

Document:-  
**A/CN.4/SR.1483**

**Summary record of the 1483rd meeting**

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

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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 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.