemplated in article 25; only assistance could be characterized as complicity within the meaning of that article. The Special Rapporteur maintained, moreover, that a State that committed a wrongful act could not claim reduced responsibility by alleging incitement by another State. His own opinion, however, was that in certain cases incitement could constitute grave complicity. It should be noted, in that context, that expressions such as "mere incitement", "serious incitement" and "direct incitement" reflected subjective judgements. Perhaps the Special Rapporteur should further elaborate his conclusion on the question of incitement in the commentary. The Special Rapporteur's conclusion on coercion also required clarification. In paragraph 66 of his seventh report (A/CN.4/307 and Add.1 and 2 and Add.2/Corr.1), the Special Rapporteur referred to the position of the special legal system of the United Nations in regard to the use or threat of use of armed force. It should be noted, however, that the United Nations Charter did not confine the notion of force to armed force.

3. He agreed with those members of the Commission who considered that in all cases of complicity the solution to the problem lay in the intent. Perhaps, therefore, the notion of "intent" should be more clearly expressed in article 25. It was also very important, for purposes of application of the article, to distinguish clearly between the situation and intent of the principal, and the situation and intent of the accessory.

4. In a comprehensive set of articles on State responsibility, a provision such as article 25 was needed. He agreed with Mr. Ushakov that in article 25 the Commission was stating a general rule. Nevertheless, careful consideration should be given to the question of complicity. The draft code of offences against the peace and security of mankind<sup>2</sup> took account of such matters as the extent of the practical assistance furnished by the accessory to the author of the offence, the gravity of the complicity and the intent to facilitate the commission of an offence. He appreciated that the draft code applied to the responsibility of individuals, but it might be useful for the Commission to take some of its provisions into consideration.

5. Mr. THIAM congratulated the Special Rapporteur on the frank and objective way in which he had dealt with a subject of a political nature. He thought the text of draft article 25 was timely, since contemporary international relations were not based on purely legal considerations. The article should be examined from as general a viewpoint as possible, and not simply from the viewpoint of relations between small States and great Powers.

6. He endorsed the text submitted by the Special Rapporteur and his supporting analysis, according to which the notion of complicity could be reduced to a single basic element, namely, participation. He also agreed with the Special Rapporteur on what must be excluded from that notion. The Special Rapporteur had been right to exclude coercion because, although coercion could be a basis for establishing separate responsibility, it was not a form of complicity. He had also been right to exclude incitement, for that was a matter of degree and estimation. There were varying degrees of incitement, but it could be said that incitement ended where coercion began, and that neither incitement nor coercion could serve to establish the existence of complicity.

7. Of the constituent elements of complicity, the Special Rapporteur had been right to choose the material element of aid and assistance, basing his choice on the concept of complicity that prevailed in internal criminal law. Personally he saw no objection in using the term "complicity". Like the Special Rapporteur, he thought that, besides the material element, complicity had an intellectual element, which was intent, and he found it difficult, even in international law, to exclude the element of intent. The text of article 25 was fairly explicit on that point, even though it did not use the word "intent", since the words "in order to" clearly meant that, in rendering aid or assistance, the State had an end in view, which was to enable another State to commit an internationally wrongful act. Intent was thus sufficiently emphasized.

8. He believed the Commission should adopt a broad conception of complicity and assume that the aid or assistance rendered by one State to another was enough to characterize complicity, in other words, that it was incumbent on the State that had rendered the aid or assistance to prove that it had not done so with wrongful intent. If the Commission wished to envisage the situation in all its complexity and take account of current international circumstances, it must take a broad enough view to be able to deal with the intermediate situations that might arise. Thus complicity should be understood in the broad sense: once the provision of aid or assistance—the material element—had been established, the element of intent should be presumed.

9. Mr. SUCHARITKUL commended the Special Rapporteur for his analysis, which clearly defined the scope of the legal concept of complicity engaging, as such, the international responsibility of the State. He fully endorsed the content of the text proposed for article 25, which he found well balanced and suffi-

<sup>1</sup> For text, see 1516th meeting, para. 4.

<sup>2</sup> *Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693)*, p. 9.



ciently flexible. In his opinion, the Special Rapporteur had been right to exclude from the scope of the article cases of incitement and cases of coercion, whether by armed force or by pressure of any kind—political, economic or other.

10. Mr. USHAKOV had rightly emphasized the need to adopt general wording for article 25, since the draft articles dealt with responsibility in general, not with responsibility for delicts or crimes; but it should not be forgotten that the text would apply to specific cases. Moreover, the facts and circumstances to be taken into consideration in establishing the existence of complicity were extremely varied, because of the complexity of State affairs and modern international relations. In practice, it was not easy to make a clear distinction between cases that involved complicity and cases that did not, for there was always an area of uncertainty in which relative values were a very important factor.

11. With regard to the material element, he thought that participation must be active and direct. It must not be too direct, however, for the participant then became a co-author of the offence, and that went beyond complicity. If, on the other hand, participation were too indirect, there might be no real complicity. For instance, it would be difficult to speak of complicity in an armed aggression if the aid and assistance given to a State consisted in supplying food to ensure the survival of the population for humanitarian reasons.

12. The case of arms supplies was also very complex, because complicity could depend on the State to which the arms were supplied. For example, according to Security Council resolution 418 (1977), the provision of arms to South Africa was in itself a wrongful act, without any element of intent. Complicity also depended on the type of arms provided; if they contributed to the proliferation of nuclear weapons, the responsibility of the State supplying them would be engaged, regardless of the element of intent.

13. The provision of arms could be without wrongful intent, as, for example, when arms were sold by private enterprises, but when such sales were prohibited by the State. In that case, did absence of State control generate State responsibility? Arms could also be provided with wrongful intent. But the sales contract concluded by the State might contain conditions prohibiting the use of the arms for certain purposes, such as the repression of national liberation movements. The question then arose whether such restrictive conditions would exempt the supplying State from responsibility.

14. Mr. DADZIE endorsed the comments made by Mr. Quentin-Baxter at the previous meeting on the question of complicity. Nevertheless, the arguments advanced by the Special Rapporteur in support of article 25 were convincing, both in regard to complicity as a form of participation and in regard to assistance.

15. He fully agreed with the Special Rapporteur's analysis of the question of participation. A State in-

curred international responsibility if, by its conduct, it breached an international obligation. The Special Rapporteur had established that any international wrongfulness that might attach to the conduct of a State was supplemented by an additional and separate wrongfulness by reason of its complicity in an international offence by another State, even if the conduct of the former State was not in itself a breach of an international obligation. It was true that in internal law there were degrees of complicity, but it was perhaps neither necessary nor desirable to take such degrees into account where inter-State relations were concerned. A State was either responsible for the breach of an international obligation or it was not. Recent history provided examples of the complicity of certain States in the perpetration of international crimes.

16. The progressive development of international law required that States that were implicated in offences committed by other States should be held fully responsible for their conduct. He fully supported the article submitted by the Special Rapporteur, which contained elements of progressive development of international law, and hoped that, with the help of the Drafting Committee, a text acceptable to the whole Commission could be formulated.

17. The CHAIRMAN, speaking as a member of the Commission, said that with article 25 the Commission was embarking on a new chapter of the Special Rapporteur's report: that dealing with the implication of a State in the internationally wrongful act of another State. In order to establish the content of his working hypothesis, the Special Rapporteur had distinguished between participation proper and vicarious responsibility. He had also emphasized the differences between the situations contemplated in article 25 and those referred to in article 9,<sup>3</sup> and had distinguished "participation", on the one hand, from failure to take preventive measures and parallel perpetration of identical offences, on the other. Having delimited the scope of article 25, the Special Rapporteur had defined various cases of participation proper, distinguishing them from cases of incitement and coercion. That had led him to the conclusion set out in paragraph 70 of his report, and to the question of complicity.

18. The Special Rapporteur had cited the classic cases of complicity, such as a State allowing its territory to be used by another State for the commission of aggression, or supplying arms to another State for the maintenance of *apartheid* or colonial domination, and he had recognized that the act of participation might not in itself constitute an international crime or delict as defined in article 19. Finally, he had stressed the element of intent that characterized wrongful participation and brought out the difference between the responsibility of the principal and that of the accessory.

19. The text proposed for article 25 had been very ably drafted. The article, which constituted an im-

<sup>3</sup> See 1516th meeting, foot-note 6.

portant provision of the draft, was indispensable and was well placed in the structure of the draft. However, he had certain misgivings about the use of the terms "complicity" and "accessory", both of which pertained to criminal law. The Drafting Committee should endeavour to find a wording that avoided those terms.

20. The title of the article, in which the word "complicity" appeared, might be amended to read "Participation of a State in the internationally wrongful act of another State". In the body of the article, it might be advisable to replace the words "which thus become an accessory to the commission of the offence" by the words "which thus participates in the commission of an offence".

21. Mr. AGO (Special Rapporteur) noted that, with some minor differences, the members of the Commission all agreed on the justification of the rule stated in article 25. He thanked those who had drawn attention to the intellectual courage shown in the rule, for he believed that the Commission ought to show intellectual courage in dealing with that subject. He agreed with Mr. Schwebel that the rule partook more of the progressive development of international law than of its codification, but he believed that, if there was one case in which the Commission should carry out progressive development, it was surely the case covered by article 25.

22. He doubted that the scope of the rule should be confined to cases in which the assistance rendered was of an abnormal nature, or in which the interests of the international community as a whole were at issue, as Mr. Riphagen had suggested (1518th meeting), for that would lead to limiting the rule to complicity in international crimes. He remained convinced—and he thanked those who, like Mr. Ushakov, Mr. Reuter, Mr. Yankov and Mr. Sette Câmara, had agreed with him on that point—that the rule stated in article 25 was a general rule, and that the fact of being an accessory to a delict was not necessarily a less important source of international responsibility than the fact of being an accessory to a crime, since the fact of participation through aid or assistance could not be thus assimilated to the principal internationally wrongful act.

23. Mr. Verosta had asked (1518th meeting) whether it was not dangerous to adopt a rule without knowing exactly what its consequences would be. But it was impossible to say exactly what the consequences of an internationally wrongful act consisting in complicity would be, for, as Mr. Ushakov had so rightly said, everything would depend on the circumstances—in other words, on the extent of participation, the way in which it was effected and the act in which the State was participating. It would rest with practice and jurisprudence to establish exact standards and criteria.

24. The situation to which Mr. Verosta had referred, in which the State committing the principal internationally wrongful act was not free or not entirely free, was certainly of interest, but was in no

way related to the case covered by article 25, nor were the consequences the same. For where the freedom of decision of the State that committed the principal internationally wrongful act was limited, to the advantage of another State, there could only be dissociation between the subject that was the author of the internationally wrongful act and the subject that must assume responsibility for that act. That case would be dealt with in the next article. The subject-matter of article 25 was not the relationship between the State that was the author of the principal internationally wrongful act and the State that had participated in that act, but the relationship between the latter State and the State victim of the internationally wrongful act. Hence the case in which the State author of the principal internationally wrongful act was in a position of dependence should not concern the Commission at that juncture.

25. On the question of the intellectual element or the element of intent inherent in the concept of complicity, opinions appeared to differ: some members were inclined to minimize the importance of that element, others to emphasize it. He himself considered that, if intent should not, perhaps, be overemphasized, it was impossible to pass it over in silence, since a State could not be accused of complicity if it had acted in all innocence.

26. Although mere incitement, as Mr. El-Erian (1518th meeting), Mr. Yankov and Mr. Thiam had pointed out, could not in itself be an internationally wrongful act, there were cases where the State that "incited" did not confine itself to incitement alone. For example, if a State concluded an agreement with another State undertaking to maintain benign neutrality if the latter committed an act of aggression, that was not mere incitement but aid and assistance, and it would then be proper to speak of complicity.

27. In reply to Mr. Quentin-Baxter's question (1518th meeting) whether article 25 did not leap the barrier between primary and secondary rules, he said that in his opinion the Commission should not hesitate to leap that barrier whenever necessary.

28. With regard to the question of coercion raised by Mr. Tabibi (1518th meeting), he said that he had been very cautious and had refrained from taking a position on the question of forms of coercion that were legitimate and those that were not; he had confined himself to saying that opinions differed on that point. Apart from that, he had pointed out that coercion as such, even if carried out by armed force, was not necessarily an internationally wrongful act—for instance, if the victim of aggression acted in self-defence. But if the victim, in legitimate reaction, subjected the aggressor State to military occupation and thus assumed control over the country and the exercise of certain activities, it might eventually come to participate in an internationally wrongful act of the occupied State, if not—as most frequently happened—to assume indirect responsibility for a similar act if such an act were committed under its control.

29. Like Mr. Sucharitkul, he thought the word "participation" might in itself be ambiguous, for if participation went beyond mere aid or assistance in an internationally wrongful act committed exclusively by another, that was no longer complicity in but co-authorship of that act. The case to which article 25 was intended to refer should therefore be clearly specified.

30. As to the wording of the article, he thought that the English and French texts would have to be harmonized. Mr. Ushakov had been right to criticize (1518th meeting) the word "permettre" ("enable"), which might refer to an act of an authority repealing a prohibition, whereas article 25 dealt with an entirely different matter. The situation to which he had intended to refer in that article was one where a State made possible or facilitated the commission of an internationally wrongful act by the aid or assistance it provided to another State. For example, if the territory of an aggressor State was separated from that of the victim State by the territory of another State, it was obvious that that other State made aggression possible if it allowed the aggressor State to cross its territory to attack the victim State.

31. Mr. Ushakov had perhaps been right to criticize the word "infraction" ("offence"), because someone might wonder why that term had been used instead of the expression "internationally wrongful act" and interpret it differently, whereas he had in fact used it to mean "internationally wrongful act", but had simply wanted to avoid repetition.

32. The most important objection raised had been that relating to the words "against a third State". He had chosen the classical case in which State A helped State B to commit a wrongful act against State C, but he recognized that there were subjects of international law other than States and that an internationally wrongful act could be committed against an international organization. Moreover, an increasing number of international conventions placed on each party obligations towards the whole international community or towards all the other parties to the convention. For example, if a State breached an international labour convention by not according certain treatment to its own workers, it was not committing an internationally wrongful act against any one State, but against all the States that had ratified the convention. He therefore agreed with Mr. Ushakov, Mr. Njenga and Mr. Pinto (1518th meeting) that the words "against a third State" should be deleted and that reference should be made only to the commission of an internationally wrongful act, without saying against whom the act was committed.

33. He noted that the Commission was hesitant about using the term "complicity" and that some members feared to use it, although they had not objected to the use of the word "crime". He thought the Commission could try to avoid the use of the term, provided that the situation referred to was made perfectly clear, and that it was realized that what was at issue was in fact complicity.

34. In his opinion, the words "assistance ... in the

commission ... of an internationally wrongful act", proposed by Mr. Ushakov,<sup>4</sup> would be too restrictive, not only because they presupposed that the commission of the internationally wrongful act on the same begun when the aid was given, which was not always the case, but especially because they might give the impression that the State took part in the commission of the internationally wrongful act on the same footing as the principal author of the act. A clear distinction must be made between a case where the purpose of the aid or assistance was to make it possible or easier for another State to commit an internationally wrongful act, and a case where the State actually took part in the commission of an internationally wrongful act and became a co-author of that act. He was grateful to Mr. Yankov, Mr. Sucharitkul and Mr. Thiam for having drawn the Commission's attention to that point.

35. Finally, he wondered whether it would not be dangerous to begin the article with the words "if it is established", as Mr. Ushakov had proposed, since that would suggest a form of judgement by a judicial or other authority, an idea the Commission had so far avoided.

36. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 25 to the Drafting Committee.

*It was so agreed.*<sup>5</sup>

*The meeting rose at 1 p.m.*

<sup>4</sup> 1518th meeting, para. 5.

<sup>5</sup> For consideration of the text proposed by the Drafting Committee, see 1524th meeting, paras. 2-6.

## 1520th MEETING

*Tuesday, 18 July 1978, at 3 p.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Calle y Calle, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Yankov.

**The most-favoured-nation clause (continued)\***  
(A/CN.4/308 and Add.1 and Add.1/Corr.1 and Add.2, A/CN.4/309 and Add.1 and 2, A/CN.4/L.280)

[Item 1 of the agenda]

\* Resumed from the 1506th meeting.

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE<sup>1</sup>

1. The CHAIRMAN thanked the Chairman and members of the Drafting Committee for the care they had taken in finalizing the draft articles on the most-favoured-nation clause.
2. Mr. SCHWEBEL (Chairman of the Drafting Committee) introduced the complete set of draft articles on the topic of the most-favoured-nation clause (A/CN.4/L.280). The draft consisted of 29 articles instead of the 27 adopted by the Commission on first reading in 1976,<sup>2</sup> because the Drafting Committee had decided to delete article 8 of the 1976 draft and to add three new articles, namely, articles 6, 12 and 14 of the new draft.
3. The Drafting Committee had first considered the articles of the 1976 draft and those incidental to them and had then proceeded to consider the proposals for additional articles made by members of the Commission at the current session. The proposed new articles, namely, articles A and 21 *ter* proposed by Mr. Reuter (A/CN.4/L.264 and A/CN.4/L.265),<sup>3</sup> article 21 *bis* proposed by Mr. Njenga (A/CN.4/L.266)<sup>4</sup> and article 23 *bis* proposed by Sir Francis Vallat (A/CN.4/L.267),<sup>5</sup> had thus been considered towards the end of the Drafting Committee's work.
4. The Drafting Committee had devoted 20 of the 34 meetings so far held during the session to the draft articles on the most-favoured-nation clause, concluding its examination of the 1976 draft only on the morning of 14 July. For that reason, and also because it had not been in possession of all the necessary elements for a full consideration of the four proposed new articles on an equal basis, and differences of opinion had emerged after a preliminary exchange of views of each of the four proposals, the Drafting Committee had concluded that the most appropriate course of action would be to recommend that the Commission should include the texts of the four proposals, together with a discussion of the arguments advanced for and against each of them, in the introduction to the chapter of its report concerning the most-favoured-nation clause. Accordingly, the Drafting Committee was not submitting articles based on any of the four proposals.
5. He suggested that the Commission should examine the draft article by article.
6. Mr. ŠAHOVIĆ expressed surprise that, although the Drafting Committee had done a great deal of work, it had not managed to consider the few articles proposed by members of the Commission. Regardless of the difficulties to which those proposals might

have given rise in the Drafting Committee, they should have led to more practical results, since their importance had been generally recognized during the Commission's discussion of them.

7. In particular, the Commission had considered article 21 *bis*, proposed by Mr. Njenga, as essential to the success of the draft. It was highly regrettable that the Drafting Committee had not put forward a text corresponding to that proposal. Personally, he would be prepared to take part in a further discussion of article 21 *bis*.

8. Mr. NJENGA said that he would find it very difficult to examine the draft article by article in view of the omission from it of some of the proposals introduced at the current session. It was not clear to him why the Drafting Committee had insisted on associating the four proposals in question, which concerned entirely different matters and had in fact met with very different receptions in the Commission. His own proposal for a new article 21 *bis* introduced a principle that was considered by many, both inside and outside the Commission, as the very core of the issue of the most-favoured-nation clause and had had the support of almost all the Commission's members, as the records of the 1494th, 1495th and 1496th meetings testified. Many members had expressed their views on the text and, on the conclusion of the debate, the Special Rapporteur had suggested an improved wording.<sup>6</sup> That being so, he did not see what further information the Drafting Committee could have required for a full consideration of the article. Unless the Commission wanted to expose itself to very serious criticism in the Sixth Committee, it should decide, if necessary by voting, to insert the article in the body of the draft.

9. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the importance of the four proposals in question was not in doubt. It was perfectly correct that article 21 *bis* had received a large measure of support in the Commission, but in the Drafting Committee it had been subjected to vigorous attack. Some members had argued that the proposed provision was desirable, but would be difficult to apply because of the absence of a universally accepted definition of developing countries, in particular, some members had thought that the Group of 77 was not uniformly composed of developing countries and included some oil-rich States that were not entitled to the concessions they would receive under the proposed article. Others had argued that the proposal was not only unworkable but also undesirable, in that it would restrict the application of the most-favoured-nation clause to a small group of developed States and exclude developing countries. Yet others had accepted the proposal in substance but had thought it should be brought more closely into line with the old article 21. Had a vote been taken, the proposal would probably have commanded only a bare majority. In the circumstances, the Drafting Committee had agreed that, in view of the lack of

<sup>1</sup> For the initial debate on the draft articles at the current session, see 1483rd-1500th meetings, 1505th meeting, paras. 13-67, and 1506th meeting.

<sup>2</sup> *Yearbook... 1976*, vol. II (Part Two), pp. 11 *et seq.*, doc. A/31/10, chap. II, sect. C.

<sup>3</sup> See 1495th meeting, paras. 23 and 22.

<sup>4</sup> See 1494th meeting, para. 25.

<sup>5</sup> See 1498th meeting, para. 18.

<sup>6</sup> 1496th meeting, para. 54.

time, it should refrain from recommending the text to the Commission.

10. Mr. PINTO reminded members that in 1976 he had proposed a provision on lines similar to Mr. Njenga's proposal.<sup>7</sup> In his opinion, a text of that kind should have been incorporated in the body of the draft, not to insert it might amount to excluding one of the provisions that would have received the support of an overwhelming majority of States. The argument had been advanced that such a provision would present insurmountable difficulties of interpretation and application, as there was no objective criterion for deciding which State fell into the category of developing countries for the purposes of the provision. In his view, a country was a developing country if it belonged to the Group of 77 and was not a developing country if it did not belong to that group. The concept of a developing country was essentially political in nature, and rooted in the belief that the economic interests that united developing countries were greater than the interests that divided them. Accordingly, there was no general recognition of gradations of development among developing countries; a category of least developed countries and a category of countries most seriously affected by certain economic forces were recognized only in very specific and limited contexts that had no connexion whatever with the subject of the draft articles under discussion. He fully associated himself with the position taken by Mr. Njenga.

11. Mr. CALLE y CALLE said that, although the draft articles before the Commission represented an improvement on the 1976 draft, they did not deal with the important matters referred to in the proposals made by Mr. Njenga, Mr. Reuter and Sir Francis Vallat. In his opinion the Drafting Committee, even in the little time available to it, should have been able to include in the draft an article reflecting Mr. Njenga's proposal that preferences granted by developing countries to other developing countries should be excluded from the operation of the most-favoured-nation clause. The Drafting Committee should also have taken account of Sir Francis Vallat's proposal for the inclusion of an article on the most-favoured-nation clause in relation to treatment extended by one member of a customs union to another member, for the Commission and the Sixth Committee of the General Assembly would then have had an opportunity to consider whether other similar associations of States should also be excluded from the operation of the most-favoured-nation clause. In addition, the inclusion in the draft of Mr. Reuter's important proposals for articles on treatment extended in accordance with the Charter of Economic Rights and Duties of States<sup>8</sup> and treatment extended under commodity agreements would have reflected current international concern about the need for measures to correct the widening imbalance between developed and developing countries.

12. Mr. TABIBI remarked that never in the 17 years of his membership of the Commission had a proposal been put aside by the Drafting Committee after receiving general support in the Commission. He agreed with previous speakers that the article proposed by Mr. Njenga should be incorporated in the draft articles and go forward to the Sixth Committee.

13. Mr. QUENTIN-BAXTER did not wish to detract in any way from the Drafting Committee's achievement, but could not help regretting the course it had adopted in respect of the proposals in question. If lack of time were the only reason, the decision would be understandable. What was disturbing was the policy-making element involved. It seemed as though the Drafting Committee were substituting the judgment of its own members for that of the Commission, and that might have serious implications from the point of view of the Commission's standing with the General Assembly. Members' technical qualifications and detachment should enable them to reshape texts even where problematic issues were involved. He strongly felt that the Drafting Committee should have come forward with a text even in the presence of apparently irreconcilable differences.

14. Mr. FRANCIS agreed that it was the Commission's duty to itself as well as to the Sixth Committee to come to some conclusion on Mr. Njenga's proposal, if not necessarily on the three other proposals in question. It was unrealistic to insist on linking the four proposals. The least that could be done for the text of article 21 *bis* would be to place it in square brackets in the body of the draft.

15. Mr. DÍAZ GONZÁLEZ fully supported Mr. Njenga's proposal for the inclusion in the draft of an article 21 *bis* on the most-favoured-nation clause in relation to arrangements between developing countries. Although he had absolutely no doubt about the competence and devotion of the members of the Drafting Committee, he considered that, in the final analysis, it rested with the Commission itself to decide what draft articles should be submitted to the General Assembly. He was therefore unable to accept the Drafting Committee's decision that the draft articles should not include the proposals made by Mr. Njenga, Mr. Reuter and Sir Francis Vallat, which had been supported by the majority of the Commission and were of primary importance to developing countries.

16. Mr. THIAM said that he would fully have supported the article 21 *bis* proposed by Mr. Njenga (A/CN.4/L.266) had he been present at the meeting at which it had been submitted to the Commission. The Drafting Committee, according to its Chairman, had considered the substance of the article, but its members had been unable to reach agreement and had decided to exclude the article. In no event, however, could the Drafting Committee take the place of the Commission. It might of course discuss a matter of substance, but it could not decide that an issue should be set aside. The respective roles of the Drafting Committee and the Commission should be made clear.

<sup>7</sup> See *Yearbook... 1976*, vol. I, p. 144, 1387th meeting, para. 16.

<sup>8</sup> General Assembly resolution 3281 (XXIX).

17. The matter referred to by Mr. Njenga in the proposed article was such that it could not be put aside without the Sixth Committee of the General Assembly receiving the impression that it had given rise to a political problem that the Commission had preferred to avoid. It rested with the General Assembly, however, not with the Commission, to define the notion of a developing country and to decide whether the Group of 77 included some developed countries. As he saw it, the international community in fact considered all countries belonging to the Group of 77 to be developing countries. Moreover, it could not be claimed that article 21 *bis* gave rise to insurmountable problems because the notion of a developing country had not been defined, for in article 23 the Commission referred explicitly to developing countries.

18. He therefore expressed the hope that the Commission would reconsider article 21 *bis*.

19. Mr. SUCHARITKUL thought that, given more time, the Drafting Committee would have considered the proposed text of article 21 *bis* and would probably have adopted it. Apart from the reasons mentioned by previous speakers, the proposal deserved to be incorporated in the body of the text because it was tantamount to a new rule of international law in favour of developing countries, as provided for in article 29 of the draft. As for the absence of a definition of the notion of developing countries, the Commission was being asked to approve article 23, which dealt with relations between developed and developing States under generalized systems of preferences; the objection was therefore invalid.

20. Mr. EL-ERIAN shared the views of previous speakers and reminded members of the full support he had given to Mr. Njenga's proposal as well as to a similar one made by Mr. Pinto in 1976.

21. With regard to the difficulty arising from the absence of a definition of developing countries, he endorsed the highly pertinent remarks made by Mr. Thiam. On past occasions, as an exceptional measure, the Commission had relegated provisions that it had not had time to discuss to an annex to the main text. That might still be done in respect of the proposals made by Mr. Reuter and Sir Francis Vallat. Mr. Njenga's proposal, however, had been discussed by the Commission in detail and should appear in the body of the draft.

22. Mr. USHAKOV (Special Rapporteur) did not think there was any need to discuss the respective powers of the Drafting Committee and the Commission. It was quite certain that the Drafting Committee had merely to submit proposals to the Commission and that it could not go against the Commission's will.

23. In summing up the discussion on article 21 and on article 21 *bis* proposed by Mr. Njenga, he had suggested simpler and more precise wording for article 21 *bis*.<sup>9</sup> However, he had indicated that such a

provision would be applicable only if it were made clear what was meant by developing countries in the sphere of international trade. Personally, he could not accept the criterion of membership of the Group of 77, which was of a political nature. Everyone was aware that among the "economically developing" countries there were States that were relatively highly developed.

24. The proposal that a developed beneficiary State should not be entitled to the preferences granted by developing countries to one another meant, *a contrario*, that a developing beneficiary State would be entitled to such preferences. However, that rule would not be easy for developing countries to apply to one another. For example, a State that was regarded as a developing country from the political point of view might claim the preferences that two other, less wealthy, developing countries granted to one another. Similar difficulties arose in connexion with the generalized system of preferences. In its commentary to article 21 of the draft articles adopted on first reading, the Commission had referred to the case of Hungary, stating that, for that country,

beneficiary countries are those developing countries in Asia, Africa and Latin America whose *per capita* national income is less than Hungary's; which do not apply discrimination against Hungary; which maintain normal trade relations with Hungary and can give reliable evidence of the origin of products eligible for preferential tariff treatment...<sup>10</sup>

As the Commission had observed in the same commentary, the generalized system of preferences

is based upon the principle of self-selection, i.e. that the donor countries have the right to select beneficiaries of their system and withhold preferences from certain developing countries.<sup>11</sup>

Thus, although article 21 referred to developing countries, the situation was entirely different from the one covered by article 21 *bis* since, under article 21, the granting States themselves selected the beneficiary developing States. In another passage of the commentary, moreover, the Commission had taken cognizance of the fact that "there is at present no general agreement among States concerning the concepts of developed and developing States".<sup>12</sup> Accordingly, it could not now be claimed, in connexion with article 21 *bis*, that such an agreement existed in the sphere of international trade.

25. If the Commission adopted article 21 *bis*, it would be promoting the progressive development of international law, not its codification. Mr. Njenga's proposal was based on article 21 of the Charter of Economic Rights and Duties of States, which provided:

Developing countries should endeavour to promote the expansion of their mutual trade and to this end may, in accordance with the existing and evolving provisions and procedures of international agreements where applicable, grant trade preferences to other developing countries without being obliged to extend such preferences to developed countries, provided these arrangements

<sup>10</sup> *Yearbook... 1976*, vol. II (Part Two), p. 61, doc. A/31/10, chap. II, sect. C., art. 21, para. (9) of the commentary.

<sup>11</sup> *Ibid.*, p. 63, para. (17) of the commentary.

<sup>12</sup> *Ibid.*, para. (19) of the commentary.

<sup>9</sup> See 1496th meeting, para. 54.

do not constitute an impediment to general trade liberalization and expansion.

Article 21 *bis* was based on that provision, but those who supported it should be quite certain that it was actually applicable. It was not enough to affirm that, for the purposes of international trade, developing countries were the 120 or so member States of the Group of 77. Nor was it enough to formulate a proposal, for a proposal must be drafted in terms that were precise enough to give it every chance of being properly applied. It was not, therefore, without justification that some members of the Drafting Committee had taken the view that article 21 *bis* should not be included in the draft.

26. Mr. NJENGA said that the absence of an agreed definition of developing countries was not a cogent argument for leaving his proposal aside. The proposal was based on practices followed in UNCTAD and on the principle set forth in article 21 of the Charter of Economic Rights and Duties of States. The Commission would appear in a very bad light if it refused to adopt a useful principle on such formalistic grounds as lack of a definition.

27. The proposal he was asking the Commission to reconsider was the original text of article 21 *bis* as amended by the Special Rapporteur at the 1496th meeting. That text incorporated many drafting points that had been raised during the debate, and the fact that the Drafting Committee had not had a great deal of time to discuss it should therefore not weigh too heavily in the balance. The other new articles had been proposed later in the debate, had been discussed less fully and had not commanded unanimous support. It would therefore be inappropriate to insist on giving equal treatment to all four proposals.

28. He would have no objection to the text appearing in square brackets if that were the Commission's wish.

29. Mr. YANKOV thought that the article 21 *bis* proposed by Mr. Njenga should have been included in the draft articles on the most-favoured-nation clause in view of the broad support it had received both in the Commission and in the Drafting Committee. Moreover, justification for mentioning developing countries was to be found in articles 23 and 29 of the draft under consideration. He was quite certain that the inclusion in the draft of the article proposed by Mr. Njenga would be approved by the Sixth Committee and that its omission would do a great disservice to the Commission.

NEW ARTICLE 23 *bis* (The most-favoured-nation clause in relation to arrangements between developing countries).

30. Mr. NJENGA formally proposed the inclusion in the draft of the following new article 23 *bis*:

*"The most-favoured-nation clause in relation to arrangements between developing States*

*"A developed beneficiary State is not entitled under a most-favoured-nation clause to any prefer-*

*ential treatment in the field of trade extended by a developing granting State to a developing third State."*

31. Mr. SCHWEBEL (Chairman of the Drafting Committee) fully agreed with Mr. Ushakov that there was no need to discuss the respective powers of the Drafting Committee and the Commission.

32. As he had already pointed out, the Drafting Committee had carefully considered the article 21 *bis* proposed by Mr. Njenga but had failed to reach agreement on it. The Drafting Committee had then been informed that there was no precedent for placing a provision of a draft in square brackets on second reading. It had therefore refrained from adopting the solution of placing draft article 21 *bis* in square brackets and had decided to give equal treatment to the proposals of Mr. Njenga, Mr. Reuter and Sir Francis Vallat in the introduction to the chapter of the Commission's report on the most-favoured-nation clause.

33. Turning to the new article 23 *bis* proposed by Mr. Njenga, he said that it did not meet the point about which Mr. Ushakov had expressed well-founded concern and that its wording did not correspond to that of the existing article 23, as adopted by the Drafting Committee, in that it did not refer to the conformity of such an exception with the relevant rules and procedures of a competent international organization. If the wording of the new draft article 23 *bis* were to attract wide support, it should be in line with that of article 23.

34. He therefore proposed that the words "in conformity with the relevant rules and procedures of competent international organizations of which the developing State concerned is a member" should be added at the end of the proposed article 23 *bis*.

35. Mr. NJENGA said that he would have no difficulty in accepting the amendment proposed by the Chairman of the Drafting Committee, particularly if it ensured broad support for the proposed article 23 *bis*.

36. Mr. RIPHAGEN said that, in the case in point, three States were concerned and that, in his opinion, they must all be members of the competent international organization. He therefore proposed that the words "of which the developing State concerned is a member" should be replaced by the words "of which the States concerned are members".

37. Mr. FRANCIS had some doubts about the notion of conformity with the relevant rules and procedures of competent international organizations, as introduced in the amendment to draft article 23 *bis* proposed by Mr. Schwebel. Article 23 referred to a generalized system of preferences recognized by the international community of States as a whole, whereas article 23 *bis* referred not only to arrangements between developing countries under a generalized system of preferences but also to any other arrangements on which they agreed. It seemed to him that article 23 *bis*, as amended by the Chairman of the Drafting Committee, meant that any single grant by one devel-

oping country to another would be required to be in conformity with the relevant rules and procedures of the competent international organization and that, as such, the article would detract from the freedom accorded to developing countries by the draft articles as a whole.

38. Mr. SCHWEBEL (Chairman of the Drafting Committee), referring to the amendment proposed by Mr. Riphagen, suggested that it would be better to retain the wording he himself had proposed. If article 23 *bis* provided that, for the relevant rules and procedures of the competent international organization to apply, all three of the States concerned must be members of that organization, it might not be clear whether or not the developed beneficiary State was entitled to the preferential treatment in question; whereas, if the wording he had proposed were accepted, the exception provided for in article 23 *bis* would apply if either of the developing States concerned was a member of the competent international organization.

39. He also thought that the words "competent international organizations" in his amendment should be replaced by the words "a competent international organization".

40. Mr. PINTO said that he could accept article 23 *bis*, which appeared to be a step in the right direction. He nevertheless had doubts similar to the ones expressed by Mr. Francis and was not certain about the full implications of the first amendment proposed by Mr. Schwebel.

41. Mr. RIPHAGEN still thought that the international organization in question could be competent only if all three of the States concerned were members of it.

42. Mr. EL-ERIAN supported the text proposed by Mr. Njenga, as amended by Mr. Schwebel and Mr. Riphagen.

43. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that he could accept Mr. Riphagen's amendment to the text of article 23 *bis*, which would now read:

*Article 23 bis. The most-favoured-nation clause in relation to arrangements between developing States*

A developed beneficiary State is not entitled under a most-favoured-nation clause to any preferential treatment in the field of trade extended by a developing granting State to a developing third State in conformity with the relevant rules and procedures of a competent international organization of which the States concerned are members.

44. The CHAIRMAN said that, if there were no objection, he would take it that the Commission decided to adopt the title and the text of article 23 *bis*, as amended.

*It was so agreed.*

*The meeting rose at 6.15 p.m.*

## 1521st MEETING

*Wednesday, 19 July 1978, at 10.05 a.m.*

*Chairman : Mr. José SETTE CÂMARA*

*Members present :* Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

**The most-favoured-nation clause (continued)**  
(A/CN.4/308 and Add.1 and Add.1/Corr.1 and Add.2, A/CN.4/309 and Add.1 and 2, A/CN.4/L.280)

[Item 1 of the agenda]

NEW ARTICLE 23 *bis* (The most-favoured-nation clause in relation to arrangements between developing States)<sup>1</sup> (concluded)

1. Mr. USHAKOV (Special Rapporteur) said that in the commentary to article 23 *bis* it would be essential to indicate that, even more than article 23, the article concerned the progressive development of international law, that it was based on article 21 of the Charter of Economic Rights and Duties of States<sup>2</sup> and that it would be very difficult to apply in the absence of any classification of countries into developed and developing countries from the point of view of international trade. On the last point, it should be made clear that the Commission had judged that responsibility for formulating proposals for the implementation of certain rules of the draft rested not with the Commission but with the organs competent to establish lists of developing countries or to determine the applicable criteria.

2. Mr. RIPHAGEN said that a foundation in the Charter of Economic Rights and Duties of States could be claimed not only for the further exception to the most-favoured-nation clause adopted by the Commission in article 23 *bis*, but also for other proposals for new draft articles on which the Drafting Committee had not agreed, particularly the proposals relating to treatment extended under commodities agreements and in connexion with customs unions, and the proposal concerning treatment extended in conformity with the Charter of Economic Rights and Duties of States. Hence, although the Commission had covered in its draft articles the subject-matter of articles 18 and 21 of the Charter of Economic Rights and Duties of States, it had not provided for that of articles 5 and 6, which concerned primary commodities, or for that of article 12, which concerned customs unions and similar groupings. The Commission

<sup>1</sup> For text, see 1520th meeting, para. 43.

<sup>2</sup> General Assembly resolution 3281 (XXIX).



should have looked into those two questions, for the most-favoured-nation clause must be adapted to contemporary trends in international trade, and particularly to the principles laid down in the Charter of Economic Rights and Duties of States. He greatly regretted that for reasons of time, the Commission had been unable to examine the proposals he had mentioned.

3. Mr. PINTO said that, if the only purpose of the condition expressed by the phrase “in conformity with the relevant rules and procedures of a competent international organization” was to remind the parties contemplated in article 23 *bis* that they must act in accordance with previous contractual obligations, the qualification seemed unnecessary, albeit harmless. He would find it unacceptable, however, if it meant that, in order to ensure the exclusion of a developed State from entitlement under a most-favoured-nation clause, it was necessary to belong to a “competent international organization”. Many countries in Asia and Latin America were not members of GATT or any other such arrangement, and he thought it would be wrong to restrict the protection offered by the qualification to States that belonged to such bodies. Moreover, the article as drafted failed to make it clear whether such protection would be available only where all three States referred to were members of the same organization and had, as he supposed, consented in advance to the situation envisaged, or whether it would also exist where the members of the organization included only the two developing States or perhaps only one of them.

4. Some of those ambiguities might have been avoided by dividing the article into two sentences, with the qualification appearing in the second sentence. The latter sentence might have provided that, if the developing granting State and the developing third State were members of an international arrangement or organization competent in the sphere of trade, they would have to abide by the relevant rules and procedures of that arrangement or organization. It would then have been clear that the article meant what he interpreted it to mean, namely, that the requirement that relations between the developing granting State and the developing third State should be in conformity with the rules of an international organization would not apply—and in consequence would not restrict the freedom of developing countries to grant preferential treatment among themselves—unless both those States were members of that organization.

5. Mr. REUTER welcomed the adoption of article 23 *bis*, although it was far from coming up to his expectations. It seemed from the procedure which the Commission had had to follow at the previous meeting that the other articles proposed by members of the Commission, and in particular the two articles he had himself proposed, would not be examined. Generally speaking, the methods adopted in preparing the draft, both in the Commission and in the Drafting Committee, could hardly be a matter for satisfaction. The application of the most-favoured-

nation clause had indeed been carefully studied in the abstract, but the same was not true of its role in international trade; that aspect of the problem had been touched upon only incidentally, in connexion with frontier traffic, for example. It was not for lack of time or qualification that the Commission had not looked at the question from the angle of the new international order, but because it had not wished to do so. And it had been unwilling to look at the question from that angle because it had considered that it would not reach agreement. The modest article 23 *bis* that had been adopted was in fact of no great value, but it would be necessary to make do with it. It was nevertheless paradoxical that the Commission should be unable to submit to the General Assembly articles as fundamental and at least as far-reaching as certain provisions already adopted by the General Assembly and set forth in the Charter of Economic Rights and Duties of States.

6. Mr. SUCHARITKUL did not regard the amendment incorporated in the original text of article 23 *bis* on the proposal of Mr. Schwebel and Mr. Riphagen as in any way affecting the granting by one developing State to another, by way of an exception from the most-favoured-nation clause, of preferential treatment in the sphere of trade. He interpreted the phrase “in conformity with the relevant rules and procedures” as referring to a permissive and not a mandatory situation; the term “competent international organization” as meaning the United Nations; and the term “the States concerned” as meaning the developed beneficiary State, the developing granting State, and the developing third State.

7. When developing States Members of the United Nations concluded arrangements for preferential treatment between themselves in the form of a treaty, they were required by Article 102 of the United Nations Charter to register the instrument with the Secretariat of the Organization. Such registration in itself represented compliance with “the relevant rules and procedures of a competent international organization”. He believed that all preferential treatment that had so far been granted by Members of the United Nations among themselves through regional, bilateral or other arrangements was in conformity with the “relevant rules and procedures” of the Organization as they currently existed. Otherwise, those arrangements would surely have been questioned when, as was the case each year, they were brought to the attention of the General Assembly in the part of the report of the Economic and Social Council that concerned the activities of the regional commissions of the United Nations.

8. Mr. VEROSTA remarked that the expression “international organization”, in article 23 *bis*, did not cover the General Agreement on Tariffs and Trade. The wording of the article should be amended accordingly.

9. Mr. SCHWEBEL understood article 23 *bis* to mean that, if one developing State extended preferential treatment to another, a developed State that

was the beneficiary State under a most-favoured-nation clause would be prohibited from invoking that clause in order to obtain the same treatment only if the preferential treatment granted by the developing country was in conformity with the relevant rules and procedures of a competent international organization of which the States concerned were members. The fact that the article referred to "a" competent international organization indicated that the organization in question might be any organization in that category, a category that undoubtedly included GATT. He held that view not merely because he had understood the Drafting Committee to have had GATT in mind when it had drawn up article 23, in which it had employed the expression "a competent international organization" in the same context as in article 23 *bis*, but in particular because GATT was in fact generally treated, by reason of its objectives, structure, method of working and relations with the United Nations, as tantamount to a specialized agency of the United Nations. GATT had its special legal characteristics but, as a matter of fact, it was and operated as an international organization.

10. Mr. YANKOV said that, by permitting developing nations to establish special régimes among themselves, the article rightly made allowance for the particular economic, social or political problems such States might encounter. He therefore approved the general philosophy of the article and subscribed to much of what Mr. Pinto had said concerning its operation. He wished, however, to stress that, as he interpreted it, the article offered no basis whatsoever for political or other discrimination against any country that was a member of the group of developing nations, even if that country's gross national product happened to be higher than that of another country which was not a member of that group. To use the article for the purposes of such discrimination would be to use it for the opposite of what was intended.

11. Mr. QUENTIN-BAXTER was grateful to the members of the Drafting Committee who had spoken on article 23 *bis*, and particularly to the Special Rapporteur, for having dispelled all possibility of suspicion that, in setting aside certain of the proposals submitted to it, the Drafting Committee had acted perfunctorily or adopted a position different from that of the Commission. The current discussion showed that it was impossible to give an article such as article 23 *bis* the same measure of clarity and precision as the Drafting Committee had achieved in other articles. He hoped the Commission would be able to convey to the General Assembly the inevitability of a difference in quality between an abstract presentation of the most-favoured-nation clause and what the Commission could do to reflect current preoccupations. He also hoped the Commission would tell the General Assembly that the question of customs unions was an important one and must be taken into account if there were to be a possibility of convening a conference that would do justice to the very high quality of the work underlying the draft articles.

12. Mr. USHAKOV (Special Rapporteur), supported

by Mr. REUTER, said that in the French version of the article the words "les Etats en cause" should be replaced by the words "les Etats intéressés", so as to bring it into line with the English version.

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE  
(continued)

ARTICLE 1<sup>3</sup> (Scope of the present articles)

13. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 1:

*Article 1. Scope of the present articles*

The present articles apply to most-favoured-nation clauses contained in treaties between States.

14. The Committee had decided not to alter the title and text of article 1 as adopted by the Commission on first reading at its twenty-eighth session.<sup>4</sup>

*Article 1 was approved.*

15. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that, since article 2 contained definitions of terms, he would introduce it last.

ARTICLE 3<sup>5</sup> (Clauses not within the scope of the present articles)

16. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 3:

*Article 3. Clauses not within the scope of the present articles*

The fact that the present articles do not apply to a clause on most-favoured treatment other than a most-favoured-nation clause referred to in article 4, shall not affect:

(a) the legal effect of such a clause;

(b) the application to it of any of the rules set forth in the present articles to which it would be subject under international law independently of the present articles.

17. The version of article 3 adopted in 1976 had dealt essentially with two kinds of international agreements containing clauses on most-favoured-nation treatment, namely, agreements concluded by States otherwise than in written form and agreements to which subjects of international law other than States were also parties. In considering the article, the Drafting Committee had borne in mind that members of the Commission had criticized the introductory wording of the original version of the article as being incomplete and that, as indicated in article 4, a most-favoured-nation clause was a provision

<sup>3</sup> For consideration of the text initially examined by the Commission at the current session, see 1483rd-1485th meetings.

<sup>4</sup> For the text of the articles adopted by the Commission on first reading, see *Yearbook... 1976*, vol. II (Part Two), pp. 11 *et seq.*, doc. A/31/10, chap. II, sect. C.

<sup>5</sup> For consideration of the text initially examined by the Commission at its current session, see 1486th meeting, and 1487th meeting, paras. 7-27.

in a “treaty”, which was defined in article 2, paragraph 1, subparagraph (a), as an international agreement concluded between States “in written form”. The Committee had therefore decided to deal separately, in article 6, with the case of clauses on most-favoured-nation treatment contained in agreements to which other subjects of international law were also parties. For the sake of consistency, it had also dealt in article 6 with relations between States under clauses on most-favoured-nation treatment contained in international agreements to which subjects of international law other than States were also parties, a question that had been covered in subparagraph (c) of the former article 3.

18. The Drafting Committee had made use in the new article 3 of the expression “clause on most-favoured treatment”—as distinct from the expressions “clause on most-favoured-nation treatment”, which appeared in article 6, and “most-favoured-nation clause”, which appeared in numerous articles—in order to cover the wide variety of situations, such as those involving a most-favoured-international-organization clause or a most-favoured-free-city clause, in which either the grantor or the beneficiary, or both, were subjects of international law other than States. The Committee had abandoned the reference made in the 1976 version to “a clause on most-favoured-nation treatment contained in an international agreement between States not in written form”, since such clauses were virtually unknown in practice.

*Article 3 was approved.*

ARTICLE 4<sup>6</sup> (Most-favoured-nation clause)

19. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 4:

*Article 4. Most-favoured-nation clause*

A most-favoured-nation clause is a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured-nation treatment in an agreed sphere of relations.

20. Article 4 substantially reproduced the text of the article adopted on first reading in 1976. However, in the light of comments made in the Commission, the Committee had decided to replace the word “means” by the word “is”, to avoid giving the article the appearance of a definition, and to stress the legal nature of the undertaking by one State towards another under a most-favoured-nation clause by adding the words “an obligation”.

*Article 4 was approved.*

ARTICLE 5<sup>7</sup> (Most-favoured-nation treatment)

21. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 5:

*Article 5. Most-favoured-nation treatment*

Most-favoured-nation treatment is treatment accorded by the granting State to the beneficiary State, or to persons or things in

a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.

22. The text of article 5 was the same as that adopted on first reading, except that the word “means” had been replaced by the word “is” for the same reason as in article 4, and that at all appropriate points in the draft the words “a third State” had been amended, for the sake of precision, to read “that third State”.

23. It should also be noted that, in article 4 and elsewhere, the Committee had adhered to the practice followed in the articles adopted at the Commission’s twenty-eighth session by using the verb “to accord” when referring to the treatment applied by the granting State to the beneficiary State and the verb “to extend” when referring to the treatment applied by the granting State to a third State.

*Article 5 was approved.*

ARTICLE 6 (Clauses in international agreements between States to which other subjects of international law are also parties)

24. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 6:

*Article 6. Clauses in international agreements between States to which other subjects of international law are also parties*

Notwithstanding the provisions of articles 1, 2, 4 and 5, the present articles shall apply to the relations of States as between themselves under an international agreement containing a clause on most-favoured-nation treatment to which other subjects of international law are also parties.

25. The Committee proposed the new article for the reasons he had stated when introducing article 3.

26. Mr. TSURUOKA said that article 6 really concerned the scope of the draft and it would therefore be preferable to make it the second paragraph of article 1. Apart from its drafting aspect, that suggestion perhaps involved a matter of substance.

27. Referring to the English version of the article, he noted the use of the verbal form “shall apply” as opposed to the form “apply” employed in article 1. There seemed to be no difference of meaning between the two expressions. At most, the presence of the word “notwithstanding” at the beginning of article 6 might explain the form “shall apply”. If article 6 became paragraph 2 of article 1, the word “shall” could be omitted.

28. Mr. REUTER was prepared to accept article 6. However, like the corresponding article of the Vienna Convention on the Law of Treaties,<sup>8</sup> it might lead to varying interpretations, according to whether or not obligations were considered divisible where they arose under a multilateral agreement to which sub-

<sup>6</sup> *Ibid.*, 1487th meeting, paras. 28-46.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

jects of international law other than States were parties.

29. The CHAIRMAN said that, if there were no other comments, he would take it that the Commission decided to approve the title and text of article 6 as proposed by the Drafting Committee.

*Article 6 was approved.*

ARTICLE 7<sup>9</sup> (Legal basis of most-favoured-nation treatment)

30. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 7:

*Article 7. Legal basis of most-favoured-nation treatment*

Nothing in the present articles shall imply that a State is entitled to be accorded most-favoured-nation treatment by another State otherwise than on the basis of an international obligation undertaken by the latter State.

31. Article 7 corresponded to and had substantially the same form as the article 6 adopted by the Commission on first reading. However, the words "a legal obligation" had been replaced by the words "an international obligation undertaken by the latter State", in order to avoid any suggestion that the obligation in question might arise from agreements that were not international in character but were concluded between States and private persons.

*Article 7 was approved.*

ARTICLE 8<sup>10</sup> (The source and scope of most-favoured-nation treatment)

32. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 8:

*Article 8. The source and scope of most-favoured-nation treatment*

1. The right of the beneficiary State to most-favoured-nation treatment arises only from the most-favoured-nation clause referred to in article 4, or from the clause on most-favoured-nation treatment referred to in article 6, in force between the granting State and the beneficiary State.

2. The most-favoured-nation treatment to which the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, is entitled under a clause referred to in paragraph 1 is determined by the treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.

33. Article 8 corresponded to and took substantially the same form as the article 7 adopted on first reading. Paragraph 1 of the article contained a specific reference to the two kinds of clauses with which the draft articles were concerned, namely, those mentioned in articles 4 and 6. By comparison with the

corresponding paragraphs of the former article, paragraph 1 of article 8 had been simplified by the deletion of certain words, and paragraph 9 had been made clearer by the addition of the words "for itself or for the benefit of persons or things in a determined relationship with it". Those words had also been added, for the same reason, in other draft articles.

*Article 8 was approved.*

ARTICLE 9<sup>11</sup> (Scope of rights under a most-favoured-nation clause)

34. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 9:

*Article 9. Scope of rights under a most-favoured-nation clause*

1. Under a most-favoured-nation clause the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject-matter of the clause.

2. The beneficiary State acquires the rights under paragraph 1 only in respect of persons or things which are specified in the clause or implied from its subject-matter.

35. Article 9 corresponded to and, apart from minor drafting changes, was identical with article 11 as adopted on first reading.

*Article 9 was approved.*

ARTICLE 10<sup>12</sup> (Acquisition of rights under a most-favoured-nation clause)

36. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 10:

*Article 10. Acquisition of rights under a most-favoured-nation clause*

1. Under a most-favoured-nation clause the beneficiary State acquires the right to most-favoured-nation treatment only if the granting State extends to a third State treatment within the limits of the subject-matter of the clause.

2. The beneficiary State acquires rights under paragraph 1 in respect of persons or things in a determined relationship with it only if they:

(a) belong to the same category of persons or things as those in a determined relationship with a third State which benefit from the treatment extended to them by the granting State and

(b) have the same relationship with the beneficiary State as the persons and things referred to in subparagraph (a) have with that third State."

37. Article 10 corresponded to and reproduced in substance the article 12 adopted on first reading. A number of drafting changes had been made for the sake of clarity, and in particular in order to spell out the relationship between the general rule concerning the acquisition by the beneficiary State of most-favoured-nation treatment, stated in paragraph 1, and the limits on such acquisition in respect of persons or

<sup>9</sup> For consideration of the text initially examined by the Commission at the current session, see 1487th meeting, paras. 47 et seq., and 1488th meeting, paras. 1-4.

<sup>10</sup> *Ibid.*, 1488th meeting, paras. 5-32.

<sup>11</sup> *Ibid.*, 1490th meeting, paras. 16-25.

<sup>12</sup> *Ibid.*

things in a determined relationship with the beneficiary State.

*Article 10 was approved.*

ARTICLE 11<sup>13</sup> (Effect of a most-favoured-nation clause not made subject to compensation),

ARTICLE 12 (Effect of a most-favoured-nation clause made subject to compensation), *and*

ARTICLE 13<sup>14</sup> (Effect of a most-favoured-nation clause made subject to reciprocal treatment)

38. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that he was introducing articles 11, 12 and 13 together because they were closely interconnected. The Committee proposed the following titles and texts for those articles:

*Article 11. Effect of a most-favoured-nation clause not made subject to compensation*

If a most-favoured-nation clause is not made subject to a condition of compensation, the beneficiary State acquires the right to most-favoured-nation treatment without the obligation to accord any compensation to the granting State.

*Article 12. Effect of a most-favoured-nation clause made subject to compensation*

If a most-favoured-nation clause is made subject to a condition of compensation, the beneficiary State acquires the right to most-favoured-nation treatment only upon according the agreed compensation to the granting State.

*Article 13. Effect of a most-favoured-nation clause made subject to reciprocal treatment*

If a most-favoured-nation clause is made subject to a condition of reciprocal treatment, the beneficiary State acquires the right to most-favoured-nation treatment only upon according the agreed reciprocal treatment to the granting State.

39. Of the corresponding articles in the 1976 draft, articles 8 and 9 had been the object of considerable criticism in the Commission. In the light of that criticism, the Drafting Committee had decided to reformulate the articles concerning conditional clauses so as to make it perfectly clear that the condition of material reciprocity was only one of the conditions to which the beneficiary State's right to most-favoured-nation treatment might be made subject.

40. The Committee had therefore dealt separately, in article 11, with the case of a most-favoured-nation clause not made subject to any conditions and had introduced for that purpose a new term, "condition of compensation"; as defined in article 2, paragraph 1, subparagraph (e), that was a generic term meaning a condition providing for compensation of any kind. Where the former article 9 had referred to "conditions" and "material reciprocity", article 11 referred to "a condition of compensation" and "any compensation" respectively. Otherwise, the texts of the two articles were the same. The Drafting Com-

mittee believed that the new phrase, "a condition of compensation", was a distinct improvement on the term previously used and would rapidly acquire authoritative currency.

41. Although the condition of material reciprocity, which had been the subject of article 10 in the 1976 draft, was now considered as only one of a number of types of conditions, it had traditionally been of importance and was therefore dealt with once again in a separate article, namely, article 13. In view of the criticism levelled against the term "material reciprocity" by members of the Commission, particularly on grounds of its obscurity, article 13 spoke of "a condition of reciprocal treatment", which was defined in article 2, paragraph 1, subparagraph (f), as "a condition of compensation providing for the same or, as the case may be, equivalent treatment by the beneficiary State of the granting State or of persons or things in a determined relationship with it as that extended by the granting State to a third State or to persons or things in the same relationship with that third State". The words "material reciprocity" had similarly been replaced by the words "reciprocal treatment" in the remainder of the draft. Subject to that amendment and a minor drafting change, the text of article 13 was the same as that of the former article 10.

42. To avoid leaving a gap in the draft as a result of the changes he had mentioned, the Committee had introduced a new provision, article 12, concerning the effect of a most-favoured-nation clause made subject to a condition of compensation.

43. Since the rule stated in the former article 8 had been incorporated in the new article 11, the Committee had seen no reason to retain the former article.

*Articles 11, 12 and 13 were approved.*

ARTICLE 14 (Compliance with agreed terms and conditions)

44. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 14:

*Article 14. Compliance with agreed terms and conditions*

The exercise of rights arising under a most-favoured-nation clause for the beneficiary State or for persons or things in a determined relationship with that State is subject to compliance with the relevant terms and conditions laid down in the treaty containing the clause or otherwise agreed between the granting State and the beneficiary State.

45. The Drafting Committee was proposing article 14—a new article—because its consideration, in the light of the Commission's debate, of the articles dealing with most-favoured-nation clauses made subject to conditions, had shown that there might be a gap in the draft unless provision were made not only for conditions of compensation and, more specifically, of reciprocal treatment, but also for conditions precedent to the exercise of rights under a most-favoured-nation clause. The Committee had realized that the word "conditions" was used in practice to cover not

<sup>13</sup> *Ibid.*, 1488th meeting, paras. 33 *et seq.*, 1489th meeting, and 1490th meeting, paras. 3-15.

<sup>14</sup> *Ibid.*

only conditions for the existence of a right under a clause, but also conditions for its exercise. Conditions of the latter kind might be either imposed by the internal law of the granting State or agreed between the granting and beneficiary States in the treaty containing the clause or otherwise. The first of those cases had been covered in the former article 20, which had now become article 22, concerning compliance with the laws and regulations of the granting State; the second was the subject of the article under discussion, which was modelled as closely as possible on the first sentence of article 22.

*Article 14 was approved.*

ARTICLE 15<sup>15</sup> (Irrelevance of the fact that treatment is extended to a third State against compensation),

ARTICLE 16<sup>16</sup> (Irrelevance of limitations agreed between the granting State and a third State),

ARTICLE 17<sup>17</sup> (Irrelevance of the fact that treatment is extended to a third State under a bilateral or a multilateral agreement), *and*

ARTICLE 18<sup>18</sup> (Irrelevance of the fact that treatment is extended to a third State as national treatment)

46. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following titles and texts for articles 15, 16, 17 and 18:

*Article 15. Irrelevance of the fact that treatment is extended to a third State against compensation*

The acquisition without compensation of rights by the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, under a most-favoured-nation clause not made subject to a condition of compensation is not affected by the mere fact that the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended against compensation.

*Article 16. Irrelevance of limitations agreed between the granting State and a third State*

The acquisition of rights by the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, under a most-favoured-nation clause is not affected by the mere fact that the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended under an international agreement between the granting State and the third State limiting the application of that treatment to relations between them.

*Article 17. Irrelevance of the fact that treatment is extended to a third State under a bilateral or a multilateral agreement*

The acquisition of rights by the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, under a most-favoured-nation clause is not affected by the mere fact that the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended under an international agreement, whether bilateral or multilateral.

<sup>15</sup> *Ibid.*, 1490th meeting, paras. 26 *et seq.*, and 1491st meeting, paras. 1-37.

<sup>16</sup> *Ibid.*, 1491st meeting, paras. 38-47.

<sup>17</sup> *Ibid.*, 1491st meeting, paras. 48 *et seq.*, and 1492nd meeting, paras. 1-27.

<sup>18</sup> *Ibid.*, 1492nd meeting, paras. 28-51.

*Article 18. Irrelevance of the fact that treatment is extended to a third State as national treatment*

The acquisition of rights by the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, under a most-favoured-nation clause is not affected by the mere fact that the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended as national treatment.

47. Articles 15, 16, 17 and 18 dealt with the irrelevance, for the purposes of the acquisition of rights by the beneficiary States under a most-favoured-nation clause, of various modalities of the extension of treatment by the granting State to a third State. All those modalities had been covered in articles 13, 14, 15 and 16 on the subject of irrelevance, adopted at the twenty-eighth session. As in the case of those earlier articles, the Committee had sought maximum uniformity in the drafting of the provisions it had adopted at the current session. The former article 13 having used the verb "to acquire", the Committee had referred in all four articles now proposed, as in the new article 10, to "acquisition of rights" rather than to "entitlement to treatment". The phrase "is not affected by the mere fact", which appeared in all the articles under discussion, was intended to emphasize as strongly as possible the irrelevance of the fact in question.

*Articles 15, 16, 17 and 18 were approved.*

ARTICLE 19<sup>19</sup> (Most-favoured-nation treatment and national or other treatment with respect to the same subject-matter)

48. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 19:

*Article 19. Most-favoured-nation treatment and national or other treatment with respect to the same subject-matter*

1. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause is not affected by the mere fact that the granting State has agreed to accord as well to that beneficiary State national treatment or other treatment with respect to the same subject-matter as that of the most-favoured-nation clause.

2. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause is without prejudice to national treatment or other treatment which the granting State has accorded to that beneficiary State with respect to the same subject-matter as that of the most-favoured-nation clause.

49. Article 19 corresponded to, and retained the title of, the former article 17. In discussing the earlier article in the light of comments on it in the Commission, the Drafting Committee had come to the conclusion that the text was ambiguous, particularly the clause "the beneficiary State shall be entitled to whichever treatment it prefers in any particular case", was ambiguous. The Committee had generally agreed that a beneficiary State to which a granting

<sup>19</sup> *Ibid.*, paras. 52 *et seq.*

State offered most-favoured-nation treatment and national or other treatment with respect to the same subject-matter did not necessarily have to choose exclusively between those treatments; it might be able to opt for the cumulative enjoyment of all, some, or parts of the various treatments concerned. To avoid restricting the potential range of choice, the Committee had decided to divide the article into two paragraphs. Paragraph 1 stated the general rule, namely, that agreement by the granting State to accord the beneficiary State other forms of favourable treatment was irrelevant to the enjoyment by the beneficiary State of a right to most-favoured-nation treatment. It therefore used the phrase “is not affected by the mere fact”, employed in the preceding articles. The Committee had decided not to retain from the former article 17 the words “undertaken by treaty”, because of the possibility that national or other treatment might be accorded in some other way. Paragraph 2 of article 19 offered, as it were, the other side of the coin, stipulating that the right of the beneficiary State to most-favoured-nation treatment was without prejudice to national or other treatment accorded to that State by the granting State with respect to the same subject-matter.

*Article 19 was approved.*

ARTICLE 20<sup>20</sup> (Arising of rights under a most-favoured-nation clause)

50. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 20:

*Article 20. Arising of rights under a most-favoured-nation clause*

1. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause not made subject to a condition of compensation arises at the moment when the relevant treatment is extended by the granting State to a third State or to persons or things in the same relationship with that third State.

2. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause made subject to a condition of compensation arises at the moment when the relevant treatment is extended by the granting State to a third State or to persons or things in the same relationship with that third State and the agreed compensation is accorded by the beneficiary State to the granting State.

3. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause made subject to a condition of reciprocal treatment arises at the moment when the relevant treatment is extended by the granting State to a third State or to persons or things in the same relationship with that third State and the agreed reciprocal treatment is accorded by the beneficiary State to the granting State.

51. Article 20 corresponded to article 18 of the 1976 draft. The earlier article had contained only two paragraphs, dealing respectively with most-favoured-nation clauses not made subject to the condition of

material reciprocity and with clauses made subject to that condition. Since the Committee had decided to introduce in its new articles 11 and 12 provisions dealing with clauses respectively not made or made subject to the wider condition of compensation, it had considered it necessary to divide article 20 into three paragraphs, the first two concerning respectively clauses not made and made subject to a condition of compensation, and the third covering the case of a clause made subject to a condition of reciprocal treatment. Paragraph 1 of the article was essentially the same as the corresponding paragraph of the former article 18, except that, as in the other paragraphs of article 20, the Committee had replaced the expressions “any treatment” and “at the time” by the more precise expressions “most-favoured-nation treatment” and “at the moment” respectively. Since the condition of reciprocal treatment was merely one type of condition of compensation, the rule stated in paragraph 3 of the article was similar to that stated in paragraph 2 and was expressed in similar language. In the opinion of the Drafting Committee, what was essential for the right of the beneficiary State to arise under the conditional clauses contemplated in paragraphs 2 and 3 was the moment of coexistence of the two elements involved, namely, the moment when the relevant treatment was extended and the moment when the agreed compensation or reciprocal treatment was accorded. The references made in paragraph 2 of the former article 18 to “the time of the communication” and “consent to accord” had therefore been dropped.

52. Mr. REUTER pointed out that, in the English version of article 20, the verbal from “is extended” appeared in both paragraphs 2 and 3, but in the French version it had been rendered by “est conféré” in paragraph 2 and by “a été conféré” in paragraph 3. To bring the French version into line with the English, the words “a été conféré” should be replaced by “est conféré” in paragraph 3. However, the French version of paragraphs 2 and 3 would not be altogether clear if it were drafted throughout in the present tense. It would be better, in both paragraphs, to replace the wording beginning “au moment où le traitement pertinent” by the words “à partir du moment où le traitement pertinent a été conféré par l’Etat concédant à un Etat tiers ou à des personnes ou à des choses se trouvant dans le même rapport avec cet Etat tiers et où l’Etat bénéficiaire a accordé à l’Etat concédant...”. That would make it clear that two conditions must be met and that the critical moment was the moment when the second condition was fulfilled.

53. Mr. SCHWEBEL (Chairman of the Drafting Committee) regarded Mr. Reuter’s suggestion as sound and was prepared to accept it.

54. Mr. YANKOV asked what effect acceptance of Mr. Reuter’s amendment would have on the English version of the article.

55. Mr. SCHWEBEL (Chairman of the Drafting Committee) replied that, in paragraphs 2 and 3 of the

<sup>20</sup> *Ibid.*, 1493rd meeting, paras. 1-31.

English version, the words "is extended" would be amended to read "has been extended" and the words "is accorded" would be amended to read "has been accorded". That would not affect the substance of the paragraphs.

56. Mr. USHAKOV (Special Rapporteur) said that the Drafting Committee had discussed the question at length and come to the conclusion that the agreed compensation was not normally accorded to the granting State until the latter had extended the relevant treatment to a third State, but that sometimes the compensation was accorded before the relevant treatment was extended. That was why the Drafting Committee had opted for wording that left the matter vague.

57. Mr. RIPHAGEN said that, since the essential requirement in both paragraph 2 and paragraph 3 was that the two specified conditions should be fulfilled, he did not think it made any difference whether the present or the past tense were used.

58. Mr. USHAKOV (Special Rapporteur) said that if the Commission used the present tense in each case it would preserve the ambiguity desired by the Drafting Committee. On the other hand, if it used the past tense in the first case and the present tense in the second, one condition would have to be fulfilled before the other.

59. Mr. VEROSTA understood Mr. Reuter to have been mainly concerned about the successive use of the past and present tenses in the French version of paragraph 3. To maintain the necessary ambiguity, it would be sufficient to use the present tense throughout.

60. Mr. REUTER explained that he had first suggested bringing the French version into line with the English version by wording it entirely in the present tense, but had afterwards expressed a preference for the use of the past tense in each case, which would indicate more clearly that the decisive moment was the one when the second condition had been fulfilled. However, as his second suggestion had raised doubts among members of the Commission, he would withdraw it.

61. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to approve the title and text of article 20 as proposed by the Drafting Committee, subject to the words "a été conféré" being replaced by the words "est conféré" in the French version of paragraph 3.

*Article 20 was approved.*

ARTICLE 21<sup>21</sup> (Termination or suspension of rights under a most-favoured-nation clause)

62. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 21:

*Article 21. Termination or suspension of rights under a most-favoured-nation clause*

1. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause is terminated or suspended at the moment when the extension of the relevant treatment by the granting State to a third State or to persons or things in the same relationship with that third State is terminated or suspended.

2. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause made subject to a condition of compensation is equally terminated or suspended at the moment of termination or suspension by the beneficiary State of the agreed compensation.

3. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause made subject to a condition of reciprocal treatment is equally terminated or suspended at the moment of termination or suspension by the beneficiary State of the agreed reciprocal treatment.

63. Basically, article 21 corresponded to article 19 of the 1976 draft. In that draft, articles 19 and 18, dealing with two symmetrical situations, had each contained two paragraphs. The same symmetry obtained between articles 20 and 21 of the current draft. Like article 20, and for the same reasons, article 21 was divided into three paragraphs. The Drafting Committee had made the same drafting changes, *mutatis mutandis*, in article 21 as in article 20. In addition, to avoid any possible confusion, the word "also" used in the English text of the 1976 draft had been replaced by the word "equally".

*Article 21 was approved.*

ARTICLE 22<sup>22</sup> (Compliance with the laws and regulations of the granting State)

64. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 22:

*Article 22. Compliance with the laws and regulations of the granting State*

The exercise of rights arising under a most-favoured-nation clause for the beneficiary State or for persons or things in a determined relationship with that State is subject to compliance with the relevant laws and regulations of the granting State. Those laws and regulations, however, shall not be applied in such a manner that the treatment of the beneficiary State or of persons or things in a determined relationship with that State is less favourable than that of the third State or of persons or things in the same relationship with that third State.

65. Article 22 reproduced the title and text of article 20 of the 1976 draft with only minor drafting changes. In the title, the words "the exercise of rights arising under a most-favoured-nation clause and" had been deleted as being unnecessary. In the body of the article, the word "and" had been replaced by the word "or" between the words "beneficiary State" and the words "persons" and "things", in order to maintain consistency throughout the

<sup>21</sup> *Ibid.*, paras. 32-37.

<sup>22</sup> *Ibid.*, paras. 38-51.



draft. Finally, the English version had been aligned with the other language versions by the use of the expression “laws and regulations” instead of the word “laws” alone.

*Article 22 was approved.*

ARTICLE 23<sup>23</sup> (The most-favoured-nation clause in relation to treatment under a generalized system of preferences)

66. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 23:

*Article 23. The most-favoured-nation clause in relation to treatment under a generalized system of preferences*

A beneficiary State is not entitled under a most-favoured-nation clause to treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a scheme of generalized preferences established by that granting State, which conforms with a generalized system of preferences recognized by the international community of States as a whole or, for the States members of a competent international organization, adopted in accordance with its relevant rules and procedures.

67. In article 23, the Drafting Committee had basically retained the provision embodied in the former article 21. It had considered it appropriate, however, to make the text more explicit, in order to reflect more closely the actual operation and effects of the generalized system of preferences. It had therefore replaced the phrase “within a generalized system of preferences established by that granting State” by the words “within a scheme of generalized preferences established by that granting State, which conforms with a generalized system of preferences”.

68. In addition, with a view to alleviating some of the concern expressed in the debate on the article, the Drafting Committee had decided to qualify the reference to a generalized system of preferences by adding at the end of the article the words “recognized by the international community of States as a whole or, for the States members of a competent international organization, adopted in accordance with its relevant rules and procedures”. The purpose of the change was to take account of the current general acceptability and implementation of the generalized system of preferences, having regard to the number of States participating in international organizations or other arrangements concerned with the question.

69. Finally, in the English version, the word “any”, before the word “treatment”, in the original text had been deleted as inappropriate in a provision dealing with treatment extended under a generalized system of preferences.

70. Mr. REUTER proposed that, at the end of the French version, the word “décisions” should be replaced by the word “règles”, which was a better translation of the English word “rules”.

71. He pointed out that the word “generalized” sometimes qualified the preferences and sometimes

the system. He proposed that the words “generalized system of preferences” should be replaced by the words “general system of preferences”.

72. Mr. SCHWEBEL (Chairman of the Drafting Committee) thought the text should be left as it stood. If a change were to be made, it was in the phrase “a scheme of generalized preferences”, where the word “generalized” should be replaced by the word “general”, because the term “a generalized system of preferences” referred to a system recognized by the international community.

73. Mr. USHAKOV (Special Rapporteur) suggested that the Secretariat should ascertain the terminology normally used in United Nations documents and that the same terminology should be used in the article.

74. Mr. SCHWEBEL (Chairman of the Drafting Committee) took it that the words “which conforms with a generalized system of preferences” would be retained, and that the expression “a scheme of generalized preferences” would also be retained unless it were found not to be accepted United Nations terminology, in which case the words “generalized preferences” would be replaced by the words “general preferences”.

75. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to approve the title and text of article 23 proposed by the Drafting Committee, subject to the understanding expressed by the Committee’s Chairman.

*Article 23 was approved.*

ARTICLE 24<sup>24</sup> (The most-favoured-nation clause in relation to treatment extended to facilitate frontier traffic)

76. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 24:

*Article 24. The most-favoured-nation clause in relation to treatment extended to facilitate frontier traffic*

1. A beneficiary State other than a contiguous State is not entitled under a most-favoured-nation clause to the treatment extended by the granting State to a contiguous third State in order to facilitate frontier traffic.

2. A contiguous beneficiary State is entitled under a most-favoured-nation clause to treatment not less favourable than the treatment extended by the granting State to a contiguous third State in order to facilitate frontier traffic only if the subject-matter of the clause is the facilitation of frontier traffic.

77. Article 24 basically reproduced the text of article 22 of the 1976 draft. In both paragraphs the indefinite article “a” had been used instead of the definite article “the” before the words “most-favoured-nation clause”. The phrase at the end of paragraph 2. of the former text (“and relating to frontier traffic only if the most-favoured-nation clause relates especially to the field of frontier traffic”), which was not sufficiently clear, had been replaced by the phrase “in order to facilitate frontier traffic only if the sub-

<sup>23</sup> *Ibid.*, 1494th meeting—1497th meeting, paras. 1-20.

<sup>24</sup> *Ibid.*, 1497th meeting, paras. 21-32.

ject-matter of the clause is the facilitation of frontier traffic". In addition, to avoid difficulties of interpretation concerning the treatment involved, the Drafting Committee had thought it desirable to use the expression "treatment not less favourable than".

78. Mr. YANKOV assumed that article 23 *bis*, which had already been adopted, would become article 24 and that the existing article 24 would be renumbered 25.

79. The CHAIRMAN said that the Secretariat would renumber the articles later.

*Article 24 was approved.*

ARTICLE 25<sup>25</sup> (The most-favoured-nation clause in relation to rights and facilities extended to a land-locked third State)

80. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 25:

*Article 25. The most-favoured-nation clause in relation to rights and facilities extended to a land-locked third State*

1. A beneficiary State other than a land-locked State is not entitled under a most-favoured-nation clause to rights and facilities extended by the granting State to a land-locked third State in order to facilitate its access to and from the sea.

2. A land-locked beneficiary State is entitled under a most-favoured-nation clause to the rights and facilities extended by the granting State to a land-locked third State in order to facilitate its access to and from the sea only if the subject-matter of the clause is the facilitation of access to and from the sea.

81. Article 25 reproduced the text of the former article 23, with changes similar to those made to the preceding article. In contrast with its decision in respect of article 24, however, the Drafting Committee had not found it necessary, in paragraph 2 of article 25, to add the words "not less favourable than" (which related to "treatment"), as the article spoke of "rights and facilities", an expression widely used and understood in the context of access to and from the sea for land-locked States. As to the term "land-locked State", which had given rise to comments in the Commission, the Drafting Committee had believed it should be retained, as it had virtually become a term of art in contemporary international relations. Finally, for the sake of precision, the word "third" had been inserted between the words "land-locked" and "State" in the title of the article.

82. Mr. NJENGA suggested that the article should be so amended as to make it clear that its provisions would be applicable only to land-locked States situated in the same region or subregion as the granting State. That could be done by inserting the words "in the region or subregion" after the words "a land-locked State" at the beginning of paragraph 1.

83. Mr. USHAKOV (Special Rapporteur) pointed out that it was not a question of belonging to the same region or subregion, but of the physical possib-

ility of granting access to or from the sea. For example, it was physically impossible for the Soviet Union, because of its geographical position, to grant access to or from the sea to an African or American State.

84. Mr. DÍAZ GONZÁLES said that in the Spanish version the words "si la materia objeto de la cláusula es el facilitación del acceso al mar y desde el mar" should be replaced by the words "si tal es la materia objeto de la cláusula". The end of article 24 should be similarly amended.

85. Mr. TABIBI recalled that, when the question had been discussed by the Commission, he had pointed out (1497th meeting) that the term "land-locked" was incorrect but that it was a term of art and was always used. Countries termed "land-locked" were countries without a sea-coast; nevertheless, like all nations they had a share in the high seas. He suggested, therefore, that the article should have a foot-note referring to the 1965 Convention on Transit Trade of Land-Locked States, which contained a definition of land-locked States. Alternatively, a reference to the Convention could be made in the commentary to the article.

86. Mr. NJENGA took the view that the expression "rights and facilities" covered more than rights and facilities by railway, road or pipeline. It could cover facilities in ports and warehouses and the right of the beneficiary State to send its nationals to work in the ports of the granting State. Such rights and facilities should be restricted to countries in the region or subregion concerned. His proposal was consistent with the decision already taken in the matter by the Third United Nations Conference on the Law of the Sea.

87. Mr. RIPHAGEN pointed out that, under paragraph 1 of the article, a beneficiary State other than a land-locked State was not entitled to rights and facilities extended by the granting State to a land-locked third State. The insertion of the words "of the region or subregion" after the words "land-locked State" would therefore mean that a land-locked State not belonging to the region or subregion in question would be entitled to such rights. Consequently, he did not think the words suggested by Mr. Njenga should be inserted in paragraph 1. They might be inserted in paragraph 2, but, for the reasons explained by Mr. Ushakov, they were unnecessary. In any case, the notions of "region" and "subregion" were not always very clear. He therefore suggested that the paragraph remain as it stood.

88. Mr. EL-ERIAN, supported by the CHAIRMAN, speaking in his personal capacity, appealed to Mr. Njenga not to press his point.

89. Mr. NJENGA agreed not to press the point, provided the matter was mentioned in a foot-note or in the commentary to the article.

90. Referring to Mr. Riphagen's comments, he pointed out that "region" and "subregion" were important notions in the law of the sea.

91. The CHAIRMAN said that, if there were no objections, he would take it that the Commission de-

<sup>25</sup> *Ibid.*, Paras. 33 *et seq.*, and 1498th meeting, paras. 1-17.

cided to approve the title and text of article 25 referred to it by the Drafting Committee.

*Article 25 was approved.*

ARTICLE 26<sup>26</sup> (Cases of State succession, State responsibility and outbreak of hostilities)

92. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 26:

*Article 26. Cases of State succession, State responsibility and outbreak of hostilities*

The provisions of the present articles shall not prejudice any question that may arise in regard to a most-favoured-nation clause from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

93. The text of article 26 was the same as that of the former article 24 and followed the wording of article 73 of the Vienna Convention on the Law of Treaties.

*Article 26 was approved.*

ARTICLE 27<sup>27</sup> (Non-retroactivity of the present articles)

94. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 27:

*Article 27. Non-retroactivity of the present articles*

1. Without prejudice to the application of any rule set forth in the present articles to which most-favoured-nation clauses would be subject under international law independently of these articles, they apply only to a most-favoured-nation clause in a treaty which is concluded by States after the entry into force of the present articles with regard to such States.

2. Without prejudice to the application of any rule set forth in the present articles to which clauses on most-favoured-nation treatment would be subject under international law independently of these articles, they apply to the relations of States as between themselves only under a clause on most-favoured-nation treatment contained in an international agreement which is concluded by States and other subjects of international law after the entry into force of the present articles with regard to such States.

95. The text of the former article 25 had been retained for paragraph 1 of article 27, with minor drafting changes. A paragraph 2 had been added in regard to clauses on most-favoured-nation treatment contained in international agreements to which subjects of international law other than States were also parties, and which were referred to in article 6 of the draft.

*Article 27 was approved.*

ARTICLE 28<sup>28</sup> (Provisions otherwise agreed)

96. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 28:

*Article 28. Provisions otherwise agreed*

The present articles are without prejudice to any provision on which the granting State and the beneficiary State may otherwise agree.

97. Article 28 corresponded to article 26 of the 1976 draft, entitled "Freedom of the parties to agree to different provisions". The words "regarding the application of the most-favoured-nation clause in the treaty containing the clause or otherwise" had been rendered unnecessary by the transfer of the word "otherwise" to its current position, and the words "the provisions" had been changed to read "any provision", which made the text more precise. In addition, the title had been simplified.

98. Mr. REUTER understood the word "may" ("peuvent" in the French text) to indicate a possibility in law.

*Article 28 was approved.*

ARTICLE 29<sup>29</sup> (New rules of international law in favour of developing countries)

99. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 29:

*Article 29. New rules of international law in favour of developing countries*

The present articles are without prejudice to the establishment of new rules of international law in favour of developing countries.

100. The text of article 29 reproduced without change that of the former article 27. However, the title had been simplified by the deletion of the words "the relationship of the present articles to".

101. Mr. REUTER pointed out that the draft articles did not contain all the rules currently existing in favour of developing countries, as the wording of article 29 might imply.

*Article 29 was approved.*

ARTICLE 30 (Use of terms)

102. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 2:

*Article 2. Use of terms*

1. For the purposes of the present articles:

(a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "granting State" means a State which has undertaken to accord most-favoured-nation treatment;

(c) "beneficiary State" means a State to which a granting State has undertaken to accord most-favoured-nation treatment;

(d) "third State" means any State other than the granting State or the beneficiary State;

<sup>26</sup> *Ibid.*, 1505th meeting, paras. 13-17.

<sup>27</sup> *Ibid.*, paras. 18-23.

<sup>28</sup> *Ibid.*, paras. 24-41.

<sup>29</sup> *Ibid.*, paras. 42-51.

<sup>30</sup> *Ibid.*, 1506th meeting, paras. 6-42.

(e) "condition of compensation" means a condition providing for compensation of any kind agreed between the granting State and the beneficiary State, in a treaty containing a most-favoured-nation clause or otherwise;

(f) "condition of reciprocal treatment" means a condition of compensation providing for the same or, as the case may be, equivalent treatment by the beneficiary State of the granting State or of persons or things in a determined relationship with it as that extended by the granting State to a third State or to persons or things in the same relationship with that third State;

(g) "persons or things" means any object of most-favoured-nation treatment.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

103. Article 2 of the 1976 draft had had one paragraph defining five terms used in the draft. The new text retained, in subparagraphs (a) to (d) of paragraph 1, the first four terms of the former text, with some drafting changes. In subparagraphs (b) and (c), which dealt with "granting State" and "beneficiary State" respectively, the verb "grant" had been replaced by the expression "has undertaken to accord", in order to conform to the terminology used in article 4, which defined a most-favoured-nation clause. The fifth term, "material reciprocity" (former subparagraph (e)), had been replaced by two new terms: "condition of compensation" (new subparagraph (e)) and "condition of reciprocal treatment" (new subparagraph (f)), the need for which he had explained when introducing articles 11, 12 and 13. In addition, a new term, "persons or things", had been defined in a subparagraph (g), to take account of the Commission's debate and because of its widespread use throughout the draft. Conscious of the almost insurmountable difficulties involved in drafting an abstract definition of persons and things, the Drafting Committee had agreed to define them by reference to the subject-matter of the draft articles.

104. Finally, a new paragraph 2 had been added, based on paragraph 2 of article 2 of the Vienna Convention on the Law of Treaties.

105. Mr. PINTO considered the definition in subparagraph (g) unsatisfactory, since the expression "persons or things" was used in the draft in meanings other than that given in the definition.

106. Mr. REUTER said that, in the French version of subparagraphs (b) and (c) of paragraph 1, the words "has undertaken to" would be better translated by the words "a consenti à" than by the words "s'est obligé à".

107. For subparagraph (g), the French version seemed clearer than the English version; however, if the latter were approved, the French version should be brought into line with it and the words "tout ce qui peut être l'objet" replaced by the words "tout objet".

108. Mr. YANKOV understood the term "granting State", in subparagraph (b), to mean a State that had already granted most-favoured-nation treatment as

well as a State that had undertaken to accord it. Similarly, he understood the words "beneficiary State", in subparagraph (c), to mean a State to which a granting State had already accorded most-favoured-nation treatment as well as one to which a granting State had undertaken to accord such treatment.

109. Mr. VEROSTA thought that, in view of Mr. Reuter's comment, the English version of subparagraph (g) might perhaps be brought into line with the French version.

110. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Drafting Committee had purposely used the quite imprecise words "any object" and "tout ce qui peut être l'objet", because some objects of most-favoured-nation treatment might not be "things" in the physical sense. The Committee had thus adopted the broadest possible approach to the matter. It might be preferable to leave the English version as it stood.

111. Mr. NJENGA said that he did not understand the meaning of subparagraph (g).

112. Mr. DÍAZ GONZÁLES said that in Spanish it was strange to say that a person was an object.

113. Mr. RIPHAGEN suggested that the French version should be translated into English.

114. Mr. FRANCIS said that the definition had been a source of trouble to the Drafting Committee. If possible, the English text should be left as it stood. No improvement would be made by translating the French text into English.

115. Mr. USHAKOV (Special Rapporteur) pointed out that subparagraph (g) did not say that the expression "persons or things" meant objects—which would be difficult to accept—but that it meant any object of a certain treatment, which was very different.

116. Mr. DADZIE agreed with Mr. Francis. The definition was the best the Drafting Committee had been able to produce. A solution might be to replace the word "means" by the word "covers".

*The meeting rose at 1.05 p.m.*

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## 1522nd MEETING

*Thursday, 20 July 1978, at 10.50 a.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

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**The most-favoured-nation clause (*continued*)**  
(A/CN.4/308 and Add.1 and Add.1/Corr.1 and Add.2, A/CN.4/309 and Add.1 and 2, A/CN.4/L.280)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE (*continued*)

ARTICLE 2 (Use of terms)<sup>1</sup> (*continued*)

1. Mr. THIAM said that, whether or not the English version of subparagraph (g) of paragraph 1 were amended, the French version of the subparagraph should remain unchanged.

2. Mr. SUCHARITKUL said that he and Mr. Riphagen had been working on the definition given in paragraph 1, subparagraph (g). They suggested that the English version of the definition be amended to read:

“‘persons or things’ means any object in respect of which most-favoured-nation treatment can be accorded”.

3. Mr. FRANCIS said that it might be preferable to speak of a person as the object of an instrument, such as a treaty or law. If the amendment proposed by Mr. Sucharitkul were adopted, a person would be referred to as an inanimate object. He was accustomed to hearing a person spoken of as the object of a law but not simply as an object.

4. Mr. SUCHARITKUL said that, to his mind, an object could be animate or inanimate, animal, vegetable or mineral. The purpose of his amendment was to bring the English version into line with the French version.

5. Mr. USHAKOV (Special Rapporteur) was not satisfied with the French version of subparagraph (g). The expression “persons or things” did not mean “anything that might be the object of most-favoured-nation treatment” but any object of most-favoured-nation treatment, real or agreed. The English version of the provision was entirely satisfactory but the French version was too wide in scope.

6. The CHAIRMAN pointed out that the Commission was doing the work of the Drafting Committee. He suggested that it approve article 2 on the understanding that the Drafting Committee would re-examine paragraph 1, subparagraph (g), with a view to working out a satisfactory text.

7. Mr. VEROSTA regretted being at the origin of the difficulties arising from the definition of the expression “person or things”, whose inclusion in article 2 he had himself proposed.

8. Two courses were now open to the Commission. It could either delete subparagraph (g) or adopt the following wording for it in the English version:

“(g) the expression ‘persons or things’ means anything in respect of which most-favoured-nation treatment can be accorded.”

In the former case, it should first make sure that the words “persons or things” did not occur in the draft too frequently. In the second case, as an exception, the definition would begin with the words “the expression”, whose equivalent was in the French version.

9. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to approve the title and text of article 2 referred to it by the Drafting Committee, on the understanding that the Committee would endeavour to find a satisfactory text for paragraph 1, subparagraph (g).

*It was so agreed.*

TITLE OF THE DRAFT ARTICLES

10. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee had decided to recommend a change in the title of the draft articles from the singular to the plural form, which it had considered more generic in character. The title of the draft would thus read: “Draft articles on most-favoured-nation clauses”.

11. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to approve the title of the draft articles proposed by the Drafting Committee.

*The title of the draft articles was approved.*

RESOLUTION AND RECOMMENDATION OF THE COMMISSION

12. Mr. EL-ERIAN said that the Commission owed a debt of gratitude to Mr. Ushakov, who had spent much time and energy in preparing the draft articles on most-favoured-nation clauses. He suggested that the Commission should pay a tribute to Mr. Ushakov by adopting the following draft resolution:

*“The International Law Commission,*

*“Having adopted the draft articles on most-favoured-nation clauses,*

*“Desires to express to the Special Rapporteur, Professor Nikolai A. Ushakov, its deep appreciation of the outstanding contribution he has made to the treatment of the topic by his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its work on most-favoured-nation clauses.”*

13. Mr. TABIBI expressed the hope that the draft resolution proposed by Mr. El-Erian would be shown in the report as having been put forward by the Commission as a whole.

14. Mr. FRANCIS fully supported the draft resolution proposed by Mr. El-Erian. Mr. Ushakov had worked like a Trojan and left his imprint on the draft articles.

15. He expressed his personal appreciation to Mr. Schwebel, Chairman of the Drafting Committee, for the masterly way in which he had conducted the work of the Drafting Committee and for the skill with which he had introduced the draft articles to the Commission.

<sup>1</sup> For text, see 1521st meeting, para. 102.

16. In the course of the session, he had benefited greatly from the experience of the other members, particularly Mr. Reuter, Mr. Riphagen and Mr. Schwebel.

17. Mr. DADZIE fully supported the draft resolution proposed by Mr. El-Erian, and associated himself with the tribute paid by Mr. Francis to Mr. Schwebel.

18. The CHAIRMAN fully subscribed to all the tributes paid to Mr. Ushakov. He suggested that the Commission should adopt the draft resolution proposed by Mr. El-Erian.

*The draft resolution was adopted by acclamation.*

19. Mr. USHAKOV (Special Rapporteur) thanked the members of the Commission warmly for the resolution they had adopted. The credit for the results achieved was due mainly to Mr. Endre Ustor, the specialist in the subject who had preceded him as Special Rapporteur. It should also be stressed that the Drafting Committee had worked very hard during the current session on improving the draft. Mr. Tsuruoka, although not a member of the Drafting Committee, had made a useful contribution to that work. Lastly, it was the experience and competence of the Chairman of the Commission that had made it possible for the draft to be approved in its final form.

20. Perhaps it would now be appropriate to formulate a recommendation to the General Assembly. He proposed that the recommendation should be based on the Commission's recommendation for the draft articles on diplomatic intercourse and immunities and that the following passage should accordingly be inserted at the end of the chapter of the Commission's report on the most-favoured-nation clause:

"At its 1522nd meeting, on 20 July 1978, the Commission decided, in conformity with article 23 of its Statute, to recommend to the General Assembly that the draft articles on most-favoured-nation clauses should be recommended to Member States with a view to the conclusion of a convention on the subject."

21. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to adopt the recommendation proposed by Mr. Ushakov.

*The recommendation was adopted.*

#### **Relations between States and international organizations (second part of the topic) (A/CN.4/311 and Add.1)**

[Item 7 of the agenda]

22. The CHAIRMAN invited the Special Rapporteur to introduce his second report on the second part of the topic of relations between States and international organizations (A/CN.4/311 and Add.1).

23. Mr. EL-ERIAN (Special Rapporteur) said that the report had two purposes: to examine the preliminary questions raised by the Commission when it had examined the preliminary report, at its twenty-ninth

session,<sup>2</sup> and by the Sixth Committee when it had discussed the Commission's report; and to elicit guidelines for the study on the second part of the topic. The report consisted of five chapters: introduction (basis of the report), summary of the Commission's discussion at its twenty-ninth session and of the Sixth Committee's discussion at the thirty-second session of the General Assembly, examination of general questions in the light of those discussions, and conclusions.

24. Before presenting his second report, he wished to place on record that in preparing it he had been greatly helped by the Secretariat. Pursuant to the Commission's recommendation, the Legal Counsel of the United Nations had written to the specialized agencies and to IAEA requesting them to reply to a very elaborate questionnaire. That questionnaire had taken as its point of departure the questionnaire circulated in 1965, the replies to which had served as the basis for the study entitled "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat".<sup>3</sup> He expressed his deep appreciation to Mr. Suy, Legal Counsel, for the care with which he had responded to the Commission's request. He also wished to thank Mr. Romanov, Director of the Codification Division, and his assistants, for the material they had provided for him, including a complete set of the *United Nations Juridical Yearbook*, from 1962 to 1975, which contained very useful material on the legal status, privileges and immunities of international organizations.

25. He had also been in touch with a number of regional organizations, some of which had already furnished him with material relating to their legal instruments and practice in the matter under study. Some of the specialized agencies had already replied to the questionnaire sent them by the Legal Counsel, and their replies had been forwarded to him. Finally, he had visited the legal adviser of UPU and the legal advisers of certain specialized agencies based in Geneva, who had given him information.

26. It had been a very rewarding experience for him to study the comments made by members of the Commission on his preliminary report. Although at its twenty-ninth session the Commission had devoted only three meetings to that report, the discussion had been in the best traditions of the Commission. The discussion was summarized in six sections of chapter II of his second report, entitled respectively "Question of the advisability of codifying the second part of the topic", "Question of the scope of the topic", "Subject-matter of the envisaged study", "Theoretical basis of immunities of international organizations", "Form to be given to the eventual codification" and "Methodology and processing of data".

<sup>2</sup> *Yearbook ... 1977*, vol. II (Part One), p. 139, doc. A/CN.4/304.

<sup>3</sup> *Yearbook ... 1967*, vol. II p. 154, doc. A/CN.4/L.118 and Add.1 and 2.

The statements of Commission members on those subjects had been very useful. For example, Mr. Reuter had drawn his attention to the five-volume compilation of principal legal instruments published by UNCTAD and entitled "Economic co-operation and integration among developing countries",<sup>4</sup> which dealt with an impressive number of regional organizations, the existence of many of which had previously been unknown to him. He wished to thank Mr. Reuter for that. Mr. Šahović had suggested that a much more practical analysis should be made of the situation, taking account of recent developments in the international community and of their impact on international organizations. It had also been suggested that, in dealing with the legislative sources of the legal status, privileges and immunities of international organizations, a thorough study should be made of national legislation, which supplemented conventions and headquarters agreements. A complete account of the comments made on those points and on others, such as the theoretical basis of immunities and the methodology and processing of data, was to be found in the six sections of chapter II to which he had referred.

27. Turning of chapter III of his report, he said that the general reaction of the Sixth Committee to the Commission's report on the progress of its work on the second part of the topic of relations between States and international organizations could be said to be one of approval. He had dealt in that chapter with statements by members of the Sixth Committee in which the topic had been reviewed in detail. Some of those statements had contained reservations concerning, for example, the advisability of codifying the second part of the topic, the implications of the Commission's work for the general conventions on privileges and immunities, and the desirability of studying relations between States and international organizations before the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character<sup>5</sup> had been generally accepted. His report took account of all the reservations expressed by Members of the General Assembly.

28. In chapter IV of the report, he had examined general questions in the light of the discussions in the Commission and in the Sixth Committee. In section A, he had pointed out that the developments that had had the most impact on the United Nations system since the adoption of the general conventions were institutional evolution and functional expansion. The interaction of those phenomena had resulted in both a quantitative and a qualitative renovation of institutionalized inter-State co-operation, as illustrated by the emergence of the institution of permanent missions and of permanent observer missions

to international organizations. Space had not permitted him to give an account of all the different aspects of the institutional, evolution and functional expansion that had taken place in the United Nations, in the specialized agencies and in other international organizations of a universal or regional character during the previous 30 years, but he had given examples of the impact of some of those aspects on the law of immunities of international organizations. Since those examples were drawn from the practice of the United Nations, it would be necessary, at the next stage of work on the topic, to study the practice of the specialized agencies and regional organizations in the light of the replies of the specialized agencies to the questionnaire circulated by the Legal Counsel of the United Nations and of the information he had obtained through his personal contacts.

29. In addition to institutional evolution, the refinement and extension of the régime of immunities of international organizations had been considerably influenced by the increasing expansion of the activities of the United Nations and related organizations as a consequence of the theory of functionalism, as that theory was described in paragraph 104 of his report. The steady broadening and diversification of the functional programmes of the United Nations, its related agencies and their subsidiary organs had led to developments of great significance for the Commission's work, such as the establishment of UNDP and of the OPEX Programme.<sup>6</sup> The opening in a great many countries of permanent UNDP offices had resulted in the institution of "resident representatives" of international organizations to States. The sending of *ad hoc* missions and panels to governments and the assignment of experts to assist governments in planning their development projects had extended the activities and categories of United Nations experts far beyond what had been envisaged in the general conventions on privileges and immunities.

30. In section B of chapter IV he had remarked that, while the basic provisions regulating the privileges and immunities of international organizations were embodied in the constituent instruments of those organizations, in headquarters agreements and in the general conventions on privileges and immunities, legislation designed primarily to give effect to those various international instruments had now been enacted in a large number of countries. Among the first countries to introduce laws of that type had been the United Kingdom and the United States of America. In the case of the latter country, not only federal but also state legislation was of relevance to the Commission's study. Special mention should also be made of the case of Switzerland which, although not a member of the United Nations or a party to the 1946 Convention on the Privileges and Immunities of the United Nations,<sup>7</sup> had been among the first countries to enact legislation in that area.

<sup>4</sup> TD/B/609/Add.1.

<sup>5</sup> For the text of the Convention (hereinafter referred to as the 1975 Vienna Convention), see *Official Records of the United Nations Conference on the Representation of States in their relations with International Organizations*, vol. II. *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207.

<sup>6</sup> OPEX = Operational and Administrative Personnel. See A/CN.4/311 and Add.1, para. 105.

<sup>7</sup> United Nations, *Treaty Series*, vol. 1, p. 15.

31. In reviewing, in section C of chapter IV, the case for codification of the law of international immunities, he had dealt with the concern expressed as to the possible effects of such codification on the status of the general conventions and headquarters agreements. He had noted in that connexion that the 1975 Vienna Convention on the first part of the topic contained an article 4 that stated expressly that the provisions of the Convention were without prejudice to international agreements. With reference to the comments made in the Sixth Committee concerning the utility, in the light of the degree of acceptance of the 1975 Vienna Convention, of the Commission's work on the second part of the topic, he had pointed out in paragraph 113 of his report that the Commission had in the past deemed it possible to commence consideration of a topic that was closely related to a convention before that instrument had entered into force or gained general acceptance; that had been the case, for example, in regard to the topics of special missions, succession of States in respect of treaties, and the question of treaties concluded between States and international organizations or between two or more international organizations. He had also mentioned that, although there was certainly an organic relationship between the two parts of the topic of relations between States and international organizations, each part constituted a self-contained unit capable of being separately codified. That had of course been recognized by the General Assembly when it had decided, in 1971 (resolution 2780 (XXVI), section II), that it was not necessary to wait for work on the second part of the topic to be completed before convening the Conference on the first part.

32. Section D of chapter IV set out the views so far expressed on the place of regional organizations in the régime of international immunities.

33. In chapter V of his report, he had expressed his conclusion that there was general approval in the General Assembly and the Commission for undertaking a study of the immunities of international organizations and that such a study must include a thorough examination of existing international instruments, national legislation, and practice. Only after such an examination could a decision be taken on the form in which the results of the Commission's work should be presented. As to whether the study should include all international organizations, of both a universal and a regional character, he had stated that his thinking on that point had changed significantly since recommending to the Commission in his first report that the study should concentrate on international organizations of a universal character alone.<sup>8</sup> He had made that recommendation on the grounds that, since regional organizations did not have objective personality (unlike organizations of a universal character, which had been recognized as possessing such personality in the advisory opinion of the International Court of Justice on *Reparation*

*for Injuries Suffered in the Service of the United Nations*),<sup>9</sup> to study them would raise difficulties of an essentially different nature. He had also had in mind that there were few permanent missions, or permanent observer missions, to regional organizations, that there was little legislation on the law of immunities of such organizations, and that practice with respect to them was still evolving. However, as he had recognized in paragraph 121 of his second report, the theoretical and practical considerations that had led him to make his earlier recommendation were no longer valid. Indeed, the situation had changed so much that he could imagine no problems, among those that might be considered in the study, that were exclusive to organizations of a universal character. He therefore recommended that the study should cover both universal and regional international organizations.

34. With reference to the questions raised concerning the relationship between the proposed study and the question of the jurisdictional immunities of States, he recognized that it was the Commission's practice not to deal with any topic in relation to international organizations before it had completed work on that topic in relation to States. He considered none the less that the study he proposed could go ahead as planned, since the immunities of States flowed from their sovereignty, whereas those of international organizations were justified by their functional needs. Furthermore, the Commission's Working Group on jurisdictional immunities of States and their property had recommended that the Commission should appoint a special rapporteur on that topic and that the topic should be included in the Commission's current programme of work (A/CN.4/L.279, para. 32). The Commission would therefore be aware of the orientation of its work on the jurisdictional immunities of States when it examined the question of the immunities of international organizations.

35. He wished to express his deep appreciation to the Legal Counsel of the United Nations and his staff for the assistance they had given him. He hoped that the Codification Division of the Office of Legal Affairs would be able to produce, for inclusion in the *Yearbook of the International Law Commission*, an analysis of the material form the United Nations, the specialized agencies and IAEA similar to the study that had appeared in the 1967 *Yearbook*, which had proved of such value to both scholars and practitioners of international law. He also hoped that, as in connexion with the first part of the topic, arrangements would be made to associate not only the Members of the United Nations, but also the Government of Switzerland and the specialized agencies and IAEA, with the preparation of any draft articles the Commission might propose on the second part of the topic.

36. He was deeply grateful to the Chairman of the

<sup>8</sup> *Yearbook ... 1963*, vol. II, p. 185, doc. A/CN.4/161 and Add.1, para. 179.

<sup>9</sup> *I.C.J. Reports 1949*, p. 185.



Commission for the contribution he had made to the topic as a whole. The Chairman had been instrumental, as President, in ensuring the success of the 1975 United Nations Conference on the Representation of States in their Relations with International Organizations and, as Chairman of the Planning Group, in securing the agreement of the Commission to the commencement of work on the second part of the topic. The Chairman had also greatly encouraged the Special Rapporteur in his work.

37. The CHAIRMAN, speaking on behalf of the Commission, congratulated the Special Rapporteur on his learned report and on his lucid and encouraging presentation. It was well known that the Special Rapporteur was an authority on the topic of relations between States and international organizations, and might justly be termed the father of the 1975 Vienna Convention, whose success he had ensured.

38. It had been very encouraging to hear of the response of the Sixth Committee to the Special Rapporteur's preliminary report on the second part of the topic, since consideration of the immunities of international organizations was necessary in order to complete the great cycle of instruments codifying diplomatic law that so far included the Vienna Convention on Diplomatic Relations (1961),<sup>10</sup> the Vienna Convention on Consular Relations (1963),<sup>11</sup> the Convention on Special Missions (1969),<sup>12</sup> and the 1975 Vienna Convention.

39. Mr. TABIBI reiterated his view that it would be not merely logical to complete the study of the topic of relations between States and international organizations, but contrary to the interests of the world community and of international organizations and their officials to do otherwise. It was clear, however, that it would not be easy to achieve what must be the objective in investigating the second part of the topic, namely, to strike a proper balance between the vital interests of host governments and the vital interests of organizations or their field staff. The treatment offered by host governments to international organizations and their officials varied widely from country to country, as it had varied in time, and there were also substantial differences between the areas of activity of the various international organizations and the duties of their officials.

40. With regard to international organizations of a universal character, the Commission should start by examining the experience of the oldest of them, namely, the bodies now called the International Telecommunication Union and the Universal Postal Union, and see how practice had evolved since their foundation. It was also essential that the Commission look at the practice and experience of the United Nations and its related agencies and of the countries that were hosts to the headquarters or regional or branch offices of universal organizations. That would

mean investigating the situation in innumerable, and perhaps even all, countries. The written material that must be examined included not only headquarters agreements and the general conventions on privileges and immunities, but also the protocols to such instruments, resolutions and decisions of international organizations, the internal legislation of States and the correspondence often exchanged between heads of State and senior officials of international organizations in connexion with the organization of special missions and programmes such as the OPEX Programme. Only on the basis of such a wide-ranging study would the Commission be able to decide whether it would be appropriate to propose rules relating to regional as well as universal organizations. Furthermore, if the Commission were to draft generally acceptable rules, it would have to concentrate on those points on which its investigations revealed general agreement or disagreement.

41. It was therefore important not only that, before proceeding further, the Commission should have the replies to the questionnaire that had been sent to the specialized agencies and IAEA, but also that it should circularize the governments of all the States Members of the United Nations, for all those countries had some experience of the presence of international organizations or their officials on their territory. It would be of particular value to receive information from government departments that had practical responsibilities in the areas covered by the privileges and immunities of international organizations.

42. Mr. PINTO said that, with regard to the institutional evolution and functional expansion of international organizations, the contribution of national law to the immunities of such organizations, and the general classification of international organizations into universal and regional bodies, the Special Rapporteur might wish to bear in mind the phenomenon of the evolution of operational international organizations. Essentially, such organizations were not merely co-ordinative, administrative or regulatory, as were most United Nations specialized agencies, and they did not deal with broad political or economic issues, as did the United Nations itself; they were established by governments for the express purpose of operational, and sometimes even commercial, activities. Whether such organizations were universal or regional, the very nature of their activities made it unrealistic to apply to them, without modification, the "traditional" rules relating to the status, privileges and immunities of international organizations. In making the modifications required, a balance must be maintained between the interests of the individual States that were members or "shareholders" of an organization and the interest of the community as a whole in the accomplishment of the objectives for which the organization had been created.

43. Organizations of the kind he had in mind included the World Bank, with respect to which there already existed a fairly large body of practice relating to immunities. That practice, however, could serve only as a starting-point for a review of special appli-

<sup>10</sup> United Nations, *Treaty Series*, vol. 500, p. 95.

<sup>11</sup> *Ibid.*, vol. 596, p. 261.

<sup>12</sup> General Assembly resolution 2530 (XXIV), annex.

cations of the traditional principles; consideration must also be given to the arrangements that had been made for more recent bodies, such as INTELSAT, and to those that might be made for the benefit of the sea-bed mining Enterprise envisaged in the proposed convention on the law of the sea. In the absence of any international corporate law by which such institutions might be governed, the rules for their activities were those provided in their constituent instruments. Those instruments, therefore, had to meet the difficult requirement of being models of completeness.

44. He hoped the Special Rapporteur would find it possible to cover organizations with operational competence in the study he now proposed. If that proved impossible, it might be necessary to add a third part to the topic.

45. Mr. ŠAHOVIĆ expressed gratitude to the Special Rapporteur for having taken into consideration the remarks he had made at the preceding session on the importance of practice.<sup>13</sup> In the report under discussion, the Special Rapporteur had analysed the subject substantively and outlined the general framework of his future work. His field of study had distinctly broadened. In the light of his new outlook and the conclusions he had reached, the Special Rapporteur should now indicate his plan of work.

*The meeting rose at 1 p.m.*

<sup>13</sup> See *Yearbook* ... 1977, vol. I, pp. 205 and 206, 1452nd meeting, paras. 32 and 34.

## 1523rd MEETING

*Friday, 21 July 1978, at 10.10 a.m.*

*Chairman* : Mr. José SETTE CÂMARA

*Members present* : Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

**The most-favoured-nation clause (concluded)**  
(A/CN.4/308 and Add.1 and Add.1/Corr.1 and Add.2, A/CN.4/309 and Add.1 and 2, A/CN.4/L.280)

[Item 1 of the agenda]

**ARTICLE 2 (Use of terms)<sup>1</sup> (concluded)**

1. The CHAIRMAN invited the Chairman of the Drafting Committee to report on the Committee's further discussion of article 2, paragraph 1, subpara-

graph (g), in which the Committee had proposed a definition of the term "persons or things" and which the Commission had referred back to the Committee at its previous meeting.

2. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the outcome of the further discussions mentioned by the Chairman had been the conclusion that the Drafting Committee would be unlikely to find a definition of the term in question that would be sufficiently comprehensive and clear. The Committee therefore recommended the deletion of subparagraph (g). That recommendation was, however, subject to the understanding that the commentary to article 5, which was the article most directly involved, would contain an explanation of what was meant in the draft articles by the term "persons or things", and would in particular make it clear that the expression covered activities and services.

3. Mr. VEROSTA expressed support for the Drafting Committee's recommendation.

4. The CHAIRMAN said that, if there were no objection, he would take it that the Commission approved the deletion of article 2, paragraph 1, subparagraph (g).

*It was so agreed.*

5. The CHAIRMAN suggested that the Commission should adopt, as a whole, the draft articles on most-favoured-nation clauses, as amended at its 1521st and current meetings.

*The draft articles, as amended, were adopted.*

**Relations between States and international organizations (second part of the topic) (A/CN.4/311 and Add.1) (continued)**

[Item 7 of the agenda]

6. Mr. REUTER wished to know whether the Special Rapporteur thought it possible for the question of the privileges and immunities of international organizations to be dealt with quite separately from that of the responsibility of international organizations, the one being the counterpart of the other. The latter question had still to be examined and he wondered whether it could be approached from the standpoint of codification.

7. He congratulated the Special Rapporteur on the clarity and judgement displayed in his report.

8. Mr. USHAKOV observed that the members of the Commission had no legal status and enjoyed no immunities or privileges. In his view, they could not be assimilated to experts on mission on behalf of the United Nations, as was being suggested. He therefore proposed that the Secretary-General should be officially requested to enter into an arrangement with the Swiss Government, after authorization by the General Assembly, establishing the status of the members of the Commission.

9. Mr. REUTER was not opposed to the adoption of a decision on that matter, but pointed out that the

<sup>1</sup> For text, see 1521st meeting, para. 102.

Commission's position was not unique: other United Nations bodies were composed of persons who were not officials of the Organization, experts, or representatives of governments. He did not think it was correct to say that the members of the Commission had no rights, privileges or immunities. In his opinion, the Commission should proceed cautiously, for it could not raise the matter of its members' privileges and immunities without simultaneously raising the whole question of its status, and that was a highly complex issue which might take it further than it wished.

10. The CHAIRMAN suggested that the Planning Group might include the point raised by Mr. Ushakov in the agenda of its next meeting.

11. Mr. CALLE Y CALLE entirely agreed with the conclusions arrived at by the Special Rapporteur in his report on a subject that was of great interest in the modern world and that should be governed by specific rules. In studying the question of the privileges and immunities of international organizations, the Commission should take into account the experience of all such organizations and not merely of those of a universal character. Certain regional organizations that had been founded even earlier than the League of Nations continued to give valuable service, so that there was no reason for dismissing regional organizations as an immature sub-species. The Commission should frame general rules that would unify the relations between States and international organizations which, whatever their nature, were an expression of the growing solidarity of States and of their need for co-operation.

12. With regard to the methods of the Commission's study, much valuable information might be derived from the abundant practice of regional organizations. To mention a case in point, the Commission would doubtless find food for thought in the range of privileges and immunities, including full diplomatic status, accorded to the members of its counterpart organ in OAS. As the Special Rapporteur had acknowledged, the Commission should also look into the wealth of national legislation dealing with the immunities of international organizations. Although laws of that kind were sometimes specific to international organizations, they were more often general enactments on diplomatic privileges and immunities in which reference was made to particular international organizations. The Commission should also bear in mind that there was a large body of relevant national case law, for the activities of an international organization in a given country entailed not only visits by experts or special representatives, but also the prolonged residence of various categories of expatriate administrative or service personnel, employment of local staff and the presence in the country of officials' families.

13. With reference to the comments made by representatives in the Sixth Committee, as summarized in chapter III of the Special Rapporteur's report (A/CN.4/311 and Add.1), he noted with satisfaction

the general agreement that the subject now before the Commission was ripe for codification. Only a few speakers had said that the question was adequately covered by Article 105 of the Charter of the United Nations and by the 1946 Convention on the Privileges and Immunities of the United Nations;<sup>2</sup> in his own view, that convention was a useful model for subsequent instruments, but it was not exhaustive. Another opinion that he did not share was that work on the second part of the topic of relations between States and international organizations should not be pursued until the 1975 Vienna Convention<sup>3</sup> had gained general acceptance, and that the attempt at codification now contemplated might fail. Codification of the law of immunities of international organizations was necessary in order to complete the work on the codification of diplomatic law, which was already so well advanced. The reason why the 1975 Vienna Convention was not yet in operation was not that it was not a good convention, but rather that the number of ratifications required for its entry into force had been set at nearly half the number of States in the world community, which was unreasonably high. He hoped that less rigorous requirements would be set for the entry into force of the convention based on the articles the Commission was about to begin drafting, since international law must keep up with the trends of contemporary international life, one of which was an increase in both the number and importance of international organizations.

14. Mr. SUCHARITKUL agreed entirely with the conclusions stated by the Special Rapporteur in his report. He would therefore simply draw the Special Rapporteur's attention to one or two points concerning the conduct of his study.

15. The Special Rapporteur had been right to point out, in paragraph 124 of his report, that the rationale for the immunities of international organizations and their officials was their functional needs. That functional criterion was in itself restrictive and implied that the immunities enjoyed by officials of international organizations were essentially immunities *ratione materiae*, whereas the immunities enjoyed by diplomats were both *ratione materiae* and *ratione personae*, inasmuch as they extended to protection of the person of the diplomat by reason of his representative function. It could, of course, be argued that certain officials of international organizations also had a representative function when they attended the meetings of other bodies, but that was only a subsidiary part of their duties. Moreover, although some immunities of international civil servants—such as immunity from arrest and detention and immunity from the seizure of personal luggage—were directly related to the person, the rest, including jurisdictional immunity in respect of words uttered or acts performed in the discharge of their duties, clearly had a functional basis. That being so, there corresponded to the immunities of international officials, as Mr. Reu-

<sup>2</sup> See 1522nd meeting, foot-note 7.

<sup>3</sup> *Ibid.*, foot-note 5.

ter had pointed out, certain responsibilities, particularly the duty of compliance with local laws, and even a virtual obligation to waive immunity if insistence on it might impede the course of local justice. The fact that the only international organizations with which the Commission was concerned were intergovernmental organizations helped to explain why the latter and their officials were generally exempt from income tax; in the absence of such an exemption, the contributions would in effect come from the member States forming the organization, which would understandably be reluctant to tax themselves.

16. But more important than the question of immunity—and the point of which he hoped the Special Rapporteur would begin his study—was the question of the status and legal personality of international organizations. It would seem that, ultimately, every international organization had two types of legal personality: that attributed to it by the national law of its host country and that attributed to it by its constituent instrument or equivalent documents. The first such capacity was of fundamental importance for determining the practical attributes of the organization in relation to private law, for instance, whether it could sue and be sued, and whether it could acquire and dispose of property. It was certainly appropriate that the Special Rapporteur should study national legislation in relation to international organizations, but the study must nevertheless begin with the consideration of the constituent instruments of international organizations, for it was they that showed how far the members of a particular organization had intended to give it international personality or capacity. The study of those instruments would, indeed, reveal that there were nuances in the degree of personality enjoyed by organizations. For example, under the terms of reference of ESCAP, the United Nations had had responsibility for concluding the headquarters agreement with the Government of Thailand. But since that Government had recognized the capacity of ESCAP to own land and property, albeit in the name of the United Nations, it could be seen that, although ESCAP had no separate international personality, it nevertheless had a certain legal capacity.

17. The Special Rapporteur had referred in his report to a finding by the International Court of Justice that 50 States had been able to endow an international organization with objective international personality (A/CN.4/311/Add.1, para. 120). In theory, two or three States that wished to form an international organization could give it that kind of personality although, like ASEAN or the Ministerial Conference for Economic Development of South-East Asia, such an organization would clearly be smaller than the organization the Special Rapporteur had had in mind. In many cases, a small organization of that kind did not have a single constituent instrument but was governed by rules set out in a number of documents, such as declarations. There was ample evidence that such small organizations had been recognized as having international personality both by their members

and by other States. There had even been cases in which the offspring of such organizations had been given legal personality; for example, the South East Asia Centre for the Promotion of Trade, Investments and Tourism, in Tokyo, had been recognized by the Japanese Diet as having legal personality under Japanese law.

18. The Special Rapporteur should be completely free to choose whether his future work would deal solely with organizations of a universal character, or also with smaller organizations. What was certain was that the United Nations itself and the bodies attached to it merited special attention, for some of them, such as the International Court of Justice and the Security Council, were so powerful that they displayed many aspects of vested sovereign authority.

19. Mr. THIAM was gratified that the Special Rapporteur had decided to include in his study the question of regional organizations, which had grown in importance with the creation of new organizations on the African continent. He was surprised, however, that OAU was not among the African organizations mentioned in the report.

20. Mr. YANKOV agreed wholeheartedly with the conclusions and suggestions for the general outline of the study set forth in the Special Rapporteur's report.

21. The question of the need for the study of the law with respect to immunities of international organizations and for the codification of such law had already been settled; however, he shared the Special Rapporteur's view that the subject was one that called for prudence and realism. As the Special Rapporteur himself had realized, the principal need was for pragmatism, for the aim of the study must be to produce not a theoretical treatise, but a body of rules relevant to practical dealings between governments and international organizations. In that connexion, the Special Rapporteur might wish to study the proceedings of committees on host country relations, such as the one that functioned in New York. The constant growth in the role of international organizations was a fact of contemporary international life; the Special Rapporteur was therefore right to say that it must be taken into account.

22. He was pleased that the Special Rapporteur intended to study not only the law of organizations in the United Nations system, but also the evolving law of regional organizations, and that he intended to do so without giving undue weight to either. As he understood it, the list of regional organizations in paragraph 121 of the Special Rapporteur's report was in no way to be considered as exhaustive or as indicating the Special Rapporteur's intention to study only the organizations listed. That was a particularly important point, since there existed organizations not mentioned in the list that were *a priori* regional organizations but whose influence and activities spread far beyond regional bounds.

23. He believed that the study should centre on the three categories of privileges and immunities to which the Special Rapporteur had referred in para-

graph 37 of his report. However, other related but more general issues also deserved attention, namely, the legal status and capacity of international organizations in public and private international law and in internal law, the relations of international organizations among themselves and the status of their representatives to other international organizations, and international personality in the context of Articles 104 and 105 of the United Nations Charter. There was also the very delicate, but real, problem of the status of United Nations peace-keeping forces and their officials.

24. Mr. TSURUOKA expressed broad support for the conclusions presented by the Special Rapporteur in his report and in his oral presentation of the report at the previous meeting. In particular, he shared the view that the basis for the privileges and immunities of international organizations and their officials, experts and agents should be their functional requirements.

25. At the previous meeting, Mr. Pinto had raised the important point that international organizations must be distinguished according to the nature of their activities. It was certainly true that the organizational and institutional arrangements of operational organizations, such as IBRD, IFC and various regional development banks, exhibited unique features and that the privileges and immunities of such organizations were also specific to them. For example, although many international organizations—for example the United Nations and ILO—were generally immune from proceedings in national courts, the charters of operational organizations provided that they might be sued in the courts of the member States where they maintained offices. That provision was considered necessary in order to avoid giving those organizations an unfair advantage in the various financial and commercial transactions in which they engaged daily with private persons, such as the sale of bonds and the purchase of goods and services.

26. That example demonstrated that the Commission's draft articles should link the scope and degree of the privileges and immunities of international organizations with their specific functions and assignments. Hence, in following the "functionalist" approach, the Commission should not only consider the functional requirements and the privileges and immunities of international organizations in general, but should also analyse very carefully the relations between the scope and degree of the privileges and immunities of each individual organization and its particular functions and objectives. It should also consider the possibility that the duties of particular organs or officials might be such that they would require different privileges and immunities from other organs or officials of the same international organization.

27. Mr. DADZIE said that the Special Rapporteur, in his second report, had sought to tailor his work to the needs of the international community. He had done so by paying close attention to the views of the members of the Commission and of the members of

the Sixth Committee of the General Assembly, by studying the wealth of material at the disposal of international organizations and by examining national laws relating to the topic and to allied topics.

28. He particularly welcomed the Special Rapporteur's recommendation that, in its initial work on the second part of the topic, the Commission should adopt a broad outlook and include regional organizations in the study. However, the final decision to include such organizations in the eventual codification could not be made until the study was completed. That recommendation was all the more important for being made at a time when regional organizations were assuming growing significance in international relations. Their importance was borne out by the impressive list of organs established at the regional level that were referred to in the five-volume compilation published by UNCTAD.<sup>4</sup>

29. The Special Rapporteur could count on the speaker's full support in his future work on the important study in question. He agreed with those members who had said that the Special Rapporteur should be given every latitude to develop and expand the topic.

30. In conclusion, he associated himself with Mr. Ushakov's request that the question of the Commission's status be officially taken up by the Secretariat with the Swiss authorities. He agreed with Mr. Reuter that such a step would give rise to some difficulties but he nevertheless considered that the matter should be raised as soon as possible.

31. Mr. FRANCIS greatly appreciated the contents of the report and the masterly skill with which the Special Rapporteur had introduced it. He was convinced that members' comments would guide the Special Rapporteur in his future work. There seemed no doubt, for instance, that the Special Rapporteur would pay attention to the point made by Mr. Pinto (1522nd meeting) concerning the difference between the operational activities of international organizations and their regulatory functions, to the comment by Mr. Reuter concerning the responsibility of international organizations, and to the suggestion of Mr. Šahović (1522nd meeting) that the Special Rapporteur should provide a plan of his work. In that connexion, he believed that modesty had prevented the Special Rapporteur from submitting a plan that he was not certain he would be able to carry out himself; the Special Rapporteur might not have wished to commit his successor to a plan in whose formulation the latter had not participated.

32. In conclusion, he wished the Special Rapporteur all success in his future activities.

33. Mr. SCHWEBEL greatly appreciated the Special Rapporteur's excellent report, which dealt with an important and delicate topic. The law on the subject was developing, but not always progressively.

<sup>4</sup> "Economic co-operation and integration among developing countries: Compilation of the principal legal instruments" (TD/B/609/Add.1).

34. He shared the Special Rapporteur's view that increased attention should be paid to the position of regional organizations. It was interesting to note in that connexion that the community of international organizations was manifesting interest in the outcome of the appeal against the decision of the District Court, the court of first instance, in the case of *Broadbent v. OAS*. A number of OAS staff members had instituted proceedings against the organization because they had been dismissed as a result of staff reductions. The District Court had ruled that they had no case, on the ground that it had no jurisdiction over employment disputes in an international organization of which the United States was a member. An important question connected with that case was the scope of the Foreign Sovereign Immunities Act passed in the United States in 1976. Was that statute's limitation of State immunities to the sphere of non-commercial activities a principle that extended to international organizations? His own impression was that the Act had not been intended to affect the immunities of international organizations. The case proved how important it was that the Commission should guide the development of the law in the right direction, namely, one of prudence and response to the characteristics and needs of different international organizations.
35. He agreed with those members who had stressed the functional nature of immunities and he shared Mr. Reuter's views concerning the responsibility of international organizations. Another question to be taken into account was that of the responsibility of States. It was important that States should respect their treaty obligations to their nationals, whether members of the secretariat of an international organization or of a national delegation to an international organization. In other words, States should not require their nationals to engage in exclusively national activities or in activities that were unlawful in the host State. Such activities brought discredit on international organizations in the eyes of the general public.
36. Turning to the question of the pace of the Commission's work on the subject, he suggested that all members were agreed that the work should proceed and progress. It was not unreasonable, however, in deciding the priorities of the Commission, to take account of the digressive capacity of the international community. If States appeared unwilling, at that stage, to accept fresh codification, their views should be taken into consideration. He agreed with Mr. Yan'kov that the work should not be classified as urgent.
37. The Commission would miss Mr. El-Erian should he be unable to complete the work, but would wish him well in his future activities.
38. Mr. DÍAZ GONZÁLEZ said that, although the subject of the report was important and difficult, the skill of the Special Rapporteur was such that he had succeeded in producing an excellent summary of the vast amount of material made available to him.
39. He thought that the question of the status of the Commission's members, raised by a previous speaker, should be dealt with by the Planning Group at a private meeting.
40. The Special Rapporteur had rightly devoted particular attention to the question of national legislation and the practice of the national ministries of foreign affairs. His own country had had considerable experience, particularly as a result of the United Nations Conference on the Law of the Sea, in dealing with the question of the privileges and immunities of international organizations, officials of organizations, experts on mission for organizations, resident representatives and observers sent by international organizations to Venezuela. Each case was dealt with individually and formed the subject of a separate decree.
41. In conclusion, he wished the Special Rapporteur all success in his future functions.
42. Mr. EL-ERIAN (Special Rapporteur), replying to questions raised and comments made during the debate on his report, wished at the outset to acknowledge his debt to Mr. Reuter, who had been his mentor on the subject.
43. Referring to the comments made by Mr. Thiam, he said that he would certainly not overlook OAU. In that connexion, the last three words of the introductory part of paragraph 121 of the English text read "the list includes"; in other words, the list was not exhaustive.
44. Replying to Mr. Šahović's question (1522nd meeting) concerning a plan for future work, he said that a broad approach should be taken to the study, both in terms of organizations to be covered and in terms of subject-matter, which would include the organization, its officials, its experts and its resident representatives. It would appear logical, as far as the subject-matter was concerned, to take the organization first, particularly since, in the case of the organization, the Commission would be dealing with its legal capacity as well as with its privileges and immunities, and it was in the matter of the legal capacity of an international organization that the Commission had a contribution to make.
45. Turning to the question raised concerning the responsibility of international organizations, he said that the Commission had to deal with the status of international organizations in the particular context of diplomatic law. An organization established in the territory of a State had a legal status whose modalities had to be defined. That was another area in which the Commission could fill a gap left in previous instruments.
46. Mr. Pinto had raised a question (1522nd meeting) concerning the types of organizations to be covered in the study. The Commission's aim was to produce a common denominator, i.e. general rules that would play a residuary role when there was no law to govern a particular situation. The Commission should study all instruments, both international and national, that were applicable to the question, in

order to determine whether they contained a common denominator that could be codified and developed; it would not be possible to legislate for each individual case. Every existing type of organization would have to be studied. It was therefore a source of satisfaction to him that members had agreed that account should be taken of regional organizations. In that connexion, he recalled that the list of organizations in paragraph 121 of his report was not exhaustive, and that European organizations would be included in future lists.

47. It was gratifying to note that the Commission had reaffirmed its opinion that the topic was ripe for codification. He agreed with Mr. Schwebel and Mr. Yankov that a prudent approach should be adopted to the matter and that other topics had a better claim to priority. Nevertheless, it seemed useful that the Commission should complete its work on topics concerning inter-State relations with a topic concerning relations between States and international organizations.

48. In raising the question of the status of the members of the Commission, Mr. Ushakov had drawn attention to a lacuna in the law governing international organizations. Conventions and headquarters agreements referred to the organization, its officials, its experts and its resident representatives, but made no provision for persons who, like the members of the Commission, fell into none of those categories. It would be necessary, however, to heed the warning given by Mr. Reuter on the subject. The Special Rapporteur would consider the matter when he came to the question of experts.

49. The question of the waiver of immunities, to which Mr. Sucharitkul had referred, would be taken into account when dealing with the question of immunities.

50. In conclusion, he said that the Commission could congratulate itself on having laid the foundations for future work on the second part of the topic.

*The meeting rose at 1 p.m.*

## 1524th MEETING

*Monday, 24 July 1978. at 3.10 p.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Ago, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

**Relations between States and international organizations (second part of the topic) (concluded)**  
(A/CN.4/311 and Add.1)

[Item 7 of the agenda]

1. The CHAIRMAN observed that at its previous meeting the Commission had omitted to approve the conclusions submitted by the Special Rapporteur in his second report (A/CN.4/311 and Add.1, chapter V). If there were no objections, he would take it that the Commission approved those conclusions.

*It was so agreed.*

**State responsibility (concluded)\* (A/CN.4/307 and Add.1 and 2 and Add.2/Corr.1, A/CN.4/L.271/Add.1)**  
[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE (concluded)\*\*

ARTICLE 27<sup>1</sup> (Aid or assistance by a State to another State for the commission of an internationally wrongful act)

2. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the title and text proposed by the Drafting Committee for article 27 (A/CN.4/L.271/Add.1), which read:

*Article 27. Aid or assistance by a State to another State for the commission of an internationally wrongful act*

Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act, carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute a breach of an international obligation.

3. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the article was based on article 25, entitled "Complicity of a State in the internationally wrongful act of another State", proposed by the Special Rapporteur (A/CN.4/307 and Add.1 and 2, para. 77). Article 27 would be the first article of chapter IV of the draft, entitled "Implication of a State in the internationally wrongful act of another State".

4. The aim of the Drafting Committee in preparing the text had been to retain the essence of the original text in terms as simple and balanced as possible, while removing any source of ambiguity or misinterpretation. That was why it had discarded such words as "complicity", "accessory" and "international offence", which had appeared in the original text. As the Special Rapporteur had suggested in summing up the discussion (1519th meeting, para. 32), the expression "against a third State" had also been discarded.

5. The formulation adopted by the Drafting Committee stressed the cardinal material element of the internationally wrongful act envisaged by the article, but it also took into account the element of the intention of the State rendering aid or assistance to an-

\* Resumed from the 1519th meeting.

\*\* Resumed from the 1518th meeting.

<sup>1</sup> For consideration of the text initially submitted by the Special Rapporteur, see 1516th meeting, paras. 4-22, 1517th meeting, paras. 1-12, 1518th meeting, paras. 3 *et seq.*, and 1519th meeting.

other State for the commission of an internationally wrongful act by the latter, The words "if it is established that it is rendered for the commission" made it clear that the aid or assistance in question must have been given for the purpose of the commission of an internationally wrongful act by the other State and that such intention must be "established". Furthermore, the words "carried out by the latter" had been added to emphasize that the commission of the "principal" internationally wrongful act by the State that had received the aid or assistance was a condition for the existence of the internationally wrongful act of "participation" as a separate wrong entailing the international responsibility of the State that provided the aid or assistance in question. Finally, the last part of the text adopted by the Drafting Committee specified that the giving of such aid or assistance would be "wrongful" even if, under other conditions, the actions or omissions in question would be lawful under international law.

6. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to approve the title and text of article 27 proposed by the Drafting Committee.

*It was so agreed.*

### Organization of future work

[Item 10 of the agenda]

#### REPORT OF THE WORKING GROUP ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY (A/CN.4/L.279)

7. The CHAIRMAN invited the Chairman of the Working Group on jurisdictional immunities of States and their property to introduce the Group's report (A/CN.4/L.279).

8. Mr. SUCHARITKUL (Chairman of the Working Group) said that, since the report was merely exploratory in nature, its findings were necessarily tentative. The main objectives of the Working Group had been to identify the questions to be examined, to define and delineate the general scope of the future study and to make recommendations on how the Commission should proceed in its work on the topic. The members of the Working Group were indebted to the Chairman of the Commission and to Sir Francis Vallat, both of whom had kept alive the Commission's interest in the topic. He himself was particularly grateful for the advice he had received from Mr. Tsuruoka. The Group had also held private consultations with Mr. Ushakov, Mr. Šahović and Mr. Njenga.

9. The Working Group, which had been set up on 16 June 1978, at the 1502nd meeting, had held three meetings, on 20 June and on 11 and 12 July.

10. The report was divided into four parts, entitled "Introduction", "Historical background", "General aspects of the topic" and "Recommendations of the Working Group". In part II, the Working Group described how the topic had originally been brought to

the attention of the Commission. In 1948, the Secretary-General had prepared for the first session of the International Law Commission a memorandum entitled *Survey of International Law in relation to the work of Codification of the International Law Commission*.<sup>2</sup> The *Survey* had included a separate section on "Jurisdiction over foreign States", in which it had been stated that the subject covered "the entire field of jurisdictional immunities of States and their property, of their public vessels, of their sovereigns, and of their armed forces". At its first session, in 1949, the Commission had reviewed various topics of international law with a view to selecting topics or codification, taking the 1948 *Survey* as a basis. It had drawn up a list of 14 topics selected for codification,<sup>3</sup> including one entitled "Jurisdictional immunities of States and their property".

11. In its work on various topics, the Commission had touched upon certain aspects of the question of the jurisdictional immunities of States and their property. In its 1956 draft articles on the law of the sea, the Commission had referred to the immunities of State-owned warships and other ships. The immunities of State property used in connexion with diplomatic missions had been considered in the 1958 draft articles on diplomatic intercourse and immunities, while those of State property used in connexion with consular posts had been dealt with in the 1961 draft articles on consular relations. The 1967 draft articles on special missions had also contained provisions on the immunity of State property, as had the 1971 draft articles on the representation of States in their relations with international organizations.

12. In 1970, the Commission had asked the Secretary-General to submit a new working paper on the basis of which it might select a list of topics for inclusion in its long-term programme of work. In 1971, the Secretary-General had submitted a working paper entitled *Survey of international law*,<sup>4</sup> containing a section on jurisdictional immunities of foreign States and their organs, agencies and property. The 1971 *Survey* had served as a basis for discussion during the Commission's consideration of its long-term programme of work at its twenty-fifth session, in 1973. Among the topics repeatedly mentioned in the discussion had been that of the jurisdictional immunities of foreign States and of their organs, agencies and property. The Commission had decided that it would give further consideration to the various proposals or suggestions in the course of future sessions. It was not until 1977, however, that the Commission had considered possible additional topics for study after the completion of its current programme of work. The topic "Jurisdictional immunities of States and their property" had then been recommended by the Commission for consideration in the near future, bearing in mind its day-to-day practical importance as well as its suitability for codification and progressive

<sup>2</sup> United Nations publication, Sales No. 1948.V.1 (I).

<sup>3</sup> See *Yearbook ... 1949*, p. 281, doc. A/925, para. 16.

<sup>4</sup> *Yearbook ... 1971*, vol. II (Part Two), p. 1, doc. A/CN.4/245.



development. Finally, in resolution 32/151, the General Assembly had invited the International Law Commission, at an appropriate time and in the light of progress made on the draft articles on State responsibility for internationally wrongful acts and on other topics in its current programme of work, to commence work on the topics of international liability for injurious consequences arising out of acts not prohibited by international law and jurisdictional immunities of States and their property.

13. In its consideration of the general aspects of the topic, the Working Group had started with the nature of the topic and the legal basis of jurisdictional immunities. It had been observed that the doctrine of State immunity resulted from the interplay of two fundamental principles of international law, namely, the principle of territoriality and the principle of State personality. The topic was of interest to States from two standpoints: as territorial sovereigns for the exercise of their sovereign authority over the entirety of their territorial units; and as foreign sovereigns, when they were pursued in litigation or suits by individual or corporate plaintiffs before the judicial or administrative authorities of another State exercising territorial jurisdiction over cases involving foreign States. The Working Group had considered, therefore, that it was in the interest of States generally that the rules of international law governing State immunities should be made more easily ascertainable so as to give general guidance to States for the adoption and maintenance of a consistent attitude in the exercise of their territorial sovereign authority as well as in the assertion of their sovereign right to be exempt from the exercise of a similar authority by another State.

14. With regard to the scope of the study, the topic concerned the immunities of foreign States from the jurisdiction of territorial authorities; it also covered the immunities accorded by territorial authorities to foreign States and to their property.

15. With regard to the question of sources of international law for the study of the topic, evidence of rules of international law on State immunities appeared to be available primarily in the judicial and governmental practice of States, in the judicial decisions of national courts and in the opinions of legal advisers to governments, and secondarily in the rules embodied in national legislation and international conventions of a universal or regional character dealing with the subject-matter concerned. Customary international law had grown largely out of the judicial practice of States, since the question of extent of jurisdiction of a national court was invariably determined by the court itself. At a later stage in the study of the topic, the views of governments might be sought as to the nature, scope and extent of the immunities that States were prepared to accord each other and the immunities they considered themselves entitled to claim from each other. For the purposes of the initial stage of the study, it would be helpful to request governments to provide basic information and material relating to State practice in the matter.

16. The Commission would reserve the right to alter the title of the topic if it deemed it necessary.

17. With regard to the content of State immunities, an examination should be made of the substance of State immunities in various forms, including immunity from civil jurisdiction, from penal or criminal jurisdiction, from arrest, search, service of writs and detention, and from provisional measures of protection by way of seizure and attachment. The exercise of jurisdiction by the judicial authorities of a State was essentially different from the exercise of measures by the competent authority of that State in execution of judgement. Immunities from execution formed a special class of State immunities, requiring separate attention and treatment. Waiver of immunities from jurisdiction did not, as a general rule, extend to waiver of immunities from execution.

18. In the matter of beneficiaries of State immunities, it had been observed that such immunities were enjoyed by States in respect of a wide variety of beneficiaries, persons or things. The expanding list of beneficiaries of State immunities deserved thorough examination. In particular, it should be determined what constituted a "foreign State" for the purpose of immunities. Such an inquiry would entail the study of the different types of organs, agencies and instrumentalities of States that participated in the enjoyment of State immunities. Beneficiaries of State immunities certainly included the armed forces of States and, conversely, "foreign visiting forces". The status of political subdivisions of States and the position of constituent States members of a federal union also merited special study. Men-of-war, space-ships, public vessels, submarines, aircraft, military vehicles and public property were also covered by State immunities.

19. The question of the extent of State immunities would be the crux of the study. The doctrine of State immunities had been formulated in the nineteenth century at a time when immunities had been accorded to States on the grounds of their sovereign equality and political independence, irrespective of the nature of their activities. That doctrine of absolute or unqualified immunity appeared, however, to have undergone considerable changes. Current trends in State practice and in legal thinking gave strong support to the idea of restrictive as opposed to absolute immunities. The time had therefore come to define the precise extent to which immunities should be granted. Any examination of the extent of jurisdictional immunities should also cover related matters such as voluntary submission to local jurisdiction, waiver of immunities, counter-claims, service of writs, security for costs and the question of execution of judgements against foreign States.

20. In conclusion, he pointed out that the recommendations of the Working Group were contained in paragraph 32 of its report.

21. The CHAIRMAN thanked the Working Group, and particularly its Chairman, for its excellent report, which was a model of objectivity and efficiency.

22. Mr. TSURUOKA fully concurred with the general analysis of the topic presented by the Working Group. He also supported the Working Group's recommendations in paragraph 32 of its report.
23. It was particularly satisfying to him that the Group was aware of recent important developments in State practice on the subject. The Group had observed, for instance, that current trends in the practice of States and in the opinion of jurists were predominantly in favour of restrictive as opposed to absolute immunities, and that a distinction should be drawn between activities of States covered by immunities and other increasingly numerous activities in which States engaged like individuals, often in direct competition with the private sector. It was sometimes said that in current practice immunities were accorded only in respect of activities of States that were public in character, official in purpose or sovereign in nature. In other words, only *acta jure imperii* as distinct from *acta jure gestionis* or *jure negotii* were covered by State immunities. That was a very important point, deserving careful study from the standpoint of both theory and State practice.
24. He fully supported the Working Group's recommendation that the Commission should include the topic "Jurisdictional immunities of States and their property" in its current programme of work. The topic would call for a careful study of historical precedent and current State practice; it should not, therefore, be dealt with too hastily. In Mr. Sucharitkul, the Commission had a member with the necessary academic knowledge and practical skills to serve as Special Rapporteur for the topic, and he was convinced that, with Mr. Sucharitkul's assistance, the Commission would be able to deal with the task successfully.
25. Mr. USHAKOV said that, subject to two minor amendments, he could accept the recommendations made by the Working Group in paragraph 32 of its report (A/CN.4/L.279). In paragraph 32(c), he proposed that the word "authorize" should be replaced by the word "invite", and he would favour setting governments a shorter time-limit than the one provided for in paragraph 32(d).
26. On the other hand, he thought that the Commission could not adopt section III, E, F and G, of the Working Group's report, since it could not take a position on the topic without first studying it thoroughly. He was particularly surprised at the reference in paragraph 22, in connexion with the content of State immunities, to "immunities from arrest, search, service of writs, detentions". In addition, the expression "jurisdictional immunities" in the title of the topic was not entirely satisfactory; he would prefer the words "immunities from jurisdiction".
27. Mr. SCHWEBEL agreed that the Commission could not appoint a better Special Rapporteur than Mr. Sucharitkul.
28. He supported the Working Group's recommendations. However, he agreed with Mr. Ushakov that the date mentioned in paragraph 32(d) should be brought forward to 1 February 1979 and that the Special Rapporteur should be "invited"—not "authorized"—to prepare a preliminary report for consideration by the Commission.
29. He was puzzled, however, by the remainder of Mr. Ushakov's comments. At the current stage, the Commission was required merely to adopt the recommendations of the Working Group and to take note of the report as a whole. The forms of State immunities cited in the report were commonplace, and it would be odd not to mention them.
30. Mr. TABIBI fully supported the Working Group's recommendations, subject to the drafting changes suggested by Mr. Ushakov. It was high time that the topic was codified.
31. He agreed with previous speakers that the Chairman of the Working Group should be appointed Special Rapporteur for the topic.
32. Mr. QUENTIN-BAXTER thanked the Group for its important work. The fact that the Commission would be taking up the topic of jurisdictional immunity of States and their property would be welcomed in the world of scholarship. It would also be welcomed in common-law countries. In courts in the United Kingdom, judges were facing the need to come to terms with modern thinking in a sphere in which the general trend was very conservative. He was convinced that the Commission would produce a set of articles that would find its place in the legislation of all countries.
33. Mr. YANKOV said that the Working Group's report was well organized and provided guidelines for the Commission's future work on the subject. Nevertheless, he agreed with Mr. Ushakov that the Commission should approach the topic cautiously. In particular, the scope of the study must be very carefully defined and the Commission must be extremely prudent in selecting the sources of international law to be taken into consideration; those sources should include international conventions, customary law and the judicial and administrative practice of States. He also agreed with Mr. Ushakov's remark about the title of the topic.
34. In general, he supported the recommendations made by the Working Group but hoped that the amendments suggested by Mr. Ushakov and Mr. Schwebel would be accepted.
35. Mr. DADZIE said that, generally speaking, he approved the manner in which the Working Group had dealt with the subject. It might be useful, however, to allow the Commission more time to analyse the report.
36. He fully supported the recommendations made by the Working Group, but agreed with previous speakers that in paragraph 32(c) the word "authorize" should be replaced by the word "invite". In paragraph 32(d) the date should be amended to read "1 February 1979".
37. He was not convinced that the time had come to appoint a Special Rapporteur for the topic. When

that time came, however, he would support a proposal that Mr. Sucharitkul should be appointed Special Rapporteur.

38. In conclusion, he suggested that the Commission should not rush its work on such an important subject.

39. Mr. REUTER congratulated the Chairman of the Working Group on his research and fully approved the Group's report. However, the period for the submission of information by governments should be shorter, since a good deal of that information had already been published. At all events, the preparation of the preliminary report by the Special Rapporteur should not be delayed because such information had not been submitted on time. He thought that a Special Rapporteur should be appointed as soon as possible.

40. Mr. PINTO said that the Working Group was to be congratulated on having prepared, in the short time available to it, an excellent report that reviewed the subject comprehensively. Although some of the statements in the report were controversial, the Working Group had succeeded in presenting matters in an objective light. That augured well for the success of the Commission's work on the topic, for which Mr. Sucharitkul was eminently qualified to act as Special Rapporteur.

41. He supported the drafting change proposed in paragraph 32(c) of the recommendations of the Working Group (A/CN.4/L.279), but thought that the date to be stipulated in paragraph 32(d) should be 30 June 1979 and not 1 February 1979.

42. The report already gave some idea of the wealth of material available on the subject of jurisdictional immunities and placed emphasis on an intention to study existing practice. Although he welcomed that approach, he considered it essential, in order to set that rich practice in its proper perspective, that the future Special Rapporteur should begin his work by analysing the social and political purpose of State immunity as it had been accorded through the ages.

43. Mr. THIAM warmly congratulated the Chairman of the Working Group, whom he considered very well qualified to exercise the functions of Special Rapporteur and who had already given an admirable introduction to the main aspects of the topic and the problems and controversies to which it gave rise.

44. The recommendations of the Working Group might be adopted, with the various amendments proposed.

45. Mr. VEROSTA also favoured the adoption of the recommendations, with the proposed amendments. He stressed the fact that, once the information that governments would be requested to submit by 1979 had been received, it would be even more interesting to have their opinions on certain matters of substance.

46. As to the appointment of a Special Rapporteur, the Commission's choice should be Mr. Sucharitkul.

47. Mr. SUCHARITKUL (Chairman of the Working Group) said that the Group had not imagined for one moment that its report, which it had regarded as a purely exploratory document, would give rise to such a lively and illuminating debate. The Group was grateful and encouraged by the interest shown in its work and it approved the drafting changes proposed in its report.

48. He assured the Commission that no member of the Working Group had any desire to prejudge the topic, and that subsections C to G of section III of the report were intended merely to indicate the type and nature of the problems that the Commission would probably have to study. The comments of Mr. Ushakov and Mr. Yankov concerning the need to take a cautious attitude and avoid the presentation of premature conclusions on a subject displaying several controversial aspects had been most apposite. The topic was indeed one that required profound study and in which not only practice itself, but also, as Mr. Pinto had said, the political, social and other considerations that had given rise to that practice, must be carefully sifted and weighed.

49. The CHAIRMAN said that, if there were no objections, he would take it that the Commission approved the report of the Working Group (A/CN.4/L.279), subject to the replacement in subparagraph (c) of paragraph 32 of the word "authorize" by the word "invite", and in subparagraph (d) of the date "1 February 1980" by "30 June 1979".

*It was so agreed.*

**Question of treaties concluded between States and international organizations or between two or more international organizations (concluded)\* (A/CN.4/312)**

[Item 4 of the agenda]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE (concluded)

ARTICLES 39, 40 AND 41

STATEMENT BY THE CHAIRMAN OF THE DRAFTING COMMITTEE

50. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that, owing to the Drafting Committee's heavy workload and the time constraints imposed on it, as well as on the Commission, it had been unable to take up the study of the articles 39, 40 and 41 submitted by the Special Rapporteur in his seventh report (A/CN.4/312) and referred by the Commission to the Committee at its 1507th, 1508th and 1509th meetings respectively. The Committee hoped, however, that it would be able to examine those articles and report on them early in the Commission's next session.

\* Resumed from the 1512th meeting.

### Draft report of the Commission on the work of its thirtieth session

51. The CHAIRMAN invited members to consider the Commission's report on the work of its thirtieth session, beginning with chapter V.

#### CHAPTER V. *Question of treaties concluded between States and international organizations or between two or more international organizations* (A/CN.4/L.277)

##### A. Introduction

*Section A was approved.*

##### B. Draft articles on treaties concluded between States and international organizations or between two or more international organizations

TEXT OF ARTICLES 35, 36, 36 *bis*, 37 AND 38, AND OF ARTICLE 2, PARAGRAPH 1 (*h*), WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS THIRTIETH SESSION

ARTICLE 2, PARAGRAPH 1 (*h*)

*Commentary to subparagraph (h) of paragraph 1 of article 2 (Use of terms)*

52. Mr. USHAKOV said that it was inaccurate to state, in paragraph (1) of the commentary, that the definition of the terms used in subparagraph (*h*) of paragraph 1 of article 2 "follows the Vienna Convention exactly", since the Vienna Convention on the Law of Treaties<sup>5</sup> defined only the term "third State". Moreover, since the definition in question covered two terms, it should be modelled on article 2, paragraph 1 (*e*), and include the word "respectively".

53. Paragraph (2) of the commentary referred to article 36 *bis*, but the commentary related only to article 2. It was therefore inappropriate to refer to article 36 *bis*, particularly since that provision had not been adopted by the Commission, but it should be explained that the term "third State" meant any State that was not a party to the treaty, including the States members of an international organization.

54. Mr. REUTER (Special Rapporteur) proposed that the words "follows the Vienna Convention exactly", in paragraph (1) of the commentary, should be replaced by the words "is based directly on the Vienna Convention", and that paragraph (2), which had been drafted in reply to an objection raised during the discussion, should be deleted.

55. Mr. USHAKOV also thought it would be best to delete paragraph (2), which might give rise to misunderstandings. The definition of the terms "third State" and "third international organization" must be a general one, that would apply to the draft as a whole.

56. Mr. RIPHAGEN suggested that, in order to take account of the objection raised by Mr. Ushakov and of the importance of the statements made in paragraph (2), that paragraph should be deleted from the

commentary to article 2; perhaps it might be considered for insertion in the commentary to article 36 *bis*.

*It was so agreed.*

*The commentary to article 2, paragraph 1 (h), as amended, was approved.*

ARTICLES 35, 36, 36 *bis*, 37 AND 38

*Commentary to article 35 (Treaties providing for obligations for third States or third international organizations)*

Paragraph (1)

57. Mr. USHAKOV said that the words "if a treaty is to create obligations for them", in the first sentence of the paragraph, should be redrafted to reflect more closely the text of article 35 of the Vienna Convention, and thus the truth of the matter: an obligation was created not by a treaty, but by a provision of such an instrument, and then only if the parties to the treaty intended the provision to have that effect. The statement in the same sentence to the effect that article 35 extended the rule of the corresponding provision of the Vienna Convention to third international organizations was also inaccurate; article 35 of the Vienna Convention required express acceptance of an obligation in writing, whereas paragraphs 2 and 3 of the Commission's article 35, which were the paragraphs that referred to third international organizations, required respectively that an obligation should be expressly accepted and that the acceptance should be given in writing, which was not the same thing.

58. Mr. SCHWEBEL (Chairman of the Drafting Committee) suggested that the final part of the first sentence of the paragraph be amended to read: "... if a provision of a treaty is to establish obligations for them, and it extends that rule to third international organizations".

*Paragraph (1), as amended, was approved.*

Paragraph (2)

59. Mr. USHAKOV said that paragraph (2) of the commentary related to article 35, paragraph 2. What should be stated in the commentary was that, where the parties to a treaty intended to create an obligation for an international organization, they must, in general, ensure that that obligation was within the sphere of the organization's activities, instead of stating that an organization could accept an obligation only "in the sphere of its activities"; it did not rest with the Commission to decide whether an organization might or might not accept an obligation. Moreover, it was not true that the expression "in the sphere of its activities" referred in flexible terms to the capacity of an organization; it referred to the sphere of activities that must be taken into consideration by the States parties to a treaty when they intended to create an obligation for the organization. Throughout the rest of the paragraph under consideration, the Commission gave the impression of wanting to interfere in the internal affairs of organizations, but that was not how article 35, paragraph 2, must be understood.

<sup>5</sup> For the text of the Convention (hereinafter referred to as the Vienna Convention), see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E. 70.V.5), p. 287.

60. Mr. RIPHAGEN said that, as he had stated during the Drafting Committee's discussion of the question, he agreed fully with Mr. Ushakov that an international organization was limited in its capacity to accept obligations only by the provisions of its own rules.

61. Mr. REUTER (Special Rapporteur) suggested that the second and third sentences of paragraph (2) should be replaced by the following text: "All organizations pursue their activities in a sphere whose extent is determinable externally and it is logical that the parties to a treaty will not intend to create an obligation for an international organization outside that sphere of activity".

*Paragraph (2), as amended, was approved.*

Paragraph (3)

62. Mr. USHAKOV, referring to the second sentence of paragraph (3), said it was inaccurate to state that the expression "by those rules" referred not only to the rules that concerned the organization's capacity but also to those that determined its competent organs, the procedures it must follow, the form of its acts and the entire legal régime that continued to govern the acceptance it had given. The expression "rules of the organization" had already been defined in article 2, paragraph 1 (j), which made no reference to rules such as those that determined an organization's competent organs, the procedures it must follow and the form of its acts. Why should the expression "rules of the organization" now be given another meaning?

63. Mr. REUTER (Special Rapporteur) said that there was a misunderstanding. The material expression in the second sentence of paragraph (3) was not the words "by those rules", but the word "governed". The sentence in question had been included in the commentary because, in the Drafting Committee, Mr. Ushakov had pointed out that what was being dealt with was not only the capacity of the organization, but also the entire legal régime. Since Mr. Ushakov did not find the sentence satisfactory, it would be best to delete it.

64. Mr. USHAKOV said that there was a difference between the content of article 6, relating to the capacity of international organizations to conclude treaties, and paragraph (3) of the commentary to article 35. He could therefore accept the deletion of the second sentence of that paragraph.

*Paragraph (3), as amended, was approved.*

Paragraph (4)

65. Mr. SCHWEBEL (Chairman of the Drafting Committee) suggested that, in order to reflect more accurately the outcome of the Commission's discussion of article 36 bis, the word "approve" should be replaced by the word "adopt".

*Paragraph (4), as amended, was approved.*

*The meeting rose at 6.05 p.m.*

## 1525th MEETING

*Tuesday, 25 July 1978, at 11.25 a.m.*

*Chairman: Mr. José SETTE CÂMARA*

*Members present: Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.*

### Organization of future work (continued)

[Item 10 of the agenda]

#### APPOINTMENT OF SPECIAL RAPPORTEURS IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTION 32/151

1. The CHAIRMAN said that, pursuant to the provisions of paragraph 7 of General Assembly resolution 32/151, the Enlarged Bureau recommended that Mr. Quentin-Baxter should be appointed Special Rapporteur for the topic of international liability for injurious consequences arising out of acts not prohibited by international law and that Mr. Sucharitkul should be appointed Special Rapporteur for the topic of jurisdictional immunities of States and their property.

2. If there were no objections, he would take it that the Commission approved those recommendations.

*It was so agreed.*

### Organization of work

#### APPOINTMENT OF OBSERVERS TO THE WORLD CONFERENCE TO COMBAT RACISM AND RACIAL DISCRIMINATION

3. The CHAIRMAN said that, if there were no objections, he would take it that the Commission approved the recommendation of the Enlarged Bureau that Mr. Tabibi and Mr. Dadzie should be appointed the Commission's observers to the World Conference to Combat Racism and Racial Discrimination.

*It was so agreed.*

### Draft report of the Commission on the work of its thirtieth session (continued)

#### CHAPTER V. Question of treaties concluded between States and international organizations or between two or more international organizations (concluded) (A/CN.4/L.277)

#### B. Draft articles on treaties concluded between States and international organizations or between international organizations (concluded)

TEXT OF ARTICLES 35, 36, 36 bis, 37 AND 38, AND OF ARTICLE 2, PARAGRAPH 1 (h), WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS THIRTIETH SESSION (concluded)

ARTICLES 35, 36, 36 bis, 37 AND 38 (concluded)

*Commentary to article 36 (Treaties providing for rights for third States or third international organizations)*

## Paragraph (1)

4. Mr. REUTER suggested that, in order to take account of a criticism which had been raised with him privately, the second sentence of paragraph (1) should be redrafted to read: "The solution embodied in article 36 of the Vienna Convention<sup>1</sup> is proposed in the former circumstance (paragraph 1), but a somewhat stricter régime in the latter (paragraph 2)."

*It was so agreed.*

*Paragraph (1), as amended, was approved.*

## Paragraphs (2) and (3)

*Paragraphs (2) and (3) were approved.*

## Paragraph (4)

5. Mr. USHAKOV suggested that, as in the case of paragraph (4) of the commentary to article 35, mention should be made of the fact that the Commission had not approved article 36 *bis*.

*It was so agreed.*

*Paragraph (4), as amended, was approved.*

*The commentary to article 36, as amended, was approved.*

*Commentary to article 36 bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization)

## Foot-note 22

6. Mr. USHAKOV said it was his understanding that the agreement reached by the Commission at its 1512th meeting had concerned article 36 *bis*, not "the text of article 36 *bis*". The statement that the Commission had agreed "to consider the article further in the light of comments made on the text by the General Assembly, governments and international organizations" was also inaccurate, since, at the current stage, the General Assembly could not be expected to make comments on the text of article 36 *bis*, and it was not planned to submit that text to governments and international organizations. The foot-note should be brought into line with the agreement actually reached by the Commission.

7. Mr. RIPHAGEN said it should be verified whether the statement made in foot-note 22 was, as he believed, an accurate reflection of the agreement reached by the Commission concerning article 36 *bis*.

8. The CHAIRMAN said that paragraph 41 of the summary record of the Commission's 1512th meeting indicated that the Commission had "decided that article 36 *bis* should appear in its report in square brackets, and that the report should reflect the comments made on the subject-matter of the article and indicate clearly that no decision had been taken on the text other than to reconsider it in the light of the comments made by Governments and international organizations".

9. Mr. USHAKOV said he continued to maintain that the foot-note was inaccurate, since the Commis-

sion was not at the moment expecting comments from governments and international organizations; at most, comments on article 36 *bis* might be made by members of the Sixth Committee of the General Assembly.

10. Mr. REUTER (Special Rapporteur) suggested the deletion of the words "the text of", which were ambiguous. It was for the Commission to decide whether the articles thus far adopted should be submitted to governments and international organizations at the current stage. If it so decided, the foot-note would be more accurate.

11. Mr. USHAKOV observed that it was the Commission's custom to await completion of the first reading of all the articles in a particular draft before submitting them to governments.

12. Mr. ŠAHOVIĆ suggested that the second phrase of the foot-note should be reworded to read "and to consider the article further on second reading". Since the Commission would have to be in possession of the comments of the General Assembly, governments and international organizations before beginning the second reading, that solution would serve to advance the Commission's work.

13. Mr. TSURUOKA said that the Commission would do well to confine itself to a factual statement and to reword the second phrase of the foot-note to read: "and to consider the article further, particularly in the light of the reactions of the General Assembly".

14. Mr. USHAKOV pointed out that the fact of placing an article between square brackets meant that the Commission retained the option of reconsidering it on first reading, which was quite a different matter from retaining the possibility of reverting to the article on second reading.

15. Mr. RIPHAGEN said that, with the amendment suggested by the Special Rapporteur, foot-note 22 should be acceptable to all members of the Commission, since it reflected the actual situation. The mere fact that the Commission published the results of its work could be considered as an invitation to governments and interested parties to comment on them.

16. The CHAIRMAN said that, if there were no objections, he would take it that the Commission approved the Special Rapporteur's proposal for the deletion of the words "the text of" in foot-note 22.

*It was so agreed.*

*Foot-note 22, as amended, was approved.*

## Paragraph (1)

17. Mr. REUTER (Special Rapporteur) said that, as a result of a private conversation with a member of the Commission, he wished to propose the deletion of the word "formally" in the second sentence of paragraph (1). Moreover, in the light of the suggestion made at the previous meeting that the passage deleted from the commentary to article 2, paragraph 1 (*h*), should be reproduced in the commentary to ar-

<sup>1</sup> See 1524th meeting, foot-note 5.

ticle 36 *bis*, he proposed that the phrase“; however, some members of the Commission expressed reservations concerning the term ‘third State members of an international organization’” should be added at the end of that sentence.

18. The CHAIRMAN said that, if there were no objections, he would take it that the Commission approved the Special Rapporteur’s suggestions.

*It was so agreed.*

*Paragraph (1), as amended, was approved.*

Paragraph (2)

19. Mr. REUTER (Special Rapporteur) said that it had been pointed out to him privately that the preliminary question at issue was not only in what cases and to what extent the system advocated might be made more flexible, but also what reasons there were for making it more flexible. The words “for what reasons” might therefore be inserted before the words “in what cases”.

20. Mr. USHAKOV would have liked those reasons to be indicated in the commentary.

*Paragraph (2), as amended, was approved.*

Paragraph (3)

21. Mr. REUTER (Special Rapporteur) suggested that the words “might be assumed” should be replaced by “might, from one standpoint, be assumed”, since a member of the Commission had observed to him in private that the current wording committed the Commission too much and did not accurately reflect the discussions.

22. Mr. USHAKOV said that the statement made in the first phrase of paragraph (3) was altogether unacceptable. The constituent instrument of an international organization could not create treaty rights for the States members of that organization and, consequently, obligations for other parties to the treaty. Such obligations could arise only by virtue of international law. The Commission could not subscribe to such opinions.

23. Regarding the second phrase of paragraph (3), the fact of being cognizant of the provisions of the constituent charter of an international organization was not a sufficient basis for consent to the effects set out in article 36 *bis*.

24. Mr. SCHWEBEL pointed out that the differences of opinion within the Commission concerning the substance of article 36 *bis* had been reflected by placing the article in square brackets, even though its text had received a very wide measure of support, and by recording the distinctive views of some members of the Commission in paragraph (4) of the commentary to the article. It should therefore be unnecessary to reopen the debate on the article.

25. Mr. USHAKOV said it could not be maintained that the constituent instrument of an international organization bound the other parties to a treaty.

26. Mr. ŠAHOVIĆ stressed that paragraphs (2) and (3) should be read in conjunction with paragraph (4), in which it was stated that the proposition set forth in paragraphs (2) and (3) had been subjected to sharp criticism.

27. Mr. REUTER (Special Rapporteur) suggested that the word “have”, in the first phrase of paragraph (3), should be replaced by the words “might have”, thus changing an assertion into a supposition.

28. The CHAIRMAN said that, if there were no objections, he would take it that the Commission accepted the two amendments suggested by the Special Rapporteur.

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

Paragraph (4)

29. Mr. REUTER (Special Rapporteur) suggested, in order to forestall a possible criticism, that the words “while many members of the Commission”, at the beginning of paragraph (4), should be replaced by the words “while some members of the Commission”.

*It was so agreed.*

*Paragraph (4), as amended, was approved.*

Paragraph (5)

30. Mr. REUTER (Special Rapporteur) said that a member of the Commission had told him privately that he did not share the Special Rapporteur’s interpretation of the two examples cited in paragraph (5). To meet that objection, the words “to take a simple example”, at the beginning of the second sentence of paragraph (5), could be replaced by the words “the Special Rapporteur had given an example:”, and the following sentence could be added at the end of the paragraph: “Some members of the Commission objected to that interpretation.”

31. Mr. SCHWEBEL said that the proposed addition to the end of the paragraph should avoid giving the erroneous impression that the members of the Commission in general had been opposed to the theses in question.

32. Mr. USHAKOV was prepared to accept the wording: “One member of the Commission strongly objected to that interpretation.” The main point was to emphasize that the interpretation given in paragraph (5) was not that of the Commission. The Commission must refrain, indeed, from interfering in the internal affairs of international organizations and, in particular, from interpreting headquarters agreements.

33. The CHAIRMAN said that, if there was no objection, he would take it that the Commission accepted the replacement of the words “to take a simple example” by the words “the Special Rapporteur had given the following example:”, and the addition, at the end of paragraph (5), of the sentence: “One member of the Commission strongly objected to this interpretation.”

*It was so agreed.*

*Paragraph (5), as amended, was approved.*

## Paragraph (6)

34. Mr. REUTER (Special Rapporteur) suggested the deletion of the word "technical", in the third sentence of paragraph (6), as it was inadequate.

*It was so agreed.*

*Paragraph (6), as amended, was approved.*

## Paragraph (7)

35. Mr. REUTER (Special Rapporteur) proposed that the words "the vast majority of treaties", in the second sentence, should be replaced by "many treaties".

36. Mr. USHAKOV could not accept the phrase "the two being inseparably linked", which he considered to be contrary to articles 35 and 36 of the Vienna Convention. Although the rights of a person and the corresponding obligations of another person were inseparable, the rights and obligations of one and the same person were always divisible.

37. Mr. REUTER (Special Rapporteur) proposed the replacement of the words "ultimately prompts the conclusion", in the first sentence, by the words "prompted some members of the Commission to conclude", in order to take account of Mr. Ushakov's comment.

38. Mr. TSURUOKA proposed that the words "inseparably linked", in the second sentence, should be replaced by "closely linked".

39. Mr. RIPHAGEN supported the amendment to the second sentence suggested by the Special Rapporteur. There were numerous types of treaty in which the exercise of a right was linked to the performance of an obligation, as the Commission had recognized in its draft articles on the most-favoured-nation clause.

40. Mr. ŠAHOVIĆ proposed the deletion of the words "the two being inseparably linked", at the end of the second sentence.

41. Mr. RIPHAGEN objected that the final phrase of the second sentence was necessary, because the problem considered in paragraph (7) existed only in relation to treaties in which rights and obligations were in fact inseparably linked.

42. Mr. USHAKOV observed that the Vienna Convention distinguished between the rights and the obligations arising from a treaty. Although, under paragraph 4 of article 36 (which was based on article 36, paragraph 2, of the Vienna Convention), a State or an international organization exercising a right in accordance with a treaty was required to comply with the conditions for its exercise provided for in the treaty, that in no way meant that the rights established by a provision of a treaty and the obligations established by another provision of the same treaty were inseparable.

43. Mr. REUTER (Special Rapporteur) supported Mr. Šahović's proposal for the deletion of the words "the two being inseparably linked". However, he would point out that, although there were cases in

which the rights and obligations arising from a treaty could be separated, there were also, under article 44 of the Vienna Convention, cases in which they were inseparable.

44. Mr. VEROSTA supported Mr. Tsuruoka's proposal that the words "inseparably linked" should be replaced by "closely linked".

45. Mr. USHAKOV said that any instances in which the rights and obligations arising from a treaty were inseparable were exceptions to the general rule, since in principle rights and obligations could be separated. If that were not the case, the régime that should prevail would be the stricter one—in other words, the régime relating to obligations.

46. Mr. RIPHAGEN said he had always understood that, in the case of States members of an international organization, the acknowledgement mentioned in article 36 *bis*, subparagraph (b), must be collective. It would, indeed, be contrary to the right of all members of an organization to equal treatment for any one of those members to be able to refuse to agree to the creation by the organization of obligations and rights "in its regard", as the final sentence of paragraph (7) suggested was the case. That sentence might perhaps be amended to take account of his objection.

47. Mr. USHAKOV observed that the condition laid down in article 36 *bis*, subparagraph (b), was tantamount to giving the right of veto to all States members of the organization, and not only to those that had participated in the negotiation of the treaty.

48. Mr. REUTER (Special Rapporteur) suggested that the reservation made by Mr. Riphagen should be mentioned in the Commission's report.

49. The CHAIRMAN said that, if there were no objections, he would take it that the Commission approved paragraph (7) of the commentary to article 36 *bis*, subject to the reservation made by Mr. Riphagen and to the following amendments: in the first sentence, the words "ultimately prompts the conclusion" should be replaced by "prompted some members of the Commission to conclude"; in the second sentence, the words "the vast majority of treaties" should be replaced by "many treaties", and the words "the two being inseparably linked" should be deleted.

*It was so agreed.*

*Paragraph (7), as amended, was approved.*

## Paragraph (8)

50. Mr. REUTER (Special Rapporteur) proposed the deletion of the word "final", in the last part of the text.

51. Mr. SCHWEBEL suggested that the opening clauses of the paragraph, which he found too emphatic in their existing form, should be amended to read: "Since, however, it is primarily for governments to interpret articles 35 and 36 of the Vienna Convention, and since it is primarily for those gov-



ernments and for the international organizations concerned to say what needs arise...”.

52. Mr. USHAKOV suggested that Mr. Schwebel's amendment should be modified to refer, at the beginning of the sentence, not to “governments” but to “the parties” to the Vienna Convention, since only the parties to a treaty had the right to interpret it.

53. Mr. RIPHAGEN supported the suggestions made by Mr. Schwebel and Mr. Ushakov.

54. The CHAIRMAN said that, if there were no objections, he would take it that the Commission accepted the drafting changes suggested by the Special Rapporteur, by Mr. Schwebel and by Mr. Ushakov.

*It was so agreed.*

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

*The commentary to article 36 bis, as amended, was approved.*

*Commentary to article 37 (Revocation or modification of obligations or rights of third States or third international organizations)*

Paragraph (1)

55. Mr. USHAKOV emphasized that it should be indicated that the fact that paragraphs 5 and 6 of article 37 had been placed in square brackets meant that those paragraphs had not been adopted.

*Paragraph (1), as amended, was approved.*

Paragraph (2)

56. Mr. REUTER (Special Rapporteur) proposed that the words “reproduce the exact wording of”, in the first sentence, should be replaced by “follow the wording of”.

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

Paragraphs (3)-(5)

*Paragraphs (3)-(5) were approved.*

*The commentary to article 37, as amended, was approved.*

*Commentary to article 38 (Rules in a treaty becoming binding on third States or third international organizations through international custom)*

Paragraphs (1)-(4)

*Paragraphs (1)-(4) were approved.*

Paragraph (5)

57. Mr. REUTER (Special Rapporteur) proposed that paragraph (5) should be replaced by the following text:

“The present draft article does not prejudice in one way or the other the possibility that the effects of the process of the formulation of customary law might extend to international organizations, and it

was with that consideration in mind that the article was adopted by the Commission.”

*It was so agreed.*

*Paragraph (5), as amended, was approved.*

*The commentary to article 38, as amended, was approved.*

*Section B as a whole, as amended, was approved.*

*Chapter V as a whole, as amended, was approved.*

*The meeting rose at 1 p.m.*

## 1526th MEETING

*Wednesday, 26 July 1978, at 10.10 a.m.*

*Chairman: Mr. José SETTE CÂMARA*

*Members present: Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.*

**Review of the multilateral treaty-making process (para. 2 of General Assembly resolution 32/48) (A/CN.4/L.283)**

[Item 8 of the agenda]

1. The CHAIRMAN invited the Chairman of the Working Group on review of the multilateral treaty-making process to introduce the Group's report (A/CN.4/L.283).

2. Mr. QUENTIN-BAXTER (Chairman of the Working Group) said that the Group's report was constructed in such a way that the Commission, if it so wished, could make paragraphs 4 to 9 part of its own report to the General Assembly.

3. In paragraph 4 there was a general statement of the Commission's attitude to a review of the multilateral treaty-making process. The paragraph made it clear that the Commission regarded the question as an important one and that, in view of the role the Commission played in the progressive development of international law, it welcomed the opportunity to make a contribution to the study of the matter.

4. In paragraphs 5 and 6, the Working Group made the point, which followed directly from the terms of General Assembly resolution 32/48, that the role of

the Secretary-General in that undertaking—which consisted in preparing a factual report on the techniques and procedures used in multilateral treaty-making within the United Nations—differed from that of the Commission, whose observations would necessarily be more in the nature of an appraisal.

5. In paragraph 7, the Working Group pointed out that the achievements of the Commission were the outcome of the work of the members of the Commission combined with the support the Commission received from the Codification Division of the Office of Legal Affairs. The members of the Working Group were by no means certain that the extent of the support provided by the Codification Division was appreciated outside the Commission.

6. In paragraph 8, the Working Group referred briefly to the substance of the question, noting that it would not be possible to assess the technical and procedural aspects of treaty-making without paying attention to the subject-matter of the topics chosen for codification and progressive development.

7. Lastly, in paragraph 9, the Working Group recommended that the Group be reconstituted at the beginning of the Commission's thirty-first session, taking into account the need for continuity of membership. The Working Group considered it important to ensure that each of the five regional groups was at all times adequately represented on the reconstituted Group, and the Commission might therefore wish to examine the possibility of expanding the Group's membership.

8. The members of the Working Group were of the opinion that the newly constituted Group should hold at least two meetings a week early in the Commission's 1979 session, with a view to submitting a final report to the Commission not later than 30 June 1979. If possible, that report should be submitted earlier, so that the Commission as a whole would have ample time to prepare its report on the subject to the General Assembly. To that end, the Working Group hoped that every member of the Commission would furnish the reconstituted Group, no later than by the end of the first week of the Commission's 1979 session, with a note setting forth his views on the scope of the subject and the manner in which it should be dealt with. It would be helpful if the Secretariat, in transmitting documents to members, were to remind them of that request.

9. The CHAIRMAN said he was sure he was expressing the sentiments of the Commission in congratulating the Chairman and members of the Working Group on their excellent report.

10. Mr. PINTO said that the multilateral treaty-making process was a matter of the highest importance and one that had not been adequately examined. The General Assembly's decision that the subject should be studied was timely. The Commission was in a position to make a major contribution to such a study, and it should examine the problems involved not only with objectivity but also with imag-

ination and creativity. It would not be the Commission's task to consider all aspects of the subject. Indeed, certain vital aspects, such as the social and economic cost of the negotiating process (the international conference) in relation to its productivity and benefits, might not be dealt with by the General Assembly at all. Nevertheless, the legal and institutional aspects of the question provided the Commission with sufficient scope to produce a study that would be of practical and permanent value to the General Assembly and to the world community.

11. The study should be conducted bearing in mind the objectives of the treaty-making process, which were: fair regulation of international activities by means of universally endorsed multilateral instruments; achievement of that first objective through the universal participation of all States in the negotiating process; and achievement of both those objectives through expeditious government action, starting with prompt instructions to delegations at the negotiating stage and ending with early ratification and legislative implementation at the domestic level.

12. Mr. SCHWEBEL agreed with the Chairman of the Working Group that the Group should be reconstituted at the beginning of the Commission's thirty-first session and should be given the opportunity to complete its work early in that session so that the Commission would have ample time to review the Group's final report.

13. Mr. Pinto had been right to draw attention to the essential objectives of the multilateral treaty-making process. He could agree with Mr. Pinto that the universal participation of all States was necessary at some stage of the negotiating process. He could not agree, however, that such participation was necessary at all the stages. The membership of the United Nations had grown so large that to require all Members to take part in the preparation of multilateral treaties would be counter-productive. The Commission itself provided an example of the way in which a body with a smaller membership could produce treaties for universal application. It was a tradition in the United Nations to set up small expert bodies to prepare drafts of instruments that had an effect on international law. The Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, which had met prior to the United Nations Conference on the Law of the Sea, had been composed of 90 members, but neither in its preparatory nor in its plenary stages had the Conference made rapid headway.

14. Mr. USHAKOV, referring to paragraph 5 of the report of the Working Group, remarked that the Commission was not called upon to pronounce on the contents of the Secretary-General's report. In particular, it was inappropriate to state that the report "is to be" a factual report, that it "would take account" of other treaty-making practices and that it "would describe" the various technical and procedural United Nations patterns in treaty-making. That being so, it would be best to delete the paragraph.

15. Mr. TSURUOKA noted that, in paragraph 7, the Working Group mentioned two factors that determined the Commission's productive capacity, one of them being the work that members of the Commission could accomplish during an annual session. In that connexion, he observed that each member of the Commission should fully realize the importance of his functions. Other and even more important tasks might sometimes require a member of the Commission to absent himself, but no one should lightly agree to be a member of the Commission. Members of the Commission should perform their duties conscientiously and efficiently.

16. Mr. ŠAHOVIĆ said that the Working Group's excellent report provided a basis for a thorough discussion on a subject to which many States Members of the United Nations attached great importance. The Sixth Committee of the General Assembly had considered that the Commission was the body most competent to examine the multilateral treaty-making process and was expecting it to make a detailed study of that question. The Commission should therefore set aside a sufficiently large number of meetings at its next session for that purpose. It should analyse the experience it had itself acquired and shed light on general world practice in the matter.

17. All the aspects and aims of the undertaking had not yet, it seemed, been clearly defined. It would rest with the States Members of the United Nations and with the Commission itself to provide such clarification. The Commission had a special role to play in that connexion, as the body entrusted with the codification and progressive development of international law.

18. Mr. USHAKOV endorsed the views expressed by Mr. Tsuruoka concerning paragraph 7 of the report. It should be made clear that the first factor upon which the Commission's productive capacity depended was not only the work that its members could accomplish during an annual session, but also the work that they, together with the Special Rapporteurs, accomplished throughout the year. With regard to the second factor, it should be stated that it was the material and documentation required by the Commission for its work that necessitated an increase in personnel and financial resources.

19. Mr. VEROSTA reiterated the appeal he had made to the Special Rapporteurs at the previous session to make every effort to submit more than two or three articles to the Commission annually, as it was very difficult to pronounce on particular articles without knowing the content of those that would follow.

20. Mr. FRANCIS considered Mr. Šahović's comments on the Commission's role in the matter to be very pertinent. Indeed, at the thirty-second session of the General Assembly, Mr. Lauterpacht, of the Australian delegation, who had introduced the draft resolution that had eventually been adopted as resolu-

tion 32/48,<sup>1</sup> had stressed the importance of the role to be played by the Commission.<sup>2</sup>

21. At the conference of the Asian-African Legal Consultative Committee held in Doha (Qatar) in January 1978, Mr. Nagendra Singh had drawn attention to the lack of co-ordination within the United Nations system in matters of codification. Reference had also been made, at the thirty-second session of the General Assembly, to the need for co-ordination in the treaty-making process and to the part to be played therein by the Sixth Committee and the Commission. To meet that need, the Commission's role in that regard might well have to be expanded.

22. Mr. SUCHARITKUL said that the Working Group's report would pave the way for further consideration by the Commission of the questions raised in the Sixth Committee. The Commission would then have an opportunity to assess its own role in the law-making process. Various bodies, including the First, Third and Sixth Committees of the General Assembly and certain specialized agencies, had been involved in drafting articles on different subjects. The Commission should maintain its primary role in the codification and progressive development of international law. Another United Nations body, UNCITRAL, was responsible for international trade law, and the division of labour between the Commission and UNCITRAL was clear. There had, however, been instances in which, for reasons of a political or economic nature, the task of preparing articles on a specific subject-matter had been assigned to a body other than the Commission. It would therefore be fitting for the Commission to give careful consideration to the questions raised in the Working Group's report.

23. Mr. YANKOV, referring to comments made on paragraph 5 of the report, said that that paragraph was largely based on General Assembly resolution 32/48 and merely reflected the decisions taken on the matter by the Sixth Committee. It would be a pity, therefore, to delete the paragraph.

24. Mr. FRANCIS supported the remarks made by Mr. Yankov. It had indeed been at Mr. Yankov's suggestion that the representative of Australia, who had originally suggested that the Secretariat should make an assessment of the treaty-making process, had agreed that the Secretariat should confine itself to preparing a factual report on the situation.

25. Mr. USHAKOV explained that his difficulties related to the wording of paragraph 5. He proposed that the words "it was understood that the Secretary-General's report is to be", in the first sentence, should be replaced by the words "in accordance with the relevant resolutions of the General Assembly, the Secretary-General's report would be". Moreover, the words "it was also understood that", at the begin-

<sup>1</sup> See *Official Records of the General Assembly, Thirty-second Session, Annexes*, agenda item 124, doc. A/32/363, paras. 4-6.

<sup>2</sup> See A/C.6/32/SR. 46, para. 32.

ning of the third sentence, should be deleted, for the content of the Secretary-General's report did not depend on the "understanding" of the Working Group. Those amendments would entail a consequential drafting change in paragraph 6, where the words "on the other hand" should be deleted.

26. Mr. QUENTIN-BAXTER (Chairman of the Working Group) said that the Working Group considered that, in order to take account of the comments made by members of the Commission, a number of amendments should be made to paragraphs 5, 6 and 7 of its report. He proposed that the words "it was understood that", in the first sentence of paragraph 5, should be replaced by the words "in accordance with General Assembly resolution 32/48,". As suggested by Mr. Ushakov, the words "it was also understood that" should be deleted from the third sentence of the same paragraph, and the phrase "on the other hand" should be deleted from the first sentence of paragraph 6. With regard to paragraph 7, he proposed that the first sentence should be amended to read:

"It would need to be stressed that the Commission's productive capacity depended primarily upon two factors: first, the work that the Commission could accomplish during a 12-week annual session, and the work that its members, particularly the Special Rapporteurs, could accomplish at other times of the year; and secondly, the analysis of materials, the selection of documentation, and the preparation of studies by the Codification Division of the Office of Legal Affairs in the field of work of the Commission on the various topics on its agenda, all of which requires a reasonable increase in the manpower and financial resources of the Division."

27. The CHAIRMAN said that, if there were no objections, he would take it that the Commission approved the amendments mentioned by the Chairman of the Working Group.

*It was so agreed.*

*The report, as amended, was adopted.*

#### **The law of the non-navigational uses of international watercourses**

[Item 5 of the agenda]

28. The CHAIRMAN invited the Special Rapporteur on the law of the non-navigational uses of international watercourses to make a statement on the topic.

29. Mr. SCHWEBEL (Special Rapporteur) said that, before informing members of recent or current United Nations activities relating to the non-navigational uses of international watercourses, he wished to draw attention to the fact that non-governmental organizations were also performing work relevant to the topic. For example, the Committee on International Water Resources Law of the International Law Association

was to submit to the Association's conference in Manila a report containing draft articles on the regulation of the flow of water of international watercourses.

30. Turning to the work of the United Nations, he recalled that the United Nations Water Conference had adopted, on 25 March 1977, the Mar del Plata Action Plan.<sup>3</sup> Included in the plan had been a recommendation that the Commission should give a higher priority in its work programme to the codification of the law of the non-navigational uses of international watercourses and should co-ordinate its work with the activities of other international bodies dealing with the development of the international law of waters, with a view to the early conclusion of an international convention. Subsequently, the Economic and Social Council, in its resolution 2121 (LXIII), had drawn the attention of the Commission to that recommendation of the Conference. By its resolution 32/158 of 19 December 1977, the General Assembly had endorsed resolution 2121 (LXIII) of the Economic and Social Council and approved the Mar del Plata Action Plan. Furthermore, the United Nations Conference on Desertification, held in August and September 1977, had reiterated the request of the United Nations Water Conference concerning the work of the Commission on the law of the non-navigational uses of international watercourses. Finally, members would recall that, at the beginning of the current session (1474th meeting), they had received copies of the correspondence exchanged between the Executive Secretary of ESCAP and the Chairman of the Commission at its twenty-ninth session, in which the Executive Secretary had drawn attention to the opinion of ESCAP's Committee on Natural Resources that the Commission should expedite its work in regard to shared water resources, as recommended in the Mar del Plata Action Plan.

31. It went without saying that the Commission's programme of work had as its basic point of reference the resolution adopted each year by the General Assembly, on the recommendation of the Sixth Committee, relating to the report of the Commission. At the thirty-second session of the General Assembly, a number of representatives in the Sixth Committee had expressed support for the Commission's decision to continue its study of the law of the non-navigational uses of international watercourses. Certain representatives had expressed the hope that the topic might be taken up with some degree of priority. In its resolution 32/151, the General Assembly had recommended that the Commission should continue its work on the topic, but it had not assigned it any particular priority.

32. UNEP had established two groups of experts whose work might be considered to have a bearing on the topic. The Group of Experts on Environmental Law was currently concentrating on liability and

<sup>3</sup> *Report of the United Nations Water Conference* (United Nations publication, Sales No. E.77.II.A.12), chap. I.

compensation for damage from marine pollution caused by off-shore mining. On its long-term agenda, however, there was an item of particular relevance to the Commission's work, namely, the item on the legal aspects of pollution of rivers and other inland waters. The future work of that Group thus merited monitoring. The work of the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States was also of interest. At its fifth session, that Working Group had adopted, subject to reservations and declarations, 15 draft principles of conduct in the sphere of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States. The Commission would no doubt consider some of those draft principles in its future work on the topic.

33. In co-operation with the Office of Legal Affairs, the secretariats of certain United Nations bodies, programmes and regional economic commissions, as well as certain specialized agencies and other international organizations, had been requested to provide recent information and material relevant to the law of the non-navigational uses of international watercourses. He had recently conferred with Mr. Caponera, of FAO, who had had immense practical experience in legal problems of international watercourses. Mr. Caponera had given him much valuable material and had assured him that FAO would respond to the request made by the Office of Legal Affairs, *inter alia* by forwarding copies of an index prepared by FAO of all treaties dealing with international watercourses.

34. At its twenty-eight session, in 1976, the Commission had had before it replies from 21 governments to the questionnaire on the topic formulated by the Commission in 1974.<sup>4</sup> By its resolution 31/97 of 15 December 1976, the General Assembly had urged Member States that had not yet done so to submit their replies to the Commission's questionnaire. Document A/CN.4/314, containing comments from a further four Member States, represented the response to that appeal. However, he wished to stress the importance of receiving as many replies as possible at an early date.

35. In conclusion, he hoped to be in a position to submit to the Commission in the not-too-distant future his first report on the law of the non-navigational uses of international watercourses, and looked forward to the Commission's renewed consideration of the topic.

36. The CHAIRMAN thanked the Special Rapporteur for his very useful statement on recent activities relating to the topic of the law of the non-navigational uses of international watercourses.

37. If there were no objections, he would take it that the Commission decided to take note with appreciation of the statement made by the Special Rapporteur, to express the view that the Special Rapporteur

should proceed with the preparation of his report on the topic, and to urge Member States that had not already done so to submit their replies to the Commission's questionnaire, in pursuance of General Assembly resolution 31/97.

*It was so agreed.*

### Draft report of the Commission on the work of its thirtieth session (*continued*)

#### CHAPTER I. *Organization of the session* (A/CN.4/L.273)

##### Paragraph 1

38. Mr. SCHWEBEL suggested the insertion, in the first sentence, of the words "at its permanent seat" after the word "session", and the deletion, in the penultimate sentence, of the word "finally".

*It was so agreed.*

*Paragraph 1, as amended, was approved.*

##### Paragraphs 2-12

*Paragraphs 2-12 were approved.*

##### Paragraph 13

39. The CHAIRMAN said that the number of meetings held by the Commission and its organs would be inserted by the Secretariat.

*Paragraph 13 was approved on that understanding.*

##### Paragraph 14

40. The CHAIRMAN pointed out that, pursuant to the decision taken by the Commission at its 1525th meeting, the names of Mr. Tabibi and Mr. Dadzie should be inserted in the final sentence of the paragraph.

*Paragraph 14 was approved.*

*Chapter I as a whole, as amended, was approved.*

#### CHAPTER IV. *Succession of States in respect of matters other than treaties* (A/CN.4/L.276 and Corr.1)

##### A. Introduction

*Section A was approved.*

##### B. Draft articles on succession of States in respect of matters other than treaties

TEXT OF ARTICLES 23-25, WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS THIRTIETH SESSION

41. The CHAIRMAN drew attention to the correction in the text of article 23, paragraph 2, which was contained in document A/CN.4/L.276/Corr.1, paragraph 4.

*Commentary to article 23* (Uniting of States)

##### Paragraph (1)

42. Mr. VEROSTA proposed the deletion of the word "hybrid", in the final sentence.

*It was so agreed.*

*Paragraph (1), as amended, was approved.*

<sup>4</sup> See *Yearbook ... 1976*, vol. II (Part One), p. 150, doc. A/CN.4/204 and Add.1, para. 6.

Paragraphs (2) and (3)

*Paragraphs (2) and (3) were approved.*

Paragraph (4)

43. Mr. VEROSTA suggested that the third and fourth sentences should be redrafted to make it clear that the practice in question had been instituted by the Kingdom of Sardinia and continued by the Kingdom of Italy upon the latter's succession to the Kingdom of Sardinia.

*It was so agreed.*

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

Paragraphs (5)-(12)

*Paragraphs (5)-(12) were approved.*

*The commentary to article 23, as amended, was approved.*

44. Mr. TSURUOKA requested that a reference be included in the report to the memorandum concerning article 23, paragraph 2, which he had submitted in document A/CN.4/L.282 and Corr.1.

45. The CHAIRMAN said that the Secretariat would comply with that request.

Commentary to article 24 (Separation of part or parts of the territory of a State) and article 25 (Dissolution of a State)

46. The CHAIRMAN drew attention to the correction to the texts of articles 24 and 25 (A/CN.4/L.276/Corr.1, para. 6).

Paragraphs (1)-(13)

*Paragraphs (1)-(13) were approved.*

Paragraph (14)

47. Mr. VEROSTA proposed the deletion of the words "the pretext for or", in the penultimate sentence. Moreover, he believed it would be more accurate to refer, in the same sentence, to "consular representation" rather than to "foreign representation".

48. The CHAIRMAN suggested that the Secretariat should be asked to check whether the reason for the dissolution of the Union of Norway and Sweden had been the one mentioned in the penultimate sentence and to make any necessary amendment thereto, the words "the pretext for or" being deleted in any case.

*It was so agreed.*

*Paragraph (14) was approved on that understanding.*

Paragraphs (15)-(28)

*Paragraphs (15)-(28) were approved.*

New paragraphs (28 a) and (28 b)

49. The CHAIRMAN drew attention to the new paragraphs (28 a) and (28 b) (A/CN.4/L.276/Corr.1, para. 9).

*Paragraph (28 a) was approved.*

50. Mr. USHAKOV suggested the addition at the end of paragraph (28 b) of the words "and that it should discuss that point at the second reading".

*It was so agreed.*

*Paragraph (28 b), as amended, was approved.*

Paragraph (29)

*Paragraph (29) was approved.*

*The commentary to articles 24 and 25, as amended, was approved.*

*Section B as a whole, as amended, was approved.*

*Chapter IV as a whole, as amended, was approved.*

*The meeting rose at 1 p.m.*

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## 1527th MEETING

*Thursday, 27 July 1978, at 10.10 a.m.*

*Chairman: Mr. José SETTE CÂMARA*

*Members present: Mr. Ago, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.*

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### Organization of future work (concluded)\*

[Item 10 of the agenda]

#### REPORT OF THE WORKING GROUP ON INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (A/CN.4/L.284 AND CORR.1)

1. Mr. QUENTIN-BAXTER (Chairman of the Working Group), introducing the report of the Working Group (A/CN.4/L.284 and Corr.1), said that the Group's basic aims had been to avoid suggesting premature conclusions and to stimulate reflection on a very new subject involving number of variables and unknowns. That explained the abstract title of the report and the avoidance, as far as possible, of the use in the report of catchwords such as "risk", "fault" and "ultra-hazardous acts", which would have conjured up a particular image in the mind of the reader. The topic discussed in the report was not one that had been treated in standard text books, and it was in many respects of remarkable contemporaneity. The Working Group therefore hoped that the reader would develop his ideas on the substance of the topic by reflection on the work of the United Nations Conference on the Environment and of the Third United Nations Conference on the Law of the Sea, particularly of the Third Committee of that Con-

\* Resumed from the 1525th meeting.

ference, as well as on the efforts undertaken since the foundation of the United Nations to develop régimes for outer space activities and the peaceful uses of atomic energy, and also on the problems that might arise between neighbours in relation to the difficult subject of shared resources.

2. It might be wondered why the report made no direct reference to the 1948 Warsaw Convention.<sup>1</sup> The reason was that the object of that Convention had not been to explore the limits of the liability of the States of registration of aircraft for accidents to those aircraft, but rather to ensure that the application to aircraft of the local laws of the countries through which they passed would not unduly affect the normal conduct of civil air transport operations. On the other hand, the régime of the Warsaw Convention unquestionably fell within the general frame of reference of the topic under discussion, since it constituted an early method of limiting absolute liability for a particular form of activity that owed its origin to technological progress.

3. The reader might also wonder at what point the substance of the international law topic began to fade into the subject of “transnational law”, or even into the realm of private international law, to become a question of unification of the rules of different systems of internal law. More fundamentally still, he might ask whether, in the distinction between the objectives of limiting liability, on the one hand, and establishing an absolute liability on the other, there was not a lesson to be learned about the limits of international obligations—in other words, about the distinction between “obligations”, as that term was employed in the Commission’s draft articles on State responsibility,<sup>2</sup> and the “liabilities” with which the topic under discussion was concerned. That might lead the reader to reflect on the very elusive line of distinction between acts which were wrongful in themselves and acts which, while not inherently wrongful, were non the less capable of establishing a liability.

4. In that connexion, the Working Group had thought it necessary to draw attention, in paragraph 8 of its report, to the speculation by some representatives in the Sixth Committee that there might be a category of acts that were not wrongful in the traditional sense of the term, but were not lawful either. The general opinion was that acts could be divided simply into those that were lawful and those that were not, but, as Mr. Ago had asked in his early reports on State responsibility, if the possibility were admitted of more than one régime of responsibility,

was there any justification for saying that there were only two? Might there not be a third category of cases, as representatives in the Sixth Committee had suggested? Valuable information on that question might be drawn from Mr. Ago’s latest report (A/CN.4/307 and Add.1 and 2).

5. He was very much aware that, in studying the topic under discussion, care must be taken not to stray into the area of prohibited acts. On the other hand, it must be recognized that a clear understanding of what categories of acts were prohibited by international law was essential before work on the new topic could begin. Questions such as whether and to what extent distinctive terminology should be employed for the new topic could be settled only at a later stage.

6. He had recently had occasion to study a report of the Governing Council of UNEP concerning the question of shared resources. It was apparent from that document that, while the representatives of States were desirous of reaching a wider understanding on the sharing of resources than currently existed, they found it necessary to enter reservations on behalf of their governments at every point. He believed that the essential reason for that position was that the topic of resource sharing, like the topic now before the Commission, was one in which there were as yet no fixed points of reference.

7. It was only natural that a State should be reluctant to give a categorical response to a proposal if it had good reason to fear that the context in which the proposal and the response were made would soon change, and that its response would then be given a meaning it had not intended. A government might be willing to declare that, in principle, it should not be injured, and that it was the government that permitted the danger to arise, or that created it, that should bear responsibility for injurious consequences arising out of an act not prohibited by international law. But when such consequences arose in practice, answers would have to be found to the questions as to what constituted harm, and in what circumstances actions by a State within its own territory, or in respect of matters over which it had jurisdiction and control outside its territory, could be considered harmful. Sometimes the answers would be obvious from the facts of the case; sometimes they might depend on agreed scientific standards, which might themselves be based on accepted suppositions; and sometimes, especially in matters relating to shared resources, there might be room for genuine disagreement as to whether the consequences of the activity were such that anyone had a right to complain of them. Similarly, while it might be supposed that, in principle, a government should be responsible for the consequences of the operation of ships flying its flag or of aircraft on its register, it was clear that in practice it had often been found more convenient and more equitable to attribute responsibility to the transport operator and to allow it to be litigated under the national law system that had jurisdiction.

<sup>1</sup> Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on 12 October 1929 (League of Nations, *Treaty Series*, vol. CXXXVII, p. 11), and protocol to amend the Warsaw Convention, signed at The Hague on 28 September 1955 (United Nations, *Treaty Series*, vol. 478, p. 371).

<sup>2</sup> For the text of the articles adopted by the Commission up to 1977, see *Yearbook ... 1977*, vol. II (Part Two), pp. 9 *et seq.*, doc. A/32/10, sect. B, 1.

8. At the current stage there were no simple answers to many of the questions he had raised. Perhaps, therefore, the greatest justification for studying the topic under consideration would be that its systematic treatment might reveal some more fixed points of reference from which doctrine, practice and international agreement in individual sectors might grow. Clearly, however, if the Commission were to present materials on the topic that might enable governments to develop their own views, it would be necessary to rely more heavily than before on the records of contemporary activities within the United Nations and elsewhere. It was for that reason that the Working Group had emphasized the need for collection and analysis by the Codification Division of the wealth of relevant material that was flowing almost without interruption from organs of the United Nations and other international institutions. That work would be of value not only to the Special Rapporteur and the members of the Commission, for whom the indexes and papers on current practice, which were the normal tools of the international lawyer, would not suffice to keep them up to date on a subject of such vitality, but also to the members of the Sixth Committee, for the ramifications of the topic were such that no one could be expected to keep abreast of it without special assistance.
9. He was deeply grateful to all the members of the Working Group for the assistance they had given him in the preparation of the report and to the members of the Commission for having appointed him as Special Rapporteur for the topic.
10. The CHAIRMAN, speaking on behalf of the Commission, congratulated the members of the Working Group on their excellent report on a fascinating topic in which the General Assembly had shown very great interest.
11. Mr. AGO said he was convinced that the Chairman of the Working Group possessed the necessary qualities to bring the study of the topic that had been entrusted to him as Special Rapporteur to a successful conclusion. That topic, as the Working Group had pointed out in the introduction to its report, was closely linked to the topic of State responsibility. In both cases, the difficulties were largely due to the fact that, as a result of the progress of modern science and technology, the activities of States and individuals were continually extending to new areas and often had consequences that could not have been foreseen by those engaged in them.
12. Because of the fears aroused by the consequences of those activities, mankind might consider it necessary to prohibit certain activities, which seemed too dangerous, by adopting prohibitive primary rules whose breach would entail State responsibility for an internationally wrongful act. But where less danger was involved, it might authorize the activities and require States to assume responsibility for any dangerous consequences that might ensue. Thus in one and the same sphere there might be both prohibitions and authorizations, but accompanied by the obligation to make reparation for any damage.
13. The statement "a revolution in technology... has extended dramatically man's power to control his environment", in paragraph 10 of the Working Group's report, was somewhat infelicitous, since it would seem to imply that man controlled his environment, whereas it was intended to convey precisely the opposite idea. Nevertheless, he unreservedly endorsed the approach adopted by the Special Rapporteur and his conclusions.
14. The course the Special Rapporteur was taking was beset with obstacles, for the subject was difficult to master and expanded as it was studied. The object in view must therefore be precisely defined. It was certainly not the Commission's task to establish specific rules of conduct for particular activities; that was not the object of codification, but of the special agreements that would be adopted on the various subjects. The Commission's real task was to ascertain whether it was possible to establish some general rules on the basis of an analysis of the special rules adopted in particular areas. It was thus the inductive method that must be used, for the new topic perhaps more than for any other. The Commission would have to study an enormous mass of documents—treaties, agreements, internal laws—in order to extract what might appear to be little, but would in fact be much.
15. In conclusion, he expressed his best wishes to the Special Rapporteur for success in the work he was undertaking.
16. Mr. PINTO fully endorsed both the report submitted by the Working Group and the choice of Mr. Quentin-Baxter as Special Rapporteur for the topic.
17. Points to which Mr. Quentin-Baxter might wish to give attention in his work included paragraph 14 of General Assembly resolution 2749 (XXV), the substance of which had been incorporated in the informal composite negotiating text of the Third United Nations Conference on the Law of the Sea.<sup>3</sup> That paragraph referred to "activities in the area", meaning all activities of exploration for, and exploitation, of, the resources of the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction, and stated, in particular, that "damage caused by such activities shall entail liability".
18. In considering environmental damage in general, the Special Rapporteur might wish to consider not only the problem of responsibility arising from activities that were in themselves particularly likely to be harmful, but also responsibility in connexion with activities in areas such as the Arctic and the Antarctic, which, because of their particular nature, were especially vulnerable. Finally, in his search for the foundations of liability, the Special Rapporteur might like to bear in mind the Roman law concept of liability *quasi ex contractu*.

<sup>3</sup> Official Records of the Third United Nations Conference on the Law of the Sea, vol. VIII (United Nations publication, Sales No. E.78.V.4).



19. Mr. YANKOV supported the Working Group's conclusion that the topic discussed in its report was suitable for codification and progressive development, and the choice of Mr. Quentin-Baxter as Special Rapporteur. He also agreed with the general suggestions made in the report concerning the conduct of the study.

20. As one who had been associated for 10 years, through his connexions with the United Nations Conference on the Law of the Sea, with questions relating to the protection and preservation of the marine environment, he was well aware of the magnitude and complexity of the problems involved in assessing liability for the new forms of massive damage to the environment introduced by the technological revolution. He believed that the Commission would render the greatest service to the international legal order if it made the object of its work on the new topic prevention rather than punishment.

21. It was also important to maintain a clear distinction between the topic of State responsibility and the new topic under consideration. Reference should therefore be made to the work already done by Mr. Ago, with whose suggestion that the rules on liability for the consequences of acts not prohibited by law should be general, rather than special, he fully agreed. He also agreed with Mr. Quentin-Baxter that the new topic should be approached with caution and that the collection of materials would entail more work than usual, owing to the need to consult not only international agreements, but also the records and other documents of numerous bodies, including the Maritime Safety Committee of IMCO.

22. Mr. USHAKOV congratulated the Working Group on its excellent report, the conclusions of which he willingly accepted. He considered, however, that it was necessary to protect not only the environment, but also the legitimate rights and interests of States. Although man had only recently become aware of the deterioration of his environment, that deterioration itself was not a new phenomenon attributable solely to modern industrial activities, but one of long standing to which agricultural activities had largely contributed over the centuries.

23. Lastly, he noted that the report did not refer to the legal bases for the study, although rules of customary law existed on which the study should be based.

24. Mr. SCHWEBEL congratulated the Working Group on its excellent report and warmly supported the appointment of Mr. Quentin-Baxter as Special Rapporteur for the new topic. As Special Rapporteur for the law of the non-navigational uses of international watercourses, he had been pleased to note the reference in the report to the relevance of that topic to the study of liability, and he looked forward to a cross-fertilization of ideas between himself and Mr. Quentin-Baxter.

25. Mr. RIPHAGEN shared the admiration that had been expressed for the Working Group's report. He also subscribed to Mr. Ago's comment on para-

graph 10, for in his view the current situation would have been better described if the verb "diminished" had been used in place of "extended". In that connexion, he agreed with Mr. Yankov that there was a need for preventive rules. On the basis of his experience as chairman of an intergovernmental working group on shared resources, he was convinced that the new topic, unlike that of State responsibility, was not one whose various parts could be clearly divided. It would be meaningless to have rules without the corresponding institutional arrangements.

26. Mr. TABIBI expressed his full support for the recommendations of the Working Group and for the appointment of Mr. Quentin-Baxter as Special Rapporteur.

27. Mr. DÍAZ GONZÁLEZ strongly supported the recommendations of the Working Group. Not only was there a link between the new topic and that of State responsibility, but there was also an intimate connexion between the new study and that in progress on the law of the non-navigational uses of international watercourses. It was therefore very important that the Special Rapporteur should take account of the work in progress on those subjects. He should also bear in mind, as other speakers had already suggested, the proceedings of the Third United Nations Conference on the Law of the Sea and the immense and increasing amount of national legislation on environmental protection and on the regulation of the use of shared natural resources.

28. Mr. VEROSTA associated himself with the congratulations addressed to the Working Group. He wished to point out, however, that customary rules probably existed already, and that an analysis of State practice would make it possible to determine them.

29. Mr. SUCHARITKUL was wholeheartedly in favour of the contents of the Working Group's report, including its recommendations. The study to be undertaken might be of particular value to developing countries, which were often unaware of, and therefore had inadequate legislation to combat, the risks of pollution associated with the foreign technologies or industries that their economic situation obliged them to import.

30. Mr. QUENTIN-BAXTER said that, in his capacity as Special Rapporteur, he was most grateful to all the members of the Commission who had spoken for their very helpful and inspiring comments. He was particularly indebted to Mr. Ago, who had long ago foreseen the guidelines for the study of the new topic and who had been the prime instigator of his own interest in it. He was extremely conscious of the importance of trying to elaborate general rules and of the relevance to his future work of the other points raised by members, whose collective knowledge would clearly be of great benefit to him.

31. The CHAIRMAN said that, if there were no objections, he would take it that the Commission approved the report of the Working Group and the recommendations it contained.

*It was so agreed.*

REPORT OF THE WORKING GROUP ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY (A/CN.4/L.279) (concluded)\*

32. Mr. SUCHARITKUL (Chairman of the Working Group) said that he had discussed with Mr. Ushakov the question of the revision of parts of the Working Group's report (A/CN.4/L.279). As a result of those discussions, he wished to suggest changes to paragraphs 22, 24, 25, 26, 27, 28 and 29.

33. In paragraph 22, the words "immunities from arrest, search, service of writs, detentions" should be deleted. The texts of paragraphs 24 and 25 should be replaced by the following new texts:

"24. State immunities are enjoyed by States themselves. State organs, instrumentalities, agencies and institutions which exercise the sovereign authority of the State are also entitled to State immunities. The expanding list of beneficiaries of State immunities and the ever-widening application of such immunities deserve a thorough and careful examination. In particular, an inquiry should be made as to what constitutes a 'foreign State' for the purpose of immunities. This inquiry will entail the study of the types of organs, agencies, instrumentalities and institutions which, forming part of the machineries of the State, participate in the enjoyment of State immunities. The beneficiaries of some State immunities certainly include the armed forces of States, or conversely 'foreign visiting forces' and all the men and equipment, such as members of the armed forces, men-of-war, military vehicles and military aircraft. The status of political subdivisions of States and the position of constituent members of a federal union also merit special treatment.

"25. The benefits of the rules of State immunities are also extended to other manifestations of State authority, which have no legal personality, or more accurately, in the form of things or property."

The last sentence of paragraph 26 should be replaced by the following new sentence: "However, this doctrine, which has been styled 'absolute' or 'unqualified' immunity, has not been followed with consistency in the practice of States." The texts of paragraphs 27, 28 and 29 should be replaced by the following new texts:

"27. A glance at the more recent practice of States and contemporary legal opinions will clearly show that immunity has not been accorded in all cases, and that several limitations have been recognized, with the result that in several categories of cases immunity has been denied. Theories have been advanced advocating limitations of the domain of State immunities. These theories, which have sometimes been styled 'restrictive', appear to be gaining further ground in State practice.

"28. The current trends in the practice of States and opinion of jurists deserve further and closer

examination to indicate more clearly the direction in which State practice is developing. Neither State practice nor the *opinio doctorum* can now be said to have been fully orchestrated to the 'restrictive' tune, since the bases for measuring the quantum of immunities to be accorded to foreign States are far from uniform or generally consistent.

"29. The time has come for a careful study to be made in an effort to codify or progressively develop rules of international law on State immunities to define or assess with greater precision the amount or quantum of State immunities or the extent to which immunities should be granted. A working distinction may eventually have to be drawn between activities of States performed in the exercise of sovereign authority which are covered by immunities, and other activities in which States, like individuals, are engaged in an increasing manner and often in direct competition with private sectors. It is sometimes said that the current practice seems to indicate that immunities are accorded only in respect of activities which are public in character, official in purpose or sovereign in nature. In other words, only *acta jure imperii* or acts of sovereign authority as distinct from *acta jure gestionis* or *jure negotii* are covered by State immunities. This indication should also be further examined with the greatest care and scrutiny."

34. As a result of those changes, the report was no more than exploratory; it was less conclusive, a great deal more restrained and more precise, and the use of internal law terminology had been avoided.

35. He proposed that section III, which would appear as a revised version with the changes proposed, should be included in the part of the Commission's report dealing with the topic.

36. Mr. SCHWEBEL doubted the utility of making changes in the excellent report submitted by the Working Group. In the first place, it was a report of the Working Group, of which the Commission had merely taken note; it was not a report attributed to the Commission as a whole. There seemed little purpose, therefore, in seeking to negotiate changes. Secondly, he had some substantive doubts about passages remaining in the report, even with the improvements that had just been read out. He was not sure, for example, that, as was stated in the third sentence of the new text for paragraph 24, the application of immunities was "ever-widening". It was his impression that over the past few decades the application of immunities had been narrowing, and that the practice in favour of restricted application of immunities, which had begun in such countries as Belgium, had spread to an increasing number of States. It was true that more and more State entities were operating in spheres that had formerly been private and that the question of the application of immunities might therefore arise more frequently. But whether immunities were in fact applied more frequently was uncertain.

37. He was in favour of endeavouring to obtain the

\* Resumed from the 1524th meeting, paras. 7-49.

maximum support of the Commission for all spheres of the Commission's work, but he wondered whether the appropriate time to do that might not be at a later stage, when the responsibility of the Commission as a whole was engaged, not when the Commission was simply taking note of a report of one of its Working Groups.

38. Mr. VEROSTA said that the Commission was faced with a very peculiar situation, since it had already, at its 1524th meeting, approved the report. It was true that two or three members had expressed certain doubts, but it seemed too late to amend the report at that stage of the Commission's work.

39. He appealed to Mr. Sucharitkul to agree that discussion of the new proposals should be deferred until the next session.

40. Mr. SUCHARITKUL said that no new proposals had been made. The only effect of the proposed changes would be to eliminate parts of the report that might give rise to certain doubts. Controversies existed, but no solutions had yet been proposed. He hoped that the Commission would allow the Working Group to revise the report in such a way as to respond to the wider needs of the Commission.

41. The CHAIRMAN emphasized that the report was the responsibility of the Working Group. The Commission had approved the Working Group's conclusions, but that did not mean that it subscribed to everything in the report, even if it were to be attached to the Commission's report as an annex.

42. Mr. VEROSTA said that he would have no objection to the suggested changes being annexed to the former report. In that way the Commission would have ample time to consider them carefully before its next session. The Commission as a whole had already approved the former report, and it should not now approve another report without scrutinizing it.

43. The CHAIRMAN suggested that the Commission should conclude its discussion of the matter.

*It was so agreed.*

#### **Draft report of the Commission on the work of its thirtieth session (*continued*)**

#### **CHAPTER III. *State responsibility* (A/CN.4/L.275 and Add.1-5)**

##### **A. Introduction (A/CN.4/L.275)**

*Section A was approved.*

##### **B. Draft articles on State responsibility (A/CN.4/L.275 and Add.1-5)**

###### **Paragraph 20**

*Paragraph 20 was approved.*

##### **1. TEXT OF ALL THE DRAFT ARTICLES ADOPTED SO FAR BY THE COMMISSION (A/CN.4/L.275)**

44. The CHAIRMAN said that section B of chapter III had been drafted before the Commission had

made changes in the text of certain articles and before it had adopted article 27. In subsection 1, therefore, the words "Moment and duration of the" should be inserted before the word "breach" in the titles of articles 24 and 25. In paragraph 3 of the French version of article 25, the words "de comportements" should be replaced by the words "d'actions ou omissions". In the French and Spanish versions of article 26, the last word of the title should be amended to read "donné" and "dado" respectively. Finally, article 27, as contained in document A/CN.4/L.271/Add.1,<sup>4</sup> should be added in all versions.

*Subsection 1, as corrected and supplemented, was approved.*

##### **2. TEXT OF ARTICLES 23-27 OF THE DRAFT, WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS THIRTIETH SESSION (A/CN.4/L.275/Add.1-5)**

*Commentary to article 23 (Breach of an international obligation to prevent a given event) (A/CN.4/L.275/Add.1)*

*The commentary to article 23 was approved.*

*Commentary to article 24 (Moment and duration of the breach of an international obligation by an act of the State not extending in time) (A/CN.4/L.275/Add.2)*

*The commentary to article 24 was approved.*

#### **Status of the diplomatic courier and of the diplomatic bag not accompanied by diplomatic courier (A/CN.4/L.285)**

[Item 6 of the agenda]

45. The CHAIRMAN invited the Chairman of the Working Group on status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier to introduce the Group's report (A/CN.4/L.285).

46. Mr. EL-ERIAN (Chairman of the Working Group) said that the Group had held four meetings and considered three working papers. The first paper, prepared by the Secretariat, had contained a classification of the general views of Member States on the elaboration of a protocol on the subject, their proposals for such a protocol, and some practical measures proposed in the written comments submitted by Member States during 1976-1978 and in the observations made by their representatives in the Sixth Committee at the thirtieth and thirty-first session of the General Assembly. The paper had also reproduced, in a comparative table, the relevant provisions of the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions, and the 1975 Vienna Convention on Representation of States in their Relations with International Organizations of a Universal Character.

<sup>4</sup> Reproduced in the summary record of the 1524th meeting, para. 2.

47. The second working paper had contained his suggestions for an outline of relevant issues, based on the comments and proposals in the first working paper.

48. The third paper, prepared by the Secretariat at the Group's request, had set out the provisions of the four conventions reproduced in the first working paper and had classified them under each of the headings contained in the second paper.

49. The Working Group had agreed that there had been considerable developments in various aspects of the question in recent years and that the provisions of the conventions reproduced in the first working paper should form the basis for any further study of the question. The Group had tentatively identified 19 issues and had examined each of them in order to ascertain whether any of the four conventions adequately covered the issue concerned and what further elements could be considered as appropriately falling within each issue. Although most of the issues identified had been taken into account in the existing conventions, the Group had added others—for example, the multiple appointment of the diplomatic courier and the nationality of the diplomatic courier—on which the conventions were silent.

50. The CHAIRMAN noted that the Working Group had recommended that the Commission should include paragraphs 1-8 of the Group's report in its report to the General Assembly on the work of its current session. If there were no objections, he would take it that such was the Commission's decision.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

## 1528th MEETING

*Thursday, 27 July 1978, at 4.10 p.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

### Draft report of the Commission on the work of its thirtieth session (*continued*)

CHAPTER II. *The most-favoured-nation clause* (A/CN.4/L.274 and Add.I-6)

A. Introduction (A/CN.4/L.274)

1. SUMMARY OF THE COMMISSION'S PROCEEDINGS

*Subsection 1 was approved.*

2. THE MOST-FAVOURLED-NATION CLAUSE AND THE PRINCIPLE OF NON-DISCRIMINATION

*Subsection 2 was approved.*

3. THE MOST-FAVOURLED-NATION CLAUSE AND THE DIFFERENT LEVELS OF ECONOMIC DEVELOPMENT

Paragraphs 37-40

*Paragraphs 37-40 were approved.*

Paragraph 41

1. Mr. SCHWEBEL suggested that the word "if", in the second sentence, should be replaced by the word "as", and the comma deleted.

*It was so agreed.*

*Paragraph 41, as amended, was approved.*

*Subsection 3, as amended, was approved.*

4. THE MOST-FAVOURLED-NATION CLAUSE IN RELATION TO CUSTOMS UNIONS AND SIMILAR ASSOCIATIONS OF STATES

Paragraphs 42 and 43

*Paragraphs 42 and 43 were approved.*

Paragraph 44

2. Mr. SCHWEBEL proposed the deletion, from the second sentence, of the words "of a political nature and that it will have".

*It was so agreed.*

3. Mr. RIPHAGEN suggested that some reference should be made to the fact that the Commission had had insufficient time to study the matter thoroughly.

*It was so agreed.*

*Paragraph 44, as amended, was approved.*

*Subsection 4, as amended, was approved.*

5. THE GENERAL CHARACTER OF THE DRAFT ARTICLES

Paragraphs 45-54

*Paragraphs 45-54 were approved.*

Paragraph 55

4. Mr. SCHWEBEL suggested that the insertion, at the beginning of the paragraph, of the words "while this proposal attracted some support" would better reflect the Commission's discussion of the point in question.

*It was so agreed.*

*Paragraph 55, as amended, was approved.*

Paragraphs 56-58

*Paragraphs 56-58 were approved.*

*Subsection 5, as amended, was approved.*

*Section A, as amended, was approved.*

B. Recommendation of the Commission (A/CN.4/L.274)

*Section B was approved.*

**C. Resolution adopted by the Commission**

*Section C was approved.*

**D. Draft articles on most-favoured-nation clauses (A/CN.4/L.274/Add.1-6)**

ARTICLES 1-7 (A/CN.4/L.274/Add.1)

*Commentary to article 1 (Scope of the present articles)*

*The commentary to article 1 was approved.*

*Commentary to article 2 (Use of terms)*

*The commentary to article 2 was approved.*

*Commentary to article 3 (Clauses not within the scope of the present articles)*

*The commentary to article 3 was approved.*

*Commentary to article 4 (Most-favoured-nation clause)*

*The commentary to article 4 was approved.*

*Commentary to article 5 (Most-favoured-nation treatment)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were approved.*

Paragraph (3)

5. Mr. TSURUOKA pointed out that, whereas the words "object of treatment" were used in the third sentence, the same concept was expressed by the words "subjects of ... treatment" in the eighth sentence. He thought the same expression should be used in both cases.

6. Mr. VEROSTA suggested that the term "object" should be used in both sentences, since it would make it clear that the word "things" covered activities and services as well as corporeal and incorporeal things.

*It was so agreed.*

7. Mr. SCHWEBEL suggested that the beginning of the fifth sentence should be amended to read: "It did not find that it would be likely to arrive".

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

Paragraphs (4)-(7)

*Paragraphs (4)-(7) were approved.*

Paragraph (8)

8. Mr. USHAKOV proposed that the last word in the paragraph should be replaced by the word "States".

*It was so agreed.*

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

*The commentary to article 5, as amended, was approved.*

*Commentary to article 6 (Clauses in international agreements between States to which other subjects of international law are also parties)*

*The commentary to article 6 was approved.*

*Commentary to article 7 (Legal basis of most-favoured-nation treatment)*

*The commentary to article 7 was approved.*

ARTICLES 8-10 (A/CN.4/L.274/Add.2)

*Commentary to article 8 (The source and scope of most-favoured-nation treatment)*

Paragraphs (1)-(7)

*Paragraphs (1)-(7) were approved.*

Paragraph (8)

9. Mr. TSURUOKA said that, in the penultimate sentence, the words "things being in a determined relationship with it are entitled" should be replaced by the words "things in a determined relationship with it is entitled".

*It was so agreed.*

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

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

*Commentary to article 9 (Scope of rights under a most-favoured-nation clause) and article 10 (Acquisition of rights under a most-favoured-nation clause)*

*The commentary to articles 9 and 10 was approved.*

ARTICLES 11-16 (A/CN.4/L.274/Add.3)

*Commentary to article 11 (Effect of a most-favoured-nation clause not made subject to compensation), article 12 (Effect of a most-favoured-nation clause made subject to compensation) and article 13 (Effect of a most-favoured-nation clause made subject to reciprocal treatment)*

*The commentary to articles 11, 12 and 13 was approved.*

*Commentary to article 14 (Compliance with agreed terms and conditions)*

*The commentary to article 14 was approved.*

*Commentary to article 15 (Irrelevance of the fact that treatment is extended to a third State against compensation)*

*The commentary to article 15 was approved.*

*Commentary to article 16 (Irrelevance of limitations agreed between the granting State and a third State)*

*The commentary to article 16 was approved.*

ARTICLES 25-29 (A/CN.4/L.274/Add.6).

*Commentary to article 25 (The most-favoured-nation clause in relation to treatment extended to facilitate frontier traffic)*

*The commentary to article 25 was approved.*

*Commentary to article 26 (The most-favoured-nation clause in relation to rights and facilities extended to a land-locked third State)*

*The commentary to article 26 was approved.*

*Commentary to article 27 (Cases of State succession, State responsibility and outbreak of hostilities)*

*The commentary to article 27 was approved.*

*Commentary to article 28 (Non-retroactivity of the present articles)*  
*The commentary to article 28 was approved.*

*Commentary to article 29 (Provisions otherwise agreed)*  
*The commentary to article 29 was approved.*

**CHAPTER VII. Second part of the topic "Relations between States and international organizations" (A/CN.4/L.286)**

*Chapter VII was approved.*

**CHAPTER VIII. Other decisions and conclusions of the Commission (A/CN.4/L.278 and Add.1, 3 and 4)**

10. The CHAIRMAN invited the Commission to consider the parts of its draft report appearing in documents A/CN.4/L.278 and Add.3 and 4, namely, sections A, B, E, F, G, H, I, J and K.

A. The law of the non-navigational uses of international water-courses (A/CN.4/L.278)  
*Section A was approved.*

B. Review of the multilateral treaty-making process (A/CN.4/L.278)  
*Section B was approved.*

E. Programme and methods of work of the Commission (A/CN.4/L.278/Add.3)  
*Section E was approved.*

F. Inclusion in the Yearbook of the Commission of the survey on "force majeure" and "fortuitous event" as circumstances precluding wrongfulness (A/CN.4/L.278/Add.3)  
*Section F was approved.*

G. Co-operation with other bodies (A/CN.4/L.278/Add.4)

Paragraphs 1-5

*Paragraphs 1-5 were approved.*

Paragraph 6

11. Mr. EL-ERIAN proposed the deletion of the second sentence of paragraph 6 in order to bring the wording of the paragraph into line with that of paragraph 10.

*It was so agreed.*

*Paragraph 6, as amended, was approved.*

Paragraphs 7-13

*Paragraphs 7-13 were approved.*

Paragraph 14

12. Mr. EL-ERIAN suggested that the same change should be made in paragraph 14 as had been decided on for paragraph 6.

*It was so agreed.*

*Paragraph 14, as amended, was approved.*

Paragraphs 15-17

*Paragraphs 15-17 were approved.*

*Section G, as amended, was approved.*

H. Date and place of the thirty-first session (A/CN.4/L.278/Add.4)

13. The CHAIRMAN said that the Enlarged Bureau had decided to recommend that the thirty-first session of the Commission should be held from 14 May to 3 August. He proposed that those dates should be inserted in paragraph 18.

*It was so agreed.*

*Section H, as completed, was approved.*

I. Representation at the thirty-third session of the General Assembly (A/CN.4/L.278/Add.4)

*Section I was approved.*

J. Gilberto Amado Memorial Lecture (A/CN.4/L.278/Add.4)

*Section J was approved.*

K. International Law Seminar (A/CN.4/L.278/Add.4)

Paragraphs 23 and 24

*Paragraphs 23 and 24 were approved.*

Paragraph 25

14. Mr. ŠAHOVIĆ, supported by Mr. EL-ERIAN, suggested that the last sentence of paragraph 25 should appear as a separate paragraph at the end of the section.

*It was so agreed.*

Paragraphs 26 and 27

*Paragraphs 26 and 27 were approved.*

*Section K, as amended, was approved.*

*The meeting rose at 5.25 p.m.*

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## 1529th MEETING

*Friday, 28 July 1978, at 10.15 a.m.*

*Chairman: Mr. José SETTE CÂMARA*

*Members present: Mr. Ago, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.*

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### Draft report of the Commission on the work of its thirtieth session (concluded)

CHAPTER II. *The most-favoured-nation clause (concluded)*  
 (A/CN.4/L.274 and Add.1-6)

**D. Draft articles on most-favoured-nation clauses (concluded)**  
(A/CN.4/L.274 and Add.1-6)

ARTICLES 17-23 (A/CN.4/L.274/Add.5)

*Commentary to article 17* (Irrelevance of the fact that treatment is extended to a third State under a bilateral or a multilateral agreement)

Paragraphs 1-13

*Paragraphs 1-13 were approved.*

Paragraph (14)

1. Mr. TSURUOKA suggested that the term "most-favoured-nation treaty", used twice in the English version of the paragraph, should be replaced by less unusual wording.

2. The CHAIRMAN said that the English version would be brought into line with the French version. *Paragraph (14) was approved, subject to that amendment.*

Paragraphs (15)-(23)

*Paragraphs (15)-(23) were approved.*

*The commentary to article 17 was approved.*

*Commentary to article 18* (Irrelevance of the fact that treatment is extended to a third State as national treatment)

Paragraphs (1)-(7)

*Paragraphs (1)-(7) were approved.*

Paragraph (8)

3. Mr. TSURUOKA suggested that, once again, the term "most-favoured-nation treaty" should be replaced by more standard wording.

4. The CHAIRMAN said that the English version would be brought into line with the French version. *Paragraph (8) was approved, subject to that amendment.*

*The commentary to article 18 was approved.*

*Commentary to article 19* (Most-favoured-nation treatment and national or other treatment with respect to the same subject-matter)

*The commentary to article 19 was approved.*

*Commentary to article 20* (Arising of rights under a most-favoured-nation clause)

*The commentary to article 20 was approved.*

*Commentary to article 21* (Termination or suspension of rights under a most-favoured-nation clause)

*The commentary to article 21 was approved.*

*Commentary to article 22* (Compliance with the laws and regulations of the granting State)

*The commentary to article 22 was approved.*

*Commentary to article 23* (The most-favoured-nation clause in relation to treatment under a generalized system of preferences)

Paragraphs (1)-(21)

*Paragraphs (1)-(21) were approved.*

Paragraph (22)

5. Mr. USHAKOV requested the deletion of the word "other", at the end of the last sentence.

*It was so agreed.*

*Paragraph (22), as amended, was approved.*

*The commentary to article 23, as amended, was approved.*

ARTICLES 24 AND 30 (A/CN.4/L.274/Add.4)

*Commentary to article 24* (The most-favoured-nation clause in relation to arrangements between developing States)

Paragraphs (1)-(14)

*Paragraphs (1)-(14) were approved.*

New paragraph (15)

6. Mr. USHAKOV proposed the addition of a new paragraph (15) to the commentary to article 24. It would read:

"(15) The absence of such agreed concepts for purposes of international trade may give rise to enormous difficulties in the application of the provisions of article 24."

7. Mr. NJENGA, supported by Mr. DÍAZ GONZÁLEZ, said that the idea reflected in the proposed paragraph was not shared by all members of the Commission. However, provided that was made clear, he could accept the new paragraph.

8. Mr. YANKOV pointed out that the paragraph proposed by Mr. Ushakov reflected the discussion that had taken place in the Drafting Committee. Perhaps the text would be acceptable to the majority of the Commission if the word "generally" were inserted between the words "such" and "agreed", because it was the absence of generally agreed concepts of "developed" and "developing" States that might create difficulties in applying the article.

9. Mr. ŠAHOVIĆ said that the viewpoint of the Commission as a whole on the matter under discussion was adequately reflected in article 14. To take account of Mr. Ushakov's proposal, it would suffice to say that a member of the Commission had expressed a dissenting opinion.

10. Mr. USHAKOV said that, to render the text more acceptable, the new paragraph could begin with the words "some members of the Commission believed that", and the words "in particular" could be inserted after the word "concepts".

*It was so agreed.*

*The proposed new paragraph (15), as amended, was approved.*

*The commentary to article 24, as amended, was approved.*

*Commentary to article 30* (New rules of international law in favour of developing countries)

*The commentary to article 30 was approved.  
Section D, as amended, was approved.  
Chapter II, as amended, was approved.*

**CHAPTER III. State responsibility (concluded)\*** (A/CN.4/L.275 and Add.1-5)

**B. Draft articles on State responsibility (concluded)** (A/CN.4/L.275 and Add.1-5)

2. TEXT OF ARTICLES 23-27, WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS THIRTIETH SESSION (concluded) (A/CN.4/L.275/Add.1-5)

*Commentary to article 25* (Moment and duration of the breach of an international obligation by an act of the State extending in time) (A/CN.4/L.275/Add.3)

*The commentary to article 25 was approved.*

*Commentary to article 26* (Moment and duration of the breach of an international obligation to prevent a given event) (A/CN.4/L.275/Add.4)

*The commentary to article 26 was approved.*

*Commentary to article 27* (Aid or assistance by a State to another State for the commission of an internationally wrongful act) (A/CN.4/L.275/Add.5)

*The commentary to article 27 was approved.*

*Subsection 2 was approved.*

*Section B, as amended, was approved.*

*Chapter III, as amended, was approved.*

**CHAPTER VI. Status of the diplomatic courier and of the diplomatic bag not accompanied by diplomatic courier** (A/CN.4/L.288)

*Chapter VI was approved.*

**CHAPTER VIII. Other decisions and conclusions of the Commission (concluded)** (A/CN.4/L.278 and Add.1, 3 and 4)

11. The CHAIRMAN invited the Commission to consider the parts of its draft report appearing in document A/CN.4/L.278/Add.1, namely, sections C and D.

**C. International liability for injurious consequences arising out of acts not prohibited by international law** (A/CN.4/L.278/Add.1)  
*Section C was adopted.*

**D. Jurisdictional immunities of States and their property** (A/CN.4/L.278/Add.1)  
*Section D was adopted.*

*Chapter VIII, as amended, was adopted.*

12. The CHAIRMAN put the draft report of the Commission on the work of its thirtieth session as a whole, as amended, to the vote.

*The draft report as a whole, as amended, was adopted.*

#### Organization of work

13. Mr. SCHWEBEL said that the speed with which the Commission had adopted its draft report was a cause for concern. That question might be taken up by the Planning Group or the Enlarged Bureau; consideration might, for instance, be given to the possibility of adopting parts of the report as the session proceeded, rather than leaving the whole report for adoption at the last few meetings of the session.

#### Closure of the session

14. After an exchange of congratulations and thanks, the CHAIRMAN declared the thirtieth session of the International Law Commission closed.

*The meeting rose at 12.35 p.m.*

\* Resumed from the 1527th meeting.









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