

Document:-  
**A/CN.4/SR.1378**

**Summary record of the 1378th meeting**

Topic:  
**Most-favoured-nation clause**

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treaties concluded exclusively between States were governed by that Convention. The topic of the most-favoured-nation clause would be governed not only by the draft articles under consideration, but also—first and foremost—by the rules on the law of treaties contained in the Vienna Convention and in the general law of treaties.

45. The idea expressed in the first sentence of article A was that while the articles on the most-favoured-nation clause were intended to serve for purposes of the formulation, interpretation and application of most-favoured-nation clauses, the matters regulated by them were still governed by the law of treaties. Those matters were subject to the Vienna Convention for States parties to that Convention and to the general law of treaties for States which were not parties to that Convention.

46. He suggested that he should prepare a modified text for the Drafting Committee dealing with the two separate ideas expressed in article A and that the Commission should not take a definite stand on that article until it had dealt with the rest of the draft.

46. The CHAIRMAN, speaking as a member of the Commission, said that the remarks made by Mr. Hambro and Mr. Ago on the binding force of the preamble to a treaty brought to mind the discussion that had taken place in the Sixth Committee on the principle of self-determination, in the course of which it had been argued that that principle was not a binding rule of international law because it was stated only in the Preamble to the Charter. He and others had successfully asserted the legally binding force of the Preamble to the Charter, relying, among other authorities, on a book on the Charter of the United Nations of which Mr. Hambro was one of the joint authors.<sup>13</sup>

48. Speaking as Chairman, he said that, if there were no further comments, he would take it that the Commission agreed to accept the Special Rapporteur's suggestion that he should prepare a revised draft of article A and submit it to the Drafting Committee, which would decide on the appropriate time for taking up the article.

*It was so agreed.*

*The meeting rose at 12.55 p.m.*

<sup>13</sup> L. M. Goodrich, E. Hambro and A. P. Simons, *Charter of the United Nations: Commentary and Documents*, 3rd ed. (rev.) (New York, Columbia University Press, 1969).

### 1378th MEETING

*Thursday, 27 May 1976, at 10.10 a.m.*

*Chairman:* Mr. Abdullah EL-ERIAN

*Members present:* Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

### Most-favoured-nation clause (*continued*)

(A/CN.4/293 and Add.1)

[Item 4 of the agenda]

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

ARTICLE 2 (Use of terms), subparagraph (e) ("material reciprocity")

1. The CHAIRMAN invited the Special Rapporteur to introduce his proposal for a new subparagraph (e) in article 2:

#### Article 2. Use of terms

[For the purposes of the present articles:

...]

(e) "material reciprocity" means the extension by one State to another State or to persons or things in a determined relationship with that State of the same treatment in kind as the treatment extended by the latter State to the former or to persons or things in the same relationship with that former State.

2. Mr. USTOR (Special Rapporteur) said that the purpose of the new provision was to define the meaning in which the term "material reciprocity" was used in the draft and thus to solve a drafting problem. He had already discussed the question of material reciprocity in his fourth report.<sup>1</sup> A good illustration of the concept was to be found in article 46 of the 1958 Consular Convention between Poland and Yugoslavia, whereby the contracting parties accorded most-favoured-nation treatment to each other, with the proviso:

However, neither Contracting Party may invoke the most-favoured-nation clause for the purpose of requesting privileges, immunities and rights other or more extensive than those which it itself accords to the consuls and consular staff of the other Contracting Party.<sup>2</sup>

3. The purpose of combining the most-favoured-nation clause with the condition of material reciprocity was not to secure in a foreign country treatment equal to that of nationals or institutions of other countries, but rather to secure equal treatment by the Contracting States of each other's nationals or institutions. Equality with competitors was of great importance in matters of trade, particularly Customs duties, and the condition of material reciprocity was therefore practically never to be found in treaties dealing with those matters.

4. His proposed subparagraph was intended to express the idea that the two contracting parties concerned would grant substantially the same advantages to each other's nationals, ships, establishments or institutions. In the light of that explanation, the expression "the same treatment" perhaps went rather too far.

5. He had received from Mr. Ushakov an informal written suggestion redrafting subparagraph (e) to state

<sup>1</sup> See *Yearbook... 1973*, vol. II, pp. 98-102, document A/CN.4/266, commentary to article 6.

<sup>2</sup> United Nations, *Treaty Series*, vol. 432, p. 322.

that material reciprocity meant a stipulation attached to the most-favoured-nation clause whereby the beneficiary State was only entitled to benefit from the most-favoured-nation clause on condition that it extended equivalent treatment to the granting State.

6. Mr. KEARNEY said it was difficult to draft a provision defining the meaning in which the term "material reciprocity" was used in the draft, because of the need to lay down rather strict limits while at the same time allowing enough tolerance to make the most-favoured-nation clause workable.

7. His own proposal was that the new subparagraph (e) should explain the concept of "condition of material reciprocity" rather than attempt to deal with material reciprocity itself. He would submit in writing, for the benefit of the Drafting Committee, a revised text stating that a condition of material reciprocity meant that the State subject to that condition would receive most-favoured-nation treatment by another State only if it accorded equivalent treatment in respect of equivalent subject-matter.

8. Mr. REUTER said he was in favour of referring subparagraph (e) of article 2 to the Drafting Committee. In his view, the difficulty was caused by the expression "same treatment in kind", which was not satisfactory. It would be better to use the words "treatment relating to an equivalent specific subject-matter", which would be in conformity with the explanations given by the Special Rapporteur in his commentary.

9. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer the proposed new subparagraph (e) to the Drafting Committee for consideration in the light of the various suggestions made during the discussion.

*It was so agreed.*<sup>3</sup>

ARTICLE 3 (Clauses not within the scope of the present articles), subparagraph (4)

10. The CHAIRMAN invited the Special Rapporteur to introduce his proposal for a new subparagraph (4) to be inserted in the opening paragraph of article 3, which read:

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

[The fact that the present articles do not apply  
...]

or (4) 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 another such subject of international law.

11. Mr. USTOR (Special Rapporteur) said that the article 3 had been intended to impose the same limitations as article 3 of the 1969 Vienna Convention on the Law of Treaties.<sup>4</sup> It excluded from the scope of the present

draft, by subparagraphs (1), (2) and (3) of its opening paragraph, clauses on most-favoured-nation treatment contained in oral agreements and in international agreements between States and other subjects of international law. It would be agreed that, as he had pointed out in his seventh report (A/CN.4/293 and Add.1, para. 19), the expression "a subject of international law other than a State" covered intergovernmental organizations. The question arose, however, whether hybrid unions such as EEC would also be covered by that expression, and he had suggested (*ibid.*, para. 20) that the commentary to article 3 should explain that for the present purposes the Commission considered the expression as covering such unions; it might be added that the Commission did not wish to enter into the controversy concerning the precise legal character of such unions.

12. During the discussion in the Sixth Committee, attention had been drawn to the possibility of a most-favoured-nation clause being included in a treaty concluded between two hybrid unions. It had been pointed out that the contemporary world was a "world of areas" characterized by the existence of a considerable number of groupings, particularly customs unions. He had accordingly formulated his proposal for a new subparagraph (4), in order to make it clear that the articles did not apply to a most-favoured-nation clause in an international agreement concluded between two subjects of international law other than States.

13. That exclusion was, of course, implicit in draft article 1 (Scope of the present articles), which specified that the articles applied to "most-favoured-nation clauses contained in treaties between States". Nevertheless, it might be useful to state it explicitly in article 3, so as to make clear that the draft articles would not apply to a most-favoured-nation clause contained in a treaty concluded between say, EEC and a Latin American or African economic group.

14. Mr. YASSEEN observed that article 3 defined the scope of the draft articles by specifying that it did not go beyond that of the 1969 Vienna Convention; in other words, that the articles did not apply to oral agreements or to agreements concluded with subjects of international law other than States. The real problem was that of other subjects of international law, in particular, international organizations. The term "international organization" had a fairly precise meaning; the criterion for distinguishing an international organization from a mere association of States was the existence of an international entity concealing the individual identity of each State. Thus, when EEC negotiated as such with a State or group of States, it was not the States members of the Community themselves which conducted the negotiations, but another international entity.

15. The 1969 Vienna Convention had followed that idea, but it was not entirely categorized in regard to the definition of an international organization. At the United Nations Conference on the Law of Treaties, BIRPI and GATT had defended their status as international organizations on the grounds that, although they had no statutes, they had nevertheless been established by an international agreement. In the light of the communications received

<sup>3</sup> For the consideration of the text proposed by the Drafting Committee, see 1404th meeting, paras. 6-8.

<sup>4</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. 289.

from GATT and BIRPI, the Drafting Committee of the Conference had considered the scope to be given to the term "international organization" and had concluded, as its Chairman had stated in the Committee of the Whole of the Conference, that it denoted "institutions established at intergovernmental level either by agreements or by practice and which exercised international functions of some permanence".<sup>5</sup> No one had contested that statement and the Conference had unanimously adopted article 2, paragraph 1 (i) of the Convention, which stated that the term "international organization" meant an intergovernmental organization. That definition of an international organization included "hybrid unions" such as EEC. In his view, therefore, it was not necessary to add a separate paragraph covering "hybrid unions".

16. Mr. USHAKOV pointed out that in article 1 the Commission had limited the scope of the articles to "most-favoured-nation clauses contained in treaties between States". The term "treaty" had been defined in article 2 (a), as "an international agreement concluded between States in written form...". Article 4, however, referred to a *disposition conventionnelle* ("treaty provision"); that would mean a provision in any agreement, written or oral, concluded between States or between other subjects of international law. The definition of the most-favoured-nation clause given in the French version of article 4 would thus be in contradiction with article 1 and article 3, which excluded from the scope of the draft articles agreements which were not written or which were concluded between subjects of international law other than States. It should therefore be stated in article 4 that the term "most-favoured-nation clause" meant a provision contained in a treaty within the meaning of the term "treaty" as defined in article 2.

17. He also wondered whether it was correct to refer in subparagraph (4) of article 3, to "most-favoured-nation treatment", when dealing with subjects of international law other than States.

18. Mr. USTOR (Special Rapporteur) said that article 4 was the key article of the whole draft, because it defined the most-favoured-nation clause. The provisions of that article made it abundantly clear that the draft dealt only with most-favoured-nation clauses contained in treaties between States. In an earlier report, he had noted that in headquarters or similar agreements of international organizations, the host State sometimes specified that it would extend to the organizations concerned all the advantages which it gave to other organizations.<sup>6</sup> By virtue of articles 1 and 4, such clauses were excluded from the present draft. If the Commission wished to deal with them it could only do so under item 5 of the agenda: "Question of treaties concluded between States, and international organizations or between two or more international organizations".

<sup>5</sup> *Ibid.*, Second Session, Summary Records of the plenary meetings and of the meetings of the Committee of the Whole (United Nations publication, Sales No. E.70.V.6), p. 346, 105th meeting of the Committee of the Whole, para. 31.

<sup>6</sup> *Yearbook...* 1972, vol. II, p. 162, document A/CN.4/251 and Add.1, para. 1 of the commentary to article 1.

19. He understood the difficulty to which Mr. Ushakov had drawn attention but he thought that wording of subparagraphs (1), (2) and (3) of the opening paragraph of article 3 could remain as it stood. He agreed, however, that it would be necessary to adjust the language of his proposed new subparagraph (4), in particular so as to avoid the expression "most-favoured-nation treatment", which was unsuitable in the context of an agreement concluded between two subjects of international law other than States.

20. Mr. USHAKOV said that the difficulty to which he had drawn attention arose mainly because of the use in article 4 of the French expression "*disposition conventionnelle*" ("treaty provision"), which made it possible to construe article 4 as meaning that the expression "most-favoured-nation clause" was intended to cover a provision contained in any international agreement. The real intention was, of course, to confine the scope of that definition, and of the whole draft, to most-favoured-nation clauses contained in treaties within the meaning given to the term in article 2 (a) (Use of terms), namely "an international agreement concluded between States in written form".

21. Mr. HAMBRO suggested, in the light of the comments made by Mr. Ushakov and Mr. Yasseen, that the Special Rapporteur's proposal for a new subparagraph (4) should be referred to the Drafting Committee, leaving that Committee entirely free to drop the provision if it found that course advisable.

22. He noted that reference had been made during the present discussion to the problem of economic groups and Customs unions. He wished to make it clear that it would still be possible for the Commission to take up the whole question of Customs unions and economic unions when discussing later articles of the draft.

23. Mr. CALLE y CALLE said that the purpose of article 3 was to exclude a number of situations from the scope of the draft. The case dealt with in subparagraph (1) of the opening paragraph was that of a most-favoured-nation clause forming part of an oral agreement between States; the need for that exclusion was obvious and called for no comment.

24. Subparagraph (2) excluded the case of a clause by which a State undertook 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. Subparagraph (3) dealt with the opposite case and excluded a clause whereby a subject of international law other than a State undertook to accord most-favoured-nation treatment to a State. It seemed to him both useful and logical to deal also with a situation in which both of the parties concerned were subjects of international law other than States. It was quite conceivable that a clause on most-favoured treatment might be included in an agreement between two economic unions or systems.

25. He believed that the inclusion of the Special Rapporteur's proposed new subparagraph (4) was justified, notwithstanding Mr. Yasseen's remarks. It was true that article 3 of the draft was modelled on article 3 of the

1969 Vienna Convention, but that did not mean that its formulation need be identical. There was every reason in the present instance for making the opening paragraph of article 3 more extensive than the corresponding passage in article 3 of the Vienna Convention. That had already been done in article 3 of the Commission's 1975 draft articles on treaties concluded between States and international organizations or between two or more international organizations,<sup>7</sup> in order to meet the requirements of the new topic.

26. For those reasons, he strongly supported the Special Rapporteur's proposal.

27. Mr. TABIBI said that he had no objection to the inclusion of the proposed subparagraph (4). As far as the wording was concerned, he agreed that the Special Rapporteur should seek an expression other than "most-favoured-nation", which was inappropriate for the purposes of that sub-paragraph.

28. The question of a most-favoured-nation clause contained in an international agreement between two economic unions, which had been raised during the discussion in the Sixth Committee, could be left to the Drafting Committee, which might well decide to deal with the matter in the commentary.

29. Lastly, he wished to take that opportunity of expressing his regret at the Special Rapporteur's decision not to deal with national treatment (A/CN.4/293 and Add.1, para. 16). One of the reasons for that decision was probably that the Special Rapporteur would not have sufficient time to deal with the subject before his present term of office expired. He wished to place on record that, in his own statements to the Sixth Committee as the outgoing Chairman of the Commission, he had stressed the importance of continuity for Special Rapporteurs.

30. Mr. REUTER supported the insertion of a subparagraph (4), which he considered a felicitous addition to subparagraph (3). The whole of article 3 should be regarded as a formal reference to the methods of the United Nations Conference on the Law of Treaties and Mr. Ushakov's comments therefore seemed to him to be very sound. In his view, the Commission was bound to use, in subparagraph (4) as in subparagraph (3), the expression "subject of international law other than a State", which was broader than the term "international organization". The recent development of the law of the sea showed that entities other than international organizations or States could conclude agreements governed by international law which were not treaties.

31. The reservations set out in article 3 were formal reservations which did not relate to any problem of substance or application. The problems of practical application remained very difficult, for it was necessary to know what in practice was an international organization or, to use Mr. Yasseen's words, when the entity in question concealed the identity of its members. In particular, it was necessary to know whether an organization

was recognized by a third party, and its status would also have to be known.

32. The reservations stated in article 3 were necessary, but left open the question whether that article could apply in a specific case to a particular union.

33. Sir Francis VALLAT said that the substance of the matter now under discussion did not give rise to any great difficulty; it was the drafting that was very elusive. He therefore urged that before the present draft articles were sent to the General Assembly, the drafting as a whole should be carefully scrutinized.

34. The point raised by Mr. Ushakov<sup>8</sup> provided a good illustration. It related essentially to the French text of article 4, where the words *une disposition conventionnelle* could lend themselves to misunderstanding. They had in fact a slightly different meaning from the English words "a treaty provision". In the English text, the word "treaty" would undoubtedly be construed as having the meaning attached to it in article 2 (a).

35. The difficulty could, of course, be solved by referring in all languages to "a provision contained in a treaty", thereby bringing the language of article 4 into line with that of article 1. If that were done, however, it would be necessary to examine carefully the other articles of the draft. For instance, article 8 referred to a most-favoured-nation clause "in a treaty" whereas other articles referred to the most-favoured-nation clause without stating that it was contained in a treaty. The question whether or not to include the words "in a treaty" should be carefully considered in each case.

36. He found the addition of the proposed new subparagraph (4) of article 3 logical, but the language would have to be reviewed in the light of the very tight definition adopted in article 4 for the most-favoured-nation clause. If article 4 were reworded so as to replace the expression "treaty provision" by some formula such as "provision contained in a treaty", that change would not affect the application of subparagraphs (a) and (b) of article 3, but it could raise the question of the significance of subparagraph (c) of that article. In the light of that proposed tighter definition of a "most-favoured-nation clause", it was difficult to see how clauses such as those defined in subparagraphs (2), (3) or (4) of article 3 could involve an undertaking by States to accord most-favoured-nation treatment "to other States". That difficulty did not arise in regard to article 3 (c) of the 1969 Vienna Convention on the Law of Treaties, because the reference to the scope of the application of that Convention was not tied to a specific subject-matter such as the most-favoured-nation clause.

37. In conclusion, he urged that article 3 should be examined in connexion with the other articles of the draft and suggested that, if the provisions of article 4 were clarified, article 3 (c) should also be adjusted to make its meaning clearer. He believed the real meaning of the provision to be that, notwithstanding the definition of a "most-favoured-nation clause" contained in article 4,

<sup>7</sup> *Yearbook... 1975*, vol. II, p. 171, document A/10010/Rev.1, chap. V, sect. B.

<sup>8</sup> See above, paras. 16 and 20.

the draft articles should apply as between States parties to an agreement even though subjects of international law other than States were also parties.

38. Mr. SETTE CÂMARA said that, like Mr. Calle y Calle and Mr. Reuter, he supported the inclusion of the proposed subparagraph (4). That provision would deal with certain situations which might occur in practice.

39. It had been argued that the provisions of the proposed new subparagraph (4) were not essential, but that statement would be equally true of the present subparagraphs (1), (2) and (3). The interplay of the provisions of article 1, article 2 (a) and article 3 would, strictly speaking, exclude from the scope of the draft all the situations referred to in the opening paragraph of article 3. The essence of article 3, like that of article 3 of the 1969 Convention, lay in the provisions of its subparagraphs (a), (b) and (c). The opening paragraph of the article constituted only an introductory saving clause.

40. With regard to the point raised by Mr. Ushakov concerning article 4, he agreed with Sir Francis Vallat that the difficulty arose only in regard to the French text. As he saw it, the expression "a treaty provision" clearly meant "a provision of a treaty".

41. Lastly, he agreed that the Drafting Committee would have to overhaul the language of the whole draft in order to arrive at a uniform expression of the concept of the most-favoured-nation clause.

42. Subject to those remarks, he suggested that the proposal to insert a new subparagraph (4) in the opening paragraph of article 3 should be referred to the Drafting Committee.

43. Mr. USHAKOV said that the provision should be referred to the Drafting Committee, which should be free to recast it entirely and even to make minor changes in article 4, since that provision was closely linked to article 3.

44. Mr. USTOR (Special Rapporteur) said that the discussion had proved extremely useful. It would be advisable to adopt Sir Francis Vallat's suggestion and authorize the Drafting Committee to consider the drafting of all the articles, with a view to submitting a consistent text to the General Assembly.

45. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer the proposed new subparagraph (4) of article 3 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*

**ARTICLE B (Cases of State succession, State responsibility and outbreak of hostilities)**

46. The CHAIRMAN invited the Special Rapporteur to introduce article B of his draft, which read:

**Article B**

**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.

47. Mr. USTOR (Special Rapporteur) said the idea seemed to be emerging that it would be preferable to have an autonomous set of articles not institutionally linked to the 1969 Vienna Convention on the Law of Treaties. Cases of State succession, State responsibility and outbreak of hostilities had a place in the articles on the most-favoured-nation clause and article B followed the provisions of article 73 of the 1969 Convention, which dealt with those cases.

48. All situations that might arise in connexion with succession to treaties containing the clause were covered by the Commission's draft articles on succession of States in respect of treaties.<sup>9</sup> The commentary to article B drew attention to cases in which the granting State and the third State united to form one State. Needless to say, in that instance, the rights of the beneficiary State, based on the treatment accorded by the granting State to the third State, would terminate, because the third State no longer existed. On that point, article 19 (Termination or suspension of enjoyment of rights under a most-favoured-nation clause), stated in paragraph 1 that:

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.

Article 19 thus covered cases in which extension of the relevant treatment by the granting State to the third State was terminated as a result of the merging of those two States into one. The Commission might regard that point as so obvious that it would be sufficient to mention it in the commentary on article 19. Alternatively, it might wish to insert a new paragraph in article 19 or to adopt an entirely new article.

49. Lastly, it was evident that the breach by a State of an obligation based on a most-favoured-nation clause entailed the responsibility of that State. It was not necessary for the Commission to consider the different situations that might arise in that regard.

50. Mr. KEARNEY said that the question relating to State succession raised by the Special Rapporteur could be dealt with in the commentary. In the matter of State responsibility, however, the text of article B posed a problem, because of the peculiar formulation borrowed from article 73 of the 1969 Vienna Convention on the Law of Treaties, namely, the words "prejudge any question", which were difficult to understand. The Commission was now considering the restricted area of the most-favoured-nation clause. In the case of a claim made against a State contractually bound to accord most-favoured-nation treatment, that it was not giving the treatment required and was therefore responsible for a breach of its international obligation, he thought the international obligation would be determined, at least in large part, by the articles under consideration. The

<sup>9</sup> *Yearbook... 1974*, vol. II (Part One), p. 174, document A/9610/Rev.1, chap. II, sect. D.

articles would have a direct effect upon determining, or "prejudging", what the correct legal position was with regard to the claims of the States concerned. Unfortunately, it was somewhat dangerous to propose any alternatives to the form of words used in the Vienna Convention.

51. Mr. ŠAHOVIĆ, referring to paragraph 2 of the commentary to article B (A/CN.4/293 and Add.1), concerning the case of uniting of the granting State and the third State, said he would prefer the rule applicable to be stated in the commentary rather than in a separate article, because that particular situation was covered by article 19.

52. With regard to the effect of the outbreak of hostilities on the operation of the clause, which was discussed in paragraph 4 of the commentary, the first two sentences of that paragraph gave the impression that the Special Rapporteur was not inclined to mention the question in the article, but the next sentence contained reasons for doing so. The Special Rapporteur should develop those reasons further, for they were not sufficiently convincing as they stood.

53. Mr. AGO welcomed the inclusion of article B in the draft, particularly as it reserved the question of the international responsibility of States. He did not see how the Commission could depart from the wording of the 1969 Vienna Convention without giving the impression that it wished to derogate from the system provided for in that instrument. To provide that the system of the Vienna Convention applied to treaties in general and that a different system applied to treaties containing most-favoured-nation clauses or to such clauses themselves, would introduce complications.

54. The commentary should explain that the saving clause concerning State responsibility applied not only to the violation of a most-favoured-nation clause, but to any breach of an obligation which might result in the non-application of a most-favoured-nation clause. In the case of a breach of an important international obligation for which sanctions could be applied, suspension of the application of most-favoured-nation treatment was one of the forms which sanctions could take. In the case of a breach of a less important international obligation, on the other hand, only a claim for reparation could be made. Nevertheless, it was a well-established principle that if the guilty State refused to make reparation, sanctions could be taken against it, which often included suspension of the application of a most-favoured-nation clause. The international responsibility referred to in article B thus covered both responsibility arising from the fact that an obligation deriving from the most-favoured-nation clause had been breached, and responsibility arising from the breach of another international obligation which had provoked the reaction of suspension of the application of a most-favoured-nation clause.

55. Mr. USTOR (Special Rapporteur) said that he fully appreciated the point raised by Mr. Kearney, whose comments were applicable not only to the draft, but also to the Vienna Convention itself. A treaty might to some extent prejudice questions of responsibility, for it could contain provisions specifying the consequences of a

breach of the treaty by one of the parties to it. But it would be extremely difficult to suggest language different from that employed in the Vienna Convention. The problem could be explained in the commentary and, at a later stage, the observations of Governments might prove to be of some assistance.

56. With regard to sanctions, paragraph 26 of the report referred to certain special cases that had arisen in connexion with the most-favoured-nation clause, including the case of sanctions applied under Chapter VII of the United Nations Charter. It was not possible to deal in detail in the draft with every conceivable situation, and he thought the Commission would have done its duty if article B followed the wording used in the 1969 Convention and recognized that questions of international responsibility formed a separate subject. The problem of sanctions could be further elaborated in the commentary.

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

*It was so agreed.*<sup>10</sup>

*The meeting rose at 12.50 p.m.*

<sup>10</sup> For the consideration of the text proposed by the Drafting Committee, see 1404th meeting, paras. 37-39.

## 1379th MEETING

*Friday, 28 May 1976, at 10.10 a.m.*

*Chairman:* Mr. Abdullah EL-ERIAN

*Members present:* Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

### Most-favoured-nation clause (*continued*)

(A/CN.4/293 and Add.1)

[Item 4 of the agenda]

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

#### ARTICLE C (Non-retroactivity of the present draft articles)

1. The CHAIRMAN invited the Special Rapporteur to introduce article C of his draft (A/CN.4/293 and Add.1), which read:

##### Article C. Non-retroactivity of the present draft 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 embodied in