

Document:-
A/CN.4/L.203

**The most-favoured-nation clause: title of the draft articles, titles and texts of articles 1 to 7
adopted by the Drafting Committee - reproduced in A/CN.4/SR.1238**

Topic:
Most-favoured-nation clause

Extract from the Yearbook of the International Law Commission:-
1973, vol. I

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of the violation by a State of an international obligation. An international obligation could derive from a treaty, a customary rule or other source, and one of the first rules the Commission would meet with when it took up the chapter on violation, was that there was no difference in a violation according to whether the obligation violated arose from one source or from another. It would therefore be a departure from the basic criterion, and even a setback to the codification of responsibility, to attempt to study the violation of treaties before the violation of other obligations.

34. Mr. Kearney had also mentioned the problem of abuse of rights. When the Commission had discussed the question of responsibility, it had made one point clear: if there was a rule of international law to the effect that, at least in certain matters, the possessor of an international right could not go beyond a certain limit in exercising that right, then there was an international obligation not to abuse the right, and any violation of that obligation, as of any other obligation under international law, gave rise to international responsibility. But the real problem was not one of responsibility. It was a substantive problem, a problem of a primary rule, namely, whether there was or was not a rule of international law which set a limit to the exercise of a right. He was becoming more and more convinced that the problem of abuse of rights deserved study by the Commission, but that it did not come within the framework of responsibility and should be studied separately.

35. The question of the determination "*dommages*"—which did not correspond exactly to the English term "*damages*"—would be dealt with when the Commission took up the determination of the consequences of a wrongful act, which was the last stage in the study of responsibility. That question would thus find its place in the Commission's programme of work in due course.

36. As to pollution and its relationship to responsibility, he emphasized that the problem of river pollution was not one of responsibility, so could not be solved as part of the study of responsibility. That was why Mr. Kearney had not found in the draft articles on responsibility the answers to the questions he had raised. There was nothing surprising in that, since the question to be decided was whether there were any rules of international law to prevent States from engaging in certain activities calculated to produce the results complained of, or whether the Commission wished to establish such rules where none existed. The matter would be relatively simple if the activities of States or public authorities alone were involved, but it was also necessary to consider whether there were, or whether the Commission wished to establish, rules of international law obliging States to prohibit private persons from carrying on certain activities or to require them to take certain precautions. If such rules existed and pollution was the result of State activity, the State which had violated the obligation deriving from those rules incurred international responsibility, and if a private person caused pollution by acting contrary to the rules which the State should have prescribed for him, the State would incur responsibility for failure to take the necessary measures to prevent the pollution. There again, the problem was anterior to that

of responsibility; it should be studied, but outside the framework of responsibility.

37. The CHAIRMAN said that the officers and former chairmen of the Commission, at a meeting held that morning, had examined the question of the long-term programme of work and concluded that it would be extremely difficult to reach a consensus on a list of topics for recommendation to the General Assembly. Furthermore, it had been considered undesirable to adopt a list by voting.

38. In those circumstances, it was recommended that the report to the General Assembly should include a passage giving a detailed account of the Commission's discussion. The passage would record the fact that some members had stressed the importance of certain topics; it would also note that none of the members had suggested the inclusion of some other topics, such as the right of asylum and the recognition of States and governments, which remained outstanding from the 1949 list. The proposed passage would begin with a paragraph stating that the Commission's current agenda included State responsibility, succession of States in respect of matters other than treaties, the most-favoured-nation clause and the question of treaties concluded between States and international organizations, which would take up much of the Commission's time in the years ahead. The passage would not constitute a decision, but would simply inform the General Assembly of the discussion held, leaving it to the Assembly to decide which topics should be included in the Commission's long-term programme of work and to lay down priorities.

39. The question of international watercourses was, of course, another matter, for it was already included in the Commission's programme of work.

40. If there were no comments, he would take it that the Commission decided to adopt those suggestions.

It was so agreed.

The meeting rose at 1 p.m.

1238th MEETING

Monday, 2 July 1973, at 3.10 p.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties

[Item 3 of the agenda]

(resumed from the 1232nd meeting)

1. Mr. BEDJAOUÏ (Special Rapporteur) said it would be useful if the Secretariat could help in getting together

the information needed for continuation of the work on succession of States in respect of matters other than treaties. The many studies prepared by the Secretariat on other topics had proved extremely valuable. The research stage was over so far as the question of public property was concerned, but a study might be undertaken on public debts. In view of the great number of treaties on that subject, the study might be confined to treaties concluded since the Second World War; it could also review the state of international and internal jurisprudence and, if possible, the practice of governments and international organizations. Since the work would take about two years, the Commission should decide now whether it wished the Secretariat to undertake such a study.

2. Mr. KEARNEY said he had no objection to the proposal, but suggested that the Secretariat study should not be confined to problems which had arisen since the Second World War. Apart from any other considerations, those problems were inextricably bound up with those which had arisen after the First World War.

3. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to entrust the Secretariat with the study requested by the Special Rapporteur, but that it approved Mr. Kearney's suggestion.

It was so agreed.

Most-favoured-nation clause

(A/CN.4/257 and Add.1; A/CN.4/266; A/CN.4/L.203)

[Item 6 of the agenda]

(resumed from the 1218th meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

4. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the texts adopted by the Committee (A/CN.4/L.203).

TITLE OF THE DRAFT

5. Mr. YASSEEN (Chairman of the Drafting Committee) said he would first introduce the title of the draft. It would be recalled that at its nineteenth session, in 1967, the Commission had placed the present topic on its programme of work as "The most-favoured-nation clause in the law of treaties".¹ At its twentieth session the Commission had taken the view that it should focus on the legal character of the clause and the legal conditions governing its application, and that it should clarify the scope of the clause as a legal institution in its various practical applications.² In the light of that opinion, the title of the topic on the successive agenda of the Commission and in the resolutions of the General Assembly had become simply "The most-favoured-nation clause". The Drafting Committee had found no reason to depart from that formulation.

6. The CHAIRMAN said that, if there were no comments, he would take it that the Commission agreed to approve the title proposed by the Drafting Committee.

It was so agreed.

ARTICLES 1 and 3

7.

Article 1

Scope of the present articles

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

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 accorded 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.

8. Mr. YASSEEN (Chairman of the Drafting Committee) said he would introduce articles 1 and 3 together, because they were closely linked. The two articles had been prepared by the Drafting Committee on the basis of the instructions received from the Commission, although the Commission had not held a preliminary discussion on a text for such provisions. They were based on the corresponding articles—articles 1 and 3—of the Vienna Convention on the Law of Treaties³ and of the draft articles on succession of States in respect of treaties adopted by the Commission on first reading at its previous session. The purpose of article 1 was to limit the scope of the draft articles; that of article 3 was to remove any misconception that might arise from the express limitation of their scope.

9. Mr. USHAKOV said he approved of article 1, but the draft articles applied to the consequences of most-favoured-nation clauses rather than to the clauses themselves. It should therefore be indicated in the commentary that the wording of article 1 might be amended later.

10. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve articles 1 and 3 as proposed by the Drafting Committee.

It was so agreed.

¹ See *Yearbook of the International Law Commission, 1967*, vol. II, p. 369, document A/6709/Rev.1, para. 48.

² *Ibid.*, 1968, vol. II, p. 223, document A/7209/Rev.1, para. 93.

³ 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.

ARTICLE 2

11. *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 most-favoured-nation treatment;

(d) "Third State" means any State other than the granting State or the beneficiary State.

12. Mr. YASSEEN (Chairman of the Drafting Committee) said that, as was customary, article 2 defined the sense in which terms were used in the draft articles. It was based on the draft article 1 proposed by the Special Rapporteur in his third report (A/CN.4/257 and Add.1). The reason why the Drafting Committee considered it useful at that stage to propose definitions of the terms used in the articles it had adopted was mainly to facilitate understanding of the articles to be included in the report to the General Assembly. In accordance with the Commission's practice, the article on the use of terms would be supplemented if necessary at later stages of the work. The final text of article 2 would be established after all the articles of the draft had been formulated.

13. Article 2 contained a definition of the term "treaty" which was taken from the Vienna Convention on the Law of Treaties. In addition, it defined the term "granting State" as a State which granted most-favoured-nation treatment, and the term "beneficiary State" as a State which had been granted such treatment. The verb "grant" had been used to make it clear that not only was the treatment effectively accorded and enjoyed, but the legal obligation and the corresponding right relating to the treatment were created.

14. Finally, the article defined, for the purposes of the other articles—and for those purposes only—the term "third State". The Drafting Committee was well aware that in the draft articles on succession of States in respect of treaties the Commission had preferred the term "other State party" to the term "third State", which could not be used because it had already been made a technical term in the Vienna Convention on the Law of Treaties. The Committee had considered, however, that the reasons why that term could not be used with a different meaning in a draft that was essentially within the framework was the Vienna Convention were not necessarily applicable in the present case.

15. The CHAIRMAN said that, if there were no comments, he would take it that the Commission agreed to approve article 2, as proposed by the Drafting Committee, on the understanding that other definitions could be added later.

It was so agreed.

ARTICLE 4⁴16. *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.

17. Mr. YASSEEN (Chairman of the Drafting Committee) said that article 4 defined the meaning of the expression "most-favoured-nation clause". It was based on paragraph 1 of the article 2 proposed by the Special Rapporteur in his third report (A/CN.4/257 and Add.1). The Drafting Committee had retained the expression "most-favoured-nation clause", which had become a technical term in treaty practice. As the Commission wished the effect of the clause to be examined in its various practical applications, the Drafting Committee had decided to add the words "in an agreed sphere of relations". The Drafting Committee had found it preferable to replace the words "one or more granting States" by the words "a State" and the words "one or more beneficiary States" by the words "another State". It had also decided to delete paragraph 2 of the original article, since the idea it expressed would be better placed in the commentary.

18. Mr. BILGE said he hoped the commentary would explain why a separate provision had been devoted to the definition of the most-favoured-nation clause, when the other definitions were grouped together in article 2.

19. Mr. USTOR (Special Rapporteur) said that the commentary to article 4 would explain that the definition of the expression "most-favoured-nation clause" had been placed in a separate article because it was the cornerstone of the whole draft.

20. The CHAIRMAN said that, in the light of that explanation, he took it that the Commission agreed to approve article 4 as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 5⁵21. *Article 5*
Most-favoured-nation treatment

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

22. Mr. YASSEEN (Chairman of the Drafting Committee) said that article 5, which defined the meaning of the expression "most-favoured-nation treatment", was based on paragraph 1 of the article 3 originally proposed by the Special Rapporteur in his third report (A/CN.4/257). Article 5 dealt with the treatment accorded by the granting State both to the beneficiary State itself and to persons or things in a determined relationship with that State, by reference to treatment likewise accorded to a

⁴ For previous discussion see 1215th meeting, para. 11.

⁵ *Ibid.*

third State or to persons or things in the same relationship with a third State.

23. The Committee had decided to delete paragraph 2 of the Special Rapporteur's original article in case the enumeration "treaty, other agreement, autonomous legislative act or practice" might be considered exhaustive.

24. Mr. KEARNEY said he feared that the reference in the concluding words "to persons or things in the same relationship with a third State" might be somewhat confusing. It was unlikely that persons or things would be found in exactly the same relationship with a third State. The intention was undoubtedly to refer not so much to the same relationship as to a relationship of a similar nature. Wording such as "the same type of relationship" might be more appropriate.

25. Mr. USHAKOV said that the words "in the same relationship" were obscure in themselves. They referred back to the words "in a determined relationship with that State", but an explanation should be given in the commentary.

26. Mr. USTOR (Special Rapporteur) said that the point raised by Mr. Kearney had been discussed in the Drafting Committee, which had not been able to find any better expression. The commentary would explain that the words "in the same relationship" had the meaning attached to them by Mr. Kearney.

27. Mr. KEARNEY said that for the time being he could accept that solution. On second reading, the wording could be clarified in the light of governments' comments.

28. Mr. USHAKOV considered that to explain the words "the same relationship", it would be necessary to add the words "as the persons or things in a determined relationship with the beneficiary State" at the end of the article. Since the point was purely one of drafting, it could be left till later.

29. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 5 as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 6⁶

30. *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.

31. Mr. YASSEEN (Chairman of the Drafting Committee) said that article 6 corresponded to the article 4 originally proposed by the Special Rapporteur in his third report (A/CN.4/257). After careful consideration the Drafting Committee had decided to retain that provision, which confirmed a generally accepted and well-established rule. In order to make the rule explicit enough to constitute the main safeguard it was intended to be, the

article stressed the need for the existence of a legal obligation as the basis of the right of a State to be accorded most-favoured-nation treatment by another State.

32. The CHAIRMAN said that, if there were no comments, he would take it that the Commission agreed to approve article 6 as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 7⁷

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

The right of the beneficiary State to obtain from the granting State treatment accorded by the latter to a third State arises from the most-favoured-nation clause in force between the granting State and the beneficiary State. 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.

34. Mr. YASSEEN (Chairman of the Drafting Committee) said that article 7 corresponded to the article 5 originally proposed by the Special Rapporteur in his third report (A/CN.4/257 and Add.1). It related both to the source of most-favoured-nation treatment and to the nature and scope of the treatment. On the first point, the Drafting Committee had considered that the idea of the actual source of the beneficiary State's right to enjoy a certain treatment was better conveyed by the expression "the right... to obtain" than by the original expression "the right... to claim". In addition the Drafting Committee had thought it useful to specify that the most-favoured-nation clause in question was the clause in force between the granting State and the beneficiary State.

35. The second sentence of the article clearly indicated that it was the treatment extended by the granting State to a third State that determined the treatment to which the beneficiary State was entitled under the most-favoured-nation clause.

36. Mr. KEARNEY said that, in the second sentence of the article, it was necessary to make it clear that the treatment referred to was treatment extended not only to the third State itself, but also to persons or things "in a determined relationship with that State", to use the language of article 5.

37. Sir Francis VALLAT said it would have to be explained in the commentary that the words "under that clause" in the second sentence referred to the possible limitation of the extent of the treatment by the terms of the clause itself. The commentary would also have to explain that the words "is determined by the treatment", used in the same sentence, meant "is determined by reference to the treatment". The idea which it was intended to convey was that the standard for determining the treatment of the beneficiary State was the treatment actually extended to the third State.

⁶ For previous discussion see 1216th meeting, para. 57.

⁷ For previous discussion see 1217th meeting, para. 62.

38. Mr. USTOR (Special Rapporteur) said that the commentary would deal with the valid points raised by Mr. Kearney and Sir Francis Vallat. The background to article 7 was that the contracting parties were States and that the treatment in question would be given to persons or things only through States.

39. The treatment to which the beneficiary State was entitled was determined by the relations between the granting State and the third State, but it would be granted within the framework of the most-favoured-nation clause. If that clause specified certain limitations, or—an important matter which would be dealt with in later articles—if it set certain conditions for the granting of the treatment, the agreement between the granting State and the third State would operate within the limits set by the most-favoured-nation clause.

40. Lastly, the commentary would explain that the treatment extended by the granting State was the standard which determined the scope of the treatment which the beneficiary State was entitled to claim.

41. Mr. YASSEEN (Chairman of the Drafting Committee) said that, in fact, the treatment accorded to the third State constituted the standard for determining the scope of the treatment which the beneficiary State could claim. Obviously, one treatment could not be determined “by” another treatment. But that raised a very difficult drafting problem, and the Drafting Committee had been unable to accept the English formula “with reference to”, which he personally would have preferred.

42. Mr. REUTER said he could agree to the necessary explanations being given in the commentary, but he wished to draw attention to the difference between the first and second sentences of article 7. The first sentence involved a legal link between the beneficiary State and the granting State. The second sentence, on the other hand, referred to a factual situation, so that it was incorrect to speak of the “the treatment extended by the granting State to the third State”. The treatment was not necessarily extended to the third State; it might be extended to private persons. In regard to the first sentence, it could be held that, even if the beneficiaries of the treatment were private persons, a legal link existed between the two States.

43. The CHAIRMAN asked the Special Rapporteur whether it would be possible to explain in the commentary the point raised by Mr. Reuter.

44. Mr. USTOR (Special Rapporteur) said that Mr. Reuter's point was a valid one. It was for the Commission to decide whether it should be covered by changing the wording of the article or by giving an explanation in the commentary.

45. Mr. YASSEEN (Chairman of the Drafting Committee) considered that the difference pointed out by Mr. Reuter called for clarification in the commentary.

46. Mr. USHAKOV said he thought that if article 7 was read in conjunction with article 5 it was clear that the treatment referred to in article 7 meant not only the treatment extended to a third State, but also the treatment extended to persons or things.

47. In the first sentence of article 7 he would like the words “arises from the most-favoured-nation clause”

to be amended to read “arises only from the most-favoured-nation clause”. The purpose of that amendment was not to emphasize the source of the right of the beneficiary State, but to stress that its right could not arise in any other way.

48. Sir Francis VALLAT said it was desirable that the English and French texts should be fully in accord. In the first sentence of the article, the word “accorded” was rendered in French by the word “*accordé*”. In the second sentence, however, the same French word was used to render “extended”. There was a difference in English between the two terms. The term “accorded” implied a legal obligation; the word “extended” referred to a *de facto* situation. He believed that that difference in wording correctly reflected an intended difference in meaning. He therefore suggested that the French wording should be adjusted to correspond with the English.

49. Mr. REUTER associated himself with Sir Francis Vallat's comments and suggested that, in the second sentence of article 7, the word “*accordé*” should be replaced by the word “*appliqué*” in order to bring the French text into line with the English. He considered that the words “persons or things” should be added at the end of that sentence.

50. Mr. USTOR (Special Rapporteur) said he would prefer to leave the second sentence as it stood, because any change in it could alter the meaning of the first sentence as well. It could be explained in the commentary that the word “treatment” was intended to refer to the treatment defined in article 5.

51. Mr. YASSEEN (Chairman of the Drafting Committee) said he did not think article 7 could be left as it stood. Either the concluding words, “to the third State”, should be deleted, or the whole of the formula employed in article 5 should be used. In the former case, that formula would be implied.

52. Mr. USHAKOV referring to the distinction drawn by Mr. Reuter between the first and second sentences of article 7, agreed that the text should be amplified and that it was not enough to read it in conjunction with article 5. Article 5 did not refer to the treatment extended by the granting State to the third State in the terms used at the end of article 7.

53. Mr. USTOR (Special Rapporteur) said that Mr. Yasseen's proposal did not solve the problem. It relied on part of the definition of most-favoured-nation treatment given in article 5. The second sentence of article 7, however, applied to almost any type of treatment extended to the third State or to persons or things in a determined relationship with that State. His suggestion would therefore be to insert the expression “most-favoured-nation” before the word “treatment” at the beginning of the second sentence and, at the end of that sentence, to replace the reference to “the third State” by a reference to “the third State or to persons or things in a determined relationship with that State”.

54. Sir Francis VALLAT proposed that the concluding words of the article, “to the third State”, should be replaced by the words: “to the third State, or to persons or things in the determined relationship with the latter State”. It was necessary to use the definite article “the”,

because the phrase referred back to the relationship mentioned in article 5.

55. Mr. USTOR (Special Rapporteur) accepted that proposal.

56. Mr. USHAKOV thought that the first sentence of article 7 should also be amplified by inserting, after the words "a third State", the words "or to persons or things in a determined relationship with a third State".

57. Sir Francis VALLAT said that, if the words he had proposed for addition at the end of the second sentence were also inserted in the first sentence, the word "accorded" in the first sentence would have to be changed to "extended".

58. Mr. BILGE suggested that, in view of the length of the new wording, article 7 should be divided into two paragraphs.

59. Mr. YASSEEN (Chairman of the Drafting Committee) approved of that suggestion.

60. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 7 with the changes proposed by Sir Francis Vallat and Mr. Ushakov and on the understanding that the second sentence would become a separate unnumbered paragraph.

It was so agreed.

61. Mr. MARTÍNEZ MORENO said that he had agreed to the approval of the draft articles, in particular articles 4 and 5, on the clear understanding that the Special Rapporteur would submit, at a later stage, articles dealing with the exceptions. He was interested, in particular, in the exceptions relating to developing countries and to common markets and customs unions.

62. The CHAIRMAN said that the reservation by Mr. Martínez Moreno would be placed on record.

Question of treaties concluded between States and international organizations or between two or more international organizations

(A/CN.4/258; A/CN.4/271)

[Item 4 of the agenda]

63. The CHAIRMAN invited the Special Rapporteur on the question of treaties concluded between States and international organizations or between two or more international organizations to introduce his first and second reports (A/CN.4/258 and A/CN.4/271).

64. Mr. REUTER (Special Rapporteur) said that his main purpose in introducing his first and second reports was to elicit the Commission's views on several questions which had arisen during his preparatory work and on which it was important that the Commission should give him some guidance.

65. The first question was one of method. The Vienna Conference on the Law of Treaties⁸ and the General

Assembly, in resolution 2501 (XXIV), had recommended that a set of draft articles on treaties to which international organizations were parties should be prepared in consultation with the principal international organizations. It should be decided what form that consultation was to take. It was probably too early to attempt to solve the substantive problem, namely, how a set of draft articles could acquire legal force for the international organizations concerned. That in turn raised the questions whether international organizations should normally be called upon to become parties to a multilateral treaty; whether the Commission wished to confine itself to a formula for which there were precedents, such as that of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies;⁹ or whether, if neither of those solutions was adopted, a recommendation by the General Assembly could suffice.

66. He was not suggesting that the Commission should settle those questions immediately. However, it had been necessary to enlist the help of the international organizations at the start of the work, so with the agreement of the Secretary-General he had sent a questionnaire, the text of which was annexed to his second report, to the international organizations which had been invited to submit observations on the draft articles on the law of treaties and to participate in the Vienna Conference. He had informed the organizations that unless they indicated otherwise, their replies would remain confidential. For the time being, therefore, it was not proposed to publish those replies; but since the information thus obtained had been used in his second report, and since the Commission's discussions were public, there was every reason to hope that the international organizations would authorize publication later.

67. After three years of preliminary work, he should be in a position to submit a set of draft articles to the Commission at its twenty-sixth session. He would very much like to have the benefit of further comments by international organizations, on the understanding that they would be treated with the same discretion for another year. Greatly as he desired publication of the extremely interesting documents he had received from certain organizations, in particular the United Nations, he was bound to tell the Commission that the international organizations generally had most serious misgivings about the future draft articles, because they feared that the rules to be formulated might deprive them of some of their freedom of action. That anxiety was justifiable, and his main concern was to win the confidence of the international organizations. He thought that the Commission's work would have the effect, not of making life even more difficult for the secretariats of the international organizations, but of consolidating the legal position of the agreements concluded by those organizations and giving them a status they seemed to lack. That was the first question on which he would like to have the views of the members of the Commission.

68. The second question concerned the scope of the topic entrusted to him. That scope was determined by

⁸ See *Official Records of the United Nations Conference on the Law of Treaties, Second Session* (United Nations publication, Sales No. E.70.V.6), p. 178, para. 38 *et seq.*

⁹ United Nations, *Treaty Series*, vol. 33, p. 262.

the Vienna Convention on the Law of Treaties.¹⁰ It had always been understood that it was his task to ascertain what adaptations of substance or form would be required to make the Convention applicable to treaties concluded by international organizations. But that position of principle made it necessary to consider certain particular aspects of the topic.

69. He had asked himself whether there were not some questions completely foreign to the Vienna Convention which concerned international organizations only: for example, the question of agreements concluded by subsidiary organs, since the definition of an international organization given in article 2 of the Vienna Convention did not apply to such organs. He did not propose, however, that the Commission should pursue the study of that question, for the replies to the questionnaire had shown that it was not yet ripe for study.

70. There was also the question of representation. The Vienna Convention devoted a number of articles to the representation of States by natural persons, particularly the articles concerning powers, but it left aside the more general question of the representation of one State by another in international law. He had considered whether international organizations could, for example, represent a territory for the purpose of concluding treaties. Although practice did not exclude that possibility, the replies to the questionnaire had generally been negative; some organizations had even shown lack of interest in the question, which they considered too theoretical; but the United Nations had made an admirable survey, which deserved to be published, since a new phenomenon was now appearing, in particular in connexion with Namibia. The question was not ready for codification, of course, and it would be pointless to pursue it further. The reason why he had put questions in the questionnaire which might seem strange, was to prevent anything important from being overlooked.

71. Still with regard to the scope of the topic entrusted to him, he would like to have the Commission's opinion on the definition of the term "international organization". He himself proposed to keep to the definition given in the Vienna Convention—a fairly wide definition which covered all international organizations—rather than revert to the notion of an organization of universal character which the Commission had adopted in the draft articles on the representation of States in their relations with international organizations. His reason was that the Vienna Convention laid down, for agreements concerning international organizations, certain rules which applied to all organizations. If, on the pretext of codification, the Commission were to prepare a draft concerning a certain class of international organizations only, it would create a second source of international law alongside the Vienna Convention, and there would still be yet a third: uncodified customary practice. That would make the codification a failure. So either the Commission should follow the Vienna Convention very closely, in which case it could provide the complement to that Convention

which the General Assembly had requested, or, if it found that to be impossible, it should not submit a draft at all. The Commission should bear in mind that it was required to formulate general provisions, not special rules. For whereas in law States enjoyed absolute sovereign equality, international organizations differed widely according to whether they were universal, regional, technical or of some other kind.

72. The third question he wished to refer to the Commission was whether the draft articles should deal with the capacity of international organizations to conclude treaties. The Commission was aware that there were two schools of thought on the question. According to the first, that capacity was inherent in the very notion of an international organization, no international organization existed without international capacity, and the most immediate of an organization's capacities was the capacity to conclude international agreements. That capacity could not, of course, be as extensive as the capacity of States, but was commensurate with the functions of the organization. That conception was based on the jurisprudence of the International Court of Justice, which continued that of the Permanent Court of International Justice, and was valid mainly for the United Nations. According to the second school of thought, the capacity of an international organization depended on its statutes in each individual case—not on the constituent instrument, but on the relevant rules. It was held to be a matter for the constitutional law of the organization concerned, just as the constitution of a federal State could not be interpreted according to rules laid down in the constitution of another federal State. In his view it would be better not to propose too ambitious a formula; first, because the topic under study concerned agreements and not the capacity of organizations in general, and secondly, because the Commission, in its work on the codification of the law of treaties, had always been divided on the question and had preferred to leave it aside. However, he would follow whatever instructions the Commission saw fit to give him on that point.

73. The problem of capacity indirectly raised the question of the effects of agreements concluded by international organizations, particularly the effects for member States. It would be illogical to affirm that international organizations had very extensive capacity and at the same time to attribute the widest possible effects to the agreements they concluded, even including that of binding the member States. For if the organization as such had the capacity to conclude treaties, the rules of the Vienna Convention would apply and the member States of the organization should not be bound by the agreements it concluded. He therefore submitted two solutions for the Commission's consideration. If the agreements concluded by international organizations were to produce effects with regard to the member States, they could do so in two different ways. First—according to a theory he did not at present favour, which had been adopted by Professor René Jean Dupuy in a report recently submitted to the Institute of International Law—they could do so under the agreement itself; that meant saying that member States were not third States, and the provisions of the Vienna Convention on that point would then have to be

¹⁰ 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.

clarified or amended. Secondly, they could do so under the organization's constituent instrument, and not under the agreement itself; if the statutes or practice of an organization included a rule that agreements concluded by the organization were binding on its member States, there was no derogation from the Vienna Convention, since that rule was none other than the *pacta sunt servanda* rule laid down in the Convention. A famous example was that of the constituent instrument of the European Economic Community, an article of which provided that agreements concluded by the Community were binding on Member States.¹¹

74. At present he was inclined to favour the second solution, which did not depart from the principles of the Vienna Convention and reserved to each organization the right to model the effects of the agreements it concluded according to its own rules. For example, the member States of an international financial organization which borrowed or lent funds would never consent to the agreements concluded by the organization being directly binding on them. It was thus a matter of interpreting the relevant rules of the organization. Conversely, it was unthinkable that agreements concluded by an organization of the Customs union type should not be binding on the member States, for otherwise third States would never sign any agreement with the union. For the time being, therefore, he had adopted the position which afforded the greatest possible flexibility.

75. Lastly, he would like to have the Commission's views on a matter which was not entirely within the scope of the topic under study, but which might later lead the Commission to broaden it. That was the question, not of agreements concluded by an international organization, but of the effects on an international organization of agreements concluded by certain States. It was now very common for States to entrust a new function to an international organization by treaty. That had been done in all the major treaties on nuclear safety, for example. Unless they adopted that rational solution, States would only have a choice of two alternatives, both of which were impracticable: either to revise the constituent instrument of the organization, or to establish a new organization by the treaty whenever it created the need for one. The question was whether the provisions on third States in the Vienna Convention should be strictly applied to such treaties, that was to say whether the written consent of the organization was required. The practice was much more flexible. The consent of the organization was essential, but the formalities prescribed by the Vienna Convention for protecting States against the effects of treaties concluded without their consent seemed excessive. He himself would be in favour of recognizing the mechanism of the collateral agreement, but making it as flexible as possible.

76. Mr. USHAKOV asked the Special Rapporteur whether a distinction should not be made in the future draft articles between treaties concluded between States

and international organizations and treaties concluded between international organizations.

77. Mr. REUTER (Special Rapporteur) replied that, if the Commission agreed that questions concerning the capacity of international organizations should be handled with discretion, it would seem unnecessary to distinguish between two classes of treaty. Apart from certain questions of drafting and difficult issues such as those of powers and the effects of agreements, the subject was very simple. Agreements between organizations or between States and organizations should, broadly speaking, be subject to the rules of the Vienna Convention, which established the consequences of the consensual principle. So far, he had found no reason to draw any distinction. Perhaps reasons for doing so would appear later, depending on what instructions he received from the Commission as to the questions it wished him to handle. In its work on the law of treaties, however, the Commission had always taken great care not to introduce any classification of treaties. Although a classification might follow indirectly from certain articles, it was never expressly established.

The meeting rose at 5.50 p.m.

1239th MEETING

Tuesday, 3 July 1973, at 10.5 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Bilge, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties

(A/CN.4/267; A/CN.4/L.196/Add.1)

[Item 3 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

1. The CHAIRMAN, inviting the Commission to continue consideration of the draft articles proposed by the Drafting Committee (A/CN.4/L.196/Add.1), said that unfortunately, the Special Rapporteur was unable to be present, so Mr. Yasseen, the Chairman of the Drafting Committee, had been asked to take his place so far as possible.

2. He called on the Chairman of the Drafting Committee to introduce draft article 6.

¹¹ See article 228 of the Treaty establishing the European Economic Community, United Nations, *Treaty Series*, vol. 298, p. 90.