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Summary record of the 1486th meeting

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

It was so agreed.[8]

The meeting rose at 12.55 p.m.

[8] For the consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 13 and 14.

1486th MEETING

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

Chairman: Mr. José SETTE CÂMARA

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

Organization of work (*continued*)*

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

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

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

It was so agreed.

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

[Item 1 of the agenda]

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

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

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

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

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

(*a*) The legal effect of any such clause;

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

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

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

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

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

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

* Resumed from the 1475th meeting.

[2] See 1483rd meeting, foot-note 2.

[3] *Ibid.*, foot-note 1.

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

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

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

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

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

12. However, article 3 failed to mention yet another category of treaty, namely, treaties between subjects of international law other than States. Treaties of that kind had been excluded on the assumption that they represented theoretical cases that had never arisen in practice and the Commission had therefore decided not to include a reference to most-favoured-nation clauses contained in treaties to which States were not parties. In paragraph (4) of its commentary to article 3, the Commission had stated that it had found it unnecessary to provide in the draft articles for the hypothetical case of most-favoured-nation clauses contained in international agreements concluded by States and other subjects of international law not in written form.[5] However, in the course of the discussion, the problem had arisen of written treaties between a State and an international organization such as EEC. The Commission should now consider the possibility of including in article 3, paragraph (*c*), some reference to that type of treaty, which, in the opinion of the Governments of Luxembourg and the Netherlands, would currently be excluded from the scope of the draft on account of the wording of article 1. In his written report, the Special Rapporteur had taken the view that article 3 should remain as it stood, but he had given the impression during his oral presentation that he would agree to certain changes.

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

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

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

16. One source of difficulty or ambiguity in article 1

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

[5] *Ibid.*, p. 13.

[6] *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

27. Mr. JAGOTA said that the words "do not apply", at the beginning of the introductory part of article 3, made it clear that it was a saving clause, in other words, that the draft articles applied only to most-favoured-nation clauses in treaties between States, as defined in draft article 1, and not to the clauses referred to in items (1), (2) and (3) of the introductory part of article 3. Paragraph (*a*) provided that the fact that the articles did not apply to the clauses referred to in items (1), (2) and (3) did not affect the legal effect of those clauses. The question then arose: under what law would they be valid if they were not valid under the draft articles? Paragraphs (*b*) and (*c*) referred, in that context, to "international law", which he interpreted to mean both conventional and customary international law. If that were so, any most-favoured-nation clause contained in an agreement between, say, India and EEC would still be valid even though it did not fall within the scope of the draft articles; and the law governing its validity would be either that the agreement itself or customary international law. It effect, therefore, the article invited the parties to an agreement other than an agreement between States to decide themselves how the most-favoured-nation clause was to be implemented. They could do that either by repeating in the agreement the provisions of the draft or simply by including a reference to those provisions. They could also remain silent, in which case the clause would be interpreted and applied in accordance with customary international law.

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

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

The meeting rose at 1 p.m.

1487th MEETING

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

Chairman: Mr. José SETTE CÂMARA

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

Fourteenth session of the Seminar on International Law

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