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Summary record of the 1505th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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the date of the entry of Italian troops into Ethiopia.[11] With regard to the Federation of Rhodesia and Nyasaland, Sir Francis Vallat had been right to emphasize (1503rd meeting) that India, prior to independence, had enjoyed a more marked international personality than had the Federation. He himself had mentioned it purely as an example, and in particular because the case was reported in *Materials on Succession of States in Respect of Matters other than Treaties,*[12] because it had been mentioned in connexion with the draft articles on succession of States in respect of treaties, and because it had been analysed in the literature. Before speaking of federation or uniting in that case, it would in fact be necessary to prove the existence of successor States that had joined together, and neither Rhodesia nor Nyasaland had actually been States. Before speaking of dissolution, it would be necessary to show the existence of a State that had disappeared and the emergence of new States. However, the Federation had not been a State and no new State had emerged from its dismemberment. The case of the Federation of Malaya, to which Mr. Sucharitkul had referred, had posed similar problems. Malaysia had not been annexed, neither had it been an annexing State, so that the case did not really come under article 25. The case of Borneo came under article 24, paragraph 2, as Mr. Quentin-Baxter had pointed out.

43. Mr. Sucharitkul had rightly emphasized that changes in name did not warrant the conclusion that the predecessor State had disappeared. Not only countries of South-East Asia but also some African countries had changed their names. For instance, the name "United Arab Republic" had been maintained in Egypt after the disappearance of the union in law; that name symbolized the unity so ardently desired by the Arab nation.

44. Mr. Ushakov's conclusion concerning the cases contemplated in articles 24 and 25 was correct: the rules set forth in those two provisions should be fairly similar. Moreover, they were akin to other rules in the draft in that they were based both on the agreement of the parties and on the notion of equity. The difficulty consisted in striking the right balance between those two elements.

The meeting rose at 1 p.m.

[11] *Reports of International Arbitral Awards,* vol. XIII (United Nations publication, Sales No. 64.V.3), p. 648.

[12] United Nations publication, Sales No. E/F.77.V.9, p. 547.

1505th MEETING

Wednesday, 21 June 1978, at 10.05 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahovic, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/301 and Add.1,[1] A/CN.4/313)

[Item 3 of the agenda]

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

ARTICLE 25 (Dissolution of a State)[2] (*concluded*)

1. Mr. BEDJAOUI (Special Rapporteur) explained that the question of classifying certain situations under one type of succession rather than another arose not only in connexion with article 25 and the preceding article; it had also arisen in an even more difficult form when the Commission had decided to apply two different régimes to a part of the territory of a State according to whether that part was transferred by the State to another State or separated from it and united with another State. The two cases were dealt with in article 21[3] and in paragraph 2 of article 24 (A/CN.4/313, para. 26) respectively, the emphasis in the first case being placed on agreement between the States concerned. Having drawn that fine distinction, the Commission could *a fortiori* distinguish between separation of a part of a State and dissolution of a State.

2. As in a number of other draft articles, it was important in the rule laid down in article 25 to accord their due place to agreement between the parties and to equity. In that connexion, Mr. Pinto had raised the question (1503rd meeting) whether it would be possible to consolidate the draft articles, omitting certain provisions and even some types of succession. Without altogether excluding that possibility, he would stress the need to maintain for the time being the existing structure of the draft, which had been painstakingly thought out. The advantage of the classification of types of succession adopted in the draft was that it set out ideas in a form that governments could readily understand. Perhaps the Commission could revert to the matter on the second reading of the draft. At the current stage it would suffice to note that, in the circumstances of separation dealt with in article 24, agreement between the parties was usually quite difficult to achieve, since the separation was often violent since since the predecessor State survived. On the other hand, in the case of dissolution dealt with in article 25, the successor States had very conflicting interests and therefore in general could only benefit from an agreement. That was why he had placed more emphasis on agreement in article 25 than in article 24. It should also be noted that the agreement referred to in article 24 was between

[1] *Yearbook... 1977,* vol. II (Part One), p. 45.

[2] For text, see 1503rd meeting, para. 1.

[3] See 1500th meeting, foot-note 8.

the predecessor State and the successor State, whereas the agreement referred to in article 25 was between the successor States only.

3. Despite the concern expressed by Mr. Jagota (1503rd meeting) and the Chairman (1504th meeting), there was no question of imposing an agreement on the parties. Article 25 did not lay down that succession to State debts must be settled by agreement; it went no further than to state that the matter was left to the agreement of the parties. A similar formula was used in article 12, concerning the passing of State property in the case of transfer of part of the territory of a State. In the *North Sea Continental Shelf Cases*, however, the International Court of Justice had gone so far as to place on States an obligation to negotiate in good faith.[4] In article 25, the Commission simply recognized the facts: agreement between the parties was far more frequent in the case covered by that article than in the circumstances covered by article 24. It would therefore be inadvisable to introduce into article 25, as Mr. Quentin-Baxter had suggested (1504th meeting), wording similar to that of article 24, which would merely reserve the possibility of an agreement between the successor States.

4. Many members of the Commission had expressed their concern for safeguarding the interests of creditors. It was precisely with a view to ensuring the latter's rights, which deserved protection on the same footing as those of successor States, that he had accorded pride of place to agreement between the parties in the article under consideration. In the absence of agreement, a creditor would no longer know where to turn to obtain satisfaction.

5. Both Mr. Njenga and the Chairman had said (1504th meeting) that it might be advisable to specify the nature of the State debts covered by article 25. In his own view, the important place given in the provision to equity made that unnecessary. If a debt were localized, equity required that the territory that had benefited from the proceeds of the loan should assume the debt in its entirety.

6. It had been proposed that the wording of article 25 should be brought strictly into line with that of the corresponding article on State property namely, article 16, and in particular that the opening words of article 25—"where a State is dissolved and disappears"—should be replaced by the words "when a predecessor State is dissolved and disappears". The latter wording appeared in article 16 but was not altogether appropriate, since a State that dissolved and disappeared was not yet, at that point, a predecessor State.

7. Some members had proposed that the Commission should be guided by the wording used in article 24 and replace the expression "the apportionment of the State debts", in the first paragraph of article 25, by the words "the passing of the State debts". However, in the case covered by article 24, the debts really passed from the predecessor State to the successor State whereas, in the case covered by article 25, the predecessor State had disappeared and accordingly the question was rather one of apportioning the debts among the successor States.

8. The notion of the "disappearance" of the predecessor State was not without point, since it showed clearly the difference between the situations dealt with in articles 24 and 25 respectively. Also, as Mr. El-Erian had said (1504th meeting), the disappearance of a State did not involve the disappearance of its people and territory.

9. The comments on the notion of "capacité contributive" stemmed perhaps from the fact that the term had been translated into English as "tax-paying capacity". "Capacité contributive", however, covered not only fiscal capacity but also capacity to pay. Unlike Mr. Quentin-Baxter, he considered that the notion of those kinds of capacity had its place in article 25 rather than in article 24; article 25 contemplated the case of disagreement among the successor States, when the State debts would have to be apportioned among them on the basis, in particular, of their "capacité contributive".

10. Lastly, for the guidance of Mr. Šahović and Mr. Jagota, he reiterated that the article under consideration applied equally to the dissolution of a union of States and to that of a unitary State. However, as the Commission had already noted in the preparation of the draft articles on succession of States in respect of treaties, cases of dissolution of unions were by far the most frequent.

11. The CHAIRMAN thanked the Special Rapporteur for his very pertinent replies to the various questions raised during the discussion of article 25. He was gratified to note that the three articles proposed by the Special Rapporteur at the current session had received the support of the Commission and that it had been possible to consider them far more quickly than had been anticipated.

12. If there were no objections, he would take it that the Commission decided to refer article 25 to the Drafting Committee for consideration in the light of the comments and suggestions made during the debate.

It was so agreed.[5]

The most-favoured-nation clause (*continued*)* (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2, A/CN.4/L.270)

[Item 1 of the agenda]

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

ARTICLE 24 (Cases of State succession, State responsibility and outbreak of hostilities)

[4] *I.C.J. Reports 1969*, para. 85, p. 47.

[5] For consideration of the text proposed by the Drafting Committee, see 1515th meeting, paras. 65 *et seq.*, and 1516th meeting, paras. 1-3.

* Resumed from the 1500th meeting.

13. The CHAIRMAN invited the Special Rapporteur to introduce article 24, which read:

Article 24. Cases of State succession, State responsibility and outbreak of hostilities

The provisions of the present articles shall not prejudge any question that may arise in regard to a most-favoured-nation clause from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

14. Mr. USHAKOV (Special Rapporteur) said that article 24 was a safeguard clause modelled on the corresponding provision of the Vienna Convention on the Law of Treaties.[6] It had been well received by the Sixth Committee and had given rise to no written observation except on the part of the Netherlands, which had pointed out that, should it be decided to treat certain international organizations on an equal footing with States, the article would have to be extended to cover the adherence of a State to an organization placed on the same footing as a State. The Netherlands Government had added that, since the general rules governing succession of States in respect of treaties could not be applied in a case where an international organization thus succeeded to a State, it would be necessary to provide separately in the draft for the effects of such a succession on any most-favoured-nation clause (A/CN.4/308 and Add.1/Corr.1, sect. A).

15. In his opinion, article 24 should stand as drafted and might be referred forthwith to the Drafting Committee.

16. Mr. TSURUOKA was also in favour of referring the article to the Drafting Committee.

17. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 24 to the Drafting Committee.

It was so agreed.[7]

ARTICLE 25 (Non-retroactivity of the present articles)

18. The CHAIRMAN invited the Special Rapporteur to introduce article 25, which read:

Article 25. Non-retroactivity of the present articles

Without prejudice to the application of any rule set forth in the present articles to which most-favoured-nation clauses would be subject under international law independently of the articles, the articles apply only to most-favoured-nation clauses in treaties which are concluded by States after the entry into force of the present articles with regard to such States.

19. Mr. USHAKOV (Special Rapporteur) said that article 25 was another safeguard clause and was likewise to be found in the Vienna Convention on the Law of Treaties. The article was needed both because the Vienna Convention had not yet come into force and because the States that would be bound by the articles would not necessarily be parties to the Convention.

20. In the Sixth Committee, some representatives had approved article 25; others had questioned its usefulness, bearing in mind the general rule laid down in article 28 of the Vienna Convention, but they had not requested its deletion (A/CN.4/309 and Add.1 and 2, para. 315). In its written comments, the Netherlands Government had expressed the view that article 25 duplicated article 28 of the Vienna Convention and was therefore superfluous (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A).

21. His own opinion was that article 25 was necessary; as it had not been the subject of negative comment, it might be referred forthwith to the Drafting Committee.

22. Mr. VEROSTA, while agreeing that article 25 might be referred to the Drafting Committee, pointed out that some members of the Sixth Committee, and indeed of the Commission, had asked why certain articles of the Vienna Convention had been transposed to the draft, but not others.

23. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 25 to the Drafting Committee.

It was so agreed.[8]

ARTICLE 26 (Freedom of the parties to agree to different provisions)

24. The CHAIRMAN invited the Special Rapporteur to introduce article 26, which read:

Article 26. Freedom of the parties to agree to different provisions

The present articles are without prejudice to the provisions to which the granting State and the beneficiary State may agree regarding the application of the most-favoured-nation clause in the treaty containing the clause or otherwise.

25. Mr. USHAKOV (Special Rapporteur) stressed the importance of the article. At the time the draft articles had been prepared, the Commission had on several occasions considered whether the rules it was drafting were peremptory or residual and had come to the conclusion that nearly all of them were residual. It was therefore possible to derogate from them by agreement. The granting State and the beneficiary State could negotiate any most-favoured-nation clause, together with any exceptions or limitations, and apply to them any rule of interpretation other than those stated in the draft. Article 26 made it unnecessary for the Commission to include in each article the words "unless the parties otherwise agree".

26. The Sixth Committee had given a wide measure of support to article 26. Some representatives had said that the draft provisions would undoubtedly be of interpretative value, even in the circumstances provided for in article 26, whereas other had expressed the view that article 26 should be amended if it were not to be used as a pretext for discrimination (A/CN.4/309 and Add.1 and 2, paras. 317 and 318). In regard to discrimination, Mr. Jagota had pointed out (1495th meeting), during the Commis-

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

[7] For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 92 and 93.

[8] *Ibid.*, paras. 94 and 95.

sion's consideration of article 21, relating to treatment under a generalized system of preferences, that non-discrimination was not mentioned in that article, although it was mentioned in the Charter of Economic Rights and Duties of States.[9] His own view was that the principle of non-discrimination was a peremptory rule of international law that was applicable in all relations between States and not only within the framework of a generalized system of preferences, and that, as a rule of *jus cogens,* it was at the basis of all the draft articles. If that rule were laid down expressly in one article, it could be inferred that it did not apply to the others.

27. In its written comments, the Netherlands Government had stated that article 26 lent an optional nature to all the articles and that, on any point of material interest, the parties to an agreement containing a most-favoured-nation clause could deviate from it. The Netherlands Government had added that, even if the articles were included in a treaty ratified by a large number of States, their significance would probably be relatively minor and frequent use would probably be made of the option to deviate therefrom (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A).

28. Mr. SUCHARITKUL considered that article 26 should be referred to the Drafting Committee, in view of the unquestionable need to protect the freedom of the parties to agree on different provisions. However, neither article 26 nor any other provided an adequate safeguard in that respect, since in practice a number of factors limited the freedom of States to negotiate. For example, when developing countries negotiated a most-favoured-nation clause, they very often sought to safeguard their interests by introducing an exception in favour of an association for regional economic co-operation, but the other party was unwilling to accept such an exception since, unlike the exceptions for customs unions and free-trade areas, it was not generally recognized. Sometimes a third State or even an organization, such as GATT, objected to an exception that had been agreed on by the parties.

29. Mr. TSURUOKA said that the safeguard clauses in articles 25 and 26 were extremely important and should be retained. The Commission had in any case envisaged their inclusion in the draft from the commencement of its work.

30. With regard to the drafting of the French version of article 26, the formula "les présents articles sont sans effet" was not particularly felicitous; he proposed that it should be replaced by the words "les présents articles ne préjudicient pas", which appeared in the following article.

31. Mr. REUTER observed that on that point the French version of article 26 differed from the English and Spanish versions. He personally preferred the formula used in the French text because it was more vigorous. The articles would have effect only in the form of a convention and only in respect of States that accepted them. What gave them weight was the fact that negotiations differed entirely according to whether they were entered into with a weak State or a strong State. In the face of a strong State, for example in the economic or nuclear sphere, freedom of negotiation was very limited. Many States, therefore, would be unable to accept the draft if some of its provisions were retained in their existing form. None the less, even for those that did not accept them, the provisions of the draft could be regarded as reflecting a common line of thinking and as having interpretative value.

32. The Special Rapporteur had said that the rule of non-discrimination was a rule of *jus cogens.* But what did the rule prescribe? It prescribed that absolutely identical situations should be treated identically. Doubtless, therefore, the rule could be said to be one of *jus cogens* as far as human rights were concerned, although even then everyone would have to recognize certain basic principles, such as equality of the sexes. In the economic sphere, however, non-discrimination applied as between identical entities, in which regard one aspect of the problem had been totally ignored: that, since the concept of developing countries had not been defined in international law, those countries would inevitably be treated unequally. Consequently, the fact that the principle of non-discrimination was not mentioned in the draft would not imply that, under a rule of *jus cogens,* developing countries should be treated identically whatever their stage of development.

33. In that connexion, article 27, entitled "The relationship of the present articles to new rules of international law in favour of developing countries", referred in the French and English versions to rules in favour "of" developing countries, but in the Spanish version to rules in favour "of the" developing countries. That was precisely the difference he wished to emphasize.

34. Mr. JAGOTA agreed as to the unequal bargaining power of parties negotiating the terms of an agreement, but considered that the exception provided in article 26, like the one in article 25, was of crucial importance for the quality of the rules set forth in the draft as a whole and for their future from a procedural point of view. After all, the rules were not primary rules, in other words, imperative rules from which no derogation was possible, but residual rules for the guidance of parties, from which they could derogate by agreement. It would doubtless be argued that a convention was therefore unnecessary and that the draft articles could stand as a set of guiding principles in some other form. In any event, article 26 would lose none of its value because the subject-matter of the articles would substantially affect the interests of developing countries, particularly in trade matters. No article should therefore be interpreted as a peremptory rule to the detriment of any major section of the world community, and to that of developing countries in particular.

[9] General Assembly resolution 3281 (XXIX).

35. In that connexion, he noted that the multilateral trade negotiations were making little progress. He understood, from reports in the Indian press, that in the period 1974-1978 the adverse effects of the most-favoured-nation clause, with its exceptions, on the interests of developing countries had amounted in monetary terms to several billion dollars. He therefore considered that, of all the articles, article 26 would best protect the legitimate interests of developing countries. It would also serve to mitigate any adverse effects on their trade that might ensue from the operation of the other exceptions.

36. The purpose of his earlier suggestion that article 21, relating to a generalized system of preferences, should provide for preferential treatment to be extended not only on a non-reciprocal but also on a non-discriminatory basis, had been to ensure that no distinction was made among developing countries regarding the level of tariffs applied. He had had in mind the interpretation given to the words "established by that granting State", at the end of article 21, namely, that no such State might decide at will to grant certain preferences to some developing countries while denying them to others. The principle of non-discrimination, on which great stress had been laid since 1964, was at the very heart of the concept of preferential treatment and, in his view, served the best interests of developing countries. Possibly the Special Rapporteur had considered it unnecessary to reflect that principle in article 21, since article 26 gave the parties the right to make certain demands that would not otherwise be allowed under article 21. But that was a rather awkward approach; it would be much better to express in straightforward terms any benefits to be accorded to developing countries so that those countries would not have to resort to residual provisions. Notwithstanding the terms of article 26, therefore, the Drafting Committee might consider the possibility of reflecting in it the principle of non-discrimination set forth in article 21.

37. Mr. SCHWEBEL expressed strong support for articles 25 and 26 as proposed by the Special Rapporteur. With reference to the Special Rapporteur's remarks on non-discrimination, he had little to add to what had been said by Mr. Reuter, but nevertheless wish to place on record his doubts as to whether non-discrimination could be regarded as a rule of *jus cogens,* as the Special Rapporteur had submitted. International law had always allowed States a wide measure of freedom, as was evidenced by the classic statement of the Permanent Court of International Justice in the *Case of the S.S. "Lotus",* namely, that States were free to do whatever international law did not forbid them to do.[10] Discrimination would therefore seem to be a part of international relations, and indeed was inherent in the very concept of an alliance. The Commission itself had admitted that customary international law did not bind States to grant most-favoured-nation treatment. He also doubted whether, as the law now stood, there was a legal obligation on States to grant generalized preferences at all or to grant such preferences on a non-discriminatory basis.

38. Mr. FRANCIS supported the Special Rapporteur's contention that article 26 had a special place in the draft; it stated an independent principle and was also related in some degree to the rule set out in article 8. He agreed that the article might be referred forthwith to the Drafting Committee.

39. Mr. DADZIE reiterated the support for article 26 that he had expressed during the discussion of other articles and agreed that the provision might be referring to the Drafting Committee.

40. Mr. USHAKOV (Special Rapporteur) observed that non-discrimination was a principle of general international law. In its report on the work of its twenty-eighth session, the Commission had recognized that the rule of non-discrimination was "a general rule inherent in the sovereign equality of States".[11] But it had also observed "that the close relationship between the most-favoured-nation clause and the general principle of non-discrimination should not blur the differences between the two notions". The Commission had referred, in that connexion, to article 47 of the Vienna Convention on Diplomatic Relations and to article 72 of the Vienna Convention on Consular Relations, which reflected "the obvious rule that, while States are bound by the duty arising from the principle of non-discrimination, they are nevertheless free to grant special favours to other States on the ground of some special relationship of a geographic, economic, political or other nature". It had pointed out that a State "cannot normally invoke the principle against another State which has extended particularly favourable treatment to a third State, provided that the State concerned has itself received the general non-discriminatory treatment on a par with other States".[12] The granting of most-favoured-nation treatment did not therefore constitute an act of discrimination, provided that all States benefiting by it were treated alike.

41. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 26 to the Drafting Committee.

It was so agreed.[13]

ARTICLE 27 (The relationship of the present articles to new rules of international law in favour of developing countries)

42. The CHAIRMAN invited the Special Rapporteur to introduce article 27, which read:

Article 27. The relationship of the present articles to new rules of international law in favour of developing countries

The present articles are without prejudice to the establishment of new rules of international law in favour of developing countries.

[10] *P.C.I.J.*, Series A, No. 10.

[11] *Yearbook... 1976,* vol. II (Part Two), p. 7, doc. A/31/10, para. 38.

[12] *Ibid.*, para. 40.

[13] For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 96-98.

43. Mr. USHAKOV (Special Rapporteur) said that, in their oral comments, representatives on the Sixth Committee had generally expressed satisfaction with article 27, although some of them had thought that its wording could be improved and might be supplemented by guarantees in favour of developing countries (A/CN.4/309 and Add.1 and 2, paras. 320 and 321). He therefore proposed that article 27 should be included in the draft as it stood and referred to the Drafting Committee.

44. Mr. REUTER said that the Drafting Committee should harmonize the English, French and Spanish texts of article 27, which did not tally with each other.

45. He noted, moreover, that the draft articles had not exhausted the content of all the existing rules in favour of developing countries. He therefore wondered whether it was wise, in the interests of developing countries themselves, to refer expressly to "the establishment of new rules of international law" in their favour.

46. Mr. TSURUOKA agreed that article 27 should be included in the draft. He proposed, however, that the text should be made more specific by the addition of the words "concerning the most-favoured-nation clause" after the words "new rules of international law".

47. Mr. ŠAHOVIĆ said that article 27 should be referred to the Drafting Committee, since its final wording would depend on the decisions to be taken by the Drafting Committee concerning previous articles, particularly articles 21 and 21 *bis*. The main problems posed by article 27 had already been discussed at length and the Commission could do no more at the current stage. It must therefore leave the matter to the Drafting Committee.

48. Mr. DADZIE supported the amendment proposed by Mr. Tsuruoka, since it would have the effect of binding article 27 more closely to the rules of international law concerning most-favoured-nation clauses. He agreed that the article should be referred to the Drafting Committee.

49. Mr. VEROSTA supported Mr. Tsuruoka's proposal, because he considered that article 27 was too general and should be limited in scope to the area of the most-favoured-nation clause.

50. Mr. USHAKOV (Special Rapporteur) thought Mr. Tsuruoka's proposal limited the scope of article 27 too much.

51. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 27 to the Drafting Committee.

It was so agreed.[14]

THE PROBLEM OF THE PROCEDURE FOR THE SETTLEMENT OF DISPUTES RELATING TO THE INTERPRETATION AND APPLICATION OF A CONVENTION BASED ON THE DRAFT ARTICLES

52. The CHAIRMAN invited the Special Rapporteur to introduce section IV of this report, which dealt with the problem of the procedure for the settlement of disputes relating to the interpretation and application of a convention based on the draft articles (A/CN.4/309 and Add.1 and 2, paras. 324-332).

53. Mr. USHAKOV (Special Rapporteur) said that the adoption of an article relating to the settlement of disputes would be justified only if the articles were to become a convention. It was not, however, for the Commission but for the General Assembly to decide whether the articles should take the form of a convention or merely of a resolution. As long, therefore, as the General Assembly had not taken a decision on that point it would be premature to introduce into the articles a clause concerning the settlement of disputes.

54. In any case, the Commission did not have to draft a provision for the settlement of disputes in advance, because there were many precedents on the subject and, should the need arise, States would merely have to choose a model from among them.

55. Furthermore, even if the General Assembly decided that the articles should take the form of a convention, the latter would not necessarily have to provide for the settlement of disputes since it would contain rules relating to the interpretation of most-favoured-nation clauses that would facilitate settlement of any disputes to which the interpretation of those clauses might give rise. Any dispute arising in connexion with the interpretation of the convention would therefore have two facets, since it would relate both to the rule of interpretation and to the clause itself, and would accordingly be very difficult to settle.

56. Finally, he reminded members that the Commission's general practice when preparing a draft convention was not to provide for procedures for the settlement of disputes but to leave it to States to introduce the necessary article into the convention; the Commission should abide by that tradition. He recognized, however, that Mr. Tsuruoka's proposal (A/CN.4/L.270) deserved consideration and thought the Commission should draw States' attention to the proposal in its report, so that they could bear it in mind when adopting the convention.

New article 28 (Settlement of disputes)

57. The CHAIRMAN invited Mr. Tsuruoka, who had proposed the insertion in the draft of a new article 28, on settlement of disputes (A/CN.4/L.270), to introduce the article.

58. Mr. TSURUOKA said that he had not been entirely convinced by the Special Rapporteur's arguments in section IV of his report (A/CN.4/309 and Add.1 and 2), but to avoid delaying the Commission's work he would not insist on a debate on the question of settlement of disputes at the current stage. However, the Commission was entitled to express its opinion on the subject and he hoped that it would devote the necessary time to it in the future.

59. He would be satisfied if for the moment his proposal were merely mentioned in the Commis-

[14] *Ibid.*, paras. 99-101.

sion's report, so that the attention of the General Assembly would be drawn to the importance of the matter of settlement of disputes.

60. Mr. SCHWEBEL said that the Special Rapporteur had been right to raise the question of the form the articles would ultimately take. In his opinion, the articles should not necessarily be embodied in a convention; it might be better to consider them as a set of guidelines for States wishing to conclude most-favoured-nation clauses. However, the predominant, if not definitive, view in the Commission seemed to be that the articles should become a convention, and he had therefore been puzzled by the Special Rapporteur's suggestion that it was premature to take up the question of settlement of disputes.

61. He realized that, in view of pressure of time and the improbability of reaching an agreement, it would not be prudent to undertake a lengthy discussion of the new article proposed by Mr. Tsuruoka, and it would therefore be best to proceed as Mr. Tsuruoka had suggested.

62. With regard to the wording of the proposed article, paragraph 2 might make it clearer that a party could at its sole instance seize the International Court of Justice of a dispute and that the Court would have compulsory jurisdiction. Also, paragraph 5 of the annex to the proposal might usefully mention the very valuable Model Rules on Arbitral Procedure that the Commission itself had prepared.[15]

63. Mr. Tsuruoka's proposal might be appended to the existing draft articles in parentheses or, if such were the general wish, simply be included in the Commission's report together with a summary of the discussion to which it had given rise.

64. Mr. VEROSTA said that the Commission would be acting inconsistently if it did not include an arbitration clause in the draft articles, since it had from the outset stated that the draft was a supplement to the Vienna Convention on the Law of Treaties and had, in articles 24 and 25, reproduced the provisions of articles 73 and 28 respectively of the Vienna Convention. If the Commission made no mention at all of the question of settlement of disputes, governments might conclude that it was convinced that the articles would never become a convention. He therefore found great merit in Mr. Tsuruoka's proposal.

65. Mr. DADZIE agreed with the Special Rapporteur that the final form of the articles must be known before provision could be made for the settlement of disputes, and that any article on that subject should be based on the existing models. The Commission was perhaps entitled to suggest that its articles should become a convention, but the decision on that matter lay with the General Assembly. He was grateful for the gesture Mr. Tsuruoka had made with regard to his proposal and considered that the proposal should be commented on in the Commisson's report.

66. Mr. JAGOTA agreed entirely with the Special Rapporteur's statement. The Commission should confine itself to producing the best set of articles it could and leave it to the General Assembly to decide what form they should eventually take. That decision would have important implications for the future work of the Commisson. If the General Assembly thought that the articles should constitute a protocol to the Vienna Convention on the Law of Treaties, the Commissiion would not have to concern itself with drafting final clauses or provisions on settlement of disputes, since the relevant provisions of the Vienna Convention would suffice. If the Assembly decided that the articles should form a separate convention, the choice of the method of settling disputes would rest with the plenipotentiary conference or other body that finalized the convention. If the Assembly decided that the articles should be treated merely as a set of guidelines, it would probably be neither desirable nor necessary to add anything on the settlement of disputes.

67. He had raised those points because the settlement of disputes was a divisive question for the world community and had caused considerable problems at the United Nations Conference on the Law of Treaties. Furthermore, if Mr. Tsuruoka's proposal were adopted, there would be not merely a dual problem of interpretation, as the Special Rapporteur had pointed out, but a triple one, because there would also be the question whether the articles should apply to the agreements referred to in article 26.

The meeting rose at 1 p.m.

1506th MEETING

Thursday, 22 June 1978, at 10.50 a.m.

Chairman: Mr. José SETTE CÂMARA

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

The most-favoured-nation clause (*continued*) (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2, A/CN.4/L.270)

[Item 1 of the agenda]

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

THE PROBLEM OF THE PROCEDURE FOR THE SETTLEMENT OF DISPUTES RELATING TO THE INTERPRETATION AND APPLICATION OF A CONVENTION BASED ON THE DRAFT ARTICLES (*concluded*)

[15] *Yearbook... 1958*, vol. II, p. 83, doc. A/3859, para. 22.