

# YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1975

*Volume I*

*Summary records  
of the twenty-seventh session  
5 May-25 July 1975*

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UNITED NATIONS





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UNITED NATIONS  
New York, 1976



## INTRODUCTORY NOTE

The summary records in this volume include the corrections to the provisional summary records requested by members of the Commission and such editorial changes as were considered necessary.

The symbols appearing in the text, consisting of letters combined with figures, serve to identify United Nations documents. References to the *Yearbook of the International Law Commission* are in a shortened form consisting of the word *Yearbook* followed by suspension points, a year and a volume number, e.g. *Yearbook . . . 1971*, vol. II.

The Special Rapporteurs' reports discussed at the session and certain other documents, including the Commission's report to the General Assembly, are printed in volume II of this *Yearbook*.

A/CN.4/Ser.A/1975

UNITED NATIONS PUBLICATION

*Sales No. E.76.V.3*

Price: \$U.S. 12.00  
(or equivalent in other currencies)



## CONTENTS

	Page		Page
Members and officers of the Commission .....	ix	1309th meeting	
Agenda .....	x	<i>Wednesday, 14 May 1975, at 10.10 a.m.</i>	
Summary records .....	1	State responsibility ( <i>continued</i> )	
1302nd meeting		Draft articles submitted by the Special Rapporteur	
<i>Monday, 5 May 1975, at 3.30 p.m.</i>		Article 11 (Conduct of private individuals) ( <i>con-</i>	
Opening of the session .....	1	<i>tinued</i> ) .....	28
Statement by the outgoing Chairman .....	1	1310th meeting	
Election of officers .....	2	<i>Thursday, 15 May 1975, at 10.10 a.m.</i>	
Adoption of the agenda .....	2	Co-operation with other bodies	
Organization of work .....	2	Statement by the Observer for the Asian-African Legal	
1303rd meeting		Consultative Committee .....	33
<i>Tuesday, 6 May 1975, at 11.55 a.m.</i>		State responsibility ( <i>resumed from the previous meeting</i> )	
State responsibility		Draft articles submitted by the Special Rapporteur	
Draft articles submitted by the Special Rapporteur		Article 11 (Conduct of private individuals) ( <i>continued</i> )	36
Article 10 (Conduct of organs acting outside their		1311th meeting	
competence or contrary to the provisions concerning		<i>Friday, 16 May 1975, at 10.10 a.m.</i>	
their activity) .....	3	State responsibility ( <i>continued</i> )	
1304th meeting		Draft articles submitted by the Special Rapporteur	
<i>Wednesday, 7 May 1975, at 10.20 a.m.</i>		Article 11 (Conduct of private individuals) ( <i>continued</i> )	38
State responsibility ( <i>continued</i> )		1312th meeting	
Draft articles submitted by the Special Rapporteur		<i>Tuesday, 20 May 1975, at 3.10 p.m.</i>	
Article 10 (Conduct of organs acting outside their		State responsibility ( <i>continued</i> )	
competence or contrary to the provisions concerning		Draft articles submitted by the Special Rapporteur	
their activity) ( <i>continued</i> ) .....	6	Article 12 (Conduct of other subjects of international	
1305th meeting		law) .....	41
<i>Thursday, 8 May 1975, at 10.5 a.m.</i>		1313th meeting	
State responsibility ( <i>continued</i> )		<i>Wednesday, 21 May 1975, at 11.25 a.m.</i>	
Draft articles submitted by the Special Rapporteur		Organization of work ( <i>resumed from the 1302nd meeting</i> )	46
Article 10 (Conduct of organs acting outside their		State responsibility ( <i>resumed from the previous meeting</i> )	
competence or contrary to the provisions concerning		Draft articles submitted by the Special Rapporteur	
their activity) ( <i>continued</i> ) .....	10	Article 12 (Conduct of other subjects of international	
1306th meeting		law) ( <i>continued</i> ) .....	47
<i>Friday, 9 May 1975, at 10.45 a.m.</i>		1314th meeting	
State responsibility ( <i>continued</i> )		<i>Thursday, 22 May 1975, at 10.5 a.m.</i>	
Draft articles submitted by the Special Rapporteur		State responsibility ( <i>continued</i> )	
Article 10 (Conduct of organs acting outside their		Draft articles submitted by the Special Rapporteur	
competence or contrary to the provisions concerning		Article 12 (Conduct of other subjects of international	
their activity) ( <i>continued</i> ) .....	15	law) ( <i>continued</i> ) .....	51
1307th meeting		1315th meeting	
<i>Monday, 12 May 1975, at 3.5 p.m.</i>		<i>Friday, 23 May 1975, at 10.10 a.m.</i>	
State responsibility ( <i>continued</i> )		Eleventh session of the Seminar on International Law ..	56
Draft articles submitted by the Special Rapporteur		State responsibility ( <i>resumed from the previous meeting</i> )	
Article 10 (Conduct of organs acting outside their		Draft articles submitted by the Special Rapporteur	
competence or contrary to the provisions concerning		Article 12 (Conduct of other subjects of international	
their activity) ( <i>continued</i> ) .....	18	law) ( <i>continued</i> ) .....	56
Membership of the Drafting Committee .....	23	1316th meeting	
1308th meeting		<i>Monday, 26 May 1975, at 3.10 p.m.</i>	
<i>Tuesday, 13 May 1975, at 10.5 a.m.</i>		Eleventh session of the Seminar on International Law	
State responsibility ( <i>resumed from the previous meeting</i> )		( <i>resumed from the previous meeting</i> ) .....	61
Draft articles submitted by the Special Rapporteur		State responsibility ( <i>resumed from the previous meeting</i> )	
Article 11 (Conduct of private individuals) .....	23	Draft articles submitted by the Special Rapporteur	
		Article 13 (Retroactive attribution to a State of the	
		acts of organs of a successful insurrectional move-	
		ment) .....	62

	Page		Page
<b>1317th meeting</b>		Article Y (Determination of the property of a third State) and	
Tuesday, 27 May 1975, at 10.10 a.m.		Article Z (Treatment of the property of a third State)	105
State responsibility ( <i>continued</i> )		<b>1325th meeting</b>	
Draft articles submitted by the Special Rapporteur		Monday, 9 June 1975, at 3.10 p.m.	
Article 13 (Retroactive attribution to a State of the acts of organs of a successful insurrectional movement) ( <i>continued</i> )	67	Succession of States in respect of matters other than treaties ( <i>continued</i> )	
<b>1318th meeting</b>		Draft articles submitted by the Special Rapporteur	
Thursday, 29 May 1975, at 10.10 a.m.		Statement by Mr. Pinto on articles previously discussed	108
Succession of States in respect of matters other than treaties		Article 12 (Currency)	109
Introduction by the Special Rapporteur	72	<b>1326th meeting</b>	
Draft articles submitted by the Special Rapporteur		Tuesday, 10 June 1975, at 10.20 a.m.	
Article 9 (General principle of the passing of all State property)	73	Succession of States in respect of matters other than treaties ( <i>continued</i> )	
<b>1319th meeting</b>		Draft articles submitted by the Special Rapporteur	
Friday, 30 May 1975, at 10.15 a.m.		Article 12 (Currency) ( <i>continued</i> )	113
Succession of States in respect of matters other than treaties ( <i>continued</i> )		Article 13 (Treasury and State funds),	
Draft articles submitted by the Special Rapporteur		Article 14 (State archives and libraries) and	
Article 9 (General principle of the passing of all State property) ( <i>continued</i> )	77	Article 15 (State property situated outside the transferred territory)	113
<b>1320th meeting</b>		<b>1327th meeting</b>	
Monday, 2 June 1975, at 3.10 p.m.		Wednesday, 11 June 1975, at 10.20 a.m.	
Succession of States in respect of matters other than treaties ( <i>continued</i> )		Succession of States in respect of matters other than treaties ( <i>continued</i> )	
Draft articles submitted by the Special Rapporteur		Draft articles submitted by the Special Rapporteur	
Article 9 (General principle of the passing of all State property) ( <i>continued</i> )	82	Article 12 (Currency) ( <i>continued</i> )	117
Article 10 (Rights in respect of the authority to grant concessions)	86	<b>1328th meeting</b>	
<b>1321st meeting</b>		Thursday, 12 June 1975, at 10.15 a.m.	
Tuesday, 3 June 1975, at 10.15 a.m.		Succession of States in respect of matters other than treaties ( <i>continued</i> )	
Succession of States in respect of matters other than treaties ( <i>continued</i> )		Draft articles submitted by the Special Rapporteur	
Draft articles submitted by the Special Rapporteur		Article 12 (Currency) ( <i>continued</i> )	122
Article 10 (Rights in respect of the authority to grant concessions) ( <i>continued</i> )	88	<b>1329th meeting</b>	
Co-operation with other bodies ( <i>resumed from the 1310th meeting</i> )		Friday, 13 June 1975, at 10.10 a.m.	
Statement by the Observer for the Inter-American Juridical Committee	91	Eleventh session of the Seminar on International Law ( <i>resumed from the 1316th meeting</i> )	126
<b>1322nd meeting</b>		Succession of States in respect of matters other than treaties ( <i>resumed from the previous meeting</i> )	
Wednesday, 4 June 1975, at 10.10 a.m.		Draft articles proposed by the Drafting Committee	
Succession of States in respect of matters other than treaties ( <i>resumed from the previous meeting</i> )		Article 9 (General principle of the passing of State property)	126
Draft articles submitted by the Special Rapporteur		Article 11 (Passing of debts owed to the State)	127
Article 11 (State debt-claims)	94	Sub-paragraph (e) of article 3 (Use of terms) and	
<b>1323rd meeting</b>		Article X (Absence of effect of a succession of States on third State property)	128
Thursday, 5 June 1975, at 10.10 a.m.		Draft articles submitted by the Special Rapporteur	
Organization of work ( <i>resumed from the 1313th meeting</i> )	99	Article 12 (Currency) ( <i>continued</i> )	130
Succession of States in respect of matters other than treaties ( <i>resumed from the previous meeting</i> )		<b>1330th meeting</b>	
Draft articles submitted by the Special Rapporteur		Monday, 16 June 1975, at 3.10 p.m.	
Article 11 (State debt-claims) ( <i>continued</i> )	99	Succession of States in respect of matters other than treaties ( <i>continued</i> )	
<b>1324th meeting</b>		Production of Russian texts of articles	131
Friday, 6 June 1975, at 10.15 a.m.		Most-favoured-nation clause	
Succession of States in respect of matters other than treaties ( <i>continued</i> )		Introductory statement by the Special Rapporteur	131
Draft articles submitted by the Special Rapporteur		Draft articles submitted by the Special Rapporteur	
Article X (Definition of a third State)	103	Article 6 (Presumption of unconditional character of the most-favoured-nation clause),	
		Article 6 <i>bis</i> (Effect of an unconditional most-favoured-nation clause) and	
		Article 6 <i>ter</i> (Effect of a most-favoured-nation clause conditional on material reciprocity)	135

	Page
<b>1331st meeting</b>	
<i>Tuesday, 17 June 1975, at 10.10 a.m.</i>	
Most-favoured-nation clause ( <i>continued</i> )	
Draft articles submitted by the Special Rapporteur	
Article 6 (Presumption of unconditional character of the most-favoured-nation clause),	
Article 6 <i>bis</i> (Effect of an unconditional most-favoured-nation clause) and	
Article 6 <i>ter</i> (Effect of a most-favoured-nation clause conditional on material reciprocity) ( <i>continued</i> ) ..	136
Article 6 <i>quater</i> (Observance of the laws and regulations of the granting State) .....	139
<b>1332nd meeting</b>	
<i>Wednesday, 18 June 1975, at 10.10 a.m.</i>	
Tribute to the memory of Mr. Eisaku Sato, former Prime Minister of Japan .....	142
Most-favoured-nation clause ( <i>resumed from the previous meeting</i> )	
Draft articles submitted by the Special Rapporteur	
Article 6 <i>quater</i> (Observance of the laws and regulations of the granting State) ( <i>continued</i> ) and	
Article 6 <i>quinquies</i> (Prohibition of evading obligations arising from a most-favoured-nation clause) .....	142
<b>1333rd meeting</b>	
<i>Thursday, 19 June 1975, at 10.10 a.m.</i>	
Most-favoured-nation clause ( <i>continued</i> )	
Draft articles submitted by the Special Rapporteur	
Article 7 (The <i>ejusdem genesis</i> rule) and	
Article 7 <i>bis</i> (The scope of the most-favoured-nation clause regarding persons and things) .....	148
Co-operation with other bodies ( <i>resumed from the 1321st meeting</i> )	
Statement by the Observer for the European Committee on Legal Co-operation .....	152
<b>1334th meeting</b>	
<i>Friday, 20 June 1975, at 10.10 a.m.</i>	
Most-favoured-nation clause ( <i>resumed from the previous meeting</i> )	
Draft articles submitted by the Special Rapporteur	
Article 7 (The <i>ejusdem genesis</i> rule) and	
Article 7 <i>bis</i> (The scope of the most-favoured-nation clause regarding persons and things) ( <i>continued</i> ) ..	154
Article 8 (The most-favoured-nation clause and benefit-restricting stipulations ( <i>clauses réservées</i> )) and	
Article 8 <i>bis</i> (The most-favoured-nation clause and multilateral agreements) .....	156
<b>1335th meeting</b>	
<i>Monday, 23 June 1975, at 3.15 p.m.</i>	
Most-favoured-nation clause ( <i>continued</i> )	
Draft articles submitted by the Special Rapporteur	
Article 8 (The most-favoured-nation clause and benefit-restricting stipulations ( <i>clauses réservées</i> )) and	
Article 8 <i>bis</i> (The most-favoured-nation clause and multilateral agreements) ( <i>continued</i> ) .....	158
<b>1336th meeting</b>	
<i>Tuesday, 24 June 1975, at 10.10 a.m.</i>	
Most-favoured-nation clause ( <i>continued</i> )	
Draft articles submitted by the Special Rapporteur	
Article 9 (National treatment clause) and	
Article 10 (National treatment) .....	164

	Page
<b>1337th meeting</b>	
<i>Wednesday, 25 June 1975, at 10.20 a.m.</i>	
Most-favoured-nation clause ( <i>continued</i> )	
Statement by the Special Rapporteur on the question of the national treatment clause .....	170
Draft articles submitted by the Special Rapporteur	
Article 13 (The right of the beneficiary State under a most-favoured-nation clause to national treatment) .....	170
<b>1338th meeting</b>	
<i>Thursday, 26 June 1975, at 10.10 a.m.</i>	
Most-favoured-nation clause ( <i>continued</i> )	
Draft articles submitted by the Special Rapporteur	
Article 13 (The right of the beneficiary State under a most-favoured-nation clause to national treatment) ( <i>continued</i> ) .....	175
<b>1339th meeting</b>	
<i>Friday, 27 June 1975, at 10.10 a.m.</i>	
Most-favoured-nation clause ( <i>continued</i> )	
Draft articles submitted by the Special Rapporteur	
Article 14 (Cumulation of national treatment and most-favoured-nation treatment) .....	180
Article 15 (The commencement of the functioning of a most-favoured-nation clause) and	
Article 16 (Termination or suspension of the functioning of a most-favoured-nation clause) .....	182
The case of customs unions and similar associations of States .....	184
<b>1340th meeting</b>	
<i>Monday, 30 June 1975, at 3.10 p.m.</i>	
Most-favoured-nation clause ( <i>continued</i> )	
Draft articles submitted by the Special Rapporteur	
Article 15 (The commencement of the functioning of a most-favoured-nation clause) and	
Article 16 (Termination or suspension of the functioning of a most-favoured-nation clause) ( <i>continued</i> ) .....	185
<b>1341st meeting</b>	
<i>Tuesday, 1 July 1975, at 10.15 a.m.</i>	
Most-favoured-nation clause ( <i>continued</i> )	
Draft articles submitted by the Special Rapporteur	
Article 0 (additional article) .....	190
<b>1342nd meeting</b>	
<i>Wednesday, 2 July 1975, at 10.10 a.m.</i>	
Most-favoured-nation clause ( <i>continued</i> )	
Draft articles submitted by the Special Rapporteur	
Article 0 (additional article) ( <i>continued</i> ) .....	195
<b>1343rd meeting</b>	
<i>Thursday, 3 July 1975, at 10.20 a.m.</i>	
Most-favoured-nation clause ( <i>continued</i> )	
Draft articles submitted by the Special Rapporteur	
Article 0 (additional article) ( <i>continued</i> ) and	
New article proposed by Mr. Reuter .....	201
<b>1344th meeting</b>	
<i>Friday, 4 July 1975, at 10.10 a.m.</i>	
Most-favoured-nation clause ( <i>continued</i> )	
Draft articles submitted by the Special Rapporteur	
Article 0 (additional article) ( <i>continued</i> ) .....	207
Question of treaties concluded between States and international organizations or between two or more international organizations	

	Page		Page
Draft articles submitted by the Special Rapporteur		<b>1348th meeting</b>	
Article 7 (Full powers) and		<i>Thursday, 10 July 1975, at 10.15 a.m.</i>	
Article 2 (Use of terms) paragraph 1 (c) .....	207	Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )	
<b>1345th meeting</b>		Draft articles submitted by the Special Rapporteur	
<i>Monday, 7 July 1975, at 3.50 p.m.</i>		Article 11 (Means of expressing consent to be bound by a treaty),	
Welcome to Mr. Rossides .....	213	Article 2 (Use of terms), paragraph 1 (b),	
State responsibility ( <i>resumed from the 1317th meeting</i> )		Article 12 (Consent to be bound by a treaty expressed by signature),	
Draft articles proposed by the Drafting Committee		Article 13 (Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty),	
Article 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity) ....	214	Article 14 (Consent to be bound by a treaty expressed by acceptance, approval or ratification),	
Article 11 (Conduct of persons not acting on behalf of the State) .....	214	Article 15 (Consent to be bound by a treaty expressed by accession) and	
Article 12 (Conduct of organs of another State) ....	215	Article 16 (Exchange, deposit or notification of instruments of ratification, acceptance, approval or accession) ( <i>continued</i> ) .....	232
Article 12 <i>bis</i> (Conduct of organs of an international organization) .....	216	Article 17 (Consent to be bound by part of a treaty and choice of differing provisions) and	
Article 12 <i>ter</i> (Conduct of organs of an insurrectional movement) .....	216	Article 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) ..	236
Article 13 (Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State) .....	217	Article 19 (Formulation of reservations),	
Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>resumed from the previous meeting</i> )		Article 20 (Acceptance of and objection to reservations),	
Draft articles submitted by the Special Rapporteur		Article 21 (Legal effects of reservations and of objections to reservations),	
Article 7 (Full powers) and		Article 22 (Withdrawal of reservations and of objections to reservations) and	
Article 2 (Use of terms), paragraph 1 (c) ( <i>continued</i> ) ..	218	Article 23 (Procedure regarding reservations) .....	237
Article 8 (Subsequent confirmation of an act performed without authorization) .....	219	<b>1349th meeting</b>	
Article 9 (Adoption of the text),		<i>Friday, 11 July 1975, at 10.15 a.m.</i>	
Article 2 (Use of terms), paragraph 1 (g), and		Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )	
Article 10 (Authentication of the text) .....	219	Draft articles submitted by the Special Rapporteur	
<b>1346th meeting</b>		Article 19 (Formulation of reservations),	
<i>Tuesday, 8 July 1975, at 10.10 a.m.</i>		Article 20 (Acceptance of and objection to reservations),	
Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )		Article 21 (Legal effects of reservations and of objections to reservations),	
Draft articles submitted by the Special Rapporteur		Article 22 (Withdrawal of reservations and of objections to reservations) and	
Article 9 (Adoption of the text),		Article 23 (Procedure regarding reservations) ( <i>continued</i> ) .....	240
Article 2 (Use of terms), paragraph 1 (g), and		<b>1350th meeting</b>	
Article 10 (Authentication of the text) ( <i>continued</i> ) ...	220	<i>Monday, 14 July 1975, at 3.15 p.m.</i>	
<b>1347th meeting</b>		Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )	
<i>Wednesday, 9 July 1975, at 11.10 a.m.</i>		Draft articles submitted by the Special Rapporteur	
Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )		Article 19 (Formulation of reservations),	
Draft articles submitted by the Special Rapporteur		Article 20 (Acceptance of and objection to reservations) and	
Article 11 (Means of expressing consent to be bound by a treaty),		Article 21 (Legal effects of reservations and of objections to reservations) ( <i>continued</i> ) .....	246
Article 2 (Use of terms), paragraph 1 (b),		Article 22 (Withdrawal of reservations and of objections to reservations) and	
Article 12 (Consent to be bound by a treaty expressed by signature),		Article 23 (Procedure regarding reservations) ( <i>continued</i> ) .....	247
Article 13 (Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty),			
Article 14 (Consent to be bound by a treaty expressed by acceptance, approval or ratification),			
Article 15 (Consent to be bound by a treaty expressed by accession) and			
Article 16 (Exchange, deposit or notification of instruments of ratification, acceptance, approval or accession) .....	227		

	Page		Page
<b>1351st meeting</b>			
<i>Wednesday, 16 July 1975, at 10.15 a.m.</i>			
Draft report of the Commission on the work of its twenty-seventh session		Article 13 (An exchange of instruments constituting a treaty as a means of establishing consent to be bound by a treaty) . . . . .	269
Chapter I. Organization of the session . . . . .	250	Article 14 (Ratification, act of formal confirmation, acceptance or approval as a means of establishing consent to be bound by a treaty) . . . . .	269
Chapter II. State responsibility		Article 15 (Accession as a means of establishing consent to be bound by a treaty) . . . . .	270
A. Introduction . . . . .	250	Article 16 (Exchange, deposit or notification of instruments of ratification, formal confirmation, acceptance, approval or accession) . . . . .	270
Succession of States in respect of matters other than treaties ( <i>resumed from the 1330th meeting</i> )		Article 17 (Consent to be bound by part of a treaty and choice of differing provisions) . . . . .	271
New article proposed by the Special Rapporteur . . . . .	253	Article 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) . . . . .	271
<b>1352nd meeting</b>		Most-favoured-nation clause ( <i>resumed from the previous meeting</i> )	
<i>Thursday, 17 July 1975, at 10 a.m.</i>		Draft articles proposed by the Drafting Committee	
Most-favoured-nation clause ( <i>resumed from the 1344th meeting</i> )		Article 0 [21] (Most-favoured-nation clauses in relation to treatment under a generalized system of preferences) ( <i>continued</i> ) . . . . .	272
Draft articles proposed by the Drafting Committee		<b>1354th meeting</b>	
Article 6 [8] (Unconditionality of most-favoured-nation clauses) . . . . .	254	<i>Tuesday, 22 July 1975, at 10.15 a.m.</i>	
Article 6 bis [9] (Effect of an unconditional most-favoured-nation clause) . . . . .	254	Draft report of the Commission on the work of its twenty-seventh session ( <i>resumed from the 1351st meeting</i> )	
Article 6 ter [10] (Effect of a most-favoured-nation clause conditional on material reciprocity) . . . . .	255	Chapter II. State responsibility ( <i>continued</i> )	
Article 7 [11] (Scope of rights under a most-favoured-nation clause) . . . . .	256	B. Draft articles on State responsibility	
Article 7 bis [12] (Entitlement to rights under a most-favoured-nation clause) . . . . .	256	Commentary to article 12 (Conduct of organs of another State) . . . . .	273
Article 6 ter/bis [13] (Irrelevance of the fact that treatment is extended gratuitously or against compensation) . . . . .	257	Commentary to article 12 bis [13] (Conduct of organs of an international organization) . . . . .	274
Article 8 [14] (Irrelevance of restrictions agreed between the granting and third States) . . . . .	257	Chapter IV. The most-favoured-nation clause	
Article 8 bis [15] (Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement) . . . . .	257	A. Introduction . . . . .	277
Article 13 [16] (Right to national treatment under a most-favoured-nation clause) . . . . .	257	B. Draft articles on the most-favoured-nation clause	
Article 14 [17] (Most-favoured-nation treatment, national or other treatment with respect to the same subject matter) . . . . .	258	Commentary to articles 6 [8] (Unconditionality of most-favoured-nation clauses), 6 bis [9] (Effect of an unconditional most-favoured-nation clause conditional on material reciprocity) . . . . .	278
Article 15 [18] (Commencement of enjoyment of rights under a most-favoured-nation clause) and Article 16 [19] (Termination or suspension of enjoyment of rights under a most-favoured-nation clause)	260	<b>1355th meeting</b>	
Article 6 quater [20] (The exercise of rights arising under a most-favoured-nation clause and compliance with the laws of the granting State) . . . . .	262	<i>Wednesday, 23 July 1975, at 10.10 a.m.</i>	
Article 0 [21] (Most-favoured-nation clauses in relation to treatment under a generalized system of preferences) . . . . .	262	Draft report of the Commission on the work of its twenty-seventh session ( <i>continued</i> )	
<b>1353rd meeting</b>		Chapter III. Succession of States in respect of matters other than treaties	
<i>Monday, 21 July 1975, at 3.10 p.m.</i>		A. Introduction . . . . .	278
Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>resumed from the 1350th meeting</i> )		B. Draft articles on succession of States in respect of matters other than treaties	
Draft articles proposed by the Drafting Committee		Commentary to article 9 (General principle of the passing of State property) . . . . .	279
Article 2 (Use of terms)		Commentary to article [11] [Passing of debts owed to the State] . . . . .	279
Paragraphs 1 (b) and 1 (b) bis) . . . . .	263	Commentary to article 3 (Use of terms), subparagraph (e) . . . . .	281
Paragraphs 1 (b) ter), 1 (c) and 1 (c) bis) . . . . .	264	Commentary to article X (Absence of effect of a succession of States on third State property) . . . . .	281
Paragraph 1 (g) . . . . .	265	Chapter II. State responsibility ( <i>resumed from the previous meeting</i> )	
Article 7 (Full powers and powers) . . . . .	265	B. Draft articles on State responsibility ( <i>continued</i> )	
Article 8 (Subsequent confirmation of an act performed without authorization) . . . . .	266	Commentary to article 12 ter [14] (Conduct of organs of an insurrectional movement) . . . . .	282
Article 9 (Adoption of the text) . . . . .	266	Commentary to article 13 [15] (Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State) . . . . .	283
Article 10 (Authentication of the text) . . . . .	267		
Article 11 (Means of establishing consent to be bound by a treaty) . . . . .	268		
Article 12 (Signature as a means of establishing consent to be bound by a treaty) . . . . .	268		

	Page		Page
<b>1356th meeting</b>			
<i>Wednesday, 23 July 1975, at 4.45 p.m.</i>			
Draft report of the Commission on the work of its twenty-seventh session ( <i>continued</i> )		Commentary to article 17 (Consent to be bound by part of a treaty and choice of differing provisions) . . . . .	290
Chapter IV. The most-favoured-nation clause ( <i>resumed from the 1354th meeting</i> )		Commentary to article 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) . . . . .	290
A. Introduction ( <i>continued</i> ) . . . . .	284	Chapter IV. The most-favoured-nation clause ( <i>resumed from the previous meeting</i> )	
B. Draft articles on the most-favoured-nation clause ( <i>continued</i> ) . . . . .	284	B. Draft articles on the most-favoured-nation clause ( <i>continued</i> )	
Commentary to article 6 <i>ter/bis</i> [13] (Irrelevance of the fact that treatment is extended gratuitously or against compensation) . . . . .	284	Commentary to article 13 [16] (Right to national treatment under a most-favoured-nation clause) . . . . .	290
Commentary to article 6 <i>quater</i> [20] (The exercise of rights arising under a most-favoured-nation clause and compliance with the laws of the granting State) . . . . .	284	Commentary to article 14 [17] (Most-favoured-nation treatment, national [or other] treatment with respect to the same subject-matter) . . . . .	291
Commentary to articles 7 [11] (Scope of rights under a most-favoured-nation clause) and 7 <i>bis</i> [12] (Entitlement to rights under a most-favoured-nation clause) . . . . .	285	Commentary to article 15 [18] (Commencement of enjoyment of rights under a most-favoured-nation clause) . . . . .	291
Commentary to article 8 [14] (Irrelevance of restrictions agreed between the granting and third States) . . . . .	286	Commentary to article 16 [19] (Termination or suspension of enjoyment of rights under a most-favoured-nation clause) . . . . .	291
Commentary to article 8 <i>bis</i> [15] (Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement) . . . . .	286		
<b>1357th meeting</b>		<b>1358th meeting</b>	
<i>Thursday, 24 July 1975, at 10.10 a.m.</i>		<i>Thursday, 24 July 1975, at 4.10 p.m.</i>	
Draft report of the Commission on the work of its twenty-seventh session ( <i>continued</i> )		Draft report of the Commission on the work of its twenty-seventh session ( <i>continued</i> )	
Chapter V. Question of treaties concluded between States and international organizations or between two or more international organizations		Chapter IV. The most-favoured-nation clause ( <i>continued</i> )	
A. Introduction . . . . .	287	B. Draft articles on the most-favoured-nation clause ( <i>continued</i> )	
B. Draft articles on treaties concluded between States and international organizations or between international organizations		Commentary to article 0 [21] (Most-favoured-nation clauses in relation to treatment under a generalized system of preferences) . . . . .	292
Commentary to article 7 (Full powers and powers)	288	Chapter II. State responsibility ( <i>resumed from the 1355th meeting</i> )	
Commentary to article 2 (Use of terms), paragraphs 1 (c) and 1 (c) <i>bis</i> . . . . .	289	B. Draft articles on State responsibility ( <i>continued</i> )	
Commentary to article 8 (Subsequent confirmation of an act performed without authorization)	289	Commentary to article 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity) . . . . .	293
Commentary to article 9 (Adoption of the text)	289	Chapter VI. Other decisions and conclusions of the Commission	
Commentary to article 10 (Authentication of the text) . . . . .	289	A. The law of the non-navigational uses of international watercourses . . . . .	293
Commentary to article 11 (Means of establishing consent to be bound by a treaty) . . . . .	290	B. Long-term programme of work and	
Commentary to article 2 (Use of terms), paragraphs 1 (b), 1 (b) <i>bis</i> and 1 (b) <i>ter</i> . . . . .	290	C. Organization of future work . . . . .	293
Commentary to article 12 (Signature as a means of establishing consent to be bound by a treaty) . . . . .	290	D. Co-operation with other bodies . . . . .	293
Commentary to article 13 (An exchange of instruments constituting a treaty as a means of establishing consent to be bound by a treaty) . . . . .	290	E. Date and place of the twenty-eighth session . . . . .	293
Commentary to article 14 (Ratification, act of formal confirmation, acceptance or approval as a means of establishing consent to be bound by a treaty) . . . . .	290	F. Representation at the thirtieth session of the General Assembly . . . . .	294
Commentary to article 15 (Accession as a means of establishing consent to be bound by a treaty)	290	G. Gilberto Amado Memorial Lecture and	
Commentary to article 2 (Use of terms), paragraph 1 (g) . . . . .	290	H. International Law Seminar . . . . .	294
Commentary to article 16 (Exchange, deposit or notification of instruments of ratification, formal confirmation, acceptance, approval or accession) . . . . .	290		
		<b>1359th meeting</b>	
		<i>Friday, 25 July 1975, at 10.25 a.m.</i>	
		Draft report of the Commission on the work of its twenty-seventh session ( <i>continued</i> )	
		Chapter II. State responsibility ( <i>resumed from the previous meeting</i> )	
		B. Draft articles on State responsibility ( <i>continued</i> )	
		Commentary to article 11 (Conduct of persons not acting on behalf of the State) . . . . .	294
		Chapter VI. Other decisions and conclusions of the Commission ( <i>resumed from the previous meeting</i> )	
		B. Programme and Organization of Work . . . . .	295
		Expression of appreciation to Mr. Teslenko, Deputy Director of the Codification Division . . . . .	296
		Closure of the session . . . . .	296

## MEMBERS OF THE COMMISSION

<i>Name</i>	<i>Country of nationality</i>	<i>Name</i>	<i>Country of nationality</i>
Mr. Roberto AGO	Italy	Mr. Paul REUTER	France
Mr. Mohammed BEDJAOUTI	Algeria	Mr. Zenon ROSSIDES	Cyprus
Mr. Ali Suat BILGE	Turkey	Mr. Milan ŠAHOVIĆ	Yugoslavia
Mr. Juan José CALLE Y CALLE	Peru	Mr. José SETTE CÂMARA	Brazil
Mr. Jorge CASTAÑEDA	Mexico	Mr. Abdul Hakim TABIBI	Afghanistan
Mr. Abdullah EL-ERIAN	Egypt	Mr. Arnold J. P. TAMMES	Netherlands
Mr. Taslim O. ELIAS	Nigeria	Mr. Doudou THIAM	Senegal
Mr. Edvard HAMBRO	Norway	Mr. Senjin TSURUOKA	Japan
Mr. Richard D. KEARNEY	United States of America	Mr. Nikolai USHAKOV	Union of Soviet Socialist Republics
Mr. Alfredo MARTÍNEZ MORENO	El Salvador	Mr. Endre USTOR	Hungary
Mr. C. W. PINTO	Sri Lanka	Sir Francis VALLAT	United Kingdom of Great Britain and Northern Ireland
Mr. Robert Q. QUENTIN-BAXTER	New Zealand		
Mr. Alfred RAMANGASOAVINA	Madagascar	Mr. Mustafa Kamil YASSEEN	Iraq

## OFFICERS

Chairman:	Mr. Abdul Hakim TABIBI
First Vice-Chairman:	Mr. Muhammed BEDJAOUTI
Second Vice-Chairman:	Mr. Milan ŠAHOVIĆ
Rapporteur:	Mr. Alfredo MARTÍNEZ MORENO

*Mr. Yuri M. RYBAKOV, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission.*

## **AGENDA**

The Commission adopted the following agenda at its 1302nd meeting, held on 5 May 1975:

1. State responsibility
2. Succession of States in respect of matters other than treaties
3. Most-favoured-nation clause
4. Question of treaties concluded between States and international organizations or between two or more international organizations
5. The law of the non-navigational uses of international watercourses
6. Long-term programme of work
7. Organization of future work
8. Co-operation with other bodies
9. Date and place of the twenty-eighth session
10. Other business



# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE TWENTY-SEVENTH SESSION

*Held at Geneva from 5 May to 25 July 1975*

### 1302nd MEETING

*Monday, 5 May 1975, at 3.30 p.m.*

*Chairman:* Mr. Endre USTOR

*later:* Mr. Abdul Hakim TABIBI

*Members present:* Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Castañeda, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Yasseen.

### Opening of the Session

1. The CHAIRMAN declared open the twenty-seventh session of the International Law Commission and welcomed the members and the Legal Counsel of the United Nations.

### Statement by the outgoing Chairman

2. The CHAIRMAN said that he had presented the Commission's report on the work of its previous session to the Sixth Committee of the General Assembly, at its twenty-ninth session. On that occasion the Committee, presided over by Mr. Šahović, had paid a moving tribute to their late colleague, Professor Bartoš.

3. He had made a long statement in the Sixth Committee, for the benefit of representatives who had found it difficult to study the Commission's voluminous report (A/9610/Rev.1). His statement had begun with a summary of all the Commission's activities, followed by a more detailed description of its work on the topic of succession of States in respect of treaties; that difficult, intricate and delicate topic was, on the whole, new to the Sixth Committee, and he had therefore felt justified in speaking on it at some length, at the expense of the topics of State responsibility, treaties between States and international organizations and the law of the non-navigational uses of international watercourses. He had also commented in some detail on the report of the Joint Inspection Unit (A/9795) in so far as it touched on the so-called problems of the International Law Commission. The debate on his statement was summarized in the relevant report of the Sixth Committee (A/9897), which gave most prominence to the draft articles on succession of States in respect of treaties.

4. In his closing statement, he had thanked the Sixth Committee for its appreciation of the Commission's work and had promised that the criticisms expressed would be duly taken into account. The debate had led to the adoption of General Assembly resolution 3315 (XXIX)

of 14 December 1974. The most important provisions of that resolution were paragraph 1 of part II, in which the General Assembly expressed its appreciation to the International Law Commission for its valuable work on the question of succession of States in respect of treaties and to the Special Rapporteurs on the topic for their contribution to that work; paragraph 6 of part I, in which the Assembly recognized the efficacy of the methods and conditions of work by which the Commission had carried out its tasks, and expressed confidence that it would continue to adopt methods of work well suited to the realization of the tasks entrusted to it; and paragraph 5 of part I in which the Assembly approved a twelve-week period for the Commission's annual sessions, subject to review by the General Assembly whenever necessary. In paragraph 8 of part I, the Assembly expressed the wish that, in conjunction with future sessions of the Commission, further seminars might be organized, which should continue to ensure the participation of an increasing number of jurists of developing countries. Although the resolution was the result of a compromise, the Commission would note that the Sixth Committee had expressed general appreciation of its work.

5. He had attended the annual session of the Asian-African Legal Consultative Committee held at Teheran, and Mr. Martínez Moreno had represented the Commission at the session of the Inter-American Juridical Committee. The Commission had been represented by Mr. Tabibi at the 1975 session of the European Committee on Legal Co-operation.

6. An event of importance to the Commission, which had occurred since its previous session, had been the United Nations Conference on the Representation of States in their Relations with International Organizations, held at Vienna in February and March 1975. The Conference, whose work had been based on the Commission's draft articles, had been presided over by Mr. Sette Câmara. In its Final Act (A/CONF.67/15), it had adopted two resolutions of particular interest to the Commission, one paying a tribute to the International Law Commission for its outstanding contribution to the codification and progressive development of the rules of international law on the representation of States in their relations with international organizations, and the other paying a tribute to Mr. El-Erian, the Expert Consultant, and expressing deep appreciation of the invaluable contribution he had made in his capacity both as Special Rapporteur of the International Law Commission and as Expert Consultant to the Conference. The Conference had adopted a Convention on the Representation of States in their Relations with International Organizations of a Universal Character (A/CONF.67/16).

7. In conclusion, he thanked the Commission for the confidence it had placed in him by electing him Chairman for its twenty-sixth session; he would always look back with pleasure to the term during which he had held that office.

#### Election of officers

8. The CHAIRMAN called for nominations for the office of Chairman.

9. Mr. YASSEEN, after congratulating the outgoing Chairman on the masterly way in which he had conducted the business of the preceding session and pleaded the Commission's cause in the General Assembly, nominated Mr. Tabibi, who had on many occasions distinguished himself in the Sixth Committee and at United Nations codification conferences. As the champion of the interests of land-locked countries, Mr. Tabibi had contributed notably to the acceptance of those countries' point of view in the international bodies concerned with the law of the sea.

10. Mr. ELIAS seconded the nomination and associated himself with the tribute paid to the outgoing Chairman.

11. Mr. CASTAÑEDA, speaking also on behalf of Mr. Martínez Moreno and Mr. Sette Câmara, and Mr. HAMBRO supported the nomination of Mr. Tabibi and also congratulated the outgoing Chairman on the manner in which he had represented the Commission at the General Assembly's twenty-ninth session.

12. Mr. EL-ERIAN wholeheartedly associated himself with those sentiments. He thanked the outgoing Chairman for his reference to the recent Vienna Conference and paid his own tribute to Mr. Sette Câmara for his outstanding leadership as its President, to the Legal Counsel and to the staff of the Secretariat who had contributed to the success of the work.

13. He welcomed the nomination of Mr. Tabibi, whose long and sincere devotion to the International Law Commission eminently fitted him for the office of Chairman.

14. Mr. USHAKOV supported the nomination of Mr. Tabibi and associated himself with the tributes to the outgoing Chairman.

*Mr. Tabibi was unanimously elected Chairman and took the Chair.*

15. The CHAIRMAN thanked the Commission for the honour it had done him in electing him Chairman—an honour which he took as a tribute to the devotion to international law and international co-operation shown by the Asian-African region to which he belonged. He would do his utmost to discharge his duties in accordance with the traditions of the Commission and to follow in the footsteps of his distinguished predecessors.

16. The adoption by the 1975 Vienna Conference of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character constituted a further success for the International Law Commission. The preparation of the draft articles for that Convention had been a distinguished contribution by the Commission to the codification and progressive development of international law

and to the working of international organizations. In his own name and on behalf of the Commission he congratulated Mr. El-Erian for his outstanding work as Special Rapporteur for the topic in the Commission, and as Expert Consultant at the Vienna Conference. He also congratulated Mr. Sette Câmara for the distinguished services he had rendered as President of that Conference.

17. He associated himself with the tributes paid to the outgoing Chairman for the able manner in which he had conducted the Commission's deliberations at its previous session and for the tact and wisdom with which he had represented the Commission at the General Assembly.

18. He then called for nominations for the office of first Vice-Chairman.

19. Mr. USHAKOV nominated Mr. Bedjaoui.

20. Mr. AGO, Mr. YASSEEN, Mr. RAMANGASOA-VINA, Mr. REUTER, Mr. EL-ERIAN, Mr. ELIAS, Mr. MARTÍNEZ MORENO, speaking also on behalf of Mr. Castañeda and Mr. Sette Câmara, and Mr. ŠAHOVIĆ seconded the nomination.

*Mr. Bedjaoui was unanimously elected first Vice-Chairman.*

21. Mr. BEDJAOUI thanked the Commission for electing him.

22. The CHAIRMAN called for nominations for the office of second Vice-Chairman.

23. Mr. USTOR nominated Mr. Šahović.

*Mr. Šahović was elected second Vice-Chairman by acclamation.*

24. Mr. ŠAHOVIĆ thanked the members of the Commission for electing him.

25. The CHAIRMAN called for nominations for the office of Chairman of the Drafting Committee.

26. Mr. AGO nominated Mr. Quentin-Baxter.

*Mr. Quentin-Baxter was elected Chairman of the Drafting Committee by acclamation.*

27. Mr. QUENTIN-BAXTER thanked the members of the Commission for electing him.

28. The CHAIRMAN called for nominations for the office of Rapporteur.

29. Mr. YASSEEN nominated Mr. Martínez Moreno.

*Mr. Martínez Moreno was elected Rapporteur by acclamation.*

30. Mr. MARTÍNEZ MORENO thanked the members of the Commission for electing him.

#### Adoption of the agenda

*The provisional agenda (A/CN.4/284) was adopted unanimously.*

#### Organization of Work

31. Mr. KEARNEY congratulated the Chairman and officers on their election and associated himself with the tributes paid to the outgoing Chairman.

32. Announcing his intention to propose the establishment of a planning committee, he suggested that the document he had submitted on the subject might be

given consideration at an early stage, so that the planning committee, if the Commission decided to establish it, should be able to function during the present session.

The text of the document read:

"1. The Planning Committee of the International Law Commission will consist of five members. The Chairman of the Committee will be the First Vice-Chairman of the Commission. The membership will reflect the composition of the Commission.

"2. The tasks of the Committee will include:

"(a) development, on a continuing basis, of a long range program of work;

"(b) review of the working methods of the Commission and development of proposals for any appropriate changes in working methods, either in general or for particular items on the Commission's agenda;

"(c) examination of the working conditions of the Commission, including the requirements of the Secretariat in supporting the work of the Commission, and formulation of suggestions for any needed improvements.

"3. The representative of the Secretary General or his designee will be invited to attend all meetings of the Committee.

"4. The Committee will submit a report of its decisions and proposals two weeks prior to the close of each session for consideration by the Commission."

33. Mr. USHAKOV suggested that Mr. Kearney's proposal should be considered under item 7 of the agenda: Organization of future work.

34. Mr. BEDJAOUÏ welcomed Mr. Kearney's proposal that a committee should be set up to plan the Commission's long-term programme of work and to review its working methods. He thought, however, that, as Mr. Ushakov had suggested, the proposal should be dealt with later in the session under item 7 of the agenda, in order not to upset the order of the Commission's work. In order to hasten consideration of the proposal without delaying the Commission's work, he suggested that it should first be considered by the Bureau, or by the enlarged Bureau, and that, when a consensus had been reached, the Commission should be invited to take a decision.

35. The CHAIRMAN said that the enlarged Bureau would examine Mr. Kearney's proposal and report back to the Commission.

The meeting rose at 5.5 p.m.

### 1303rd MEETING

Tuesday, 6 May 1975, at 11.55 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. El-Erian, Mr. Elias, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

### State responsibility

(A/CN.4/264 and Add.1;<sup>1</sup> A/9610/Rev.1<sup>2</sup>)

[Item 1 of the agenda]

### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR ARTICLE 10

1. The CHAIRMAN invited the Special Rapporteur to introduce article 10 of his draft, which read:

#### Article 10<sup>3</sup>

*Conduct of organs acting outside their competence or contrary to the provisions concerning their activity*

1. The conduct of an organ of the State or of an entity empowered to exercise elements of the governmental authority which, while acting in its official capacity, exceeds its competence according to internal law or contravenes the rules of that law concerning its activity shall nevertheless be considered as an act of the State under international law.

2. However, such conduct shall not be considered as an act of the State if, by its very nature, it was wholly foreign to the specific functions of the organ or if, even from other aspects, the organ's lack of competence was manifest.

2. Mr. AGO (Special Rapporteur) said that in considering article 10 of the draft articles on State responsibility, the Commission would be continuing its work on the problem of the attribution to the State of an act which could be considered as internationally wrongful and, hence, as generating international responsibility. In draft articles 5 to 9, adopted at its twenty-fifth and twenty-sixth sessions (A/9610/Rev.1, chapter III, section B) the Commission had covered the different classes of conduct which must be recognized as constituting an "act of the State", and had thus stated the different cases in which the subjective condition for the existence of an internationally wrongful act must be considered to be fulfilled.

3. In article 5, it had defined the basic category of acts of the State by affirming the principle that the "conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question". Having established that principle, the Commission had added further particulars to it in article 6, by affirming that "The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the organization of the State". That was a very important provision, for in the practice of States and in the arguments of foreign ministries there was often a traditional tendency to try to relieve the State of its responsibility whenever the organ which had acted was a subordinate organ. The Commission had taken a very clear position on that issue by affirming that, even if the organ which had acted in a certain way was a

<sup>1</sup> Yearbook . . . 1972, vol. II, pp. 71-160.

<sup>2</sup> Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 10 (see Yearbook . . . 1974, vol. II, Part One, pp. 157-331).

<sup>3</sup> Text as revised by the Special Rapporteur.

subordinate organ, its conduct must be attributed to the State, and the State must be held responsible for that conduct under international law.

4. The categories specified in articles 7, 8 and 9 supplemented the fundamental category defined in article 5, namely, the category of organs of the State "having that status under the internal law of that State". From the international point of view, the organization of the State was considered as a unit, and the notion of an "act of the State" was broad, whereas in the context of the internal legal order, the notion of an "act of the State" properly so called was much narrower. It was from the point of view of international law, however, that acts of the State as a subject of international law—the acts which could engage its international responsibility—must be defined. Thus, article 7 affirmed that "The conduct of an organ of an entity which is not a part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question." Article 8 laid down that the conduct of a person or group of persons "in fact acting on behalf of the State" "shall also be considered as an act of the State under international law". According to article 9, "The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed."

5. Having thus defined the categories of persons or groups of persons whose conduct could be attributed to the State as a subject of international law and, hence, could engage that State's international responsibility, the Commission now had to settle another question: could all the acts or omissions of those categories of organs be attributed to the State as acts generating international responsibility, or must restrictions be imposed? From the outset, the Commission had made a distinction, particularly in regard to the basic category—that of organs of the State proper—but really in regard to all the categories, between cases in which the organ had acted in its capacity as an organ and cases in which a person who happened to be an organ of the State had acted, in particular circumstances, as a private person. In the latter case, it was obvious that the problem of the State's responsibility only arose as a problem of responsibility for the actions of more private persons. But the matter was not always so simple, and the dividing line between cases was not always so clear. For instance, what was the position when an organ of the State acted as such and in the exercise of its official functions, but in so doing exceeded its competence under internal law or disobeyed the instructions it had received from its superior organs? That was the problem which had caused the most difficulties in the practice of States and in international jurisprudence and doctrine, and to be able to overcome those difficulties two essential considerations must be kept in mind.

6. First, the term "State" must be taken to mean the State as a subject of international law, not the State as a subject of internal law. Thus the fact that, in internal law, an organ which exceeded its competence or acted contrary to its instructions might have a personal responsibility attributed to it and not engage the administrative responsibility of the State as a subject of internal law—a responsibility which varied from one legal system to another—did not necessarily mean that the act of that organ was not attributable to the State in international law. No inferences should be drawn, either positive or negative, for the problem had to be considered in the context of international law.

7. Secondly, where international practice was concerned, the arguments put forward by foreign ministries when protesting against the conduct of an organ of another State sometimes called for reservations; for when one State accused another of having committed an internationally wrongful act, it preferred to use the argument that would be most effective for obtaining compensation. For example, if a superior organ or a government itself had approved the act of a subordinate organ which had in fact exceeded its competence, the complainant State would tend to stress that aspect of the case. But it would be wrong to conclude, from that alone, that according to the claimant government the act of an organ which had exceeded its competence or contravened its instructions could only be attributed to the State if it had been approved by a higher authority. Such an interpretation would go beyond the true significance of the cases drawn from international practice and jurisprudence.

8. International practice, judicial decisions and doctrine showed a very clear, though not absolutely uniform trend, which had appeared at the beginning of the twentieth century, more particularly between 1910 and 1930. That was when positions on the question had been defined and certain errors rejected.

9. The arguments advanced by claimant governments and respondent governments must in any case be treated with caution, for the former obviously tended to affirm that the accused organ had acted only as an organ of the State, whereas the latter sought to prove that the organ had acted as a private person. Those were two extreme positions, neither of which corresponded to reality. Moreover, the fact that reparation had been awarded did not necessarily mean that the injurious act committed by the incompetent organ had been attributed to the State; for the reparation might have been awarded because other organs had done nothing to prevent, disavow or punish the act of the accused organ, although it remained the act of a private person, not of the State.

10. Lastly, when it was a subordinate organ that had acted, the State accused of committing an internationally wrongful act often invoked the rule of prior exhaustion of local remedies and contended that the injured persons must first apply to the domestic courts for reparation of the wrong they claimed to have suffered. But although in many cases a claim asserting the international responsibility of the State could not be brought until local remedies had been exhausted, the fact that those remedies

had not been exhausted did not necessarily mean that the act of the organ was not an act of the State and could not be a source of international responsibility. Thus, if after the exhaustion of local remedies the last authority upheld what had been done by the first authority, the internationally wrongful act was not only an act of the last authority, but an act of all the authorities, from the first to the last, which had contributed to the breach of an international obligation of the State: hence the act of the subordinate organ which had acted first was also attributed to the State. Consequently, no conclusion must be drawn from the confusion which had often arisen between the problem of attribution to the State of the act of an incompetent organ and the problem of exhaustion of local remedies. The existence of the rule on the exhaustion of local remedies showed, on the contrary, that the acts of certain organs were, in principle, attributed to the State. The consequences of that rule were very important for the purposes of determining the amount of reparation to be awarded and the duration of the internationally wrongful act (*tempus commissi delicti*). They were particularly important in regard to arbitration agreements relating to acts committed before or after a certain date.

11. International jurisprudence and State practice had passed through a period of uncertainty in the second half of the nineteenth century, before they had succeeded in establishing a generally recognized principle. On that point, he referred members to the *Star and Herald case*, the *Tunstall case* and the *American Bible Society case*, which were discussed at length in his report (A/CN.4/264, paras. 11 *et seq.*). Towards the end of the nineteenth century there had appeared in the practice of the United States, and in the European practice, the principle of attribution to the State of acts or omissions of its organs which, while acting in their official capacity, had exceeded their competence or contravened the provisions of internal law governing their activities. It could be said that the practice of the United States and European practice had arrived at the same conclusion by slightly different routes. In the *American Bible Society case* Mr. Bayard, the United States Secretary of State had said "... it is a rule of international law that sovereigns are not liable, in diplomatic procedure, for damages to a foreigner when arising from the misconduct of agents acting out of the range not only of their real but of their apparent authority". A few years later another Secretary of State had formulated the rule observed by the United States in the following terms: "... sovereigns are not liable in diplomatic procedures for damages occasioned by the misconduct of petty officials and agents acting out of the range not only of their real of but their apparent authority". Since then, that idea had prevailed in the United States and had spread to other countries.

12. In European practice an important and rather early case was that of the Italian nationals in Peru. The British and Spanish Governments, having been invited by the Italian Government to state their view on the possibility of attributing to a State the conduct of one of its organs which had exceeded its competence or contravened internal law, had expressed similar opinions. In their view, all governments should always be held

responsible for all acts committed by their agents in their official capacity (A/CN.4/264, para. 17). They had thus expressed in positive terms what the United States had expressed in negative terms; the difference between the two positions was really no more than a difference in approach. The European foreign ministries of the time had considered that it was not possible to inquire whether the organ concerned had or had not acted within its competence, whether its conduct had or had not been disavowed or whether it had or had not been in accordance with instructions. What had mattered above all was that the accused State should not be able to find a loophole. By stressing that the organ must have acted within the limits not only of its real, but also of its apparent competence, American practice had also stressed the essential point. Indeed, for the security of international relations it mattered little, when an organ was acting in the exercise of its functions, whether its competence in the internal legal order was real or merely apparent. There again, the essential point was that it was acting in the exercise of its functions.

13. In his report to the Codification Conference of 1930, Mr. Guerrero had argued that the State was not responsible for acts of its organs performed outside their competence as defined by internal law. Subsequently, Mr. Guerrero had had to abandon that position because the contrary view had prevailed at the Conference. In the light of the answers given by governments to a number of questions asked by the Preparatory Committee for the Conference, a basis of discussion had been worked out which, as subsequently redrafted, had become the first sub-paragraph of paragraph 2 of draft article 8 and which read: "International responsibility is likewise incurred by a State if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State" (A/CN.4/264, para. 21).

14. In the *Caire case*, Mr. Verzijl, as arbitrator, had put forward some important considerations. Agreeing with the Institute of International Law, he had held that the responsibility of the State existed, whether its organs had acted in conformity with or contrary to the law or the order of a superior authority, and that it also existed when those organs acted outside their competence under cover of their status as organs of the State and making use of means placed at their disposal as such organs (*ibid.*, para. 41).

15. Doctrine had evolved in the same direction as the practice of States. Modern writers were almost unanimous in recognizing that the State was answerable for the conduct of its organs which acted beyond their competence or in breach of the provisions of internal law governing their activity. In addition to the many writers mentioned in his report, Mr. Kouris, a young Soviet author, had expressed support for the same principles since the report had been issued. Mention should also be made of the draft on State responsibility recently prepared by Graefrath and Steiniger, two jurists of the German Democratic Republic.<sup>4</sup>

<sup>4</sup> See *Neue Justiz*, 1973, No. 8, pp. 225-228.

16. While the principle was not in doubt, it was open to question what its limitations were and how they should be formulated. It might perhaps be stating the principle too categorically to say that: "Any act or omission by an organ of the State, even if it acted beyond its competence or contrary to internal law, is an act of the State under international law and engages the responsibility of that State". It might be asked—and indeed most writers did ask—whether the interests of the security of international relations were not sufficiently protected when an exception to the principle stated was made for cases in which the lack of competence of the organ in question was absolutely obvious; that was why United States practice had invoked the notion "not only of their real but of their apparent authority". The Commission would have to take a position on that point.

17. On the subject of that possible exception, the formulas proposed by writers and learned societies were very diverse. Some of them expressed the same idea twice: first in positive terms, affirming the responsibility of the State for the acts of an organ that were apparently, though not really, performed within its competence; and secondly in negative terms, excluding State responsibility when the lack of competence was obvious. In his opinion, if that approach was adopted, it was important to distinguish between, on the one hand, the basic rule attributing to the State the acts or omissions of organs which had acted beyond their competence or contrary to the provisions of internal law governing their activities and, on the other hand, the exception by which the conduct of an organ would not be attributed to the State if that conduct was totally foreign to its functions or its lack of competence was manifest.

18. Article 46 of the Vienna Convention on the Law of Treaties<sup>5</sup> might also be taken into consideration. That provision, which was intended to determine in what cases the will of the State must be deemed to have been validly expressed, and which relied on the notion of a manifest breach of a provision of internal law regarding competence, might possibly provide suitable language for stating the principle under study.

19. The Commission would also have to take account of the drafting changes it had made to the articles on State responsibility already adopted, which made it necessary to amend in the same way the text of article 10 as proposed in his report (A/CN.4/264, para. 60).

The meeting rose at 1 p.m.

<sup>5</sup> 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. 295.

### 1304th MEETING

Wednesday, 7 May 1975, at 10.20 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Yasseen.

### State responsibility

(A/CN.4/264 and Add.1;<sup>1</sup> A/9610/Rev.1<sup>2</sup>)

[Item 1 of the agenda]

(continued)

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 10 (Conduct or organs acting outside their competence or contrary to the provisions concerning their activity) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of draft article 10 as proposed by the Special Rapporteur.<sup>3</sup>

2. Mr. REUTER said that he fully supported the views of the Special Rapporteur; any rule other than that proposed in draft article 10 would have the effect of negating the responsibility of the State. It would amount to saying that the State was a legal entity which could only act in conformity with international law and that acts committed in breach of international law were not acts of the State; or, to paraphrase the basic principle of the British Constitution—the King can do no wrong—that the State could not violate international law. Such a rule would be patently absurd.

3. The only question which might arise in connexion with the rule proposed by the Special Rapporteur was that of its limitations, and that question was settled in paragraph 2 of the article. In practice, the cases covered by the article rarely concerned direct relations between States. They usually concerned relations between a private person and a State, and the responsibility of the State was then engaged only at a second stage, after an injury had been caused to a private person. In addition, such cases nearly always involved the use of physical constraint by the armed forces, the police, or officials having some power of direct coercion.

4. The Special Rapporteur had been right in drawing a parallel between draft article 10 and article 46 of the Vienna Convention on the Law of Treaties,<sup>4</sup> though in practice the provision under study would apply almost exclusively to relatively simple cases involving a private person and a public official. But the question with which writers and arbitrators in past cases had been concerned was not only that of the limits of the competence of the organ which had acted. For example, the award made in the *Caire case* (A/CN.4/264, para. 41) and the proceedings of the Committee of Experts for the Progressive Codification of International Law appointed by the League of Nations (*ibid.*, para. 21) contained passages dealing with matters far removed from the theoretical problem of competence. In the award in the *Caire case* reference was made to officials who engaged the responsibility of the State when acting "under cover of their status as organs of the State and making use of

<sup>1</sup> Yearbook . . . 1972, vol. II, pp. 71-160.

<sup>2</sup> *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 10* (see Yearbook . . . 1974, vol. II, Part One, pp. 157-331).

<sup>3</sup> For text see previous meeting, para. 1.

<sup>4</sup> 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. 295.

means placed at their disposal as such organs". That passage stressed the material means of constraint, not competence.

5. A further step had been taken in other decisions which had recognized that the State incurred responsibility if an official, exceeding his competence or contravening the rules governing his conduct, acted in a manner which the person affected could not resist. Even if the official in question had manifestly acted illegally, the private person could not escape the means of coercion used against him. An example was the case of foreign motorists who had been arrested in certain countries and ordered to pay a sum of money, failing which they would suffer vexatious investigations. While a public authority might lawfully require payment of a sum of money, it was illegal to demand payment without giving a receipt. There had also been cases in which the armed forces of several countries had committed acts unrelated to military operations. It was now a principle of codified international law that States were responsible for all acts of their armed forces. Hence, it seemed that such cases were outside the traditional scope of State responsibility; at the most they might be brought within it by applying the concepts of *culpa in custodiendo* and *culpa in eligendo*.

6. On reflexion, he thought paragraph 2 of article 10 might nevertheless be satisfactory. For the Special Rapporteur had taken the precaution of specifying that the act of the State must be "wholly foreign to the specific functions of the organ" in question, and when an official acted under cover of his authority or used means placed at his disposal by reason of his powers, his act was no longer "wholly" foreign to his functions. The Special Rapporteur had deliberately chosen an abstract formula, whereas more concrete wording had been preferred in the *Caire case*, in the work of the 1930 Codification Conference and by certain writers. It would be useful to consider further the advantages and disadvantages of the two formulations.

7. Mr. BEDJAOUI said that the rule stated in draft article 10 was not only acceptable, but also necessary. The practice of States varied widely: when they were claimants, they were always quick to attribute the acts of its organs to the respondent State, but when they were themselves respondents, they sought by all possible means to relieve themselves of responsibility. The proposed rule would therefore introduce clarity; moreover, it was essential for reasons of equity and security in international relations.

8. In the situation contemplated in article 10, it would not be equitable to make the responsibility of the State depend on proof that the individual who was an organ had acted on instructions from his government. That would be requiring a *probatio diabolica* from the claimant State and would provide loopholes for the respondent State. The Spanish Government had well understood that point when drafting its note to the Italian Government in the case of the Italian nationals in Peru (A/CN.4/264, para. 17); for it had stated that "there would be no practical way of proving that the agent had or had not acted on orders received". It was in that context that it was important to ensure the security of international

relations. Officials acting in the performance of their functions, even when they went beyond their competence, represented their government and engaged its responsibility, which was not true of private persons. In the note he had referred to, the Spanish Government had duly stressed that difference by saying that "there is no way to resist the action of these officials, because this action is based on the authority they exercise".

9. Article 10 was thus logically consistent with articles 5 and 7 (A/9610/Rev.1, chapter III, section B), which related, respectively, to the attribution to the State of the conduct of its organs and to the attribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority. Those provisions were based on the postulate that the degree of control which the State exercised over its territory gave the measure of its international responsibility. Article 13, on the acts of organs of a successful insurrectional movement, would raise the same kind of question.

10. With regard to the drafting of article 10, he was inclined to prefer a negative formulation, like that of article 2 of the draft prepared by Strupp in 1927,<sup>5</sup> or that of article 1 of the draft prepared by the German International Law Association in 1930,<sup>6</sup> both of which were cited in the Special Rapporteur's report (A/CN.4/264, para. 47). A negative formulation would be more in keeping with paragraph 2 of the proposed article 10, which referred to cases in which there was no competence or even appearance of competence. The act committed was then wholly unrelated to the functions; the individual who was an organ acted merely as a private person. The link between competence and the act performed, which would engage the State's responsibility in the situation covered by paragraph 1, was missing in the case covered by paragraph 2.

11. Mr. KEARNEY congratulated the Special Rapporteur on his excellent commentary and analysis. The positions expressed in draft article 10 were basically correct, and he had been particularly impressed by Mr. Bedjaoui's reference to the principle of equity and security which were reflected in the terms of the article.

12. Like Mr. Reuter, however, he was concerned about article 10, paragraph 2, which, because it attempted to cover a very wide range of possible situations in a few words, might produce effects not intended by its author. What, for example, would have been the outcome of the *Youmans case* (*ibid.*, para. 40) if it had been governed by the provisions of article 10, paragraph 2? Could the killing of civilian aliens by soldiers sent to protect them be considered an act "wholly foreign to the specific functions" of an army, which, at the internal level at least, were to safeguard peace and order? One could hardly rely on practice for an answer to that question for, as Mr. Bedjaoui had pointed out, the attitude of States in such matters depended on whether they were claimants or respondents. Personally, he thought there would be less chance for a State to evade responsibility in such a case if the approach adopted were that of the

<sup>5</sup> See *Yearbook* . . . 1969, vol. II, p. 151.

<sup>6</sup> *Ibid.*, p. 149.



corresponding draft provision prepared at the 1930 Codification Conference (*ibid.*, para. 21), the effect of which would have been to make all acts committed by the military or police under cover of their official capacity acts of the State in international law.

13. The basic condition laid down in article 10, paragraph 1, for the generation of State responsibility, was that the State organ must have acted in its official capacity. But in the *Yumans case*, for example, it was extremely difficult to decide whether the soldiers had been acting *de facto* or *de jure* in their official capacity. To deal with that problem, he suggested that either of the paragraphs of article 10 might contain a provision to the effect that the State incurred international responsibility for the conduct of its organs acting in their official capacity or under the apparent cover of their official capacity.

14. A further point to be considered was that, whatever the nature of the act committed, State responsibility would be engaged by the conduct of certain State organs, such as the armed forces, police, and para-military bodies, because it was by the authority of the State that they were provided with the means to cause damage. Cases had occurred such as that in which a naval captain, acting entirely on his own initiative, had abused his position to shell a place in a neutral foreign country; the Commission should ensure that the State would not be able to evade responsibility in such cases by claiming that the actions of the organ were wholly alien to its functions or manifestly beyond its competence.

15. Mr. ELIAS praised the Special Rapporteur's comprehensive commentary and introductory statement and said that draft article 10, paragraph 1, should now be acceptable to all members of the Commission, with, at the most, only minor reservations. The proposed wording of paragraph 2 was less satisfactory, however, owing to the difficulty of determining the criteria to be used to qualify the general rule laid down in paragraph 1.

16. It had been suggested that paragraph 2 should be reworded to take account of the actions of armed forces, police and similar bodies. He agreed with the view that the problem was not confined to government officials of that kind, but arose also in regard to many other persons who could be seen as acting on behalf of the State or of other bodies exercising elements of governmental authority. In that connexion, he pointed out that the British concept of the exercise of "ostensible authority" differed slightly from the concept of the exercise of "actual or apparent competence" discussed in the report (A/CN.4/264, para. 58). The British concept denoted circumstances in which a State or a State organ held out an individual or group of individuals as having authority, whether apparent or actual, to perform acts which the public or, for the purposes of international law, the international community, would see as resembling those which fell within the scope of the authority vested in the organ. According to that notion, it was possible, in many situations, to consider an individual as performing an act of the State.

17. The real problem was how to marry the two parts of paragraph 2. He agreed with the Special Rapporteur that the Commission could not do better in the second

part of the paragraph than to employ the word "manifest", which was the term employed in article 46 of the Vienna Convention on the Law of Treaties and had been selected by the Vienna Conference after a long debate. Like Mr. Reuter, however, he had difficulty in distinguishing acts in respect of which an organ was manifestly incompetent from acts which were wholly foreign to its specific functions. The treatment of both notions in the same clause might cause the reader to lose sight of the essential idea to be conveyed. He therefore suggested that paragraph 2 should be divided into two sections, the first dealing with acts or omissions extraneous to the functions which an organ was authorized to perform, and the second with cases in which its lack of authority or competence was manifest.

18. Mr. ŠAHOVIĆ said that the existence of the rule stated in article 10 was clearly demonstrated by the Special Rapporteur's report and his oral presentation. That rule, which was the foundation of the theory of State responsibility in modern international law, also met the need to strengthen legality in the international order. But while he could only endorse the principle stated in paragraph 1 of the article, he had doubts about the wording of paragraph 2 and even doubted the need for it.

19. The formulation of article 10 was discussed by the Special Rapporteur in paragraphs 58 and 59 of his report (A/CN.4/264), where he distinguished between the main rule and the subsidiary rule, but also referred to the limitative and exceptional nature of the latter. The exact purport of paragraph 2 should be made clear. As he saw it, the provision was a negative statement of the rule stated in positive terms in paragraph 1. It should be noted, moreover, that the difference between the terms "competence" and "specific functions" was not clear from the text of article 10. Perhaps it would be better to model the provision on the idea of acting in the capacity of a State organ, which had been adopted in article 5, for example.

20. To make article 10 easier to apply, he thought paragraphs 1 and 2 could be combined, so that the second part of the new text would merely qualify the general rule.

21. Mr. MARTÍNEZ MORENO said he fully supported the principles which the Special Rapporteur had embodied in draft article 10 and his arguments in support of those principles. He pointed out, however, that Latin American writers had long expressed reservations concerning the subject-matter of the article.

22. At the 1930 Codification Conference, for example, Mr. Guerrero had tried to defend the traditional position of the Latin American countries regarding the international responsibility of States, which was that precedents and practice should be regarded in the light of historical situations. It was not that Latin American States were opposed to the acceptance of international responsibility in cases of flagrant violation of the rights of foreigners; but they remembered that in the past claims had often been backed by threats or even, as in the case of the bombardment of Maracaibo, by actual violence. It was for that reason that the constitutions of many Latin American States contained provisions which



prohibited the recovery of State debts by force—the Drago-Calvo doctrine—stressed the rule concerning the exhaustion of local remedies, stipulated that a denial of justice must have occurred before a claim could be brought through the diplomatic channel, and reaffirmed the principle of non-intervention. Examples were provided by articles 19 and 20 of the Constitution of El Salvador. Furthermore, in Latin America, States disclaimed responsibility for injury to aliens in the event of civil war. The Latin American States would be more willing to accept the draft if it took account of their national legislation.

23. He suggested that, in order to forestall the problems that might arise when the draft articles came to be discussed by the Sixth Committee of the General Assembly, the Commission should study the replies to the questionnaire sent to States in preparation for the 1930 Codification Conference, and also enquire whether the Constitutions of any African or Asian States contained provisions similar to those in force in Latin America. In a matter as delicate as that of State responsibility, it was important to take account of both doctrinal opinion and traditional attitudes.

24. Mr. USHAKOV said he fully endorsed the principle stated in paragraph 1 of article 10, but had some reservations regarding paragraph 2 and the commentary. The weaknesses of the commentary were due, he thought, to the method followed in the past by the writers who had dealt with State responsibility and the conferences of plenipotentiaries concerned with that topic. In the past, State responsibility had been considered exclusively with regard to damage sustained by foreigners in the territory of the State concerned, so that practice and judicial decisions related almost solely to that aspect of the subject. Consequently, nearly all the cases cited by the Special Rapporteur in his commentary concerned damage sustained by foreigners, which explained the weakness of the commentary and its conclusions. When the Commission had begun its work on State responsibility, it had decided to leave aside the question of State responsibility for damage sustained by foreigners. That question, which was on the Commission's long-term programme of work, was now raised in the following form: what were the obligations of States to foreigners?

25. In his revised draft on State responsibility, submitted in 1961, Mr. García Amador had dealt solely with injuries caused to the person or property of aliens in the territory of the State.<sup>7</sup> But it was not the damage suffered by private persons which engaged the State's responsibility; it was cases in which the fundamental principles of international law were violated—in other words, where international peace and security were endangered. Hence it was those cases which were the Commission's main concern. Article 10, paragraph 2, should accordingly be understood as referring, not to damage caused to foreigners, but to international crimes—and aggression was now regarded as the most serious crime under international law, according to the definition recently adopted by the General Assembly.<sup>8</sup> Paragraph 2 was therefore

quite unacceptable. For although it was possible to accept some restriction of the principle stated in paragraph 1 where it applied to damage suffered by private persons, no such restriction could be accepted in the case of violations of international law such as aggression, breach of the peace or threat to peace. It was obvious that if the head of a State ordered a military attack against another State, although he was not empowered to do so by the constitution of his State, so that his lack of competence was manifest, he nevertheless engaged the responsibility of the State, which would be held responsible for the aggression.

26. The restriction set out in paragraph 2 was accordingly valid only in the particular case of damage sustained by foreigners, where internal redress was possible, so that there could be a question of denial of justice. Those were the cases contemplated in the note addressed by the Austrian Government to the Preparatory Committee for the 1930 Codification Conference, in the conclusions of that Conference and in Mr. García Amador's revised draft of 1961—all of which were cited in paragraph 50 of the Special Rapporteur's report (A/CN.4/264). In the case of diplomats, on the other hand, the situation was not the same, because no redress could be obtained in the courts of the State concerned, and consequently there could be no question of denial of justice. The restriction introduced in paragraph 2 was in any case unacceptable in regard to international crimes or other serious violations of the principles of international law, because in those cases any conduct *ultra vires* of an organ of the State was an act of the State. The case of damage sustained by foreigners was the only possible exception to the principle stated in paragraph 1, and that case was not really within the scope of the draft articles.

27. He fully approved of the principle stated in paragraph 1 of article 10, but had reservations about the expression "entity empowered to exercise elements of the governmental authority". He was not convinced that the paragraph should cover entities which did not form part of the State structure proper and which were not organs of the State in the broad sense of the term, like territorial entities. He did not think that such entities could act beyond their competence. As Mr. Reuter had said, they had physical means of constraint, but they could not act under cover of official functions. They did not act as organs, but rather as private persons, even though they were legal persons. Hence the State was responsible by reason of omission, for failing to prevent the conduct of the entity in question. He therefore doubted whether it was advisable to introduce in paragraph 1 the idea of "an entity empowered to exercise elements of the governmental authority".

28. He also had some reservations about the drafting of paragraph 1. The expression "in its official capacity" seemed ambiguous and he would prefer the expression "in that capacity"—that was to say, in its capacity as an organ—used in article 5; the words "contravenes the rules of that law concerning its activity", might be implicit in the words "exceeds its competence according to internal law"; and the word "nevertheless" might well be superfluous.

<sup>7</sup> See *Yearbook* . . . 1961, vol. II, pp. 46-54.

<sup>8</sup> See General Assembly resolution 3314 (XXIX), annex.

29. To sum up, he would be in favour of deleting paragraph 2 of article 10, or retaining it only for cases of damage suffered by private persons, because that paragraph would nearly always enable the accused State to evade its responsibilities.

The meeting rose at 1 p.m.

### 1305th MEETING

Thursday, 8 May 1975, at 10.5 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Yasseen.

#### State responsibility

(A/CN.4/264 and Add.1<sup>1</sup>; A/9610/Rev.1<sup>2</sup>)

[Item 1 of the agenda]

(continued)

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 10 (Conduct of organs acting outside their competence or contrary to the provisions concerning their activity) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of draft article 10 as proposed by the Special Rapporteur.<sup>3</sup>

2. Mr. TSURUOKA said he fully approved of the Special Rapporteur's approach to the problem of State responsibility: it was by the careful analysis and interpretation of facts, practice, precedents and doctrine that the Commission would be able to establish the principles to be applied in that sphere, without being a prisoner of pure logic. In his opinion, it was practice that was of the greatest importance, and it would be wrong to adopt too systematic an approach.

3. So far as substance was concerned, he had no difficulty in accepting the principle stated in paragraph 1 of article 10. In dealing with a problem of that kind, however, it was not always wise to adopt a strictly legal standpoint. The claimant State should try to satisfy all those who considered themselves injured, but without impairing good relations between the States concerned. In that respect, Mr. Guerrero's conclusions (A/CN.4/264, para. 21) were very wise and practical, and could serve as a guide to many foreign ministries. The Commission should pay particular attention to the diplomatic and political aspects when trying to establish a rule of law on the subject.

4. With regard to the wording of article 10, he thought the phrase "in its official capacity" did not reflect the

distinction to be made between the apparent competence and the real competence of the accused organ. That distinction was most important, for it was the key to determining whether or not the conduct of an official was attributable to the State. He hoped, therefore, that the phrase in question would be clarified in the commentary by examples.

5. The points raised by Mr. Ushakov were very important and should be taken into consideration.<sup>4</sup>

6. Mr. HAMBRO said that, like most other speakers, he could accept paragraph 1 of article 10 without difficulty. In the discussion which had taken place, there had been unanimity on one very important point: the primacy of international law had to be accepted on the question of the competence of State officials. No rule of internal law, whether constitutional or legislative, could divest the State of its responsibility within the limits set by international law.

7. It was his firm belief that the provision in paragraph 1 gave expression to a well-established rule of international law. Mr. Martínez Moreno had spoken of certain measures taken in the past to obtain compensation for injuries to aliens, which had had the character of basically illegal acts of intervention, and had also referred to the remedies to such situations sought by Latin American jurists—remedies which had sometimes conflicted with the principle stated in paragraph 1. Those remedies had been mentioned as a historical example, however, and it was clear that the rule in paragraph 1 of the article proposed by the Special Rapporteur was now accepted without question throughout the world.

8. At the same time, it was necessary to state the rule in paragraph 1 explicitly because, even at the present time, statements were occasionally made that implied a reversion to the sovereignty dogma, which could undermine the rule in question and, with it, the very essence of international law.

9. Paragraph 2 of article 10 involved considerable difficulties, even though its underlying principle was acceptable. Clearly, cases were bound to arise in which responsibility could not be imposed on the State, but it was very difficult to devise a formula to cover those cases without going too far.

10. Attention had been drawn at the previous meeting to the *Youmans case* (A/CN.4/264, para. 40). Cases of that kind raised a very serious question. The essential point was that the individual victim was powerless when facing a group of soldiers, commanded by an officer, who committed acts totally alien to their duties. The individual had no power to act; if he protested, he might lose not only his property, but even his life. It would be quite wrong in such cases to allow the State to refuse to pay compensation on the grounds that the officer concerned had acted completely outside his authority. He had been clothed with the authority of the State and had the power—given to him by the State—to enforce his point of view.

11. Perhaps the problem might be solved, at least partly, by the addition, at the end of paragraph 2, of

<sup>1</sup> Yearbook . . . 1972, vol. II, pp. 71-160.

<sup>2</sup> Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 10 (see Yearbook . . . 1974, vol. II, Part One, pp. 157-331).

<sup>3</sup> For text see 1303rd meeting, para. 1.

<sup>4</sup> See previous meeting, paras. 24 *et seq.*

some such wording as "... and could be effectively challenged". The addition of those words would obviate the question raised by the reference, in the concluding words of paragraph 2, to the "manifest" character of the organ's lack of competence: should the lack of competence be "manifest" to the persons who took the injurious action, to the person who suffered the injury, or to the international tribunal which later adjudicated the claim?

12. The addition of the words he had suggested might also cover the important point raised by Mr. Ushakov at the previous meeting. It was clearly very difficult to formulate rules to cover all the wrongful acts of the State, both those traditionally covered by the law governing the protection of citizens abroad and the much more serious acts to which Mr. Ushakov had referred, such as aggression, breaches of the peace and violations of fundamental rules of international law.

13. The Commission had not yet discussed the question of aggression and other violations of fundamental norms of international law. Those matters would be studied very carefully when it came to consider the second part of the draft on State responsibility. The Commission might then have to revise some of the rules or introduce new rules to cover the cases in question. At the same time, it was clear that most of the cases which would have to be dealt with in the future, either by international tribunals or by diplomatic negotiation, would arise out of injuries to individual aliens rather than out of major violations of international law.

14. The general rule applicable to all cases, however, was that the State could not evade responsibility by pleading that its leaders had acted outside their competence or contrary to the State's constitution or laws. It should be made absolutely clear that no overstepping of competence could relieve the State of responsibility.

15. Mr. TAMMES said that article 10 was the culmination of a long legal history. The Special Rapporteur's scholarly analysis threw light on the general trend in the development of international law: the concept of the internal legal condition of the State had given way gradually to that of its external manifestation, just as in law generally the notion of the will of the subject of law had been replaced by that of the expression of that will.

16. In the theory and practice of State responsibility, that primacy of external acts over internal conditions, such as constitutional limitations, had lagged considerably behind, because of the political situation of the past, to which Mr. Martínez Moreno had referred. It was in self-defence against strongly pressed claims that States had over-emphasized internal conditions. Times had changed, however, and draft article 10 adequately reflected the evolution of international legal thinking, which was also expressed in articles 27 and 46 of the Vienna Convention on the Law of Treaties—provisions in which the validity of external acts clearly prevailed over the internal law of the State.<sup>5</sup>

17. Subject to possible drafting refinements, he therefore saw no objection to paragraph 1 of article 10, which

was a remarkable contribution by the Special Rapporteur to legal clarity and to security in international relations.

18. Paragraph 2, on the other hand, raised difficulties, because of the link it established between the act of the State and the manifestation of that act as an act of the State. It was true that the criterion of manifestness was appropriate in article 46 of the Vienna Convention on the Law of Treaties, but that provision operated in the context of good faith: if it was evident to a contracting party that the other party had no competence to conclude treaties, the former could not complain if invalidity was subsequently invoked. In the context of State responsibility, however, the situation was different. States were simply confronted with acts of other States, regardless of the question whether those acts could be believed to be acts of State. Only in rare cases did the credulity of the injured alien play a part.

19. He thought the last part of paragraph 2 was better suited to the relatively minor cases, which called for the exercise of diplomatic protection, than to major violations of the fundamental rules of international law which safeguarded international peace and security. In the latter cases, to which Mr. Ushakov had referred, there could be no doubt that it was only by making use of its "specific functions"—to use the language of paragraph 2—that a State organ could have at its disposal the means of breaking the peace. Since both types of case were likely to occur in the future, the only question that arose was whether the issue should be dealt with in article 10 or in the provisions to be considered at a later stage, dealing with major violations of international law.

20. Mr. RAMANGASOAVINA said that the situation covered by article 10 was at the limit of cases in which a State could incur responsibility for acts or omissions by its organs or agents. The difficulty was due precisely to the fact that extreme cases were involved. The basic idea underlying paragraph 1 had emerged at the beginning in the twentieth century, despite some hesitation, and had become established in the sixties. It was now generally accepted and could be formulated in several ways, all of which amounted to affirming the responsibility of the State for acts of its organs or of entities vested with governmental authority. It was not easy to choose between the different formulations, for wording that was too categorical might have disadvantages. There could, indeed, be abuse of competence by agents empowered to exercise elements of governmental authority. Thus when an organ or agent of the State exceeded its competence under internal law or broke the rules of that law concerning its activity, the State should not be held responsible. But when such agents were apparently competent or possessed the necessary means to perform their task, it was difficult for private persons to distinguish between their apparent and their real authority. He therefore approved of the wording proposed by the Special Rapporteur in paragraph 1 of article 10, which, although not entirely satisfactory, was better than the other formulas proposed.

21. The limitation imposed in paragraph 2 raised a problem, since in most cases it was very difficult to determine whether an organ's lack of competence was

<sup>5</sup> 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) pp. 293 and 295.

manifest. Moreover, there were cases in which agents of the State normally vested with authority and acting in accordance with the provisions of internal law, could become personally liable if they committed internationally wrongful acts. For example, according to the Nuremberg principles, military personnel must, in certain cases, disobey their superiors and contravene military discipline in order not to be guilty of war crimes.

22. The basic idea of article 10 was therefore acceptable to him, though he appreciated that it was very difficult to formulate, because the provision must be neither too general nor too restrictive. The word "nevertheless" in paragraph 1 seemed inappropriate, because there was no opposition between article 10 and the preceding articles, which, from article 5 onwards, also dealt with cases in which the conduct of an organ of the State was treated as an act of the State under international law. He suggested that since article 10 also affirmed the responsibility of the State, the word "nevertheless" should be replaced by the word "also".

23. He approved of the terms used in paragraph 2, although he understood why some members might doubt the advisability of including a paragraph that limited the responsibility of the State where the act had been committed by an agent whose lack of competence was manifest and who had accordingly acted merely as a private person.

24. Mr. YASSEEN said that, in tracing the history of the question of State responsibility, the Special Rapporteur had outlined the development of the international community and of the functions of the State. The solutions adopted had differed because of the differences in the situations and in the roles assigned to the State. The examples cited by the Special Rapporteur in the early part of his commentary showed that the international community had by no means been founded on the sovereign equality of States. Owing to the flagrant inequality of States at the time, cases of responsibility had been the occasion for a display of authority by some, and for excessive reaction by others, which had often led to denial of responsibility. In many of the cases cited by the Special Rapporteur, one of the opposing States had been in a position to impose a settlement, while the other had had to do all it could to avoid complying with the excessive demands of the adverse party. Hence those cases could not provide the basis for a general rule solving the problem of responsibility. But as the international community had evolved towards increasing equality of States, the solutions adopted had eventually become balanced and had reflected the objective reality of the situation and the requirements for a harmonious settlement. With the growth of State powers, it had now become possible to hold a State responsible for the acts of its organs, even if they had exceeded their competence or acted contrary to government instructions. The only acceptable rule was that the State could not evade its responsibility by claiming that the accused organ had acted contrary to instructions: if the organ had appeared to be a State organ when it had acted, that was enough to engage the responsibility of the State.

25. Thus paragraph 1 of article 10 was not controversial for it stated a principle which was now accepted: the

State could no longer invoke internal law to deny its international responsibility, because the acts of its organs were attributable to the State even if they had exceeded their competence according to internal law. But the cases covered by article 10 arose in a particular sphere of State responsibility: that of responsibility for the treatment of foreigners. Could the principle applicable to the treatment of foreigners be extended in general to all forms of responsibility? On that point, he shared Mr. Ushakov's view that neither the principle of article 10 nor the exception to that principle could apply to certain conduct by State organs which was not concerned with the treatment of aliens—for example, acts of aggression committed on the orders of an organ which manifestly lacked competence to give such orders. Could the principle concerning the treatment of foreigners be erected into a general principle applicable to all activities of State organs? Obviously that principle could not be absolute, since logic imposed certain limits on it. The State could not be held responsible for an act committed by one of its organs if, by reason of the nature or the circumstances of the act, that organ could not be regarded as an organ of the State. But could the criterion of the "manifest" lack of competence of the organ, laid down in paragraph 2 of article 10, be applied to limit the principle of State responsibility? For one thing, that criterion might be interpreted subjectively—that was why the Vienna Conference had been careful to define the meaning of the term "manifest" as used in the Convention on the Law of Treaties.<sup>6</sup> Secondly, it was open to question whether the criterion of manifest lack of competence was sufficient to relieve the State of responsibility. That was far from certain, for it was sometimes impossible, even where the lack of competence was manifest, not to attribute to the State the act of a State organ in so far it had acted as such. That concern was apparent in the texts cited in the Special Rapporteur's commentary. Some writers maintained that the lack of competence should be so manifest that it could be stated with certainty that the organ had not acted as an organ of the State.

26. In addition, other conditions had to be fulfilled before the State could be relieved of responsibility: the organ must not have used means placed at its disposal by the State and the injury must have been avoidable. If the means of constraint used by the organ of the State were such that the victim could not avoid the injury, the State must be held responsible, even if the organ's lack of competence was manifest. The discretionary power of the State to choose its organs was, in that respect, the very basis of its responsibility: if the organs of a State exceeded their competence, the State was answerable for their acts in so far as it had been negligent in choosing them or remiss in supervising their activities. Hence, it was not enough to say that the organ's lack of competence had been manifest and that its conduct had been wholly foreign to its functions; the Commission should adopt the viewpoint of the victim, in order to protect the individual. Other criteria should therefore be added to that of manifest lack of competence laid down in para-

<sup>6</sup> *Ibid.*, p. 295, article 46, para. 2.

graph 2, in order to cover two important factors: the use of means placed by the State at the disposal of its organ as such, and the inability of the victim to avoid the injury sustained.

27. Mr. QUENTIN-BAXTER said that State responsibility had always been a discouraging subject for scholars, because of the fragmentary nature of the material available, the sporadic precedents, the uncertainty of the underlying principles and the arbitrary circumstances affecting recourse to adjudication. The admirable commentaries prepared by the Special Rapporteur, however, showed that there was a greater wealth of background material than might at first be thought. There could be no question as to the basic principle, set out in paragraph 1 of article 10, of the primacy of international law over internal law. It was an indisputable proposition that the State could not plead the defects of its own system or its own legal order to justify conduct that caused injury to others.

28. The Special Rapporteur had made a remarkable analysis of the varying tests and criteria which had been adopted by arbitral tribunals or applied in State practice. He agreed with the Special Rapporteur's conclusion that it would be unwise to adopt one or more of those criteria in the text of article 10.

29. The notion of apparent authority called for some comment, because it had played a large part in the evolution of ideas on the responsibility of the State. The notion was valuable in that it did not allow the respondent State an easy escape from responsibility: the State could not excuse itself by denying that it had approved the conduct of its agents.

30. He agreed with the Special Rapporteur that it would be desirable to define the limits beyond which agents acted not in their official capacity, but as private persons. That idea and the history of the earlier drafts were essential to an understanding of the construction of the present article 10 and of its division into two parts.

31. Paragraph 2 of the article, as he saw it, was intended to strengthen the provisions of paragraph 1, not to weaken them. The words "while acting in its official capacity" introduced an element of balance into paragraph 1 and made it possible to argue that a particular case was not one of lack of competence, but of failure to act in an official capacity. Cases of that kind occurred quite often in practice, so care should be taken to ensure that the provisions of paragraph 1 were not abused.

32. The weakness of the notion of apparent authority was that it seemed to place the emphasis on form rather than substance—on appearance rather than reality. A great many of the cases cited in the Special Rapporteur's commentary, on the other hand, illustrated very well the notion of a substantial connexion. An obvious example was the *Youmans case* (A/CN.4/264, para. 40), in which that notion emerged time and time again through the varying reasons given in the award. The soldiers, who had come in response to superior orders, had obviously not been mere assassins who happened to be soldiers. The essential point was the substantial connexion between the role of the agent as an organ of the State and the

misuse of authority, and that was the point which, in his opinion, should be stressed in article 10.

33. Although as a general rule he did not favour analogies from internal law, he was tempted to draw such an analogy in the present context. In internal law, sovereign immunity had been progressively curtailed and governments had become subject to the same legal controls and judicial processes as private citizens. At the same time, the notion of the responsibility of a commander or an employer had emerged progressively in regard to events occurring in the course of employment. He discerned a parallel between the concept of "in the course of employment" in internal law and that of "in the course of official functions" in international law. In that context, State responsibility should be interpreted widely.

34. The remarks made by Mr. Martínez Moreno and Mr. Ushakov at the previous meeting were a reminder of historical factors which affected some areas of the law. Mr. Martínez Moreno had stressed the impact of intervention and inequality between States on the development of the law governing the duties of States towards aliens.

35. The Commission had decided, some years previously, to prepare a draft in general terms not related solely, or even primarily, to the duties of States towards aliens. One advantage of that decision had been to place those duties in a new context that would enable States to escape from the bondage of history. It was true that most of the precedents relating to State responsibility concerned the treatment of aliens—inevitably so, for it was in that area that most of the litigation had occurred. It would be generally agreed, however, that those precedents could be reflected in more general terms in the broader context of State responsibility. He firmly believed that it was possible to arrive at that result.

36. That being said, he believed that the first part of paragraph 2 of article 10 was a necessary complement to paragraph 1. As he read paragraph 2 and the Special Rapporteur's commentary on it, he found that the words "wholly foreign to the specific functions" kept the exception in paragraph 2 within quite narrow limits. The provisions of paragraph 2 provided a necessary balance to paragraph 1, since the State could not escape responsibility for acts committed by an organ "in its official capacity"—to use the words in that paragraph 1—unless the acts in question were "wholly foreign to the specific functions of the organ" as stated in paragraph 2. Those remarks would, of course, apply mostly to cases relating to treatment of aliens, but they were not confined to such cases; to give but one example, the misbehaviour of a sailor on leave in a foreign port might cause injury to local inhabitants.

37. He had serious doubts, however, about the last part of paragraph 2. The concept of "manifest" lack of competence unnecessarily widened the scope of the exception. The *Mantovani case* (A/CN.4/264, para. 29) was a good illustration; the lack of competence of a police officer to make an arrest in the territory of a foreign country was "manifest", but that was not a good reason for excusing his State from international responsibility.

38. Subject to those remarks, he thought the text of article 10 represented a long step forward on a difficult road.

39. Mr. BILGE noted that all the members of the Commission seemed to agree with the principle stated in article 10, paragraph 1, although some of them had raised questions about the generality of its scope.

40. As the Special Rapporteur had pointed out, article 10 was linked with other provisions of the draft, in particular to articles 5 and 6 (A/9610/Rev.1, chapter III, section B). According to article 5, the conduct of any organ of a State acting in its capacity as an organ, was attributable to that State. That was the provision which should apply to the general cases mentioned by Mr. Ushakov and Mr. Yasseen, including the case in which a Head of State, not being competent to do so, ordered an act of aggression against another State. For article 5 should apply to all cases in which an organ acted in its capacity as an organ, whether it was competent or not. Article 6 provided that the position of the organ in the organization of the State was immaterial for the purposes of the rules governing State responsibility. Article 10 showed a certain parallelism with article 6, since it provided that it was likewise immaterial whether the organ in question had exceeded its competence or contravened the rules of internal law concerning its activity. Thus article 10 introduced a clarification in keeping with the requirements of equity, since every crime must be punished and every injury must be compensated.

41. He found the general rule entirely acceptable, but doubted whether the capacity of the organ should be qualified as "official". The essential point was that the organ should have acted in its capacity as an organ. States could not, of course, be expected to answer for all acts or omissions committed in their territory. The acts of their organs could be attributed to them, but not the acts of private persons. As the Special Rapporteur had said, the rule in article 10 fell half way between two other rules: the rule that the acts of an organ which acted within the limits of its competence were attributable to the State and the rule that the acts of private persons could not be attributed to the State. According to article 10, if an organ of the State, acting as such, exceeded its competence or contravened the rules of internal law concerning its activity, its conduct was nevertheless attributable to the State. That principle must be restricted, however. Some members of the Commission had tried to show that the concept of "functions" could help to determine whether the organ had really acted in its capacity as an organ. In paragraph 2 of article 10, the Special Rapporteur had specifically referred to the criterion of functions in order to place a limit on the general rule and to exclude cases in which the organ had manifestly not acted in its capacity as an organ.

42. In his opinion capacity as an organ was a better criterion than specific functions. Article 10, paragraph 2, stressed the functions of the organ, not its capacity or loss of capacity. When considering article 5, the Commission had decided that the status of an organ would depend on internal law. He considered that the question whether an organ was really acting in its capacity as an

organ, or whether it had lost that capacity, should not be settled by internal law. For the sake of the security of international relations, once the status of organ of the State had been conferred by internal law, States should be able to rely on that situation. On the other hand, if it was manifest that an organ had not acted in its capacity as an organ or that it had lost that capacity, its conduct could not be attributed to the State to which it belonged. That was the approach which, he thought, should be adopted in the drafting of article 10, paragraph 2.

43. Mr. SETTE CÂMARA said that the detailed and exhaustive commentary by the Special Rapporteur provided very sound support for the principle underlying the proposed article 10. It would indeed be inadmissible in modern times to question the rule that the State was responsible for the acts of its organs or of entities empowered to exercise elements of the governmental authority, which, acting in their official capacity, exceeded their competence under internal law or contravened the rules of that law concerning their activity. The commentary demonstrated beyond doubt that the nineteenth-century view that States were exempt from responsibility in such cases had long been discarded. Modern thinking, which aimed at ensuring peaceful relations between States through a clear statement of the theory of responsibility, tended to reject any position which would leave a State room to evade its international responsibility for the acts of its organs. In that sense, the general principle embodied in article 10, paragraph 1, was, in his view, in complete harmony with the approach adopted in the draft articles, which was based on what the Special Rapporteur had described as "the whole of responsibility and nothing but responsibility".

44. The replacement in the revised draft of paragraph 1 of the term "public institution" by the more comprehensive phrase "entity empowered to exercise elements of the governmental authority" corresponded to present-day reality. Mr. Ushakov had contended that the responsibility of the State for *ultra vires* acts should be confined to acts of the organs of the State and should not be extended to those of other entities;<sup>7</sup> it was, however, through the ever-increasing number of such entities that a modern State performed a multitude of activities that had formerly been performed by private persons, and the purposes of the general principle stated in paragraph 1 would be defeated if a State could evade its responsibility for activities entrusted to public enterprises which could not properly be considered organs of the State.

45. It should not be forgotten that the reason behind the doctrine of State responsibility for *ultra vires* acts was that the stability of international law required something sounder than the rules of competence under internal law, which a State could alter to suit its own convenience. In that respect, a cornerstone of the system evolved by the Special Rapporteur was the principle that the responsibility of States under international law had no connexion with, and frequently superseded, their responsibility under internal law. He therefore regarded the examples of Latin American practice cited by Mr. Martínez Moreno

<sup>7</sup> See previous meeting, para. 27.



as relics of the time when it had been believed that, in order to avoid abuses by the great Powers, a general formulation of the principles of responsibility should respect the peculiarities of regional practice and the provisions of individual constitutions. If a similar approach were adopted today, it was very doubtful whether it would ever be possible to agree on a rule that would satisfactorily cover the broad principle of integral responsibility of States for wrongful acts. Fortunately, the circumstances which had given rise, in a legitimate reaction, to the Drago doctrine and the Calvo clause, no longer obtained.

46. While, subject to minor drafting changes, he fully approved of the terms of paragraph 1, he had doubts about paragraph 2. That paragraph was based on the so-called United States tradition, established by Secretary of State Bayard (A/CN.4/264, paras. 14 and 15), according to which a State was exempt from responsibility when the *ultra vires* character of the acts of individuals or organs acting in its name was too obvious to be ignored by the other interested parties. Through the works of European writers, that doctrine had influenced the formulation of article 8, paragraph 2, second sub-paragraph, of the draft articles adopted by the 1930 Codification Conference (*ibid.*, para. 50) which he found clearer than the paragraph proposed by the Special Rapporteur.

47. He agreed with previous speakers who considered that paragraph 2 was unnecessary. It weakened the general principle of responsibility for *ultra vires* acts, and did so unnecessarily: if an act was "by its very nature" outside the competence of an organ or entity, the lack of competence would be so obvious and striking that the act would be seen as the conduct of a private person acting as such, and would come within the scope of a different article. Should the majority of the Commission be in favour of retaining the idea contained in paragraph 2, he would prefer it to be expressed in paragraph 1, in wording similar to that adopted by the Hague Conference or the learned societies mentioned in the Special Rapporteur's report. As paragraph 2 stood, it constituted an escape clause for States wishing to evade their responsibility and thus departed from the intention of the article to close all such loopholes.

48. Mr. EL-ERIAN said he agreed with the principle of draft article 10 and associated himself with those speakers who had stressed the importance of safeguarding the basic principle that a State should not, in any circumstances, be able to evade its international responsibility or invoke certain pretexts to escape its international obligations. The principle was all the more important because the Commission had decided to extend the scope of the draft articles beyond the traditional context of international responsibility for the maltreatment of aliens.

49. With regard to paragraph 1, he took it that the expressions "organ of the State" and "entity empowered to exercise . . . authority" covered what, for instance, was meant by the phrase "official, or employee of the State acting within the scope of the . . . authority", used in the Harvard Codification draft quoted by the Special Rapporteur (A/CN.4/264, para. 47).

50. Like other members of the Commission, he had doubts about the exception provided for in paragraph 2. His difficulty did not arise from the reference to "manifest" lack of competence; the Special Rapporteur had pointed out that it would be desirable to keep the wording of article 10 in line with that of article 46 of the Vienna Convention on the Law of Treaties. Furthermore, the word "manifest" was also used in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.<sup>8</sup> In his view, there was no objection to using the word since, for the purposes of legislation at least, the idea of something being "manifest" was recognized in both internal and international law; the task of defining the exact scope of the term could be left to the courts. Perhaps the doubts expressed about its use could be dispelled by using the phrase adopted by the 1930 Codification Conference, "... so apparent that the foreigner should have been aware of it and could, in consequence, have avoided the damage" (*ibid.*, para. 50).

51. He agreed with Mr. Sette Câmara that it would be better to delete paragraph 2. If a majority of the members of the Commission wished to retain an exception, it should be further restricted. There were two points to be borne in mind. First, the analogy with the law of treaties could not be applied *stricto sensu*, because of the difference between the position of an individual who wished to bring a claim against a State and that of a State considering similar action within the context of a treaty relationship. Secondly, while article 10, paragraph 1, related to the conduct of organs acting in their official capacity, but exceeding their competence, and article 11 related to the conduct of private individuals, there could be a third class of cases in which an organ manifestly exceeded its competence or manifestly broke the law concerning its activity. In his view, the responsibility of the State in such cases was not vicarious, and did not arise only if the State had neglected to prevent a wrongful act. Nor should the organ in question be regarded as an individual by reason of the fact that it had acted outside its competence. On the contrary, the mere fact that the author of the act was an organ of the State meant that the State was responsible for his conduct, although the responsibility would naturally not be the same as if the organ had acted within its competence.

The meeting rose at 1.05 p.m.

<sup>8</sup> A/CONF.67/16, article 77, para. 2.

## 1306th MEETING

Friday, 9 May 1975, at 10.45 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Yasseen.

### State responsibility

(A/CN.4/264 and Add.1;<sup>1</sup> A/9610/Rev.1<sup>2</sup>)

[Item 1 of the agenda]

(continued)

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 10 (Conduct of organs acting outside their competence or contrary to the provisions concerning their activity)<sup>3</sup> (continued)

1. The CHAIRMAN invited the Special Rapporteur to reply to comments by members of the Commission.

2. Mr. AGO (Special Rapporteur) said he was glad to note that the members of the Commission considered the principle stated in paragraph 1 of article 10 to be established. The question dealt with in that article, far from being theoretical, as some might have believed, was of undeniable practical importance. The principle had been justified on various grounds by the members of the Commission. Mr. Kearney had referred to the notions of equity and the security of international relations; Mr. Bedjaoui had referred to the State's control of its own territory and the consequences of that control; Mr. Hambro, Mr. Quentin-Baxter and Mr. Tammes had spoken of the primacy of international law over internal law. Mr. Martínez Moreno had given a historical account of the issue to explain why some countries had, in certain circumstances, come to adopt a position at variance with the principle; but he had stressed that times had changed and that conditions were now such that the principle could be generally accepted.

3. The only difficulties that arose were how to apply the principle and how to formulate it. Mr. Tsuruoka had pointed out that where practical application was concerned, political considerations sometimes prevailed over legal ones. There was, indeed, no denying that in certain spheres, such as diplomatic protection, the State did not have the duty to protect, but only the faculty of protecting, its nationals abroad. In order not to impair its relations with a particular State, the State in question sometimes preferred not to give its diplomatic protection, thus putting its political interests first. His answer to that argument was that diplomatic protection was concerned with the application of responsibility, whereas the problem before the Commission was how to define responsibility and determine the acts of the State which engaged its responsibility, regardless of whether that responsibility was applied or not.

4. Some members had mentioned that the principle that the State was responsible for all the acts of its armed forces had been codified in one of the Hague conventions.<sup>4</sup> But that very specialized Convention could not provide a basis for the drafting of the article under consideration, since it went beyond the respon-

sibility of States for internationally wrongful acts and made provision for a veritable guarantee covering all damage that might be caused by armed forces, whether they had acted as organs or as private persons.

5. Nearly all the members of the Commission had pointed out that the cases provided by international practice and jurisprudence, or cited by writers on international law, were mainly cases of injury caused to private persons, and that in those cases the use of coercion was frequent. On the latter point, he observed that in a number of cases it was an omission or a denial of justice that was held against the respondent State, not the use of coercion. On the other hand, it was true that many cases related to violation of the international legal obligations of the State regarding the treatment of foreigners. But the Commission should go beyond international practice, jurisprudence and doctrine, and formulate a really general rule to cover all cases of violation of international obligations, and especially of the basic obligations of the State, whether they concerned security, peace, the sovereignty and the independence of States, or the protection of fundamental human rights. Reference had sometimes been made to the obligations the State assumed, not towards another State, but towards the international community as a whole; with the evolution of international law, the variety and number of those obligations tended to increase.

6. As to the question whether it would be better to express the rule under discussion in positive or in negative terms, most of the members of the Commission seemed to favour a positive formula. Mr. Kearney, for example, had maintained that a positive formulation reduced the possibilities of evading responsibility. Mr. Ushakov and Mr. Ramangasoavina, who shared that view, had even made reservations about the use of the word "nevertheless", which seemed to them to give a negative character to the formula he had proposed. Mr. Bedjaoui would prefer, on the contrary, to emphasize the negative character of the formula in order to give greater prominence to the exception. Like the majority of members of the Commission, he (the Special Rapporteur) thought it would be better to state the principle that certain acts were attributable to the State, even when the authors had acted beyond their competence under internal law or had contravened provisions of that law.

7. As far as the actual drafting of paragraph 1 was concerned, the first question was whether to mention only the organs of the State or also those of other entities empowered to exercise elements of the governmental authority. His personal view was that the case of an *ultra vires* act committed by an organ of such an entity should also be covered. For instance, if a foreign ambassador serving in Rome travelled to Sardinia, he would be under the protection both of the Italian State and of the autonomous region of Sardinia. If he was injured by the conduct of a member of the Sardinian police acting beyond his competence or contrary to his orders, that would be regarded as an act of the State. An example Mr. Tsuruoka was fond of quoting was that of the private police of the Japanese National Railway Company, who might have to intervene on a train because of a bomb warning; if, contrary to the orders of his

<sup>1</sup> Yearbook ... 1972, vol. II, pp. 71-160.

<sup>2</sup> Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 10 (see Yearbook ... 1974, vol. II, Part One, pp. 157-331).

<sup>3</sup> For text see 1303rd meeting, para. 1.

<sup>4</sup> The Hague Convention of 1907 (IV) respecting the Laws and Customs of War, article 3. See J. D. Scott, *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, 1918), p. 103.



superiors, a member of that police force searched the diplomatic bag of a passenger, his conduct should be covered by the provision under consideration. Hence it was important to find a sufficiently general formula to cover all cases.

8. Some members of the Commission had said that in view of the drafting of the preceding articles, the capacity in which the organ acted need not be described as "official". He was quite willing to accept that view, but he could not accept any of the other expressions suggested. The expression "under cover of their status as organs" seemed too picturesque; the expressions "under the colour" and "ostensible authority" might be excellent in English, but were untranslatable; the expression "real or apparent authority" was vague and might provide loopholes. Lastly, the expression "making use of means placed at its disposal" was not acceptable, because a policeman, instead of using his own weapon, might use a private person's weapon to kill a diplomat, or might incite a private person to commit the act; in either case it would be an act of the State. Besides, the latter expression was not appropriate for cases of omission, which were just as common as cases of commission. Consequently, it would be better simply to provide that the organ in question must have acted in its capacity as an organ, though it would be necessary to explain in the commentary to article 10 that that formula should be understood as applying to all kinds of situations.

9. Some members had questioned whether cases of lack of competence need really be distinguished from cases of contravention of instructions. In his opinion, that distinction was indispensable, because it might happen that the conduct of an organ, though remaining within the limits of its competence, was contrary to special instructions. Thus one contingency did not rule out the other, and it would be dangerous not to mention both.

10. Some members of the Commission had referred to cases in which personal liability was added to the State's responsibility and had even mentioned the Nuremberg trial. But questions of that nature ought not to be introduced into a discussion which should bear only on the attribution to the State of internationally wrongful acts which gave rise to responsibility of the State itself.

11. Since the views expressed by members on paragraph 1 of article 10 were in agreement, the following new wording should not raise any difficulties:

"1. The conduct of an organ of the State or of another entity empowered to exercise elements of the governmental authority shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened the rules of that law concerning its activity, provided that it acted as an organ."

12. With regard to paragraph 2, Mr. Šahović had inquired whether it stated a secondary rule or limited the primary rule in paragraph 1. The intention had been to place limitations on the primary rule, like those reflected in doctrine, judicial decisions and codification drafts on the subject. While some members had been

in favour of limitations of that kind and had commented only on the drafting, others had expressed doubts about the need for paragraph 2 and considered the stipulated exception too broad. In particular, Mr. Ushakov feared that the provision might be made a generally applicable rule, whereas it was not applicable to cases other than violations of the obligations of States towards foreigners. If, for example, an executive organ sent troops abroad without previously obtaining the constitutionally necessary consent of a legislative organ, and thus manifestly exceeded its competence, its act would be attributable to the State.

13. The only reason why he had included a paragraph 2 in draft article 10 was to take account of the opinion of the great majority of writers, who recognized limitations of the general principle. So far as he was personally concerned, as early as 1939 he had held a contrary view, when he had written that it was immaterial whether, "from the point of view of the internal legal order of the State, the act of the organ must be characterized as a valid act or as an invalid or wrongful act, for even if the act is invalid or wrongful, it is still an act performed by a person in his capacity as an organ and taking advantage of that capacity . . . In conclusion, then, international law considers any conduct of an organ having acted in that capacity in the case in point as an act which may possibly be characterized as a wrongful act attributable to the State".<sup>5</sup> He was still equally convinced that no exceptions should be made in specific cases of responsibility. The obligations assumed by States in regard to the treatment of foreigners were also obligations under international law, and the general rule should cover them entirely.

14. Mr. Kearney thought that in practice it would be difficult to determine whether the conduct of an organ was foreign to its "specific functions", and that the use of those words might provide a loophole for States. Mr. Tammes and Mr. Ushakov had pointed out that the word "manifest" referred to a situation very different from that contemplated in article 46 of the Vienna Convention on the Law of Treaties.<sup>6</sup> It appeared that an analogy could not be drawn between the case of the State which concluded an agreement with another State and the case of a State which committed a wrongful act. Mr. El-Erian had distinguished three classes of situations, the first of which included acts or omissions attributable to a State because they were acts of an organ of that State, or of an entity empowered to exercise elements of the governmental authority, which had acted within its sphere of competence and in accordance with its instructions. On the other hand, there were cases in which the organ had not acted as an organ, but as a private person. Even though there was no act of the State in such cases, the responsibility of the State might nevertheless be engaged, not under article 10, but under article 11, if other organs of the State had not taken the necessary

<sup>5</sup> R. Ago, "Le délit international", *Académie de droit international, Recueil des cours*, 1939-II, vol. 68, p. 472. (Translated by the Secretariat.)

<sup>6</sup> 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. 295.

action to prevent the act or to punish the guilty party. But that did not alter the fact that the act committed by the organ as a private person could not be attributed to the State. In an intermediate class, Mr. El-Erian had included cases in which the organ had acted as such, but had exceeded its competence or had contravened its instructions.

15. The basic principle was that the conduct of its organs were attributed to the State when they had exceeded their competence while remaining within the apparent limits of their functions. In his report, he had tried to show the historical development of the relevant principles. That development had more or less stopped at the case of manifest lack of competence of the organ, excluding attribution to the State where the organ had neither real nor apparent competence. The Commission might now consider going a step further. If it wished to strengthen the rules on State responsibility and thus contribute to the progressive development of international law, it might decide to abandon all exceptions, so as not to permit States to evade their responsibility. On the other hand, if it wished to keep to pure codification, the exception should be included in article 10. It was, in reality, only in a certain international climate, which had now changed considerably, that exceptions were valid. In the interests of the security of international relations, it might be better to abolish all limitations of the principle laid down in paragraph 1.

16. He therefore proposed that either paragraph 1 alone should be retained, or the idea expressed in the present paragraph 2 should be retained in a separate paragraph, but placed in a different context. Instead of saying that a certain conduct was not attributable to the State when it was wholly foreign to the functions of the organ or when the lack of competence was manifest, the provision would stipulate that the only case of non-attribution was that in which the act was so foreign to the functions of the organ that it was manifest that it had acted not as an organ, but as a private person. That case would come within the scope of article 11. Such a radical step could not be taken, however, unless the Commission held a fresh discussion and justified it.

17. Mr. USHAKOV, referring to paragraph 1 of article 10, said that the alternative of competence according to internal law and the rules of internal law concerning the activity of the organ was not very satisfactory. In both cases article 10 referred to internal law, although the rules or the instructions given to the organ might emanate from another organ and would not necessarily have the character of rules of internal law. The Drafting Committee should try to find better wording.

18. After a brief discussion in which Mr. ŠAHOVIĆ, Mr. ELIAS, Mr. TSURUOKA, Mr. YASSEEN and Mr. EL-ERIAN took part, Mr. AGO (Special Rapporteur) suggested that article 10 should not be referred to the Drafting Committee immediately, but that there should be further discussion on the question whether or not to retain paragraph 2.

*It was so agreed.*

The meeting rose at 12.50 p.m.

## 1307th MEETING

*Monday, 12 May 1975, at 3.5 p.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

*Members present:* Mr. Ago, Mr. Bilge, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

### State responsibility

(A/CN.4/264 and Add.1;<sup>1</sup> A/9610/Rev.1<sup>2</sup>)

[Item 1 of the agenda]

(continued)

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 10 (Conduct of organs acting outside their competence or contrary to the provisions concerning their activity)<sup>3</sup> (continued)

1. Mr. AGO (Special Rapporteur) said that the Commission now had to decide whether to retain or to drop the exception provided for in article 10, paragraph 2, and what wording to adopt. In the light of the views expressed by members during the discussion he proposed the following redraft of article 10:

"The conduct of an organ of the State or of another entity empowered to exercise elements of the governmental authority shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity, provided that it acted as an organ.

"[The conduct of the organ shall not be attributable to the State in those cases only in which it is manifest that the organ acted only in a private capacity]."<sup>4</sup>

2. The second paragraph, in square brackets, did not seem absolutely indispensable, as it only confirmed the principle stated in the first; but that was for the Commission to decide.

3. Mr. TSURUOKA said that the notion of an "organ" was a notion of international law, or a notion of internal law recognized and confirmed by international law. The words "acted only in a private capacity" would add to that notion and make it more precise, so he was in favour of retaining the second paragraph.

4. Mr. SETTE CÂMARA thanked the Special Rapporteur for his redraft of article 10. He still considered, however, that the article should consist of the first paragraph only. The second paragraph referred to an organ said to have "acted only in a private capacity". The reference was clearly to individuals belonging to an organ and acting as individuals, not in an official capacity.

<sup>1</sup> Yearbook ... 1972, vol. II, pp. 71-160.

<sup>2</sup> Official Records of the General Assembly, Twenty-ninth session, Supplement No. 10 (see Yearbook ... 1974, vol. II, Part One, pp. 157-331).

<sup>3</sup> For text see 1303rd meeting, para. 1.

<sup>4</sup> cf. text proposed at the previous meeting, para. 11.

Any conduct by such individuals, which was obviously in excess of the competence of the organ, would come within the scope of article 11 (Conduct of private individuals).

5. He therefore suggested that the second paragraph of the redrafted article should be dropped; it was a potential source of confusion and might weaken the effect of the first paragraph.

6. Mr. USHAKOV said he was in favour of deleting the second paragraph altogether.

7. Mr. ŠAHOVIĆ endorsed the fundamental position taken by the Special Rapporteur in the new version of article 10, which seemed to include some progressive development of the rule on the responsibility of States. The new draft of the first paragraph was simpler than the previous version and hence preferable as a statement of a general rule applicable to all cases. Like Mr. Sette Câmara, however, he considered the second paragraph unnecessary, since the redraft of the first settled the question raised by Mr. Ushakov during the debate.<sup>5</sup>

8. Mr. YASSEEN said he thought the new version of article 10 proposed by the Special Rapporteur was better drafted than the previous text and clearly superior. He did not consider it necessary to retain the second paragraph, for there was no symmetry between the two paragraphs: the exception provided for in the second was not quite the reverse of the rule stated in the first.

9. The first paragraph was therefore sufficient, but he had some doubts about the exact meaning of the last clause: "provided that it acted as an organ". For how was it to be decided whether an organ had acted as an organ or not? Would the criterion be subjective or objective? Would it be sufficient for the organ to have apparently acted as such? He thought that point would have to be cleared up in order to know what criterion was to be applied in determining whether the organ had acted as an organ or not.

10. Mr. RAMANGASOAVINA said that the redraft of article 10 was better than the previous version and took into account the comments made by members of the Commission during the discussion. He found the first paragraph acceptable, but the last clause, "provided that it acted as an organ", made the second paragraph superfluous. For if the conduct of an organ engaged the State's responsibility only if it acted as an organ, it was obvious, *a contrario*, that if the organ had not acted in that capacity its conduct could not engage the State's responsibility. Besides, an organ was not necessarily an agent; it might be an administrative or a judicial body. In that case, how could it act "in a private capacity"? He accepted the first paragraph as drafted, but found the second paragraph unnecessary because it expressed an idea already contained in the first.

11. Mr. KEARNEY said that the redraft was an improvement on the previous text of article 10, but raised problems in regard to the concluding proviso of the first paragraph and the text of the second paragraph.

12. The concluding proviso, "provided that it acted as an organ", involved difficulties both of drafting and

of substance. As a matter of drafting, it appeared to refer only to the first part of the main clause, which mentioned the conduct of "an organ of the State". The proviso thus seemed to leave outside its scope the entities covered by the words "or of another entity". The term "entity" could not be assumed to refer to an organ, owing to the terminology used in the preceding articles.

13. The proviso was also unsatisfactory from the point of view of substance. The rule that the conduct of a State organ was considered as an act of the State under international law, even if the organ exceeded its competence under internal law, was not adequately qualified by the words "provided that it acted as an organ". That use of the term "organ" in the proviso could lead to a circular argument; it was arguable that for an organ to act as an organ it had to act within its competence under internal law.

14. In the light of the precedents mentioned in the Special Rapporteur's commentary, it was desirable to retain in article 10 some formula embodying the contents of the second paragraph. In particular, it was necessary to incorporate the important idea brought out in the award in the *Caire case* (A/CN.4/264, para. 41). In that case, the State held responsible had made available the means used in the commission of an act that was illegal under international law.

15. For those reasons, he suggested that the second paragraph should be dropped and that the concluding words of the first paragraph, "provided that it acted as an organ" should be replaced by the following wording: "unless it is manifest that the organ or entity was not exercising any elements of governmental authority and did not make use of means or instrumentalities provided by the State when so acting".

16. Mr. HAMBRO said that the Special Rapporteur had gone a long way towards meeting the points raised by members during the discussion. Like several other members, he thought that the second paragraph should be dropped as being unnecessary in the light of the contents, not only of the first paragraph of article 10, but also of article 11.

17. He agreed with Mr. Yasseen that the concluding proviso of the first paragraph should be redrafted, but thought the language suggested by Mr. Kearney was not perhaps sufficiently simple and concise.

18. Mr. REUTER said he would prefer article 10 to consist of only a single paragraph, though he saw no major objection to keeping the second paragraph, provided that the text was amended. As Mr. Sette Câmara had pointed out, it was not very clear, because the word "organ" was used in two different meanings. A distinction would have to be made between an organ of the State proper and the persons composing that organ.

19. A further question was whether the Commission should be content with a general abstract text or should include more concrete particulars. In his opinion the phrase "provided that it acted as an organ" was tautological. As Mr. Kearney had demonstrated, the status of an organ could be involved in two cases: where the entity acted as an organ of the State and where, without

<sup>5</sup> See 1304th meeting, paras. 24 *et seq.*

acting as such, it utilized means placed at its disposal by the State. For example, an act committed by a public servant who had gone mad could be regarded as an act of the organ if he had used physical means placed at his disposal by the State in his capacity as an organ. The question arose primarily in the context of inter-State responsibility: for instance, if an agent of the State who had gone mad used nuclear weapons in his charge against another country, could the State disclaim responsibility?

20. He thought the Commission had a choice between two formulas: a very general formula like that now proposed by the Special Rapporteur, and a more detailed one like that proposed by Mr. Kearney. If the Commission decided to adopt a general formula and rejected that proposed by Mr. Kearney, it would have to explain very clearly in the commentary its position on all the offences which agents of the State might commit against another State, using means of destruction or coercion placed at their disposal by the State.

21. Mr. PINTO said that he had no difficulty in accepting the main clause of the first paragraph, but found the second paragraph of the redraft somewhat difficult to understand from a practical point of view. It was hardly conceivable that an organ of the State could be capable of acting only in a private capacity. What was meant, no doubt, was that the conduct in question was not attributable to the State if it was manifestly the conduct of individuals acting in a personal capacity. The conduct of private individuals was the subject of article 11 (A/CN.4/264, para. 146), the provisions of which specified that in certain circumstances the State could be held responsible for such conduct. The second paragraph of article 10 should therefore either be expanded to bring it into line with the provisions of article 11, or dropped altogether.

22. The concluding proviso of the first paragraph was too condensed and he thought the formula suggested by Mr. Kearney was an improvement. But he had doubts about the use of the term "manifest", which would be adequate in the context of contractual liability, but not in that of tortious liability. To a person who was the victim of a tortious or wrongful act, the question whether the individual who had acted was "manifestly" acting outside governmental authority was not so pertinent.

23. Mr. MARTÍNEZ MORENO said that the redraft of article 10 was an improvement on the previous text; it took account of most of the comments made during the discussion.

24. He agreed that the second paragraph, in square brackets, should be dropped. He suggested, however, that at a later stage a separate article of a general character should be introduced to deal with those cases in which there were grounds for extenuating responsibility, even though the State might not be totally exonerated. There was some analogy between the cases he had in mind and grounds for exoneration or extenuating circumstances in internal criminal law.

25. Mr. QUENTIN-BAXTER said he agreed with those speakers who considered that the second paragraph, in the form in which it was now proposed, should be

dropped. The Commission could then concentrate on the amended text of the first paragraph, which went a long way to meet the points made during the debate.

26. He, too, had some difficulty with the concluding words of the first paragraph, "provided that it acted as an organ". The abstract idea reflected in that passage would not be of much assistance to parties to a dispute who endeavoured to determine whether State responsibility existed in a particular case.

27. In the various cases which had been decided by arbitration or had been the subject of diplomatic correspondence, a number of tests had been used to determine whether State responsibility existed. However persuasive those tests might have been in the particular instances in which they had been applied, none of them could serve as a general criterion applicable in all cases. In his statement at the previous meeting, he had discussed mainly the test of apparent authority; Mr. Kearney had now drawn attention to another test—that of the means provided by the State—which had figured prominently in a number of arbitral awards. There were cases, such as that of the use of a warship, in which the means employed constituted in themselves conclusive evidence of the use of some element of governmental authority.

28. Cases could be cited, however, in which the position was not so clear. There were countries with a citizen army, where soldiers kept their weapons at home. In the hypothetical case of such a soldier misusing his weapon to commit a crime, the State would clearly not be responsible even though the injurious act had been committed with an instrument placed at the offender's disposal by the governmental authority.

29. For those reasons, he favoured the first part of Mr. Kearney's proposal which, in his view, would be sufficient by itself, since it would embrace cases in which the State could be held responsible because the act had been committed with the use of means it had provided.

30. He would have no difficulty in accepting the word "manifest" in the present context. As used in Mr. Kearney's text, it would mean "abundantly clear". It was not enough for the respondent State to claim that the organ had not been exercising any elements of governmental authority; it was also necessary that that fact should be abundantly clear, that was to say "manifest".

31. Mr. BILGE said that article 10 was not a new source of attribution of State responsibility, for the conduct of an organ of the State that acted as such was attributable to the State under article 5 (A/9610/Rev.1, chapter III, Section B). Article 10 only added a further particular to the principle already stated, by providing that the conduct of an organ of the State which had acted as such would be considered as an act of the State under international law "even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity". To that extent, he found the first paragraph perfectly acceptable. The second paragraph seemed less necessary, but was still of some use, as it might make it easier for States to accept the principle stated in the first paragraph.

32. He was glad to note that in the first paragraph of the amended version the expression "in its official

capacity” had been replaced by the expression “acted as an organ”, for where competence was divided it was very hard to determine whether an organ had acted in the exercise of its official functions. He thought that article 10 might perhaps be linked to article 11, by replacing the expression “in a private capacity”, at the end of the second paragraph, by the words “as a private individual”.

33. Mr. ELIAS thanked the Special Rapporteur for his attempt to clarify the subject in a number of ways, which showed the direction the work of the Drafting Committee could take. The Commission was still divided, however, on the question whether to retain the second paragraph or to delete it, with or without some modification of the first.

34. The issue was a very difficult one. The Commission had to decide whether it wished to have in article 10 an absolute rule which admitted of no exception, or whether it preferred to make room for an exception and, if so, within what limits. He welcomed the constructive suggestion by Mr. Kearney, but thought the proposed wording was rather cumbersome. Moreover, he shared other speakers’ doubts about the use of the term “manifest”.

35. The decision to be taken on the deletion of paragraph 2 from article 10 was logically connected with the contents of article 11; the final formulation of article 11 was bound to have some effect on article 10.

36. Mr. USTOR said that there was complete unanimity in the Commission on the rule that a State was responsible for the conduct of its organs or other entities, even if they had exceeded their competence. There was also a unanimous feeling, however, that some saving clause should be introduced into article 10 to cover cases in which it was perfectly obvious that no State responsibility existed.

37. The problem was how to draft such a clause. Three drafts had been proposed so far: the original draft of article 10, paragraph 2; the second paragraph of the Special Rapporteur’s redraft; and Mr. Kearney’s reformulation of that paragraph. The third formula incorporated the saving clause in the first paragraph; but the attempt to shorten the proviso made it somewhat nebulous. In that respect, he partly agreed with Mr. Quentin-Baxter’s criticism; possibly the best solution would be to adopt a shortened version of Mr. Kearney’s rewording and give ample explanations in the commentary.

38. Sir Francis VALLAT said he shared the view that the second paragraph was unnecessary. Its contents overlapped to some extent with the concluding proviso of the first paragraph, so that there was a risk of conflict between the two provisions. It would be better to omit the second paragraph and try to clarify the concluding words of the first. Mr. Kearney’s proposal indicated the lines on which that might be done, though the particular language involved some difficulties.

39. Articles 10 and 11 were closely interrelated, and he hoped that they would be considered by the Drafting Committee more or less at the same time.

40. The CHAIRMAN, speaking as a member of the Commission, congratulated the Special Rapporteur on his redraft of article 10, which brought its provisions more into line with the views expressed by members during the discussion. Like other members, he approved of the first paragraph and welcomed Mr. Kearney’s proposal, which would no doubt be duly taken into account by the Drafting Committee. He fully agreed that there was a close link between articles 10 and 11; any decision on article 10 would therefore be provisional until article 11 was settled.

41. Mr. EL-ERIAN said that the redraft of article 10 was an improvement on the previous version. The Special Rapporteur had taken account of most of the points made during the discussion, and also of the wishes of those who had favoured the deletion of paragraph 2, the extremely difficult subject of which was now covered by the final passage in square brackets. The new version showed that the main criterion for the attribution of responsibility to the State was that the organ should have acted as an organ.

42. Mr. AGO (Special Rapporteur) reminded the Commission why he had asked for a further discussion on draft article 10. That provision stated a rule which had first appeared towards the middle of the nineteenth century in a restrictive form: attribution to the State of an act of one of its organs was possible only if the organ had acted within its competence and according to the rules of internal law or to instructions received. Incidentally, as he had made clear from the beginning, a person or group of persons having the status of an organ of the State could easily act as individuals. There were many organs which could be in such a situation, especially individual organs. In the course of its evolution the rule in question had gradually been changed into a stricter rule. Yet there were still a number of cases in which it was not clear whether an act should be attributed to the State and in which the trend hitherto had rather been against such attribution. It was precisely in order to reflect current practice, judicial decisions and international doctrine that he had included paragraph 2 in the first version of draft article 10.

43. Personally, he thought the Commission could go a step further and make the rule simple and absolute. Then the conduct of an organ of the State which acted in its capacity as an organ would be attributed to the State, regardless of whether it had acted within its competence and in conformity with its instructions. It was only where the organ had acted as a private person that its conduct would not be attributed to the State. It was in order to ascertain whether the Commission was prepared to lay down such a rule that he had asked for a further discussion.

44. The new version of article 10 had elicited comments on the drafting from several members, but all of them seemed to be in favour of a rule with no exception. Referring to a comment by Mr. Kearney, he explained that the conduct covered by the article should be taken to mean the conduct of an “organ” of the State or of an “organ” of another entity empowered to exercise elements of the governmental authority. To remove

any misunderstanding, it would probably be enough to add the words "an organ of" before the words "another entity" at the beginning of the article. In response to a suggestion made by Mr. Ushakov, he had replaced the reference to contravention of the rules of internal law concerning the activity of the organ by a reference to the contravention of instructions concerning its activity. In practice, it was usually such instructions—which in any case came under internal law—that the organ failed to observe.

45. Mr. Bilge had observed that the rule in question was already stated in absolute terms in draft article 5. His answer to that was that the repetition was probably useful in view of the many disputes which had arisen in cases in which an organ that was truly an organ of the State, or of another entity empowered to exercise elements of the governmental authority, had acted beyond its competence or contrary to its instructions, under cover of its status as an organ.

46. If the absolute rule were adopted, the uncertainties would be reduced to the question whether, in a particular case, the organ had acted as such or in a private capacity. In the example of a Customs official who, in the exercise of his functions, crossed the border of his State, the conduct was manifestly that of an organ of the State. But where a Customs official crossed the border to hunt game and, when challenged by the guards of the neighbouring State, wounded one of them, the conduct was certainly that of a private person, no matter whether he had been wearing his uniform or whether he had used his service revolver; he had in no way exercised any element of the governmental authority. That consideration led him to oppose Mr. Kearney's suggestion that cases in which the act of an organ of the State could be attributed to that State should be determined by reference to the means placed at the disposal of the organ by the State. Incidentally, that was not a new idea; it had been proposed earlier, notably by Charles de Visscher.

47. A reference to the means placed at the disposal of the organ might be a source of misunderstanding. A customs official who used his service revolver in a neighbouring country to kill a guard who caught him poaching, and a Swiss national who killed a foreign diplomat with his army rifle, were both committing private acts which had nothing to do with the exercise of elements of the governmental authority. On the other hand, a police officer who, when acting in his official capacity, had no weapon and used his fists against a foreigner, was not using means placed at his disposal by the State, but his conduct must nevertheless be held to be attributable to the State. Moreover, most of the violations of international law of which States were accused in the situations covered by article 10 related to the protection of foreigners, so that cases of omission were much more frequent than cases of commission; and in cases of omission, the test of the use of means made available by the State could not be applied. If a State's police force failed to take adequate measures to protect a foreign ambassador, in other words, if it did not use for that purpose the means placed at its disposal by the State, it would be precisely the fact that it had not used them which would be complained of.

48. The first part of the formula proposed by Mr. Kearney was based on the wording of some preceding articles and was accordingly welcome. It relied on the notion of the exercise of elements of the governmental authority. But the problem now before the Commission had arisen before in connexion with article 5 (A/9610/Rev.1, chapter III, section B), and had been solved differently. Article 5 stipulated that the organ must have been "acting in that capacity". It was in the light of that provision that Mr. Ushakov had suggested deleting the adjective "official" before the word "capacity", in the previous version of paragraph 1 of article 10, and simply saying "in that capacity". If the Commission now decided to introduce into article 10 the idea of exercising elements of the governmental authority, instead of the idea of acting as an organ, that difference in wording might one day give rise to difficulties in application. That being so, the Commission could either subsequently introduce a reference to the exercise of elements of the governmental authority into draft article 5, or explain in the commentary to article 10 that the organ which exercised elements of the governmental authority was acting in its capacity as an organ, or use the words "in its capacity as an organ" in both provisions.

49. He was glad to note that the first paragraph of article 10 as redrafted had received the approval of all the members of the Commission and that only the wording of the last clause had caused some of them to have doubts. In fact, the Commission merely had to weigh the advantages and disadvantages of a formula which would be more explicit, but might, for that very reason, leave some loopholes.

50. The second paragraph of the proposed new text was considered superfluous by nearly all the members of the Commission. It would be justified only in so far as repetitions were sometimes useful. In his opinion, it was not essential to retain the provision, so long as the first paragraph was drafted satisfactorily and the commentary clearly stated the limits of the rule.

51. Mr. EL-ERIAN said that article 3 specified the conditions under which an internationally wrongful act attributable to the State could be considered to have occurred. Article 4 concerned the case in which an act might not be wrongful under internal law, but be wrongful under international law. Article 10 referred to the converse case—what he might call a "grey area"—in which an act, while not attributable to the State, was wrongful under internal law and hence might give rise to State responsibility if no reparation was made under internal law or there was a denial of justice. In such cases the rule applicable was that governing responsibility for delictual acts (*responsabilité délictuelle*), under which the principal was responsible for the act of his agent or dependant.

52. The purpose of article 10, as explained by the Special Rapporteur, was to define when the act of an organ was attributable to the State. As it stood, however, the article did not preclude the generation of State responsibility even when the act was not attributable to the State because it had been committed by an organ not acting in its capacity as such. In that connexion,

he recalled that an Attorney General of France, wishing to preserve the immunity of the medical profession from prosecution, had declared that "it was not the doctor, it was the man" who had been at fault when a drunken surgeon had committed an act of gross negligence.

53. Mr. AGO (Special Rapporteur) said that for the time being the Commission was concerned only with the subjective element of the wrongful act, namely, the attribution of an act to the State. To say that the conduct of an organ of the State which had acted as an organ was attributable to that State, and that such conduct was not attributable to the State if the organ had acted as a private person, did not mean that the State was responsible in the first case, but not in the second. If the organ had acted as a private person, its act was not an act of the State. But that did not mean that in the case of an act by a private person the State could not be held responsible for the failure of its organs to act if they ought to have prevented or punished the act in question. A person who, although an organ of the State, acted in certain circumstances in a private capacity, came, by reason of that very fact, within the category of private persons. The problem of his conduct then arose in the same way as that of the conduct of a mere private person who had no official functions.

54. Although there were some connexions between articles 10 and 11, they were not such that the two articles need be taken together by the Drafting Committee. Moreover, article 10 was connected just as closely with other articles of the draft.

55. The CHAIRMAN suggested that article 10 should be referred to the Drafting Committee.

*It was so agreed.*<sup>6</sup>

#### Membership of the Drafting Committee

56. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed that its Drafting Committee should consist of Mr. Quentin-Baxter as Chairman, Mr. Ago, Mr. Elias, Mr. Martínez Moreno, Mr. Pinto, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov and Sir Francis Vallat.

*It was so agreed.*

The meeting rose at 5.50 p.m.

<sup>6</sup> For resumption of the discussion see 1345th meeting, para. 5.

### 1308th MEETING

*Tuesday, 13 May 1975, at 10.5 a.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

*Members present:* Mr. Ago, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

#### State responsibility

(A/CN.4/264 and Add.1;<sup>1</sup> A/9610/Rev.1<sup>2</sup>)

[Item 1 of the agenda]

*(resumed from the previous meeting)*

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce article 11, which read:

##### Article 11<sup>3</sup>

##### *Conduct of private individuals*

1. The conduct of a private individual or group of individuals, acting in that capacity, shall not be considered as an act of the State under international law.

2. However, the rule enunciated in the preceding paragraph is without prejudice to the attribution to the State of any omission on the part of its organs, where the latter ought to have acted to prevent or punish the conduct of the individual or group of individuals and failed to do so.

2. Mr. AGO (Special Rapporteur) said that in pure theory it was not impossible for the responsibility of a State to be engaged in cases other than those referred to in the draft articles already considered by the Commission (A/9610/Rev.1, chapter III, section B). Long ago, it had been held that any act of a citizen of a State, or of a person in the territory of a State, was an act of that State under international law. Today, that rule was not only repugnant, since the conduct of a private person who was not acting for the State, either permanently or occasionally, could not be attributed to the State, it was also contrary to the conclusion reached by the Commission concerning organs of the State, namely, that their conduct could be attributed to the State only if they had acted in their capacity as organs. At first sight, therefore, it appeared that the conduct of a private individual could not be attributed to the State. Nevertheless, it was from international jurisprudence and practice that the rule must be derived, not from abstract ideas.

3. He wished to make two preliminary remarks. First, if it was to be concluded that the act of a private individual could be attributed to the State, everything must support that conclusion; it must be possible to establish that the act attributed to the State was really the act of an individual and not a different act committed by an organ of the State in connexion with the act in question. If an individual managed to enter a foreign embassy, caused damage there and stole documents, his conduct could not be attributed to the State. What the State, and in particular its police force, would be blamed for, was not having taken adequate measures to protect the embassy. To attribute the act of the individual to the State would amount to accusing it of having failed to fulfil its obligation to respect the inviolability of the embassy, of having wrongly entered it, and of having caused damage there and stolen documents. On the other hand, if it were considered that the private individual alone was

<sup>1</sup> Yearbook . . . 1972, vol. II, pp. 71-160.

<sup>2</sup> Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 10 (see Yearbook . . . 1974, vol. II, Part One, pp. 157-331).

<sup>3</sup> Text as revised by the Special Rapporteur.



the author of the act in question and that the State was responsible only for the inaction of its agents, the State could only be accused of not having protected the embassy so as to prevent the act of the individual, or of not having punished the guilty person. That case must therefore be clearly distinguished from the case in which it was a policeman rather than a private person who wrongly entered an embassy; the act of the policeman would then be attributable to the State. In the former case, the internationally wrongful act of the State consisted in an omission on the part of its organs, namely, the failure to take adequate measures for protection or punishment. It must not be concluded from that alone, however, that the conduct of a private individual would itself be attributed to the State when it was accompanied by conduct of certain organs of the State. The fact that organs of the State were to blame for certain conduct in connexion with the act of a private individual did not transform his act into an act of the State. The act of the individual was not attributed to the State if the State was only accused of failure to fulfil its obligation to provide protection against the acts of private persons. Hence it should be determined, in every case, what the State was accused of and whether the alleged breach of an international obligation was the act of the private individual or of one of its organs.

4. The problem of determining the amount of reparation to be paid had sometimes caused confusion. States had often been ordered to pay a sum corresponding more closely to the damage caused by the individual than to that caused by the accused organ; that was because it was generally more difficult to establish the amount of pecuniary damage resulting from the inaction of an organ of the State than that resulting from the act of a private individual. Once again, the confusion arose from the fact that the damage was considered to be a constituent element of the wrongful act. It was not the damage, however, but the breach of an obligation to act or not to act which was the constituent element of the wrongful act. It was from that breach that damage could result, and it was not necessarily pecuniary damage. The damage, if any, was a material consequence of the internationally wrongful act, not the wrongful act itself. Hence there was no reason why the amount of reparation due because an organ had not taken the necessary preventive or punitive measures should not be assessed according to the damage caused by the act of the individual; but it would be wrong to deduce from that, that the act of the individual was thereby attributed to the State.

5. His second preliminary remark was in the nature of a warning. Once again, the Commission must take care not to codify, at the same time as the rules governing State responsibility, rules relating to other subjects, such as the obligations of States in regard to the treatment of foreigners and the special protection to be given to persons representing foreign States and to the property of such States. Previous attempts to codify the rules of State responsibility had been doomed to failure because they had not managed to avoid that pitfall. The 1930 Codification Conference, for example, had become entangled in considerations relating to the treatment of foreigners.

6. The concept of indirect responsibility had often been mentioned in regard to cases in which State responsibility had been incurred in connexion with the acts of individuals. In both internal and international law, indirect responsibility was the exceptional responsibility of one subject of law for the act of another subject of law. In the cases under consideration there could be no indirect responsibility, because the private individual committing the act was not a subject of international law. There was direct responsibility, inasmuch as the State which had not prevented the act or had not punished the guilty person was responsible for the omission by its organs. The act of the individual was only the catalyst for the wrongful nature of the conduct of the State organs. If an organ failed in its duty to protect an embassy effectively, the wrongfulness of its conduct would become manifest only when a private individual took advantage of that situation to attack the embassy or to enter it and commit offences there. The Commission would have occasion to revert to that question when it examined the objective element of the internationally wrongful act. It would find that there were some acts of the State whose wrongful nature showed itself without the addition of any external event, whereas others required the occurrence of an external event for their wrongful nature to appear.

7. With regard to international jurisprudence, it was necessary to go quite far back in time to understand the historical development which had taken place, and he drew attention to the many cases cited in his report. In the *British Property in Spanish Morocco case* (A/CN.4/264, para. 81), Max Huber, the arbitrator, had expressed some ideas of capital importance for the subsequent development of the principles involved. He had indicated that the acts of individuals could not be attributed to the State and that the State could be held responsible only for a failure on the part of its organs, such as a failure to prosecute offenders. He had also made a distinction, with regard to determination of the reparation payable, between damage caused by the act of the individual and damage caused by the omission of the State. Only the latter damage should, in his opinion, be compensated.

8. The *Janes case* (*ibid.*, paras. 83-85), which had been the subject of an award rendered in 1925 by a Commission presided over by Van Vollenhoven, had related to the murder of a United States national in Mexico by one of his discharged employees of Mexican nationality. The claim had been based on the fact that the Mexican authorities had failed to take proper steps to apprehend the culprit, who had gone unpunished. The United States agent had stressed the complicity of the Mexican State. The President of the Commission had considered that the notion of complicity was purely fictitious and could not provide a basis for reversing the conclusions and attributing the act of the individual to the State. He had taken the view that the delinquencies were different in their origin, character and effects. The majority of the members of the Commission had agreed with that view, but the United States member, Mr. Nielsen, in his dissenting opinion, had nevertheless supported the thesis of complicity or "condonation", which was never to appear again in judicial decisions. He had deduced from that thesis that when a State became an accomplice



because it had not taken preventive measures or had not punished the guilty persons, it took part in the act of the private person concerned and endorsed it. Despite that position, Mr. Nielsen had nevertheless associated himself with the Commission in determining the amount of reparation due.

9. With regard to the practice of States, he thought that the preparatory work for the 1930 Codification Conference could be taken as a starting point (*ibid.*, paras. 91-102). That Conference had given many States an opportunity to express their views in an objective way, whereas when foreign ministries were defending their positions in specific cases, they were inevitably inclined not to be entirely objective. The twenty-three States which had replied to the question put to them on that point by the Preparatory Committee for the Conference, had agreed that the State could not be held responsible for the conduct of an individual and that international responsibility of the State could arise only when its own organs violated an international obligation in connexion with the act of an individual. It had been in the light of those replies that the Committee had prepared the bases of discussion, which had had the unfortunate defect of relating not only to State responsibility, but also to the treatment of foreigners, and had consequently not received the support of a large enough majority to be adopted. Thus the participants in the 1930 Conference seemed to have recognized unanimously that the acts of private persons could not be attributed to the State as a source of international responsibility; but they had not been able to agree on the content of the obligations of States in regard to foreigners. Subsequently, a proposal by China, which had differed from the bases of discussion only in that it accepted the principle of equal treatment for foreigners and nationals, had been adopted without difficulty.

10. After considering the possible responsibility of the State in the simplest cases, namely, those in which private persons caused injury to individual aliens, it was necessary to examine a whole range of much more complex situations, which had given rise to great difficulties owing, once again, to the formulation of rules relating to the primary obligations of States in those situations. The situations in question could be divided into two main categories: cases in which injurious acts had been committed against individual aliens, not by isolated individuals, but during popular demonstrations, riots or disturbances of some kind; and the much more serious cases in which the victims were not mere private persons, but persons entitled to special protection as the official representatives of foreign States.

11. In the first category of cases, the respondent State usually claimed that it had been impossible to foresee and control the actions of the crowd, while the claimant State argued that the accused State had failed to fulfil its international obligations by not taking the necessary steps to prevent or punish such actions. But the dispute between the two parties generally related to the specific circumstances of the case rather than to the principles involved, as was shown by the cases cited in paragraphs 109 to 113 of his fourth report (A/CN.4/264 and Add.1).

12. The second category of cases—those of injuries caused by individuals to foreign official persons entitled to special protection by the States—was the one which had given rise to most difficulties at the international level. The *Janina incident* (*ibid.*, paras. 115-120) was significant in that respect. The Conference of Ambassadors, to which the case had been referred, had affirmed that it was “a principle of international law” that States were “responsible for the political crimes and outrages committed within their territory”. But the Special Committee of Jurists, to which the Council of the League of Nations had referred the case, had adopted a position radically different from that of the Conference of Ambassadors. To the question “In what circumstances and to what extent is the responsibility of a State involved by the commission of a political crime in its territory?”, the Special Committee had replied by affirming that “The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal”. And it had added that “The recognized public character of a foreigner and the circumstances in which he is present in its territory entail upon the State a corresponding duty of special vigilance on his behalf”. That opinion, which had been approved unanimously by the Council of the League of Nations, including Italy, meant that the representatives of a foreign State must benefit from greater protection than that owed to mere private persons, but that the State was not responsible for an act committed by private persons merely because that act had been committed in its territory; the State was responsible only in so far as it had failed in its duty to provide protection by neglecting to prevent or punish the crime.

13. That conclusion was confirmed by the cases cited in paragraphs 121 to 133 of his fourth report. In all those cases, the question that had arisen had been that of the measures taken by the State to protect the representative of a foreign State. In the *Worowski case* (*ibid.*, paras. 121-125), the Soviet Government had accused the Swiss Government not only of taking “none of the necessary steps to prevent a crime”, but also of doing “all in its power to allow the criminals to escape with impunity”.

14. In the *case of the attack on the Italian Consul at Chambéry* (*ibid.*, para. 128), the legal expert of the Legal Department consulted by the French Ministry of Foreign Affairs had recognized that “a State has the duty to ensure the punishment of offences committed against aliens in its territory” and that “This obligation is particularly strict when the victim is an official required by his functions to be present in the territory of the State where he was the victim of an offence”. He had added that “A State cannot evade this obligation under international law by invoking its legislation . . .”.

15. Finally, in the *case of the attack on the Romanian legation at Berne* (*ibid.*, para. 130), the Legal Division of the Swiss Federal Political Department had held that acts which involved the responsibility of the State were, “In principle, acts which contravene international law, in this case, acts contravening the local State’s duty to

protect diplomatic missions" and had added that "when the State fails to perform its duties to prevent and punish, or performs them incompletely, it becomes internationally responsible".

16. In all the cases cited, attention had always been drawn to the duty of the State to provide greater protection for foreigners having official status. But the responsibility of the State had been acknowledged only when its organs had violated their obligations in that respect. Thus the principle had been recognized that the State was not responsible for the acts of private persons as such.

17. The great majority of writers, starting with the Italian jurist Anzilotti, upheld that same position. An argument could hardly be based on the codification drafts already prepared, for they had been animated mainly by the desire to establish a primary rule of international law by defining the obligations of the State in regard to foreigners. The draft prepared by Mr. García Amador<sup>4</sup> had had the same defect as that submitted to the 1930 Hague Codification Conference and would probably not have led to any practical results if it had been submitted to an international conference.

18. Article 11, paragraph 1, stated the rule that "the conduct of a private individual or group of individuals, acting in that capacity, shall not be considered as an act of the State under international law", while paragraph 2 stated the principle that the State was answerable for the conduct of its organs when they failed in their international duty to provide protection against the act of the individual. In affirming that principle he had not been trying to define the primary obligations of the State; it was in each specific case that it would be necessary to determine whether the obligation existed and whether it had been violated. The obligation of the State could be summarized by two questions. First, could the State have taken action to prevent the offence committed by the individual and had it done so? Secondly, could the State have taken action to punish the individual for the offence committed and had it done so? Protection *ex post facto* was part of general protection, since punishment was a deterrent.

19. Mr. TAMMES said that paragraph 1 of article 11, which strictly distinguished the individual from the State, was the outcome of a long development which had been admirably described by the Special Rapporteur in his report. Few States would now accept the idea of the collective solidarity of the social group as a source of responsibility of the State for the acts of all persons under its jurisdiction—an idea mentioned in paragraphs 138 and 139 of the report (A/CN.4/264 and Add.1). That idea had some attraction, however, if only from the point of view of simplicity. As a matter of drafting, he found the French expression "*agissant en tant que tels*" better than the English "acting in that capacity"; the French wording was more neutral.

20. Paragraph 2 had the advantage of not trying to formulate the primary international rule the integrity of which the State organs ought to have preserved against

any adverse conduct of individuals, such as the rule concerning the protection of aliens, diplomats and other foreign organs.

21. At the same time, the Commission should not miss the opportunity of making full use of the very numerous precedents, so admirably described by the Special Rapporteur in his report. In that connexion, he wished to draw attention to an additional case, that of the *Alabama*,<sup>5</sup> in which a group of individuals in the United Kingdom during the American Civil War had committed acts preparatory to violating, abroad, the rules of neutrality, and the United Kingdom authorities had failed to prevent those acts. The case did not relate to the protection of foreigners within the territory of a State, but to the protection of a foreign State against the conduct of private persons outside its territory. In the arbitral award in that case, made at Geneva in 1872, it had been clearly decided that the territorial Power must use due diligence "as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties". Those words referred to the duty of a State to prevent any action "to carry on war against a Power with which it is at peace" and not to tolerate such warlike action by individuals on its territory. He urged that the present opportunity should be taken to generalize the rule he had just quoted, which could be considered as a declaration of non-intervention made in advance.

22. As it now stood, paragraph 2 of article 11 was rather empty; its contents would follow from the logic of the draft articles as a whole. It could, of course, be useful as a reminder, in view of past controversies, but he suggested that, if possible, it should be made more useful by amending the second half of the sentence, after the words "attribution to the State", to read: "of any omission to use all reasonable means at its disposal to prevent and punish any conduct contravening international law by natural or legal persons under its jurisdiction".

23. The expression "all reasonable means at its disposal" could be replaced by any one of a number of other phrases also appearing in the Special Rapporteur's commentary to article 11. The term "persons", or the extended form "natural or legal persons" was to be found in modern legal texts relating to the law of the sea and to the environment, such as the Stockholm Declaration.<sup>6</sup> It would cover nationals outside the territory, but under the jurisdiction of the State, as well as persons within the territorial jurisdiction.

24. The proposed amendment was in keeping with the teachings of the *Trail Smelter arbitration*<sup>7</sup> and the *Corfu Channel case*<sup>8</sup> and did not go beyond the framework of the general rules of State responsibility. It

<sup>5</sup> See Oppenheim, *International Law* (7th ed.), vol. II, pp. 714 *et seq.*; for full text of the award, see *British and Foreign State Papers*, vol. LXII, p. 233.

<sup>6</sup> *Report of the United Nations Conference on the Human Environment, Stockholm, 1972* (United Nations publication, Sales No. E.73.II.A.14), p. 3.

<sup>7</sup> United Nations, *Reports of International Arbitral Awards*, vol. III, p. p. 1905.

<sup>8</sup> *I.C.J. Reports 1949*, p. 4.

<sup>4</sup> See *Yearbook . . . 1961*, vol. II, pp. 46-54.

would have the advantage of allowing for the enormously increased legislative means at the disposal of the modern State when compared with the traditionally liberal State.

25. Another possibility would be to abandon the presumptive approach of paragraph 2 and state a positive rule attributing to the State any omission to use all reasonable means at its disposal.

26. With regard to article 11 as it stood, he had two points to put to the Special Rapporteur. The first arose from the fact that the article was not confined to the protection of foreigners against persons in the territory of the State held responsible. He suggested that, in view of that fact, it would be better to use a wider expression than "individuals", so as to cover all persons or entities against whose conduct protection was afforded by international law.

27. His second point was connected with the restrictive stand taken by Max Huber in the *British Property in Spanish Morocco case* cited in paragraph 81 of the Special Rapporteur's report; in view of the doctrinal controversies on the matter, there would be some advantage in stating explicitly, in article 11, the rejection of the old theory.

28. Mr YASSEEN said that the rule in article 11 might appear evident, but it assumed its full importance when one considered that the development of international law consisted not only in finding logical solutions, but in finding solutions accepted by all States as rules of law. To deduce that fundamental rule, it had been necessary to explore international jurisprudence and go into the history of the relevant cases. In formulating the rule, the Special Rapporteur had been faithful to positive international law, which did not recognize the responsibility of the State for the acts of private persons. He had also been faithful to the method adopted by the Commission, for he had confined himself to stating the secondary rules governing State responsibility, without trying to draw up material rules on the obligations of States. In that respect, the amendment proposed by Mr. Tammes departed to some extent from the method followed by the Commission, since it referred to a material obligation imposed on States with regard to the protection of aliens: and that was a primary rule, not a secondary rule regarding the implementation of responsibility.

29. Article 11 was very clearly worded and showed that the real source of State responsibility was not the act of the private person concerned, but the violation of an obligation incumbent on the State itself. The Special Rapporteur had made a laudable effort to remove any misunderstanding on that point, by clearly affirming that a State could be held responsible only in connexion with an offence committed by a private individual, because it had violated an international obligation. He thought that paragraph 2 was necessary in order to affirm that principle. The wording was acceptable, but he doubted whether the final words "and failed to do so" were really necessary.

30. Mr. KEARNEY said that article 11 and its impressive commentary were a monumental achievement. He cautioned the Commission, however, against excessive abstraction in legal formulas.

31. An important issue had been raised by Mr. Tammes in suggesting the use of the word "persons". It was significant that both article 8 and article 12 referred to the conduct of "a person or group of persons", not to that of "a private individual or group of individuals" as did article 11. It was essential to introduce uniformity into the terminology used throughout the articles; in order to serve as a legal tool, the draft would have to be clear as to the persons—whether individuals or legal entities—to whom the various provisions referred. Article 11 should cover both natural persons and legal persons or entities, all of them acting in a private capacity. In view of the way in which international law was developing, it was highly desirable to take legal personality into account in the present context.

32. In paragraph 2, he found considerable ambiguity in the words "where the latter ought to have acted". In particular, it was necessary to determine whether it was domestic law or international law that constituted the basis for the use of the word "ought". To him, it was obvious that the obligation derived from international law, but the point should be made clear so as to avoid future controversies.

33. He was concerned about the fact that the provisions of paragraph 2 were restricted to omissions on the part of organs of the State. There could well be some positive acts by State organs which had the same effect. The Special Rapporteur's commentary gave two examples of disputes over the effect of general amnesty laws on the punishment of individuals in situations such as those described in paragraph 2. An amnesty law did not constitute an omission on the part of the State; it was a positive act of legislation.

34. He was also concerned about the use of the formula "to prevent or punish", which he found much too absolute. The obligation of a State to prevent certain acts was not of an absolute character; that point had been made very clear in the opinion given in 1955 by the Legal Division of the Swiss Federal Political Department in the case of *the attack on the Romanian legation at Berne*, cited in paragraph 130 of the Special Rapporteur's report, which pointed out that the obligation depended on the domestic situation. The opinion added that "The State must exercise due diligence; it is not required to prevent every incident without exception ...". Some passages in that opinion perhaps went further than many members of the Commission were prepared to go, but they did point clearly to the relative character of the State's obligations in the matter.

35. As to the obligation to punish individuals who committed certain offences, he referred to the discussions on that subject held by the Commission in connexion with the protection of diplomatic agents.<sup>9</sup> Similar discussions on the extent of the obligation to punish had taken place during the formulation of the various conventions on the protection of aircraft against attacks. Different views had been expressed on the question whether a State fulfilled its obligations by simply introducing the case into the normal machinery of justice. When the

<sup>9</sup> See *Yearbook ... 1972*, vol. I, discussions on item 5 of the agenda.

time came to redraft paragraph 2 of article 11, the Drafting Committee would have to consider that important point.

36. He found considerable merit in the amendment proposed by Mr. Tammes, but it was extremely wide. It expressed a general rule of State responsibility and was probably not a primary rule; but its formulation was so sweeping that it would make article 11 less likely to gain general acceptance by States. The proposed amendment brought out the fact that certain earlier concepts were still valid. In the *Alabama* case, to which Mr. Tammes had referred, the question of confirmation of an illegal act had arisen. The older theories on the subject were not mentioned in recent literature, but they remained valid to some extent and should be taken into account in drafting paragraph 2.

The meeting rose at 1 p.m.

### 1309th MEETING

Wednesday, 14 May 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

#### State responsibility

(A/CN.4/264 and Add.1;<sup>1</sup> A/9610/Rev.1<sup>2</sup>)

[Item 1 of the agenda]

(continued)

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR ARTICLE 11 (Conduct of private individuals)<sup>3</sup> (continued)

1. The CHAIRMAN invited the Commission to continue consideration of draft article 11 as proposed by the Special Rapporteur.

2. Mr. SETTE CÂMARA said that the principle embodied in the two paragraphs of article 11 was sound, and consistent with the philosophy of the draft. It was backed by an extensive and exhaustive analysis by the Special Rapporteur of arbitral awards, State practice, attempted codifications and writers' opinions.

3. The Special Rapporteur's comprehensive exposition demonstrated conclusively that the State could not be held responsible for acts of individuals performed in their private capacity. It might happen—and indeed

often did happen—that the acts of individuals totally unconnected with the machinery of the State created a legal situation that involved the State's responsibility. But the source of that international responsibility was not the act of the individuals in question, it was the breach of an international obligation by the State or its organs. The State was thus responsible for a specific act or omission quite distinct from the acts of the individuals concerned. There was very little support in modern times for the theory that the State, by that act or omission, endorsed or condoned the acts of the individuals and became a sort of accomplice. Moreover, since individuals were not subjects of international law, it could hardly be maintained that they could violate an international obligation by their acts; such a violation could only be committed by the State or its organs.

4. The rule that the act of an individual could not be considered as a source of international responsibility was not affected by the fact that the damage caused by that act could be used as a criterion for establishing the amount of reparation. That point was irrelevant, for the Commission had already agreed, in earlier articles, to discard damage as one of the constituent elements of the internationally wrongful act.

5. The many arbitral awards cited by the Special Rapporteur in his report (A/CN.4/264 and Add.1) were virtually unanimous in attributing to the State only responsibility for acts or omissions on the part of its organs which had failed to prevent the wrongful acts of individuals or to punish individuals for such acts. The cases in question involved such omissions as denial of justice, failure to provide adequate protection and failure to prosecute and punish individual offenders effectively and promptly. Two legal relationships were involved: one, which affected the individuals directly, concerned a delinquency against the internal legal order; the other, which affected the State, concerned the breach of an international obligation and hence a delinquency against the international legal order. A striking example of the distinction between the two categories of illicit acts was provided by the *Janes* case, cited in paragraph 83 of the Special Rapporteur's report.

6. The same principle had been stated clearly in Bases of Discussion Nos. 10, 17, 18 and 19 of the 1930 Hague Codification Conference, although at that time the problem had been erroneously confined to damage to the person and property of aliens. The same was true of the merging of those formulations, by the Third Committee of the Conference, into one single text (article 10) which had been adopted unanimously by the Conference (A/CN.4/264, paras. 91-99).

7. With regard to disturbances, riots and popular demonstrations, the Special Rapporteur had made it clear that the same principle would prevail for the purpose of establishing State responsibility. As to the problem of diplomatic agents and other specially protected persons, the Convention adopted on the subject by the General Assembly<sup>4</sup> in 1973 established new international obligations which were a potential source of State

<sup>1</sup> Yearbook . . . 1972, II, pp. 71-160.

<sup>2</sup> Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 10 (see Yearbook . . . 1974, vol. II, Part One, pp. 157-331).

<sup>3</sup> For text see previous meeting, para. 1.

<sup>4</sup> See General Assembly resolution 3166 (XXVIII), annex.

responsibility. The obligation either to prosecute or to extradite an offender might, for instance, make a State liable for its refusal to extradite.

8. The importance of the principle was also demonstrated by the occurrence of hijacking attacks against aircraft. Those attacks were carried out by individuals acting in a private capacity, and the State of which they were nationals, or the State in whose territory they had boarded the aircraft, had never been held responsible for such acts. Responsibility could only be based on lack of vigilance on the part of the latter State or failure to prosecute and punish on the part of the State in which the culprits finally landed.

9. The Special Rapporteur's patient research had also revealed that the same general principle was accepted by practically all writers. There had been very meagre support for the attempt to resurrect the medieval theory of the solidarity of the group or for the contention that the State had an obligation to offer some sort of guarantee regarding everything that occurred in its territory. In the case of writers like Charles Rousseau, the affirmation that States could be held responsible for the acts of individuals was simply a question of semantics; the theories of those writers led to the same conclusion, namely, that the source of responsibility was not the acts of individuals, but the obligation to prevent the commission of such acts and to punish the criminals.

10. In the light of those considerations, he supported article 11 without reservation, but wished to add some comments on the drafting. He agreed with the suggestion made by Mr. Tammes and Mr. Kearney that the unsatisfactory English wording "acting in that capacity" in paragraph 1 should be brought into line with the more accurate French text. He had been impressed by the amendment proposed by Mr. Tammes. He considered that it did not embody a primary rule; the substance was implied in paragraph 2 and the amendment did no more than state it expressly.

11. Mr. PINTO said that he agreed with the conclusions embodied in article 11. The conduct of individuals or groups of individuals acting as such was not attributable to the State. The State might, however, be held responsible for its failure to prevent such acts or to punish the culprits.

12. The passage in paragraph 2 concerning State organs which "ought to have acted to prevent or punish" the conduct of individuals must ultimately be interpreted by reference to a rule or standard imposed by international law. At the same time, he thought the reference to an obligation to "punish" was not sufficient, because it covered only the question of punitive action or the application of penalties under criminal law. It was necessary also to cover the question of reparation to the victim, and he suggested that the idea of reparation should somehow be introduced into the text.

13. Although the terms of article 11 were well-rooted in State practice, they did not cover the full range of modern cases. Article 11 dealt only with private individuals or groups of individuals; there was no explicit mention of individuals acting collectively through a legal or juridical person. Until recently, juridical persons had

not figured prominently in the cases dealt with by international arbitration, but State enterprises and private companies, in countries where such companies existed, were now becoming increasingly important. It was, of course, possible in theory to say that companies and State enterprises acted through individuals, but in practice that approach would be neither just nor reasonable, either for the plaintiff or for the defendant in a claim. A defendant could not be treated purely and simply as an individual when he was really acting on behalf of a juridical person.

14. Where State enterprises were concerned, it was not possible to say simply that they partook of the character of State organs and should be treated as such. The mere fact that the State had created a separate entity showed its desire to dissociate itself from the activities of that entity, which were usually of a commercial or operational nature. Serious consideration should therefore be given to the question whether the State should be able to dissociate itself from ultimate responsibility for the acts of State enterprises.

15. Nor was it possible to assimilate private companies to the private individuals covered by article 11. In the market economy countries, where private companies existed, they were created in accordance with the applicable laws. All companies were subject to strict controls in the public interest; hence they could not be placed on exactly the same footing as individuals from the point of view of State responsibility. They had neither the same independence nor the same freedom of action as individuals.

16. The possibility of attributing the act of a juridical person to the State could also be affected by the fact that the activities of a particular company might be carried on under the authorization of, or by agreement with, the State, which had created the company. An even more complex situation could arise where a company operated under State authorization, or by agreement with another State or with an international organization.

17. For those reasons, it was not possible to solve that problem merely by substituting the words "natural or juridical person" for the words "private individual", in paragraph 1 of article 11. He urged that the Special Rapporteur and the Commission should carefully consider whether the State had a special duty because of the nature of the juridical person—which could range from a State enterprise to a commercial company—or by reason of its activity or of a special vigilance required of the State.

18. He had been prompted to make that suggestion because the Declaration of Principles Governing the Sea-Bed and the Ocean Floor,<sup>6</sup> which was before the Third United Nations Conference on the Law of the Sea, contained a passage dealing with the question of responsibility for damage caused by the State or by entities operating under its control or with its authorization. The discussion which had taken place on that passage had revealed a marked reluctance on the part of the interested governments to commit themselves on that aspect of State responsibility. The passage concluded with the statement that "Damage caused by such activities shall

<sup>6</sup> General Assembly resolution 2749 (XXV).

entail liability"; it did not specify to whom the damage was caused or who would be held liable, but those points could not be left unsettled for very long. Nor was the problem to which he had drawn attention confined to the law of the sea.

19. It was desirable, therefore, to explore the question of the conduct of juridical persons in connexion with the provisions of article 11. He agreed with Mr. Tammes that the present opportunity should be taken to make the draft as generally applicable as possible and to reach some conclusion on the responsibility of the State for the acts of State enterprises and private companies. He hoped that the Special Rapporteur would agree to consider whether those legal entities should receive separate treatment or should be regarded as acting through individuals.

20. Mr. ELIAS said there was clearly general agreement on the principle embodied in the two paragraphs of article 11; the drafting could be improved at a later stage.

21. The provisions of article 10 made it clear that so long as the State organ acted in the exercise of some element of governmental authority, the State was held responsible for that organ's acts or omissions; it was immaterial whether the organ had acted *ultra vires* or had attempted to deal with a matter which was wholly alien to its functions. In the cases envisaged in article 10, a State organ which exceeded its competence or acted wholly outside its functions was considered to be acting not in an official, but in a private capacity. There was, consequently, a connexion between the provisions of article 10 and those of article 11. In the situation contemplated in article 10, there was a pretence on the part of the organ to be exercising governmental authority, whereas in the case covered by article 11 there was no such pretence, but the position was very much the same as to the legal effect.

22. Article 11 expressed in positive terms a subsidiary rule without which the preceding articles 1 to 10 (A/9610/Rev.1, chapter III, section B) would be neither precise nor complete. As he saw it, article 11 stated two complementary ideas contained in one and the same basic principle. The first idea was that individuals or groups of individuals who were not exercising governmental authority could not be regarded as committing an internationally wrongful act, so long as they had acted in a private capacity when committing the act or omission in question. The second idea was that the State must accept responsibility, not for the act or omission of an individual, but for the omission of one of its organs.

23. The Special Rapporteur had rightly pointed out that, when those twin aspects of the same problem were being considered, care should be taken not to ascribe the conduct of private persons to the State by attributing responsibility to the State. A striking example was that of a private person who broke into an embassy and stole a valuable document or committed some other unlawful act. The responsibility of the receiving State was engaged, not by the individual's unlawful act, but by the failure of its organs to prevent the act or to punish the offender. The receiving State had a duty of protection, and the failure of the organ to perform that duty rendered the State internationally responsible.

24. He saw some force in the remarks of certain members regarding the use of the words "individual or group of individuals". The difficulty could be largely removed by replacing those words by the words "a person or group of persons", which the Commission had used in article 8. In the original draft, the word "individual" had been used in both the title and the body of article 8, but the Commission, after a very long debate, had replaced it by the word "person". The use of that term would have the advantage of meeting the point raised by some members regarding private companies and State entities, since by all standards of interpretation the term "person" covered both natural persons and juridical persons. With that amendment, article 11 would cover the conduct of individuals, companies, and even State enterprises which did not exercise elements of the governmental authority and were therefore outside the scope of article 7.

25. The Special Rapporteur had been careful not to introduce the concept of reparation into article 11, for reasons that were both sound and obvious. Those reasons were connected with the Commission's decision on article 3 dealing with the elements of an internationally wrongful act of a State. It had been agreed that those elements were two in number: first, there must have been an act or omission attributable to the State under international law; secondly, there must have been a breach of an international obligation of the State. After much discussion, the Commission had decided that the concept of damage did not constitute an essential element of the internationally wrongful act, and it would be totally inconsistent with that decision to introduce the notion of reparation into article 11.<sup>6</sup> An internationally wrongful act could occur in the absence of any damage—*injuria sine damno*. Conversely, there could be damage without a wrongful act having been committed—*damnum sine injuria*. In the cases covered by article 11, the amount payable as reparation for the internationally wrongful act was not necessarily measured in terms of the damage done by the individuals, and the fact that the extent of financial or economic loss was taken into account in quantifying the reparation did not alter the position.

26. With regard to the drafting, he suggested that the words "acting in that capacity" should be replaced by "acting as such". Paragraph 2 should be reformulated in more positive terms, avoiding the awkward expression "where the latter ought to have acted". The introductory words "However, the rule enunciated . . ." should also be eliminated. As redrafted, paragraph 2 would simply state that the conduct of a private person or group of persons could be the source of international responsibility of the State if its organs had failed to take action to prevent or punish such conduct, thereby contravening the obligations of the State under international law.

27. Mr. TSURUOKA said that the principle stated in article 11, paragraph 1, was a well-established rule of international law and no country questioned its validity. Article 11 might therefore seem superfluous, were it not that the principle it stated was the result of a long process of development of practice, judicial decisions and doctrine, whose course, beset with obstacles, the Special Rapporteur

<sup>6</sup> See *Yearbook* . . . 1973, vol. I, pp. 19-28 and 119.



teur had traced in his commentary. He considered, therefore, that article 11 was necessary. Paragraph 2 should be retained because it would facilitate the interpretation and application of the principle stated in paragraph 1. He thought, however, that the commentary should explain, with the help of specific examples, what was meant by the "conduct of an organ" and the "conduct of a private individual or group of individuals". The interpretation and application of article 11 would be easier if the distinction made by the Special Rapporteur between persons acting as organs and persons acting as private individuals were illustrated in the commentary by specific examples.

28. With regard to the wording of the article, he supported the remarks made by Mr. Elias concerning the English version of paragraph 1 and Mr. Kearney's comments on paragraph 2. In the text proposed by Mr. Tammes,<sup>7</sup> he thought that the words "conduct contravening international law" might be misinterpreted—a point to be noted by the Drafting Committee.

29. Mr. REUTER said that he approved of article 11 as proposed by the Special Rapporteur and thought the text should be referred to the Drafting Committee. The comments made on the drafting of the article arose out of the difficulties involved in translating into English a text which had been very well thought out in French, and out of the fact that article 11 had to be read in conjunction with articles 5, 8 and 10, which might perhaps involve some changes in terminology.

30. Article 11 was essentially self-evident: if it did not appear in the draft articles, the substance of international law would not be changed, for its only purpose was to explain the consequences of what had been stated in preceding articles and what would be stated in subsequent articles.

31. The question of attributability dealt with in article 11, was quite separate from that of the definition of the wrongful act and that of damage, but those three questions were closely connected. Hence it was perfectly natural to allude, in the commentary and in the debate, to the problem of damage and to the actual nature of the wrongful act, in connexion with the attribution of responsibility. But the Commission should take care not to touch on those two questions in the text of the draft articles, or it would come to a dead end.

32. The question of damage raised the problem of direct and indirect causality, for there was a causal link between the attitude of the State and the attitude of the individual, in so far as it was the State's failure to act which enabled the individual to cause damage. But that was a problem the Commission would meet with later and the time to deal with it had not yet come.

33. Mr. Pinto had referred to the problem of damage as it arose in the specific case of contractual liability,<sup>8</sup> in which responsibility for an act committed by several persons was, by agreement, attributed to a single person. It seemed that, for the time being, it was not possible for the Commission to deal with that problem.

34. Moreover, if the Commission undertook to define the wrongful act, it might be venturing on to very difficult ground, for the extent of State responsibility was not clear. An omission concerning observance of neutrality and an omission concerning the protection of foreigners were, indeed, two different things. The *Alabama case*<sup>9</sup> was certainly interesting and the notion of "reasonable diligence" had played an important historical role. But that notion had not been accepted later, when the Hague Conference had tried to define State responsibility. That was when the formula now proposed by Mr. Tammes had been adopted—the idea of the use of means at the disposal of States. That idea, however, was not applicable in all spheres. For example, in regard to space activities the State was fully responsible for all the actions of private individuals who took off from its territory. Hence it could not justify itself by pleading that it had used all reasonable means at its disposal.

35. With regard to the protection of foreigners, the wording proposed by Mr. Tammes was satisfactory, particularly for developing countries, which did not wish to be held responsible for failing to use means they did not possess. In other spheres, on the other hand, the responsibility of the State went far beyond the use of all reasonable means at its disposal. For instance, in the matter of protection of diplomats, the wording proposed by Mr. Tammes was insufficient because the State must have at its disposal the means necessary for such protection and could not invoke the notion of "reasonable use" to disclaim responsibility. Mr. Tammes' proposal was interesting, but he thought the Commission should not open a discussion which might lead it to anticipate the study of problems relating to the wrongful act and damage.

36. Mr. HAMBRO said that, while he did not dispute that individuals could sometimes be subjects of international law, the Commission was not dealing with that question or with the problem of reparation, but with State responsibility. Certain aspects of the question of the activities of companies, raised by Mr. Pinto, were covered in other articles which referred to the activities of State entities. While the problem was certainly of interest, the Commission would be wise to avoid discussing it in connexion with the draft articles, since it was a matter which came within the scope of primary rules, or the conventional rather than the general law of State responsibility.

37. It was his feeling that paragraph 2 of article 11 impinged on the primary rules of international law and that it would therefore be preferable to place it elsewhere in the draft. The main part of the article was undoubtedly paragraph 1, and that provision required no comment since the Special Rapporteur had covered the matter so well and all members of the Commission were in agreement on the general principle.

38. Mr. ŠAHOVIĆ said he believed that draft article 11 faithfully reflected the state of contemporary international law. Nevertheless, the Special Rapporteur's fourth report (A/CN.4/264 and Add.1) prompted him to make

<sup>7</sup> See previous meeting, para. 22.

<sup>8</sup> See 1307th meeting, para. 22.

<sup>9</sup> See previous meeting, para. 21.

a few comments. In paragraph 145 the Special Rapporteur said that if a factor of progressive development of international law was to be taken into account in drafting the applicable rule, that factor could, in his view, be represented only by the desire to eliminate from the subject any possible uncertainty, any trace of ambiguity. The Special Rapporteur had added that there was no need to dwell on the fact that the rule in question should be defined *in toto* and not only in relation to a specific topic, such as that of acts causing injury to aliens. He (Mr. Šahović) agreed that the Commission should formulate a general rule applicable to all conceivable situations, but he noted that most of the cases cited in the report related to the status of aliens. The Special Rapporteur's reasoning was based almost entirely on cases of that kind. It would therefore be desirable to consider, in the commentary to article 11, whether that provision could really be applied to all possible cases, in view of the recent trend of international relations and the current needs of the international community.

39. Like the Special Rapporteur, he considered that the act of the individual should be regarded as catalysing the wrongfulness of the conduct of organs of the State. Hence, the question whether to refer to individuals and groups of individuals or to persons and groups of persons was not purely a matter of terminology. It was necessary to consider how the phenomenon of catalysis would operate in internal law, and in doing so one could not avoid the problems raised by the conduct of private companies, State enterprises or multinational companies. Before departing from the wording proposed by the Special Rapporteur, the Commission should try to define the terms used, taking into account all other subjects of law, such as legal persons, whose conduct could have implications for State responsibility at the international level.

40. With regard to the relationship between article 11 and other provisions of the draft, he pointed out that article 8, sub-paragraph (b) dealt with a situation similar to that covered by article 11.

41. The obligations of the State had been divided by the Special Rapporteur into three categories, according to whether they related to injury inflicted by individuals on individual aliens, to injury caused to individual aliens as a result of riots or other disturbances or to injury caused to persons entitled to special protection. Since modern positive international law was now tending to stress certain obligations of States, in particular those relating to the treatment of persons entitled to special protection, he thought the rule stated in article 11 might go so far as to indicate that the responsibility of the State was engaged by reason of such obligations. The Convention on International Liability for Damage Caused by Space Objects,<sup>10</sup> to which Mr. Reuter had alluded, imposed a general obligation which applied both to private companies and to State organizations.

42. The drafting of article 11 should perhaps be amended, because the article was part of a chapter entitled "The act of the State under international law". It might be better to head the article "Conduct of organs acting by

omission", rather than "Conduct of private individuals". Perhaps it would also be preferable to state in a single paragraph the primary rule, which in the present version of article 11 was contained in paragraph 2. As Mr. Reuter had said, the rule in paragraph 1 followed from the preceding provisions and it was not strictly necessary to state it.

43. The proposals made by Mr. Tammes and Mr. Elias should be considered by the Drafting Committee.

44. Mr. QUENTIN-BAXTER said he had no doubts at all either about the principle set out in draft article 11 or about the imperative need to balance the statement in paragraph 1 of the article by that in paragraph 2. Like other speakers, however, he wondered whether balance had in fact been achieved by the inclusion of paragraph 2, or whether the article did not place undue emphasis on the absence of State responsibility in the particular case of the conduct of private individuals.

45. He agreed with previous speakers and with the Special Rapporteur that both parts of article 11 were, in a sense, inevitable corollaries of the preceding articles; in that respect there was no imbalance. Taken alone, however, paragraph 1 could have an unbalancing effect, and in that respect he supported the view that the Commission should look more widely to the context of the rule. While he had no doubt that the basic rules set out in the draft articles would prove acceptable to the representatives of States, they might be concerned over the distillation of the wealth of the commentary into such concise principles. Those whose legal tradition was empirical, for example, might be uneasy over the degree of abstraction involved, while others might be unused to the terminology employed or, having become accustomed to working with uncoded law, might think that codification must always show very substantial advances. For those reasons, he was very sympathetic to the view of other speakers that ways should be sought to reflect more of the commentary and, if possible, to include concrete elements, in the draft article. The amendment proposed by Mr. Tammes was of great interest in that respect.

46. Like other speakers, however, he had difficulties with that proposal. Some international obligations might rank higher than others, with the consequence that, as Mr. Reuter had pointed out, the use of "all reasonable means" at the disposal of the State might not always be an appropriate test. He agreed with Mr. Tsuruoka about the problem raised by the phrase "conduct contravening international law". In view of the importance of ensuring a balance between paragraphs 1 and 2, he would be happier if paragraph 2 of the article began forthrightly with a statement to the effect that the rule enunciated in paragraph 1 would in no way prevent the attribution of responsibility to the State in the circumstances in question. He would also prefer the word "omission" to be replaced by the word "failure", since the latter word could cover both an act and an omission.

47. Sir Francis VALLAT observed that there was general agreement that the Special Rapporteur had made out an overwhelming case, in his commentary and opening statement, for the principle and the saving clause contained

<sup>10</sup> General Assembly resolution 2777 (XXVI), annex.



in the draft article. The difficulties which had been mentioned related to the formulation.

48. It was important that the position of juridical persons should be covered in paragraph 1. The point could not be avoided on the basis indicated by Mr. Pinto, namely, that States could be responsible for the actions of corporations in certain circumstances, since that was more a question of liability than of the attribution of conduct to the State. Corporations normally acted independently of the State and their acts should, therefore, be seen as private acts. In that respect, he approved of the suggestion made by Mr. Elias.

49. While it was true that article 11 might to some extent be considered superfluous, because the principle in paragraph 1 followed naturally from earlier articles—particularly article 8—that principle was in itself so important that it must be stated; hence the counter-balancing effect of paragraph 2 became necessary. As the Special Rapporteur had warned, however, in the concluding sentences of paragraph 145 of the commentary, the Commission should not attempt to draft primary rules, and it was such an attempt that had caused the difficulty regarding paragraph 2; in his opinion, the phrase “ought to have acted” came within the context of primary rules. He suggested that the object of paragraph 2 should be to delimit the negative effect of paragraph 1 on earlier articles and that that object could be achieved, and the paragraph itself strengthened, by the inclusion of a phrase such as:

“... without prejudice to the attribution to the State of conduct by reason of any provision of the present articles”.

50. Mr. USHAKOV said he fully approved of the substance of article 11, but had several reservations on the drafting.

51. In drafting paragraph 2, the Special Rapporteur seemed to have gone beyond the limits of the subject he had intended to deal with in chapter II. For whereas that chapter was intended to deal only with the act of the State under international law, article 11 dealt with a wrongful act of the State, namely, a possible omission by an organ of the State when it ought to have acted in accordance with international law. In referring to the way in which an organ ought to have acted according to a primary rule of international law—which required it to prevent or punish the conduct of an individual—the Commission was taking a subjective element into consideration and leaving the sphere of “acts of the State” to enter that of wrongful acts of the State. Consequently, he considered that paragraph 2 of article 11, as it stood, was almost unacceptable. For the same reason, the wording proposed by Mr. Tammes and by Mr. Elias had no place in chapter II.

52. As drafted, article 11, paragraph 2, also seemed to imply that, in the situations contemplated, any delinquency on the part of an individual was accompanied by an omission by an organ of the State. But that was not always the case. For example, there was no omission by an organ of the State when an ambassador on mission abroad was insulted in a public place by a private individual. Admittedly, the Special Rapporteur had taken the precaution of referring to “any” omission on the

part of organs of the State, but that qualification did not seem adequate from the point of view of legal technique.

53. If it was considered necessary to refer in paragraph 2 to “any omission” on the part of organs of the State, the contents of nearly all the preceding articles would have to be repeated in order to make it clear, for example, that not only organs of the State were involved, but also other entities empowered to exercise elements of the governmental authority, and that the organs might have acted contrary to instructions.

The meeting rose at 1 p.m.

### 1310th MEETING

Thursday, 15 May 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

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

### Co-operation with other bodies

[Item 8 of the agenda]

#### STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

1. The CHAIRMAN invited Mr. Sen, Secretary-General of the Asian-African Legal Consultative Committee, who was acting as its observer, to address the Commission.

2. Mr. SEN (Observer for Asian-African Legal Consultative Committee) said that in the absence of the Committee's President, who was unfortunately prevented from attending by official business, it was his privilege to represent the Committee before the International Law Commission.

3. The Committee had been gratified to note that the Commission had elected as its Chairman Mr. Tabibi, who had for long been a powerful advocate of Asian-African legal co-operation and had been largely instrumental in promoting the current close co-operation between the two bodies. Mr. Tabibi had been so closely linked with the Committee, particularly through his recent work on the important question of land-locked countries in preparation for the Geneva Conference on the Law of the Sea, that it could almost claim him as one of its own. The Committee was also grateful to the other members of the Commission who had attended its meetings in the past, particularly Mr. Yasseen, who had been a strong supporter of the Committee in the United Nations and other organizations; Mr. Elias, who, as a former President of the Committee, had made an outstanding contribution to the expansion of its role and had given valuable assistance to its member Governments in preparing for United Nations conferences of plenipotentiaries; and Mr. Pinto, one of the architects of the Committee's work on the law of the sea.

4. One of the main objects of the Committee was to examine, on a regional basis, the problems before the Commission and to make recommendations. In its early years the Committee had had to concentrate on priority issues raised by its member Governments, but the work of the two bodies had fallen into line on the topic of the law of treaties and he firmly believed that their co-operation had contributed greatly to the adoption of the Vienna Convention on that topic. The Committee had also informed its members of the Commission's work concerning internationally protected persons, with the result that some of its own suggestions had been included in the draft articles. The Committee hoped it would soon be able to send its observations on the Commission's draft articles on succession of States in respect of treaties to its member Governments, in preparation for a possible plenipotentiary conference on the subject. In future, the Committee intended to include all subjects discussed by the Commission in its programme of work, taking them up at an early stage in the Commission's deliberations. He hoped it would be possible to achieve greater co-operation between the two bodies after the Committee had completed its work on the law of the sea.

5. With the expansion of its membership, the Committee had broadened the scope of its activities to include the study and preparation of material concerning all legal issues of interest to the United Nations and other international organizations, for the benefit of its members and other Asian and African governments. Its most important work had been done on the law of the sea; it was in the Committee that the concepts of the exclusive economic zone and the archipelagic State had originated. The Committee co-operated closely with the United Nations Environment Programme, so far as the legal aspects of environmental problems were concerned, and with UNCITRAL, UNCTAD, ECE, EEC and other bodies, on questions relating to the international sale of goods, international commercial arbitration and shipping, all of which were matters of vital interest to developing countries. The Committee helped its member Governments by conducting training programmes, collecting legal material, and organizing seminars on common problems. It hoped to hold a seminar on problems of international law for government legal advisers in 1976.

6. Members of the Committee had recognized from the outset that regional interests could best be promoted in the broader context of the world community, and had welcomed a wide range of observers to their meetings. At its sixteenth session, held at Teheran in 1975, the Committee had much appreciated the clear account given by Mr. Ustor of the meticulous care taken by the Commission in its work on succession of States in respect of treaties—a matter of great concern to Asia and Africa, where there were many new States. Another cause for satisfaction had been the presence of many high-level representatives of Latin American States, as the interests of States in that region were practically identical with those of the members of the Committee. The session had been devoted mainly to an evaluation of the Third United Nations Conference on the Law of the Sea and the discussion of specific questions on which further clarification

and consultation had appeared necessary in preparation for the recent Geneva session of that Conference, including the economic zone, the patrimonial sea, the continental shelf, the limits of national jurisdiction, passage through straits and the régime for islands and archipelagos. The Committee had also identified certain legal problems relating to the environment and hoped to discuss them further at its next session. Finally, the Standing Committee on trade-law subjects had drafted three model agreements—on agricultural products, machinery and consumer durables—which had been communicated to the governments in the region, the United Nations and other regional organizations for comment, and which the Committee would be submitting to a conference of experts in 1976. In that year the seventeenth session of the Committee would be held, at Kuala Lumpur, and he hoped the Chairman of the Commission would be able to attend.

7. He looked forward to a steady increase in the co-operation between the Asian-African Committee and the International Law Commission, which were both engaged in developing a legal order based on justice, equity and good conscience.

8. The CHAIRMAN thanked Mr. Sen for his statement and for inviting him to attend the Committee's next session. The tradition of the annual exchange of observers between the Commission and the Committee was beneficial to the work of both bodies. He had noted the keen interest which the members of the Committee took in the work of the Commission, which greatly appreciated that interest. The Committee deserved particular praise for the impressive amount of work it had done on the law of treaties and the law of the sea. The wide support it enjoyed, including that of the Latin American States, showed that it had become a third world forum whose deliberations could not but be of value to the Commission. Its success was largely due to the untiring efforts of its Secretary-General, an eminent jurist and scholar who had made a great contribution to the development of international law and of co-operation among members of the Asian-African Committee.

9. Mr. USTOR congratulated Mr. Sen on his clear account of the wide-ranging activities of his vigorous and expanding Committee and said that his own attendance at its sixteenth session had been a most rewarding experience. He had been impressed by the liveliness of the debates, the efficient conduct of business by the President of the Committee and the other officials, and above all, by the untiring efforts of its Secretary-General, who had been the motive force behind the whole session.

10. The members of the Commission were aware that the links between it and the Asian-African Committee were especially close, since article 3 of its Statutes required the Committee to examine questions that were under consideration by the Commission. Although the Committee had recently concentrated on the important topic of the law of the sea, he was confident that it would contribute to the codification of other topics and welcomed Mr. Sen's statement to that effect. It would be

gratifying if other bodies of a similar nature also systematically discussed the topics before the International Law Commission, so as to foster more fruitful co-operation between the regional and central agencies concerned with international law.

11. Mr. KEARNEY said that the work of the Committee was closely interlinked with that of the Commission and the relationship was most productive. He drew attention to the report on the Committee's work circulated to the Commission,<sup>1</sup> which, in regard to the law of international rivers, for example, illustrated the problems the Commission would have to face in tackling the same subject. He had also found it interesting to read of the Committee's work on international commercial arbitration and, indeed, all its work connected with UNCITRAL. The collection of the Committee's recommendations would be very useful to lawyers and scholars. If the Committee reviewed future recommendations relating to service of documents and the taking of evidence abroad, it would be worth while examining the conventions prepared by the Hague Conference, especially the provisions relating to machinery for the establishment of a central authority for the service of process and the taking of evidence. The Secretariat of the Committee was preparing a commentary on the question of the protection and inviolability of diplomatic agents and other protected persons, and he hoped it would support the Convention adopted on that subject by the United Nations, which he considered to be most important.<sup>2</sup>

12. Mr. MARTÍNEZ MORENO, speaking also on behalf of Mr. Sette Câmara, thanked Mr. Sen for his excellent report. There was undoubtedly a close intellectual link between bodies dealing with the codification and progressive development of international law. The countries of Asia and Africa and of the other regions of the developing world had serious demographic, economic, social and educational problems, but they could, he thought, be solved through international co-operation within the context of the higher principles of law. It had thus been of great interest to him, as a Latin American jurist, to hear of the Committee's efforts to achieve international solidarity and the advancement of international law.

13. Mr. AGO, speaking also on behalf of the other members from Western European countries, thanked Mr. Sen for his statement and wished the Asian-African Legal Consultative Committee every success in its work. He had had an opportunity of seeing the Committee at work during the session it had held some years ago at Baghdad, and had noted the valuable services which could be rendered to the International Law Commission by bodies of that kind. In their respective regions they studied the Commission's work and made it known more widely than the Commission itself would be able to do. They dealt mainly with matters of particular interest to their own regions and then communicated their views and suggestions to the Commission.

14. The Asian-African Legal Consultative Committee differed from the other similar bodies in that its membership comprised both old States and new States which urgently needed to make their contribution to the solution of current problems of international law. The International Law Commission was gratified by the ever-increasing interest the Committee took in its work, as that enabled it to achieve greater success in its endeavours to prepare truly universal rules of international law.

15. Mr. YASSEEN said he had attended the deliberations of the Asian-African Legal Consultative Committee several times and in various capacities, and he had subsequently told the Commission of the value of the Committee's work and its close links with the Commission. It was thanks to the efforts of Mr. Sen, its Secretary-General, whom he congratulated on his excellent statement, that the Committee had expanded considerably and had become a valid partner for other bodies concerned with the progressive development of international law and its codification. Much of the Committee's success was due to Mr. Sen's devotion, scholarship and patience.

16. Sir Francis VALLAT, speaking also on behalf of Mr. Quentin-Baxter, associated himself with Mr. Ago's remarks and added his appreciation of the lucid report by Mr. Sen. He stressed the great importance he and Mr. Quentin-Baxter attached to the work of the Asian-African Committee. It was encouraging to note the Committee's attention to the question of succession of States in respect of treaties, and he hoped the outcome of its efforts would be positive.

17. Mr. Sen's statement had shown the great value of the interchange between the Committee and the International Law Commission, which had become increasingly aware of the advantages of learning the views of governmental experts at an early stage in its discussions. During the last ten years, the Commission had been successful in producing draft Conventions, but, as exemplified by the Vienna Convention on the Law of Treaties, it had been less successful in securing their ratification and entry into force. He thought Mr. Sen might wish to suggest to the Committee that attention should be given not only to producing draft articles, but also to giving effect to them when they appeared in the form of a convention.

18. Mr. USHAKOV, speaking also on behalf of Mr. Šahović, thanked the observer for the Asian-African Legal Consultative Committee for his excellent statement and referred to the close links between that Committee and the International Law Commission. In accordance with its Statutes, the Committee systematically studied all topics on the Commission's agenda. Because jurists of world renown took part in its deliberations, the Committee's work was useful for international law in general and for the Commission's own work in particular.

19. Referring to his own country, he pointed out that two-thirds of the Union of Soviet Socialist Republics was in Asia, so that the Committee's work was of special interest to Soviet jurists.

20. Mr. ELIAS said that the Commission had grown accustomed to receiving reports of high quality from the Committee, but that the latest was probably the best.

<sup>1</sup> *The work of the Asian-African Legal Consultative Committee [1956-1974]*, published by the Secretariat of the Committee at New Delhi (1974).

<sup>2</sup> See General Assembly resolution 3166 (XXVIII), annex.

The Committee had probably been of more direct assistance to the Commission than any other regional organization, for in the past ten years it had studied in detail nearly all the important topics discussed by the Commission, giving its member Governments an insight into the problems the Commission was likely to encounter and an opportunity to make constructive comments. It was pleasing to note, in addition to the co-operation between the Committee and the Commission, the increasing links between the Committee and the Inter-American Juridical Committee, which had been particularly evident at the Committee's meeting at Colombo on the law of the sea. He was sure that the opportunities offered by such co-operation for the exchange of views and the formulation of common positions was of assistance to United Nations conferences.

21. Mr. Sen had referred to the Committee's work on the law of treaties and its role at the Vienna Conference, and to its work on the law of the sea. The strong interest of Asian and African countries in the law of the sea was evident in the Commission itself, in the person of Mr. Pinto, whose expert knowledge of that subject had been recognized by the United Nations. As Sir Francis Vallat had emphasized, however, and as he himself had recently mentioned to members of the Committee, more could be done to encourage its member Governments to demonstrate, through ratification, the importance they attached to the Vienna Convention on the Law of Treaties. The Committee should also give early attention to the question of succession of States, a subject of particular importance to the developing world, and, as Mr. Kearney had mentioned, to the question of the protection of diplomatic agents.

22. He had seen that the New Delhi headquarters of the Committee was a hive of purposeful activity. Behind it all was Mr. Sen, whom he could not thank too much for his notable personal contribution to the work of the Committee and to the part it played in the activities of the International Law Commission.

23. The CHAIRMAN wished Mr. Sen continued success in his efforts to further international co-operation and the development of international law, and asked him to convey the good wishes of the Commission to the members of the Asian-African Legal Consultative Committee.

#### State responsibility

(A/CN.4/264 and Add.1; <sup>3</sup> A/9610/Rev.1 <sup>4</sup>)

[Item 1 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR  
ARTICLE 11 (Conduct of private individuals) <sup>5</sup> (continued)

24. The CHAIRMAN invited the Commission to continue consideration of draft article 11, as proposed by the Special Rapporteur.

25. Mr. USHAKOV said that paragraph 2 of article 11 should refer to the conduct of the State in general and not merely to its wrongful acts. Article 8 (A/9610/Rev.1, chapter III, section B) dealt with the attribution to the State of the conduct of persons in fact acting on its behalf, without specifying whether the conduct was wrongful or not. Similarly, under all the other articles concerning the conduct of organs of a State, it was not only wrongful conduct, but also lawful conduct that was attributable to the State. He therefore suggested that paragraph 2 should be replaced by the following text: "Paragraph 1 is without prejudice to the attribution to the State of its own act". That meant any act, wrongful or not, that was attributable to the State.

26. Furthermore, paragraph 1 or paragraph 2 of article 11 should make it clear that the "conduct of a private individual or group of individuals" meant the conduct, not of any private individuals, but of private individuals subject to the jurisdiction of the State concerned. For only the conduct of private individuals who were subject to the jurisdiction of the State could result in attribution to the State of responsibility for omission.

27. He agreed with the principle stated by the Special Rapporteur in paragraph 1. The conduct of a private individual or of a group of individuals acting as such was not, in principle, attributable to the State—but in principle only, for in practice one could never be sure that the State was not involved directly or indirectly in the individual's action. The Special Rapporteur's commentary showed that in practice specific cases were always very complicated and difficult to settle. The conduct of a private individual or group of individuals could be indirectly provoked by the State—for example, by a propaganda campaign conducted by the State against another State—so that in some cases one might speak of complicity of the State, though not in the legal sense of the term, since the notion of complicity did not exist in international law. In that connexion, Mr. Reuter had rightly pointed to the causal link which might exist between the attitude of the individual and the attitude of the State.

28. With regard to the wording of paragraph 1, he thought that, in addition to the conduct of private individuals or groups of individuals, the conduct of entities not empowered to exercise elements of the governmental authority should be mentioned. The commentary should explain that the expression "group of individuals" could apply to groups of terrorists formed in the territory of a State and acting in that territory or in the territory of another State.

29. He would prefer the word "action" to the word "conduct", which meant acts as well as omissions. In the case of private individuals not empowered to exercise elements of the governmental authority, it was an act rather than an omission which could generate responsibility.

30. Mr. MARTÍNEZ-MORENO said that there was clearly no difference of opinion on the two basic principles underlying article 11, namely, that the conduct of a private individual or group of individuals acting as such should not be considered as an act of the State under

<sup>3</sup> Yearbook ... 1972, vol. II, pp. 71-160.

<sup>4</sup> Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 10 (see Yearbook ... 1974, vol. II, Part One, pp. 157-331).

<sup>5</sup> For text see 1308th meeting, para. 1.

international law, but that if organs of the State failed to take action to prevent or punish such conduct when they ought to have done so, the State should be held responsible. The Special Rapporteur had rightly stated those principles as clearly as possible, without referring to secondary matters such as reparation, which had tended to confuse earlier drafts on the subject. There was still some confusion in international juridical circles concerning such matters. For example, in a dispute between El Salvador and Honduras over the destruction of property belonging to nationals of El Salvador in Honduras, one of the mediators had maintained that, since the property had been insured, there had been no loss and that hence there was no international responsibility on the part of Honduras to make reparation.

31. Mr. Tammes, Mr. Pinto and Mr. Elias had made valuable proposals, which the Special Rapporteur would no doubt take into account in his final draft. It might well be wise to mention juridical persons and entities as well as individuals. Although responsibility which did not flow from the direct relations of the individual with the State should be treated separately, there were often indirect links which complicated cases, and wording on the lines proposed by Mr. Elias<sup>6</sup> might raise the confusing issue of indirect responsibility. It was important to keep the statement of the two basic principles absolutely clear. He agreed with Mr. Quentin-Baxter and Sir Francis Vallat that paragraph 1 should in no way diminish the principle of a State's responsibility in cases where its organs had failed to act as they should have done. The wording proposed by Mr. Ushakov for paragraph 2 would evade the problem of cases in which the State's organs had failed to prevent or punish the internationally wrongful act of an individual or group of individuals.

32. Mr. RAMANGASOAVINA said that article 11 contained two entirely acceptable principles drawn from a searching study of State practice, doctrine and jurisprudence. Paragraph 1 stated a settled principle, which could hardly be challenged, and paragraph 2 an independent principle which constituted an exception and a limitation applying to the principle stated in paragraph 1. States had the duty to take appropriate action to prevent or punish the conduct of the individual. The difficulty of applying the principle stated in paragraph 2 lay in the appraisal of the measures really taken by the State and the measures it ought to have taken; for it was necessary to make a value judgement on the measures taken by the State to prevent or punish the act of the individual. In his opinion, the word "omission" was not enough, since an examination of the cases cited in the Special Rapporteur's report (A/CN.4/264 and Add.1) showed that they differed very widely and that sometimes there was either tacit or manifest complicity by organs of the State—for example, when a service had operated defectively.

33. An analogy could be drawn between the responsibility of the State in international law and liability in criminal law, since the State was held answerable if it had failed to prevent an offence when it had the means

to do so. For example, the State had an absolute duty to prevent any act likely to harm an alien; if it failed in that duty, it incurred responsibility. But the application of the physical means necessary for preventing a wrongful act was judged differently in different cases. The State's performance of its duty might be limited by the impossibility of preventing the commission of the wrongful act; thus the State was not responsible if it had made the necessary effort to prevent the act of a private individual, but had failed.

34. He would be in favour of using the expression "failed to act", suggested by Mr. Elias, as it conveyed not only the idea of omission, but also that of deficiency or lack of diligence. He would like that idea to be introduced into the text of article 11 submitted by the Special Rapporteur. Otherwise, that text seemed preferable to the one proposed by Mr. Elias, because it was more analytical. He thought, however, that the word "*éventuelle*" weakened the word "*omission*", and preferred the expression "any omission", used in the English text.

35. Mr. BILGE observed that the rule laid down in paragraph 1 was the culmination of a long process of development of practice, jurisprudence and doctrine. That rule, according to which the conduct of a private individual or group of individuals acting in that capacity could not be considered as an act of the State under international law, might seem self-evident, but it was not a product of pure logic: it was the epitome of two centuries' experience. The cases cited in the Special Rapporteur's report showed that there had, in fact, been some resistance on the part of States. In presenting the rule in its present form, the Special Rapporteur had been careful to avoid the risk of confusion with other notions, such as complicity and indirect responsibility of the State. He (Mr. Bilge) accepted the rule in paragraph 1, which was a general rule of State responsibility and did not apply only to the treatment of aliens. It was the corollary of the rule laid down in article 5 (A/9610/Rev.1, chapter III, section B), according to which only the conduct of a State organ acting in that capacity could be attributed to the State, but it had to be stated expressly.

36. With regard to the principle stated in paragraph 2, the Special Rapporteur had warned the Commission of the danger of trying to define the obligations of the State, when it was concerned solely with the problem of the attribution of responsibility, and had pointed out that the 1930 Hague Codification Conference had failed in its task because it had tried to establish primary rules on the subject. Paragraph 2 performed a most useful function by affirming that the act of the private individual and the act of the State or its organ were two independent acts which must be treated separately, any idea of direct or indirect complicity of the State being rejected, though the existence of a causal link between the two acts was recognized. It was those two elements which made paragraph 2 so difficult to draft.

37. He had some reservations about the three proposals made in regard to paragraph 2. The text proposed by Mr. Tammes<sup>7</sup> contained three elements which he found hard to accept. First, it would introduce a primary rule;

<sup>6</sup> See previous meeting, paras. 24-26.

<sup>7</sup> See 1308th meeting, para. 22.

secondly, it would impose some limitation on the State's duty to protect; thirdly, it was debatable whether the conduct of a private individual could contravene international law. The text proposed by Mr. Elias was also in the nature of a primary rule, and at that stage it did not yet seem appropriate to speak of the "source" of the international responsibility of the State. Mr. Ushakov's proposal made too categorical a distinction between the act of a private individual and the act of the State. In his opinion, the link between the act of the State and the act of the private individual should be clarified, but not denied.

38. He approved of the text submitted by the Special Rapporteur, though he thought it could be improved in the light of the comments made by the members of the Commission during the discussion.

The meeting rose at 1.00 p.m.

### 1311th MEETING

Friday, 16 May 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

#### State responsibility

(A/CN.4/264 and Add.1;<sup>1</sup> A/9610/Rev.1<sup>2</sup>)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR  
ARTICLE 11 (Conduct of private individuals)<sup>3</sup> (continued)

1. The CHAIRMAN invited the Commission to continue consideration of draft article 11 as proposed by the Special Rapporteur.

2. Mr. USTOR expressed agreement with the underlying principle of article 11. Other articles in chapter II, particularly articles 5, 7, 8, 9, 10, 12 and 13 also dealt with attribution, indicating the circumstances in which the conduct of organs of a State were attributable to the State, but article 11 dealt with the conduct of individuals or groups of individuals acting in their private capacity, which was not, therefore, attributable to the State. The article might be drafted differently; it might provide, for example, that conduct in cases other than

those governed by the other articles of chapter II was not attributable to the State and could not be considered an act of the State. In strict logic, as some members had pointed out, paragraph 1 of article 11 was superfluous, for it stated what was obvious from the other articles. Nevertheless, he shared the view of the Special Rapporteur and other members that, for the sake of clarity and conformity with traditional practice, the rule had to be stated as a corollary to, and logical conclusion from, the other articles.

3. The question whether the term "private individuals" or "persons" or some other term should be used in paragraph 1 of article 11 could be left to the Drafting Committee to decide. Whatever term was used, paragraph 1 should cover the cases indirectly alluded to in article 10, under which the conduct of an organ of the State or other entity empowered to exercise governmental authority was attributable to the State even if the organ or entity had exceeded its competence or contravened the instructions concerning its activity, provided that it had acted in its official capacity. The Drafting Committee might therefore consider how to provide in article 11 for cases in which an organ of the State had acted, not in its official capacity, but as a private individual or group of individuals, in which case its conduct would not be attributable to the State.

4. The question of the conduct of juridical persons, particularly bodies corporate in which the State had an interest or which acted under its instructions, appeared to be beyond the scope of the Commission's present endeavour. It was a wide subject, which raised delicate issues of private international law and entered the domain of primary rules that the Commission wished to avoid. For the purpose of State responsibility it would be sufficient to indicate that the provisions of the draft did not exclude the attribution to the State of the acts of juridical persons, particularly when they were empowered to exercise elements of governmental authority. But the mere fact that a body corporate had been constituted under the State's internal law, or had its headquarters in the State's territory, or was controlled by nationals of the State, did not make its acts attributable to the State, any more than the acts of a natural person were attributable to a State solely by reason of that person's nationality. Nationality was nevertheless a link between a person and the State, and Mr. Ushakov had mentioned jurisdiction as another such link. The absence of any link between the person concerned and the State would exonerate the State *a priori* from responsibility, but matters of nationality and jurisdiction were so delicate and complex that it would be unwise to burden the text of article 11 with any reference to them.

5. With regard to paragraph 2, he agreed in principle with Sir Francis Vallat and Mr. Ushakov that it would be dangerous to enumerate, even indirectly, primary rules the breach of which would engage the State's responsibility, or to single out certain duties of States in connexion with the conduct of private individuals, especially if it was not made clear that the enumeration was not exhaustive. As Mr. Reuter had pointed out, the notions of prevention and punishment raised many questions as to the extent of a State's duty, the degree of diligence

<sup>1</sup> Yearbook . . . 1972, vol. II, pp. 71-160.

<sup>2</sup> Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 10 (see Yearbook . . . 1974, vol. II, Part One, pp. 157-331).

<sup>3</sup> For text see 1308th meeting, para. 1.

required of it, and what constituted adequate punishment.<sup>4</sup> Such questions clearly could not be answered in the text of the article, and to deal with them only in the commentary would be considered by many to be unsatisfactory. There were also other duties which might engage the State's responsibility, for example, the duty to comply with the terms of an extradition treaty. Certain acts or omissions on the part of State organs that amounted to complicity or quasi-complicity might also involve the State's responsibility in cases of wrongful conduct by private individuals. Thus there were both theoretical and practical reasons for not introducing such notions into the text. He would support a redraft of paragraph 2 along the lines suggested by Mr. Ushakov, which might then read: "Paragraph 1 is without prejudice to the attribution to the State of conduct which, according to other articles in this chapter, constitutes an act of the State". If the Commission considered, like Mr. Bilge, that such a rule would be too sterile, the sentence might continue: "as, for example, failure to prevent or punish . . .". It would then be clear that the enumeration of duties required of the State was not exhaustive.

6. The CHAIRMAN, speaking as a member of the Commission, said that article 11 was one of the most important in the draft, especially when read in the context of international relations in the modern world. Without the acceptance of such rules, there would be more anarchy—individuals would be able to commit wrongful acts with impunity by attributing them to a State, and States would be able to use individuals to commit wrongful acts, while disclaiming responsibility or failing to take the action required by their obligations. He therefore supported the basic idea expressed in article 11, and was prepared to accept paragraph 1 as drafted by the Special Rapporteur. He had no objection to the text of paragraph 2, which might, however, be clarified along the lines suggested by earlier speakers, especially Mr. Elias.<sup>5</sup>

7. He invited the Special Rapporteur to reply to members' comments on draft article 11.

8. Mr. AGO (Special Rapporteur) said that in the comments of members of the Commission on article 11, he thought he could distinguish three schools of thought.

9. First there were those—the most numerous—who had stressed the importance of the article and its essential link with the preceding articles. Those belonging to that first group, which included Mr. Yasseen, Mr. Elias, Mr. Tsuruoka, Mr. Reuter, Mr. Hambro, Mr. Martínez Moreno, Mr. Ramangasoavina, Mr. Šahović, Mr. Bilge and Mr. Tabibi, had supported his thesis and recognized that it was consistent with the method adopted by the Commission hitherto. They had approved the proposed text on the whole, and had suggested only drafting amendments designed to reflect more precisely the essential idea contained in the article. They had spoken against any change liable to alter the significance and scope of the rule deriving from the historical development of the relevant practice and jurisprudence, and had opposed any formulation, in that context, of primary

rules the breach of which could engage the responsibility of the State. They had emphasized that the rule stated in article 11 should not apply exclusively to the particular case of the violation of obligations deriving from rules of international law relating to the status of foreign individuals—although those were the commonest cases in practice—but should apply to all cases of responsibility—in other words, to all cases in which there was a breach of an international obligation of the State. In their view, the fundamental principle should be that the act of a private person who exercised no element of governmental authority was never attributable to the State. Mr. Sette Câmara had emphasized, in that connexion, that in matters of State responsibility the act of a private person could only come into consideration as a catalyst for the wrongful nature of the act of the State or its organs.<sup>6</sup> Some members of the Commission had also stressed the need to draw attention to the relationship that must exist between the act of the private person and the act or omission of the organs of the State connected with the act of the private person, before one could speak of the attribution of any act to the State as an act generating responsibility. It had also been emphasized that the primary rules must not be touched on.

10. As to the drafting of the article, Mr. Šahović had considered that the text perhaps followed too closely a rule laid down in former times, which related mainly to the responsibility of States for the treatment of foreigners. Mr. Ramangasoavina, on the other hand, had observed that the field to be covered by the rule was one in which there was a great diversity of concrete cases. Hence the rule should be stated as simply as possible, so as to be adaptable to every possibility, and so that those responsible for interpreting it could place each concrete case in its own context. And that was what he had tried to do.

11. Beside that first group, which supported draft article 11, there were, among its critics, a second and a third group whose positions were radically opposed to it: either their proposals tended to give some place in the article to the statement of a primary rule on the status of aliens, or they feared that, as it stood, the article already introduced into the draft a rule which was in fact a primary rule.

12. He wished to protest vigorously against the charge of adopting an abstract approach, which had been made against him by two members of the second group, Mr. Kearney and Mr. Quentin-Baxter. That charge seemed to him all the more undeserved as he had presented in his report a detailed analysis of judicial cases and examples of State practice, and had followed a strictly inductive method in arriving at the rule stated in article 11. Those who spoke of abstraction should not forget that the statement of a rule of law was the necessarily abstract formulation of what existed in concrete reality. It was a judgement formulated in abstract terms, which had to be interpreted by a series of concrete judgements. A rule could not be other than abstract: those who had tried to produce another formulation of the rule

<sup>4</sup> See 1309th meeting, paras. 34 and 35.

<sup>5</sup> *Ibid.*, para. 26.

<sup>6</sup> *Ibid.*, paras. 3 *et seq.*



in article 11 had also proposed abstract definitions. He recognized that codification did not have only advantages, for it might sometimes be better not to state a certain rule in precise terms, and to leave it to emerge from the totality of particular cases. But the Commission's task was, precisely, to codify. Moreover, in certain systems of law to which codification was repugnant, when practice was very abundant, as it was in regard to the subject under study, a "restatement" was made, which was only a way of trying to define, by a necessarily abstract formula, the rule which followed from the practice.

13. As all the necessary elements were to be found in the analyses of cases presented in the report, Mr. Tammes had given way to the temptation to define the rule on the primary obligations of the State.<sup>7</sup> But in his (the Special Rapporteur's) opinion that was what should not be done. The rule in the *Alabama case*, which Mr. Tammes had spoken of generalizing, seemed rather old, and he thought that in any event it would be better to rely on more recent cases. But if the Commission referred to that rule or to other rules of the same kind, it would be going beyond the limits it had set itself by deciding to codify only the principles relating to State responsibility. If it had to define the corresponding obligations of the State, it would be entering an extremely complicated sphere, for, as Mr. Tammes himself had said, the range of situations was extremely wide. In that case the Commission would not be able to confine itself to a single rule; it would have to lay down a whole series of separate rules. For the obligations of the State towards foreign individuals were not the same as its obligations towards the representatives of foreign States or in regard to the property of foreign States. To speak, as Mr. Tammes had done in his proposal, of the obligation of the State to use "all reasonable means" at its disposal, would be to adopt a formula that was very vague and difficult to translate into practice. Consequently, he thought it would be dangerous to take that course.

14. Mr. KEARNEY had questioned whether the draft should always refer to an "omission" on the part of organs of the State and had cited the example of an amnesty law, which in his opinion constituted an act, not an omission. In reality, however, it was not the amnesty law that constituted a breach of the State's obligation: it was the application of that law in the particular case—in other words, the absence of punishment. He recognized, however, that there could sometimes be both an act of the State and an omission and, in order to take account of both possibilities, he proposed the use of the word "conduct", which covered both an act and an omission.

15. Mr. Kearney and Mr. Quentin-Baxter seemed to fear an imbalance between paragraph 1 and paragraph 2 of article 11, which would be further accentuated by Mr. Ushakov's proposal.<sup>8</sup> What they really feared was that paragraph 2 would amount, in certain cases, to a denial of State responsibility. But he had always affirmed that the State was responsible when its organs, by

their acts or omissions, violated an international obligation in connexion with the act of a private person. He wished to stress, however, that what was attributable to the State was not the act of the private person, it was the act or the omission by the organ of the State.

16. Mr. Pinto wished to broaden the base of the rule in article 11 by introducing the notion of reparation.<sup>9</sup> That would be a mistake, because it would imply that there had been a wrongful act—that the wrongfulness of the act had been established. And as Mr. Ushakov had rightly pointed out, article 11 referred only to the attribution of an act to the State, when it was not yet known whether the act was lawful or wrongful. In that connexion, he drew particular attention to the danger that always arose in practice of confusing the State's obligation to punish the act of the individual, with the problem of reparation. The obligation to punish was not a form of reparation: to prevent and punish was a primary obligation of the State, whereas the obligation to make reparation implied that there had been a wrongful act on the part of the State—that there had been failure to fulfil a primary obligation. Reparation was thus the consequence of the wrongful act. If the State had not been guilty of any breach of its international obligations in regard to prevention and punishment, it had not committed any wrongful act and, consequently, owed no reparation. It would be dangerous, therefore, to introduce the idea of reparation into the draft articles.

17. Mr. Pinto had also urged that legal persons should be mentioned in the text of the article.<sup>10</sup> As Sir Francis Vallat and Mr. Ustor had pointed out, however, the fact that a body corporate had been constituted under a certain legal system or had its headquarters in a certain country and consequently possessed the nationality of that country and was subject to its jurisdiction, did not change the situation in any way: the legal entity was still a purely private person and, if it was acting in a purely private capacity, its acts were not attributable to the State. In that respect, therefore, no distinction need be made between a legal person and a natural person.

18. Where the sea and outer space were concerned, there was a danger of leaving the sphere of responsibility for wrongful acts and entering that of responsibility by reason of the risk inherent in an activity, which Mr. Kearney had called "liability". Those two forms of responsibility should not be dealt with in one and the same rule.

19. With regard to the proposal by Mr. Elias, he said that the source of international responsibility was never the act of a private individual, but always and exclusively the act of an organ of the State. It was an error, from which practice and judicial decisions had not always been exempt, to believe that the act of a private person could become a public act and a source of responsibility.

20. The third group he had mentioned included those who, like Sir Francis Vallat and Mr. Ushakov, feared that, in article 11, paragraph 2, the Commission was

<sup>7</sup> See 1308th meeting, para. 22.

<sup>8</sup> See previous meeting, paras. 25 *et seq.*

<sup>9</sup> See 1309th meeting, para. 12.

<sup>10</sup> *Ibid.*, paras. 13 *et seq.*



undertaking the statement of a primary rule, and who had accused him of having departed to some extent from the fundamental principle he had himself adopted. But he had never tried to define the primary obligations of the State; he had merely assumed the existence of a rule allegedly broken by the State, and the reason why he had referred to “any omission” (*omission éventuelle*) was precisely that, as Mr. Ushakov had pointed out, the act attributable to the State was not necessarily wrongful. He recognized, however, that in the rule he had formulated in article 11 one could, in fact, discern a shift from the subjective element of attribution to the State, to the objective element of breach of an international obligation.

21. In the light of the comments made during the discussion, he proposed the following new version of paragraph 1:

“1. The conduct of a person, group of persons or entity acting in a purely private capacity shall not be considered as an act of the State under international law.”

22. His reasons for using the French word “*personne*” instead of the word “*particulier*”—which, as Mr. Reuter had said, was perfectly appropriate in French, since it covered both natural persons and legal persons—were that the word “*particulier*” was difficult to translate into the other languages and that the word “*personne*” had been used in other articles. The expression “group of persons” took into account Mr. Ushakov’s remark that offences for which the responsibility of the State was engaged were often not the acts of isolated persons, but of organized gangs. The word “entity” had been provisionally introduced into the text to meet Mr. Pinto’s wish, although the word “person” also covered legal persons. The entities in question could be entirely private entities or entities able to exercise elements of the governmental authority, but which, in the case in question, had been acting in a purely private capacity, like the railway company referred to by Mr. Tsuruoka.<sup>11</sup> Thus the new paragraph 1 took account of all the possible situations.

23. Taking into account the comments made by Mr. Kearney,<sup>12</sup> he suggested the following new version of paragraph 2:

“2. The rule stated above is without prejudice to the attribution to the State of any conduct connected with that of the persons, groups or entities referred to in paragraph 1, which must be considered as an act of the State by virtue of the foregoing articles.”

24. The word “conduct”, which covered both an act and an omission, was used to denote both an act of the State and an act of a private person. Mr. Ushakov had said that it was difficult to see how conduct of a private person which could engage the responsibility of the State could be anything other than an act. But a private person could also be capable of “commission by omission”—for example, if he did nothing to prevent a crime being committed against a foreigner in his presence. The organs of the State, on the other hand, were most often

guilty of omission, though the possibility of a kind of complicity of a State organ going beyond mere failure to prevent or punish, should not be ruled out. A whole range of intermediate situations could be envisaged, which might involve elements other than mere failure to prevent or punish, including the extreme case in which the act of an individual became an act of the State because it was proved that the individual had, in fact, acted on behalf of the State. The word “conduct” was therefore preferable, since it allowed for all the possibilities, whether of omission or of commission.

25. He had also considered that the words “by virtue of the foregoing articles” were preferable to the words “according to international law” proposed by Mr. Kearney, since it was, precisely, the relevant international law that the Commission was trying to codify. The purpose of paragraph 2 was to show that, if there was a connexion between the conduct of the State and the conduct of the private person, the rule stated in paragraph 1 must not prevent the attribution to the State of its own act.

26. Mr. KEARNEY said that the redraft proposed by the Special Rapporteur was entirely acceptable. It dealt adequately with most of the problems mentioned in the discussion.

27. Mr. USHAKOV said that he too was satisfied with the new text proposed by the Special Rapporteur.

28. Mr. EL-ERIAN said that the redraft proposed by the Special Rapporteur was acceptable. He had one comment to make on the Special Rapporteur’s explanation that the word “conduct” was meant to denote both acts and omissions, and his example of the representatives of a State being attacked, while the bystanders made no attempt to intervene. There was an analogy with the rule of fault by omission in criminal law, but in that particular case only an omission on the part of a person who had a duty to take action could be considered a wrongful act.

29. The CHAIRMAN suggested that draft article 11 should be referred to the Drafting Committee.

*It was so agreed.*<sup>13</sup>

The meeting rose at 11.30 a.m.

<sup>13</sup> For resumption of the discussion see 1345th meeting, para. 10.

## 1312th MEETING

*Tuesday, 20 May 1975, at 3.10 p.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

*Members present:* Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

<sup>11</sup> See 1306th meeting, para. 7.

<sup>12</sup> See 1308th meeting, paras. 31 *et seq.*

### State responsibility

(A/CN.4/264 and Add.1;<sup>1</sup> A/9610/Rev.1<sup>2</sup>)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

#### ARTICLE 12

1. The CHAIRMAN invited the Special Rapporteur to introduce article 12, which read:

##### *Article 12<sup>3</sup>*

##### *Conduct of other subjects of international law*

1. The conduct of an organ of another State or of an international organization acting in that capacity in the territory of a State, shall not be considered as an act of that State under international law.

2. Similarly, the conduct of an organ of an insurrectional movement directed against the State and possessing separate international personality shall not be considered as an act of the State under international law.

3. The rules stated in paragraphs 1 and 2 are without prejudice to the attribution to the State of conduct connected with that referred to in the aforesaid paragraphs which must be considered as acts of the State by virtue of articles 5 to 9.

4. Similarly, the rules stated in paragraphs 1 and 2 are without prejudice to the attribution of the conduct referred to in the aforesaid paragraphs to the subject of international law of which the authors of that conduct are organs.

5. Finally, the rule stated in paragraph 2 is without prejudice to the situation which would arise if the structures of the insurrectional movement were subsequently to become, with the success of that movement, the new structures of the pre-existing State or the structures of another newly constituted State.

2. Mr. AGO (Special Rapporteur) said that article 12 dealt with the various situations in which it might be possible to attribute to the State, as a subject of international law, the conduct of another subject of international law. Draft article 9 (A/9610/Rev.1, chapter III, section B) stated the rule concerning the attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization, if that organ had acted in the exercise of elements of the governmental authority of the State at whose disposal it had been placed. The case to be considered now was that in which an organ of another subject of international law acted in the territory of a State, not in the exercise of elements of that State's governmental authority, but under the authority of the subject of international law of which it was an organ. It was obvious that the conduct of an organ of a foreign State which acted in the exercise of elements of the governmental authority of that foreign State was attributable to the latter. That applied, for example, to the actions of an ambassador representing his country abroad. The conduct of an organ of an international organization was normally the act of that organization. It might be asked, however, whether the State in whose territory the organ of another State or of

an international organization had acted could incur responsibility, not for the conduct of that organ, but for the attitude adopted by its own organs in regard to that conduct.

3. That situation was bound to be compared with the one covered by draft article 11, on the conduct of private persons. But whereas it was natural to think that in regard to the conduct of a private person the organs of the State might have adopted an attitude which engaged the responsibility of the State, it was more difficult to imagine that the organs of the territorial State could fail to fulfil an international obligation in the case dealt with in article 12. Such failure could only be of a marginal character, since the conduct of the organ in question was attributed to the State or to the international organization to which it belonged. Possibly, however, the territorial State might be blamed for not having adopted the attitude others were entitled to expect of it in regard to the conduct in its territory of an organ of another State, or even, though that was more exceptional, the conduct of an international organization.

4. Cases of that kind were relatively rare. Generally, what was involved was the conduct of diplomatic or consular agents or, in special situations, acts of armed forces stationed in the territory of a State or the actions of an organ on an official visit. For instance, in 1956, at the height of the cold war, the Government of the Soviet Union had sent a note of protest to the Government of the Federal Republic of Germany, because the American armed forces stationed in Germany had launched, from the territory of the Federal Republic, observation balloons equipped with automatic cameras and radio transmitters; two of those balloons had been intercepted in Soviet air space. Two days earlier a Soviet protest concerning similar acts had been sent to the Turkish Government. Both Governments had been accused of having allowed their territory to be used by organs of the United States to commit wrongful acts. It was worth remarking that in a separate note addressed to the United States Government, that Government had been held responsible for the act of its own military organs. The responsibility of the Government of the Federal Republic of Germany and Turkey had thus been based on passive conduct or toleration on the part of their organs, whereas that of the United States Government had derived from the active conduct of its organs. A similar distinction had been made when the Government of the Federal Republic of Germany had reproached the Austrian Government for not protesting when Mr. Khrushchev, the Chairman of the Soviet Council of Ministers, had compared Chancellor Adenauer to Hitler at a press conference given during a visit he had made to Austria in 1960.

5. The question of the responsibility of the territorial State in cases of that kind had been dealt with in codification drafts, in particular, that prepared by the Harvard Law School in 1929<sup>4</sup> and Mr. García Amador's revised draft of 1961.<sup>5</sup> Both those drafts had recognized the

<sup>1</sup> *Yearbook* ... 1972, vol. II, pp. 71-160.

<sup>2</sup> *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 10* (see *Yearbook* ... 1974, vol. II, Part One, pp. 157-331).

<sup>3</sup> Text as revised by the Special Rapporteur.

<sup>4</sup> Harvard Law School, *Research in International Law* (Cambridge, Mass., 1929), p. 133.

<sup>5</sup> *Yearbook* ... 1961, vol. II, p. 46.

principle that the international responsibility of the territorial State could only be engaged by some conduct of its organs connected with the actions of a foreign organ.

6. The organ in question might belong to a subject of international law which was not a State or an international organization, but, for instance, an insurrectional movement directed against the territorial State or its Government. Many different cases of that kind had been dealt with by foreign ministries and arbitral tribunals. For such cases to come within the scope of article 12, the insurrectional movements in question must really be subjects of international law. Very often those cases had been assimilated to cases of riots, disorders or popular uprisings, which were in no way acts of subjects of international law. Insurrectional movements were not States, they were simply potential States; but they could nevertheless be separate subjects of international law. In the context of article 2, the only cases to be considered, were those in which the insurrectional movement and the pre-existing State both continued to exist, or in which that State had succeeded in putting down the insurrection after it had committed the internationally wrongful act. It often happened that the claim procedure lasted longer than the insurrectional movement; but if the accused movement had disappeared when the claim was presented and had replaced the pre-existing State, or if it had become a new State established on part of the territory of the pre-existing State, the case would come within the scope of article 13, not of article 12.

7. It was clearly a very delicate matter to attribute to a State the act of an organ of an insurrectional movement directed against it, since the State could not generally be accused of failing to take the necessary measures to prevent that organ from acting. Once the movement had been put down, however, the State might more easily be charged with failure to punish the offenders. Since, in the cases contemplated, the insurrectional movement had its own international personality, it was clearly possible to attribute the conduct of an organ of such a movement to the movement itself. By its very nature, however, an insurrectional movement was of a temporary nature, and for other reasons, too, it was difficult to take proceedings against it. Besides, the fact of addressing a protest or claim to an insurrectional movement might be interpreted as tacit recognition, which often made States hesitate to lodge a complaint against such a movement.

8. Generally, where the insurrectional movement did not succeed in replacing the pre-existing State or in forming a separate State, the organs of the movement reverted to being private persons once the movement ceased to exist. In that case claims were made against the "legitimate" State, which could be accused of having failed to prevent the acts in question or to punish the guilty persons. It was necessary to bear in mind the exceptional nature of the special conventions that had sometimes been concluded between the territorial State and other States after a revolution. In those conventions the territorial State had, in a way, undertaken to make reparation for all damage caused by the insurrection. In principle, however, States only accepted responsibility for the conduct of their organs which had failed to fulfil

their obligations of protection in regard to foreign States and their nationals, or which had not taken the necessary punitive measures.

9. As early as the nineteenth century, mixed commissions had been established to examine international claims made as a result of damage caused by insurrectional movements; many of the cases were cited in paragraphs 161 to 166 of his fourth report (A/CN.4/264 and Add.1). The mixed commissions, which had generally been rather restrictive, had only accepted attribution of the conduct of organs of insurrectional movements to the "legitimate" State if that State should, and could, have taken measures against them and had omitted to do so.

10. With regard to the practice of States, he referred once again to the request for information sent to governments by the Preparatory Committee for the 1930 Codification Conference. Although the relevant question had related to damage done by private persons engaged in riots or other internal disturbances, the great majority of governments had replied that the State was not responsible for damage done by insurgents and incurred international responsibility only if, being able to do so, it had failed to take the preventive or punitive measures it was bound to take (*ibid.*, para. 169). It was in that sense that the relevant bases of discussion for the Conference had been drafted. The practice of foreign ministries was to apply more or less the same principle, and doctrine itself had followed the same course. Most writers held that conduct contrary to international law could be attributed to an insurrectional movement and make it responsible. On the other hand, the territorial State could only be held responsible for a wrongful omission on the part of its organs connected with the actions of the insurgents.

11. As to the drafting of article 12, it was necessary first to establish the principle of non-attribution to the State of the conduct of organs of another subject of international law, but a distinction should be made between, on the one hand, the organs of States and international organizations and, on the other hand, the organs of insurrectional movements. Two provisos were then required, concerning the possible failure of organs of the territorial State to perform their duty of prevention and punishment and the possible attribution of the conduct in question to an insurrectional movement. Lastly, it was necessary to reserve the case in which the structures of an insurrectional movement subsequently became the new structures of the pre-existing State or those of a new State. That case would be covered by article 13.

12. Mr. USTOR said that article 12 dealt with the attributability of the conduct of three categories of "other subjects of international law": other States, international organizations and insurrectional movements possessing separate international personality. In regard to all three of them, the Special Rapporteur concluded that the conduct in question was not attributable to the State in whose territory it occurred. As in the situation contemplated in article 11, the responsibility of the territorial State only came into play in the event of violation by its organs of that State's international obligation to

prevent, and possibly punish, wrongful acts. That conclusion was logical and well supported, but he had some doubts on a number of points.

13. With regard to the conduct of other States, he suggested that separate provision should be made for the important case of obvious complicity by a State which consented to the use of its territory for the commission of unlawful acts against a third State. There was similar complicity when a State should have known in advance that its territory would be used for an unlawful purpose by the organs of another State admitted to that territory. An obvious example was aggression committed by one State, with the assistance of another, against a third State. Even if the assistance consisted only in permitting the use of its territory, the assisting State could be considered an aggressor under the definition of aggression adopted by the General Assembly in 1974.<sup>6</sup> He urged, therefore, that the important question of complicity should be covered either by a separate article or at least in the commentary, with a reference to the Assembly's definition of aggression.

14. So far as the conduct of an international organization was concerned, the Special Rapporteur's commentary was very brief. The conclusion that the conduct of an international organization was not attributable to the State was probably correct, but there was room for improvement in the drafting. The text as it stood spoke only of the conduct of organs of an international organization acting "in the territory of a State". That restriction was clearly unwarranted. Nor was it really correct to say that the conduct of an international organization could be purely and simply assimilated to the conduct of private individuals, as paragraph 151 of the Special Rapporteur's commentary seemed to suggest. The question whether the State concerned had itself participated in the decision of the organ of the international organization was surely material in that respect. To take a simple example, an international organization might violate a treaty concluded with State B by terminating it in breach of its provisions. State A as a member of the organization had voted for the termination of the treaty. The termination having caused damage to State B, it took measures of retaliation against State A. Clearly, State A could not contend that the decision of the international organization was not attributable to it. Cases of that kind should be given careful consideration, since they cast doubt on the Special Rapporteur's conclusion that the conduct of an organization could never be attributable to a State.

15. He reserved his position on insurrectional movements and would only make some preliminary comments. In the first place, an insurrectional movement was directed not "against the State", but against the government. Secondly, article 12 was related to article 8, which dealt with the conduct of a person or group of persons acting in fact on behalf of the State. Under article 8, the conduct of such private persons was considered to be an act of the State. In article 12, paragraph 2, the Special Rapporteur appeared to reach a different conclusion, although the conduct was that of persons acting on behalf of an organ of an insurrectional movement which

possessed a separate international personality. That difference should be clarified and more fully explained.

16. There was also a close connexion between the provisions of paragraphs 5 of article 12 and those of article 13.

17. Mr. SETTE CÂMARA said that the provisions proposed for dealing with the three cases covered by article 12 were soundly grounded in the practice of States, arbitral awards and the opinions of writers, which had been so well explored by the Special Rapporteur in his report. There was little room for controversy regarding substance, so he would confine his remarks to the wording and structure of the proposed provisions.

18. In the title, the words "other subjects of international law" needed to be expanded. That expression ordinarily meant subjects other than States; but since article 12 dealt not only with the conduct of international organizations and insurrectional movements, but also with that of States other than the territorial State, he suggested that the title should be amended to read "Conduct of a person or group of persons acting as organs of another State or of other subjects of international law", or possibly "Conduct of organs of another State or of other subjects of international law".

19. In paragraph 1, after the words "of an organ", a reference to "entities empowered to exercise elements of the governmental authority" should be inserted, in order to take into account the constant proliferation of such entities in the modern State, as the Commission had done in article 11.<sup>7</sup>

20. With regard to the conduct of organs of international organizations, he would be grateful if the Special Rapporteur could give some concrete examples to serve as a basis for the proposed provision. No one denied that every international organization must be the subject of international responsibility. One writer had pointed out that within an organization's headquarters, there was no local law to characterize the acts and omissions of international officials, and the same was true where an organization administered territory or organized military operations.

21. Paragraph 2 dealt with the case of an insurrectional movement and stated the rule that persons acting on behalf of such a movement did not engage the responsibility of the State against whose government the insurrection was directed. An insurrectional movement was, of course, in itself proof of the inability of the State authorities to control the area where the movement operated, particularly if it had acquired such dimensions as to be recognized as having international personality. As the Special Rapporteur had pointed out in paragraph 153 of his report (A/CN.4/264 and Add.1), the main responsibility fell on the movement itself, which was perfectly capable of wrongful acts.

22. The responsibility of the territorial State for failing to exercise vigilance and afford protection would accordingly be of an exceptional nature; hence the saving clause in paragraph 3. Yet the territorial State could

<sup>6</sup> General Assembly resolution 3314 (XXIX), annex.

<sup>7</sup> See previous meeting, paras. 21 and 23.

rarely be accused of failure to exercise vigilance and afford protection, for as pointed out in paragraph 154 of the report, the activities of an insurrectional movement were more often than not completely beyond its control.

23. The principle underlying paragraph 5 was well grounded in State practice and legal opinion, but he had a reservation about the use of the word "structures". It was not the structure of an insurrectional movement which survived in the event of victory. Revolutionary movements were often military or para-military, and when victorious not infrequently maintained the pre-existing structures. The important point was that the victorious movement then formed a new government in the territorial State or formed the government of a new State on part of the territory. He therefore suggested that paragraph 5 should be reworded so as to eliminate the references to "structures". It might read: "The rule stated in paragraph 2 is without prejudice to the situation which would arise if the insurrectional movement were subsequently to become, with the success of that movement, the new government of the pre-existing State, or the government of another newly constituted State".

24. Another way of overcoming the difficulties to which he had drawn attention would be to divide article 12 into two separate articles. The first, modelled on article 9, would deal with the conduct of organs of a State other than the territorial State or of an international organization; the second would deal with insurrectional movements and might be combined with article 13. The relevant saving clauses would, of course, be attached to each of the two new articles.

25. Mr. REUTER said that the text of article 12 proposed by the Special Rapporteur, excellent though it was, raised many very serious problems. Even the title of the article called for reservations, for whereas States could be called "subjects of international law", in the case of international organizations and insurrectional movements that designation would certainly give rise to discussion.

26. Article 12 dealt with the conduct of States, international organizations and insurrectional movements. As Mr. Ustor and Mr. Sette Câmara had said, those were three totally different things, and it might not be possible to retain, in one and the same article, provisions concerning the three classes of problems.

27. With regard to the conduct of the State, Mr. Ustor had raised two questions that ought to be considered. The first, which was relatively simple, concerned the words "in the territory of a State". The inclusion of those words was justifiable in so far as the principle that the conduct of an organ of another State was not considered as an act of the State was so obvious that the reason for stating it must be given. But the reason why the principle had been stated was, precisely, that in certain cases the two States had some physical connexion. But the connexion could take other forms, so it might be thought that the words "in the territory of a State" should perhaps be replaced by a more complex formula. If the Commission nevertheless decided to retain the wording proposed by the Special Rapporteur, he would

propose saying "*even if* it acted in the territory of a State".

28. The second question raised by Mr. Ustor was more serious: it had to be decided whether the draft articles in general should deal with the question whether one act could be attributed simultaneously to several States. Mr. Ushakov had rejected the idea of complicity in public international law. The notion of an "accessory", known to criminal law, could also be rejected, but the question none the less remained under what conditions one and the same act could be attributed to several States at the same time. Perhaps the problem could only be solved by the device of simultaneous attribution to two States; or perhaps the Commission could rest content with the solution offered by article 12, which consisted in attributing the act to only one State, while reserving the possibility of attributing an equivalent offence to the other State.

29. With regard to international organizations, he did not think the conduct of an international organization was necessarily attributable to the organization itself. That was implied in the text proposed by the Special Rapporteur, for an international organization could not act "in that capacity" if it did not possess international personality. The same question had already arisen in connexion with the Convention on International Liability for Damage Caused by Space Objects, which provided for a kind of joint responsibility of the organization and its members.<sup>8</sup> He therefore believed that a rather cautious formula should be found in order to avoid the constraint of an unduly narrow definition of an international organization.

30. The draft articles also raised the problem of the recognition of international organizations, at least where regional organizations were concerned. That was a very serious matter, because the problem of recognition could also arise in regard to States and Governments.

31. With regard to insurrectional movements, he was not sure that the capacity of such a movement could be determined solely by objective criteria as in the past, when an insurrectional movement had acquired international personality on reaching a certain size. It might be asked whether the capacity of an insurrectional movement did not now also depend on its recognition. Yet, in all the precedents he had cited and in the text proposed, the Special Rapporteur had taken the relatively simple position based on the text of pure "effectiveness". In international relations, however, when there was an internal conflict, the problem might arise of the international, not the constitutional, legitimacy, either of the government or of the insurrectional movement itself. That problem had already arisen in the context of decolonization and would continue to arise in cases of aggression. The very clear principles stated in article 12 would therefore need some modification—if only in drafting—if the Commission decided to take account of the question of international legitimacy. His own view was that it could not ignore that question.

<sup>8</sup> See General Assembly resolution 2777 (XXVI), annex, article XXII.

32. In its discussions, he thought the Commission should distinguish between the three very different questions of the State, international organizations and insurrectional movements. The question of insurrectional movements could, if necessary, be considered in the context of article 13.

33. In regard to principles, the Commission ought to consider whether it should not distinguish between movements directed against the State—secessionist movements—and movements directed against a government. That was an important question, because the problem of transmission of the obligations which might arise out of the acts of either side was not unrelated to the problem of succession of States, so that it was not the same in both cases. The Commission should also examine the problem of recognition. Lastly, it should consider whether the present cases of international legitimacy—the result of aggression or colonialism—did not make it necessary to reconsider some of the problems referred to in article 12.

34. Mr. EL-ERIAN said that in view of the intricate nature of the article, he would make only preliminary remarks at that stage. He agreed with Mr. Reuter that it was perhaps too ambitious to try to cover the three distinct kinds of situation in one single article. A great variety of situations could arise that would involve exclusive, concurrent, direct or indirect responsibility. Whereas article 9 dealt with situations in which a State or an international organization had lent an organ to another State, and based the responsibility of the territorial State for the acts of that organ on its exclusive authority over the organ, article 12 affirmed, conversely, that the conduct of an organ of a State or of international organization acting in that capacity should not be considered as an act of the State in whose territory the organ had acted. The underlying principle of article 12 and the Special Rapporteur's approach raised no difficulties. In his commentary the Special Rapporteur had referred, in foot-note 318 (A/CN.4/264, para. 148) to a situation in which there was real complicity on the part of the organs of the territorial State in the wrongful act of an organ of another State, and had maintained that, so long as there had been no lack of diligence or prudence on the part of the territorial State, the other State incurred responsibility for the act. Such an important point should not be relegated to a foot-note; it should at least be given a prominent place in the commentary if it could not be covered in the text of the article itself.

35. The reference to "international organizations" should not raise difficulties if the expression was taken to mean such organizations as the United Nations, which had a universal vocation. In 1949, the International Court of Justice, in an advisory opinion on reparation for injuries suffered in the service of the United Nations,<sup>9</sup> had conceded international personality to the United Nations on an objective basis, even vis-à-vis non members. However, there were other international organizations whose international personality was far from established. In practice, the conduct of an organ of an international organization performing a function in the territory of a

State should not raise legal difficulties, since the organ would have been accepted by the State. An international organization which had the capacity to enter into a contract or a treaty with a State in which its organ was to operate, would clearly be responsible for the acts of that organ.

36. So far as the question of insurrectional movements was concerned, he agreed with Mr. Sette Câmara that article 12 might be divided into two separate articles. But since article 13 dealt with insurrectional situations, the provisions in paragraphs 2 and 5 of article 12 were perhaps unnecessary. The Special Rapporteur had tried to deal with the question of recognition in terms of separate international personality, but it was difficult to see how to determine whether such a personality had been established. In that respect, the Special Rapporteur had departed from the traditional rules of international law, which applied the criterion of recognition by other States. Where there was a constitutional government, the legal situation would depend on which States recognized a rebellion as an insurrection and a state of belligerency and which did not. There were also rules governing the succession of States: where there was a *de facto* government, the government of the new State succeeded to the obligations and responsibilities of the government which had acted as a *de facto* government.

37. Mr. USHAKOV said that paragraph 1 of article 12 was unnecessary in so far as it dealt with the conduct of an organ of a State, for that question had already been dealt with in previous articles. It was unnecessary to say in paragraph 1 of article 12 that the conduct of an organ of one State could not be attributed to another State, since article 5 (A/9610/Rev.1, chapter III, section B) already laid down that the conduct of any State organ having that status under the internal law of that State and having acted in that capacity was considered as an act of the State concerned. In stating that principle article 5 did not specify whether or not the State's organ had acted in the territory of the State. The only exception to article 5 was that provided for in article 9, which dealt with the conduct of an organ lent by one State to another State. The principle stated in paragraph 1 of article 12 was not an exception to the principle in article 5, so it need not be mentioned. Besides, it was not clear exactly what was meant by the words "in the territory of a State". Did they refer to territory occupied by another State?

The meeting rose at 6 p.m.

### 1313th MEETING

Wednesday, 21 May 1975, at 11.25 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

<sup>9</sup> I.C.J. Reports 1949, p. 174.

### Organization of Work

1. The CHAIRMAN announced that at its meeting that morning, the enlarged Bureau had decided to make two recommendations to the Commission. The first was that the study of further improvement of the Commission's methods of work should be entrusted to an informal group of five members: Mr. Elias, Mr. Sette Câmara, Mr. Tsuruoka, Mr. Ushakov and Mr. Kearney, who would be Chairman. The second recommendation was that, on completing consideration of the existing articles on State responsibility, the Commission should devote three weeks to the topic of succession of States in respect of matters other than treaties.

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

*It was so agreed.*

### State responsibility

(A/CN.4/264 and Add.1;<sup>1</sup> A/9610/Rev.1<sup>2</sup>)

[Item 1 of the agenda]

(resumed from the previous meeting)

### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 12 (Conduct of other subjects of international law)<sup>3</sup> (continued)

3. Mr. USHAKOV said that the expression "in the territory of a State", in paragraph 1 of article 12, called for reservations, since not only the State's own territory, but also territory occupied by its armed forces might be involved. Another possibility was the extreme case in which aircraft belonging to one State were on board a warship of another State. In its provisions concerning the conduct of private persons, article 11 did not speak of persons acting "in the territory of the State" concerned. He considered that if the "organ of another State", referred to in paragraph 1 of article 12, acted as an organ of that State, article 5 would be applicable. Hence the part of paragraph 1 which dealt with the conduct of an organ of another State seemed to him to be superfluous.

4. Paragraph 1 affirmed that a State was not responsible for the conduct of an organ of another State present in its territory. He believed that that principle was incorrect, since there might be cases of joint responsibility, in which the State in whose territory the organ of another State had acted was the co-author of the act committed in its territory. If, for instance, a State allowed its territory to be used by the army of another State for purposes of aggression, it was not only the State to which the army belonged that had acted, but also the State which had lent its territory; hence the act could be attributed to both States. The wording used in paragraph 1 was dangerous, because it did not take account of all the

possible situations. The expression "organ of another State" might denote either the official representatives of a State in the territory of another State, such as a diplomatic mission, or the armed forces of a State in the territory of another State. The problem was simple in the first case, but extremely difficult in the second. When the Commission had discussed article 9, he had made reservations regarding armed forces placed by one State at the disposal of another State, and had stressed that it was an extremely complicated problem.<sup>4</sup> Personally, he thought it would be better not to settle that question, but to keep to the principles stated in article 5 (A/9610/Rev.1, chapter III, section B).

5. With regard to the conduct of an organ of an international organization, when the armed forces of an international organization acted in that capacity in the territory of a State, it was open to question whether it was only the international organization that acted, or whether the act should not also be attributed to the States whose contingents composed the armed forces of the organization. In that case, too, there might perhaps be a joint act by the international organization and the States which had provided contingents to form its armed forces. In any case, it was very difficult to say who was responsible for the acts of the armed forces of an international organization.

6. That question raised the very difficult problem of the responsibility of an international organization. It became necessary to enquire whether the conduct of its organs must be attributed to the organization itself and whether the States members of the organization had not some share of responsibility. For his part, he thought that question should not be raised at the present stage, because the Commission would find it necessary to define the responsibility of international organizations, and that would lead it into very dangerous ground. The wording of paragraph 1 should therefore be extremely cautious and should not touch on the question of the responsibility of international organizations. Moreover, that question was already settled by article 9, which treated as an act of the State the conduct of an organ placed at its disposal by an international organization—from which it could be inferred *a contrario* that if an organ of an international organization had not been placed at the disposal of a State its conduct was attributable to the organization itself.

7. He noted that paragraph 2 did not specify that the insurrectional movement was acting in the territory of the State in question. Moreover, an insurrectional movement was not necessarily directed against the State: it might be directed against the Government. There were in fact two types of insurrectional movement: revolutionary movements directed against the Government and national liberation movements directed against the State—for instance, in the case of an anti-colonialist struggle. Nor was it clear what was meant by an "insurrectional movement". Was it a national liberation front, a revolutionary movement or a counter-revolutionary movement? That point should be clarified. It would also be better to avoid using the notion of

<sup>1</sup> Yearbook ... 1972, vol. II, pp. 71-160.

<sup>2</sup> Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 10 (see Yearbook ... 1974, vol. II, Part One, pp. 157-331).

<sup>3</sup> For text see previous meeting, para. 1.

<sup>4</sup> See Yearbook ... 1974, vol. I, p. 49, paras. 5 *et seq.*



“separate international personality”, which was much too subjective. It was very difficult to determine by objective criteria whether an insurrectional movement possessed separate international personality. The question arose from what moment it was possible to speak of an insurrectional movement whose conduct was not attributable to the State under international law. If the Commission succeeded in delimiting the problem and defining the notion of an “insurrectional movement”, he would be in favour of paragraph 2. The succeeding paragraphs depended on the first two, which raised extremely delicate problems.

8. Mr. BEDJAOUI said that article 12 dealt with the case—complementary to, but different from, that dealt with in article 9—in which a person or persons committed a wrongful act in the territory of a State, acting as an organ either of another State, or of an international organization, or of an insurrectional movement. The problems were in reality very different, according to which of those three authorities the agent or agents in question belonged to; so much so, that he was inclined to recommend that they should be dissociated and dealt with in separate articles.

9. Where an organ of one State acted in the territory of another State, two kinds of situation might arise. The situation contemplated by the Special Rapporteur, in which an organ of a foreign State—for example, a Head of State on an official visit or a mission—committed a wrongful act in which the territorial State clearly played no part, was a simple situation and raised no great problem. The opposite situation, in which the territorial State might appear to be an accomplice or co-author of the wrongful act committed by another State in its territory or from its territory, was much more serious and should be covered either by article 12 or by a separate provision. But although that situation was more serious, the problem it raised was not more difficult to solve in theory.

10. There were, on the other hand, much more delicate intermediate situations, which were far more difficult to settle equitably. He would leave aside the case of military occupation, which might give an army or an occupying authority occasion to commit an internationally wrongful act in the territory of the occupied State. He was thinking rather of problems such as that of the granting of military bases by one State to another, either under a mutual defence agreement or simply on a lease. The wrongful acts committed from such bases could, as had recently been seen, give rise to grave tension and complicated situations. Perhaps the time had not yet come to provide for objective responsibility, direct or indirect, of the territorial State by reason of its acceptance of the risks inherent in the establishment of foreign bases in its territory. That problem should, however, be kept in mind.

11. He would not dwell on the question of the conduct of an international organization, regarding which he agreed with the comments made at the previous meeting by other members of the Commission, but would deal mainly with a few problems relating to insurrectional movements. There, he saw three problems, relating to

the starting point chosen, the search for a specific solution to the problem of the responsibility of insurrectional movements, and the delimitation of the subject assigned to the Special Rapporteur.

12. With regard to the first point, some members of the Commission had questioned whether the existence of an internal conflict justified the assumption that the problem of the international legitimacy of an insurrectional movement was settled. It was that international legitimacy which the Special Rapporteur had taken as his starting point when he had adopted as a working hypothesis the case of an insurrectional movement possessing international personality. That approach to the question seemed perfectly justified. For the Special Rapporteur did not maintain that all insurrectional movements must possess international personality, any more than he maintained the converse; he merely dealt with the case in which an insurrectional movement did possess international personality. The question how and why it possessed that personality was not part of the subject under study; it belonged to another sphere.

13. For insurrectional movements, there were only two mutually exclusive positions: either they represented nothing, or they had international status. In the first case they came under article 11, which dealt with the conduct of private persons. In the second case, they possessed international personality and, consequently, came under article 12. Thus both of the possible positions were covered. The draft did not take sides; each position was assumed to have been established in advance. That approach should enable the Commission to avoid endless discussions on difficult problems, such as those of international personality, belligerency, and recognition or non-recognition.

14. Moreover, the problem of international legitimacy had been finally settled for one of the two classes of insurrectional movement, namely, anti-colonial national liberation movements. For about twenty years a three-stage process had been going on in the United Nations, which had progressed from the moral and legal justification of anti-colonialism to the affirmation that colonialism was incompatible with the purposes and principles of the Charter, and had culminated in the total and final condemnation of colonialism as an unlawful phenomenon by General Assembly resolution 1514 (XV) of 14 December 1960, on the granting of independence to colonial countries and peoples. The modern view was that colonialism was a threat to peace and security, which could attract the sanctions provided for in the Charter. The right of peoples to self-determination had become an inviolable principle of *jus cogens*, and colonialism had become an intrinsically unlawful phenomenon, which implied that the subjugation of peoples to foreign rule was unlawful, in so far as that rule was contrary to the Charter, constituted a denial of human rights and jeopardized world peace, that peoples had a right to exercise their sovereignty and that repressive measures and any armed action directed against dependent peoples were unlawful. Ever since the adoption of resolution 2105 (XX) in 1965, the General Assembly had regularly affirmed “the legitimacy of the struggle by the peoples under colonial rule to exercise their right to self-determination



and independence” and had reiterated urgent appeals for “moral and material assistance to the liberation movements”.

15. The international legitimacy of insurrectional liberation movements was therefore evident from two points of view. First, intervention on behalf of colonized countries was lawful. It was not intervention prohibited by contemporary international law; on the contrary it was an international duty, and the codified principles of non-intervention and of the prohibition of the use of force had had to be reformulated in terms taking that situation into account.<sup>5</sup> Secondly, and as a corollary, any form of support for a colonial Power now constituted a form of intervention contrary to international law. The advisory opinion on the continued presence of South Africa in Namibia, given by the International Court of Justice on 21 June 1971, left no doubt on that point.<sup>6</sup>

16. Moreover, the territory of a colony was not, in law, the territory of the colonial State. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,<sup>7</sup> affirmed that: “The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination . . .”

17. Although insurrectional movements in the nature of civil wars could still, in some cases, be treated as internal conflicts, the same was not true of insurrectional liberation movements. Anti-colonial wars of liberation had come to be recognized as international conflicts, with all the legal consequences that implied. The use of force by liberation movements had received justification and legal expression, so that the colonial Power could no longer invoke against those movements or against States assisting them, Article 51 of the Charter, on self-defence or Article 2, paragraph 7, of the Charter, on the duty not to intervene in the domestic affairs of any State.

18. In that context, it was debatable whether the colonial State had an obligation to prevent or punish the conduct of the insurrectional movement, for the movement possessed an international status and indeed a new “legal order” distinct from that of the colonial State and was situated, moreover, in territory which was now regarded as separate from that of the metropolitan country and in which the latter’s presence was considered unlawful.

19. The second point he wished to discuss concerned the responsibility of insurrectional movements. Besides the case of an insurrectional movement directed against a territorial State, which was dealt with in paragraph 2 of article 12, there were other cases, in particular that of an

insurrectional movement directed against a State other than the territorial State. That was the situation when an insurrectional movement set up a provisional government in exile in a third State. It might then happen that a provisional government which was in rebellion against a certain State, but had settled in the territory of another State, caused damage to the latter State or to yet another State. That situation was not covered by paragraph 2 of article 12. In such a case, the only possible solution was to attribute to the insurrectional movement possessing international personality the wrongful act engaging its own responsibility. There were precedents for that solution in practice. For example, the British Government had asked the nationalist Government of Burgos and Salamanca for reparation for damage it had suffered during the Spanish war. It had also happened that governments in exile set up by national liberation movements had responded favourably to claims by foreign States arising out of wrongful acts. The Special Rapporteur had not taken that practice into account in his draft article 12. He had proceeded from the principle that an insurrectional movement was essentially provisional, which was not always the case. History provided many examples of insurrectional movements which had lasted for decades, like the “long march” by the communist troops of Mao Tse-Tung until their victory in 1949, or the war in Indo-China which had lasted for thirty years and had resulted in the formation of a provisional government, the PRG.

20. For the purpose of exonerating the territorial State from all responsibility, the Special Rapporteur had placed on an equal footing, in article 12, three separate subjects of international law; the State, an international organization and an insurrectional movement. But just as he attributed the wrongful conduct of an organ to the State or the international organization to which the organ belonged, so he should attribute responsibility for its wrongful conduct to the insurrectional movement possessing international personality. That would do no more than reflect the fact that the movement had international rights and duties. But the Special Rapporteur seemed to be in a dilemma: either he must enter the realm of succession of States, or he must proceed as though the insurrectional movement had engaged its responsibility from the outset, though it would not become effective until after victory—which explained why the Special Rapporteur had made the responsibility retroactive. In his (Mr. Bedjaoui’s) opinion, recourse to retroactivity was always a rather dubious legal technique.

21. The third problem raised by article 12 was that of the demarcation of the topic assigned to the Special Rapporteur; from that point of view it was mainly paragraph 5 that was open to criticism. Incidentally, the word “structures”, which occurred three times in that paragraph, was inappropriate. If the expression “structures of the insurrectional movement”, which later became the new structures of the pre-existing State or the structures of another, newly constituted State, was intended to mean the organs of the insurrectional movement, that expression was not at all satisfactory. The organs of an insurrectional movement were provisional; they were

<sup>5</sup> See General Assembly resolutions 2131 (XX) and 2160 (XXI).

<sup>6</sup> *I.C.J. Reports 1971*, p. 16.

<sup>7</sup> General Assembly resolution 2625 (XXV), annex.

sued to the struggle, but not to the ensuing period of peace. If the expression meant the ideology, the political trend, the power philosophy or the ethico-political conception of the insurrectional movement, then it had no place in article 12. It would be better to find a formula of the kind suggested by Mr. Sette Câmara,<sup>8</sup> if paragraph 5 was necessary at all.

22. As to the justification and scope of paragraph 5, the paragraph seemed to be concerned, not with the responsibility of States, but with the succession of States or of governments in respect of responsibility. It would be possible to avoid dealing with succession of States in paragraph 5 of article 12 and in article 13, by providing in article 12, paragraph 2, that the insurrectional movement, which had international rights and duties by reason of its international personality, could assume responsibility for its wrongful acts. Article 13 dealt with the situation in which the insurrectional movement was victorious. To cover that case without encroaching on the subject of the succession of States, it should be specified that the insurrectional movement did not succeed to the responsibility of the territorial State, but assumed its own responsibility; in other words, after the restoration of peace it continued to bear the responsibility that could have been attributed to it during the period of insurrection. That responsibility must be assumed by the insurrectional movement within the framework of its own continuity, when it became the definitive authority of the pre-existing State or of a new State.

23. Mr. ELIAS said it was evident from his scholarly commentary and from his presentation of article 12 that the Special Rapporteur had appreciated that the article raised problems relating not only to its legal implications, but also to its political undertones. The Special Rapporteur had, of course, concentrated on the legal issues, but they were so inextricably bound up with the political issues that it was not possible to dispose of one set of problems without the other.

24. He found the draft of article 12 less satisfactory than articles 10 and 11, partly for reasons beyond the Special Rapporteur's control. He was opposed to dealing in one and the same article with a number of different matters which could be more satisfactorily dealt with in separate articles.

25. As it stood, article 12 attempted to deal with the conduct of three different kinds of subjects of international law: States other than the territorial State; international organizations; and insurrectional movements possessing separate international personality. Their only common factor was the requirement of international personality. Apart from that factor, the problems raised by the conduct of those three subjects of international law were so different that they should have received separate treatment.

26. In any case, the content of paragraph 2, on the conduct of organs of insurrectional movements, was not suitable for article 12. It should either form the subject

of a separate article or be transferred to article 13. In that connexion it was significant that paragraph 5, which was a saving clause relating to paragraph 2, anticipated problems dealt with in article 13.

27. On the question of the conduct of an organ of another State, he agreed with Mr. Sette Câmara that the title, as it stood, did not cover that aspect of the problem. The expression "other subjects of international law" did not embrace a State other than the territorial State. He also agreed with Mr. Ushakov's interesting suggestion about the need to clarify the relationship between paragraph 1 of article 12, which dealt with the conduct of an organ of another State acting in that capacity in the territory of a State, and article 5, which dealt with the attribution to the State of the conduct of its organs.<sup>9</sup>

28. The question of the conduct of an organ of an international organization raised problems which had been mentioned by other speakers. It was not possible to deal with that question, or, for that matter, with that of the conduct of an organ of another State, without considering how the particular organ came to act in the territory of the State concerned. For example, the action of occupation forces or forces stationed at a foreign base, raised delicate issues regarding the possible responsibility of the territorial State.

29. He would certainly not go so far as Mr. Ushakov who had suggested the deletion of paragraph 1 of article 12. The provision in that paragraph was as essential to the draft articles as the residuary rules contained in articles 1 to 9 (A/9610/Rev.1, chapter III, section B).

30. With regard to the conduct of insurrectional movements, the provision in paragraph 2 appeared to have been drafted on the assumption that the Commission would not go into questions of legitimacy or recognition, or into the reasons for the presence of the insurrectional movement in the territory in question. Yet those issues were very real. He could think of a number of examples, such as that of the Palestine Liberation Organization, which raised the question of the extent to which the movement concerned could be assumed to have a separate international personality. Another illustration was provided by the rebellion which had taken place in Nigeria some years previously; the secessionist movement had then been recognized by only four States Members of the United Nations, which at that time had numbered over 120. A number of bodies and institutions operating internationally had dealt with the rebel régime while it had lasted, but none of them had ventured to make any claim against Nigeria.

31. In conclusion, he suggested that article 12 should be split into three separate articles, one of which would deal with the matter that was now the subject of paragraph 2. The saving clauses in paragraphs 3, 4 and 5 might appear as exceptions in the appropriate articles.

32. Mr. ŠAHOVIĆ observed that the last articles of chapter II of the draft and, in particular, the article 12,

<sup>8</sup> See previous meeting, para. 23.

<sup>9</sup> *Ibid.*, para. 37.

dealt with special cases. In those provisions, the Special Rapporteur had tried to take account of the realities of international life.

33. In his written and oral presentation of article 12, the Special Rapporteur had dealt mainly with the problems raised by insurrectional movements. His analysis of judicial decisions, practice and international doctrine had been centred on cases of that kind. The problem referred to in paragraph 1 of the article, on the other hand, namely, the conduct of an organ of a State or of an international organization, was dealt with only very briefly and considered only from the point of view of article 9. And the commentary to article 9 was hardly more detailed on that point. Only by a process of deduction could it be concluded that the rule applicable to an organ of a State could also be applicable to an organ of an international organization. Since such cases seemed relatively rare in comparison with those involving insurrectional movements, it might be better not to devote a separate provision to them, but simply to mention them in article 9. The cases to which article 9 applied, and those covered by paragraph 1 of article 12, differed by reason of the capacity in which the organ in question had acted; and it was precisely that question of capacity which had caused the members of the Commission the greatest difficulties in regard to article 12.

34. He therefore proposed that all questions relating to insurrectional movements should be dealt with in a separate article. The very existence of paragraph 5 of article 12 showed that the relationship between article 12, paragraph 2, and article 13 could not be disregarded. Another solution would be to draft a saving clause which would refer to the questions covered in paragraphs 1, 3 and 4.

35. In the circumstances, he had little to add to the comments made by other members of the Commission on the text proposed by the Special Rapporteur. In view of the difficulties raised by article 12, it was important to draft it without haste, being careful to use appropriate terminology.

The meeting rose at 1 p.m.

## 1314th MEETING

*Thursday, 22 May 1975, at 10.5 a.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

*Members present:* Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

## State responsibility

(A/CN.4/264 and Add.1;<sup>1</sup> A/9610/Rev.1<sup>2</sup>)

[Item 1 of the agenda]

(continued)

### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 12 (Conduct of other subjects of international law)<sup>3</sup> (continued)

1. The CHAIRMAN invited the Special Rapporteur to give any additional explanations he thought necessary regarding draft article 12.

2. Mr. AGO (Special Rapporteur) said that in his oral presentation of the article he had perhaps dwelt more on what he thought it should contain than on the problems it should not cover. As several members of the Commission considered that article 12 presented certain risks, he would like to explain three points.

3. First, the reason why he had thought it advisable to devote only one article to the conduct of an organ of a foreign State, of an international organization or of an insurrectional movement, was that article 12 was really intended only as a complement to the preceding article. According to article 11,<sup>4</sup> the actions of private persons not exercising any element of the governmental authority were not attributable to the State; nevertheless, the State was not exempt from all responsibility if, in connexion with such actions, its organs had adopted an attitude which could be attributed to it and which could be found wrongful under international law. The reference in article 11 to conduct of the State connected with that of the persons, groups or entities mentioned in that provision did not, moreover, settle the question whether the State had acted by commission or omission, or in complicity. It was quite a different case when the person who had acted in the territory of a State performed no official function for that State, but was an organ of another subject of international law. In the light of article 5 and the following articles (A/9610/Rev.1, chapter III, section B), the conclusion might be reached that, since the conduct of such a person was attributable to the other subject of international law in question, the territorial State would be free of all responsibility, even though it had itself adopted a wrongful attitude in connexion with that conduct. The purpose of article 12 was, therefore, to specify that, when the conduct of a person was attributable, not to the territorial State but to another subject of international law, the territorial State might nevertheless have attributed to it as a possible source of responsibility, conduct connected with that of the person in question. Since what was at issue was the conduct of an organ of another subject of international law, whatever it might be, he thought the case could be covered by a single article. He would have no objection to devoting

<sup>1</sup> *Yearbook* . . . 1972, vol. II, pp. 71-160.

<sup>2</sup> *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 10* (see *Yearbook* . . . 1974, vol. II, Part One, pp. 157-331).

<sup>3</sup> For text see 1312th meeting, para. 1.

<sup>4</sup> See 1311th meeting, paras. 21 and 23.

two or three articles to it, however, though he did not see why that was necessary.

4. Secondly, article 12 was based on two assumptions. The first was the existence of conduct which could be attributed to a State, an international organization or an insurrectional movement; the second was the localization of that conduct in the territory of another State. It mattered little, therefore, at what moment, in what circumstances or why the international organization or insurrectional movement in question had acquired the status of a subject of international law. Just as the Commission had carefully refrained from defining the primary rules concerning obligations the breach of which constituted a wrongful act, so, too, it should refrain from defining the circumstances in which an organization or an insurrectional movement became a subject of international law. Moreover, that question might equally well arise in regard to States, as had been pointed out by those members of the Commission who had referred to the notion of recognition. With regard to international organizations, the case of acts committed by United Nations peace-keeping forces was not really the only one that could be considered. There were many organs of the United Nations that travelled constantly—for example, the Secretary-General—and could be in the situation contemplated in article 12, in particular on the occasion of a press conference.

5. Thirdly, the presence of a foreign organ in the territory of a State was sometimes perfectly normal, particularly in the case of an ambassador or a consul appointed to that State, or of a Head of State on an official visit. In exceptional cases, the presence of a foreign organ in the territory might in itself constitute a wrongful act, but it would then be a wrongful act of one or other of the two States concerned and would come under article 5. In any case it would be a different act from that contemplated in article 12.

6. As to the joint participation of two States in a wrongful act, he reminded the Commission that it had referred to that question in its reports on the work of its twenty-fifth and twenty-sixth sessions. In explaining the structure of the draft, the Commission had said that it consisted of several parts, dealing respectively with the attribution of an act to the State, the breach of an international obligation and circumstances precluding wrongfulness, and it had added: "Once these points have been settled . . . there will still remain some special problems to consider: for example, the possibility of attributing an internationally wrongful act simultaneously to more than one State in respect of one and the same situation, and the possibility of making a State responsible, in certain circumstances, for an act committed by another State."<sup>5</sup> That concurrence of wrongfulness was very important, but the Commission must not give way to the temptation to consider it at the present stage.

7. Sir Francis VALLAT observed that the main provisions of draft article 12, contained in paragraphs 1 and 2, were expressed in negative form and designed to show that an act committed in certain circumstances would not

be attributable to the State. That was what the Commission should bear in mind in discussing the article. Like other members, he was very concerned over the borderline issues, such as the status and capacity of international organizations and the recognition of insurrectional movements, which instinctively came to mind as one read the first two paragraphs; but the place to deal with such matters was not the article under discussion. On the other hand, the need to make provision in the draft articles for the conduct of other States, international organizations and insurrectional movements became abundantly clear if one thought of the doubts that would subsist if those matters were not covered.

8. It was obvious that there could be cases in which the issue was the conduct of "another State", as envisaged by the Special Rapporteur. It was equally obvious from, *inter alia*, judgments of the International Court of Justice concerning the United Nations and article XXII, paragraph 3, of the 1971 Convention on International Liability for Damage Caused by Space Objects,<sup>6</sup> that at least some international organizations possessed elements of international personality, could incur international responsibility and could be liable for damage. If even the possibility of such a situation was known to exist, it had to be covered in the draft articles. That it was essential to deal also with the case of insurrectional movements was clear from the wealth of material in the Special Rapporteur's fourth report (A/CN.4/264 and Add.1).

9. Nevertheless, he wondered whether the article 12 was really broad enough. Although, as always in the process of codification, the Commission must strike a balance between what was dictated by pure logic and what was known to be practical, he would be reluctant to commit himself at the present stage to a statement to the effect that there were no subjects of international law other than States, international organizations and insurrectional movements.

10. Undoubtedly all those entities could be subjects of international law, but they could well be divided into two groups, comprising States and international organizations on the one hand, and insurrectional movements on the other, according to whether the fact of their existence was normal or abnormal. That constituted an argument for drafting two separate articles. It had been perfectly reasonable to discuss States and international organizations together in article 9, and like considerations applied to article 12, the drafting of which, and that of the saving clauses at present contained in paragraphs 4 and 5, would be simplified if insurrectional movements were made the subject of a separate article. Such a division would also afford an opportunity of preparing a fuller commentary on international organizations.

11. With regard to the wording of article 12, he wondered whether the phrase "in the territory of a State", in paragraph 1, might not exclude from the effect of the article acts occurring, for example, on a ship or in an aeroplane or in an area like the exclusive "economic zone" proposed at the Third United Nations Conference on the Law of the Sea.

<sup>5</sup> See *Yearbook* . . . 1973, vol. II, p. 172, para. 51.

<sup>6</sup> See General Assembly resolution 2777 (XXVI), annex.

12. Mr. YASSEEN said that all the principles stated in article 12 were acceptable. Some of them were derived from consistent practice and a wealth of judicial precedent, whereas others, though less well established, were equally necessary. In considering article 12, members should not forget that the Commission was studying the responsibility of States, not the responsibility of all subjects of international law. The reason why it was necessary to speak of other subjects of international law was not in order to establish when they were responsible, but to exclude them from the topic under consideration. That was the purpose of article 12. The article was necessary because it supplemented articles 5 and 9, even though the principles it stated could be deduced from other provisions of the draft.

13. With regard to insurrectional movements, it should be explained that the Commission had no intention of dealing with the question of their responsibility as article 12 and above all article 13 might suggest. In fact, article 13 did not refer to the responsibility of an insurrectional movement, but to the responsibility of the State into which the movement was transformed. The subject had to be mentioned, because what was involved was the conduct of organs of a nascent State.

14. As to the structure of article 12, he pointed out that the problems raised by State organs were very different from those raised by organs of an international organization and even more different from those raised by organs of an insurrectional movement. Draft article 9 (A/9610/Rev.1, chapter III, section B), which dealt both with State organs and with organs of an international organization placed at the disposal of another State, could be divided into two articles. Similarly, the contents of paragraph 1 of article 12 could form the subject of two separate articles, one on the conduct of a State organ and the other on the conduct of an organ of an international organization. Although the phenomenon was the same in both cases, the attendant circumstances and the modalities might be very different.

15. Insurrectional movements should be dealt with in a separate article, and paragraph 2 of article 12 should not be introduced into article 13, which applied exclusively to the case in which the insurrectional movement had become a State.

16. Mr. MARTÍNEZ MORENO noted that no member had found fault with the essential principles stated in the Special Rapporteur's draft article 12. He appreciated both the reservations expressed concerning the treatment, in one and the same article, of States, international organizations and insurrectional movements, and the difficulty of separating those topics within the framework of the draft; if the problem could be solved at all, the Special Rapporteur would surely find a solution. Much of the concern caused by article 12 could be traced to the wide range of doctrinal opinions concerning the scope of the concept of a "subject of international law". Some scholars held that the State was the only subject of international law, while others took the view that the individual was the subject of international law *par excellence*. He himself was among the few jurists who

considered that any international body was a subject of international law.

17. While the article should certainly apply to acts committed "in the territory of a State", he wondered whether that phrase was broad enough to include conduct occurring, say, during diplomatic asylum in a foreign embassy, or in areas such as the proposed exclusive "economic zone", where the traditional rules governing responsibility would not apply. Similarly, could the phrase "international organization" be taken to include bodies such as commissions of investigation or arbitral commissions?

18. He agreed that questions such as the recognition of belligerents and the determination of the point at which a revolutionary movement became a subject of international law were of great importance in relation to the question of the responsibility of insurrectional movements. It was clear, however, from examples ranging from the time of Jefferson Davis to the current events in South-East Asia, that such movements could be, and had been recognized as being, capable of incurring responsibility. It might be better to deal with the topic in a separate article, but it was far too important to be ignored. He thought Mr. Sette Câmara's suggestion<sup>7</sup> might be preferable to the phrase "structures of the insurrectional movement" used in paragraph 5 of draft article 12.

19. Mr. TAMMES said that the Special Rapporteur had condensed draft article 12 out of a wealth of convincingly and objectively presented material. The article was logical and appropriate in the general context of chapter II, since, by precluding responsibility of a State for the conduct of organs which were extraneous to that State but acted within its territory, it served as a counterpart to article 9. He was gratified to note that the Special Rapporteur had recognized that there might be a need for rules concerning the joint responsibility of the territorial State in connexion with the conduct of extraneous organs; in that case, the place in which the conduct occurred would be immaterial. Such problems were, however, outside the scope of article 12, for the purposes of which the provisions of paragraph 3 would suffice.

20. The Commission should not devote too much attention to the question of the status of international organizations, since the object of article 12 was to preclude the attribution to the State of the conduct of organs that were clearly not its own. He doubted the wisdom of providing, in paragraph 2, that the article applied only to insurrectional movements "possessing separate international personality"; in his view, the conduct of an insurrectional movement was inherently foreign to the territorial State since, like an international organization, such a movement existed independently of the State. Even if the phrase in question was deleted, paragraph 2 would still reflect long-standing international practice and, indeed, the Special Rapporteur himself seemed, in paragraphs 158 and 195 of his fourth report, to have attached little practical importance to the difference between the situation in which an insurrectional movement

<sup>7</sup> See 1312th meeting, para. 23.

had, and that in which it had not acquired international personality. In his own view, the concept of the international responsibility of an insurrectional movement was not objective, like that of the personality of a State, but was dependent on the judgement of States coming into contact with the movement. Illustrations of the subjective nature of the concept were given in paragraphs 154 and 176 of the fourth report; another example was the case of claims arising out of the establishment of the Italian Socialist Republic in northern Italy in 1943. If the requirement that the insurrectional movement must possess international personality was to be retained—which he would not recommend—it would be advisable to specify that the conduct in question would not be considered as an act of the State “by a State which has recognized such personality”. The reference to international personality might give rise to numerous problems and should be deleted, particularly as it had been considered unnecessary in earlier drafts on the subject.

21. Mr. QUENTIN-BAXTER agreed with other members that the scope of article 12 was limited. If in some way article 11 was the corollary of all the preceding articles, article 12 in turn served to show that the rule in article 11 held true even when the authors of an act were organs of a State or agents of some other institution having international personality. And yet the two articles had evoked different responses in the Commission. So far as article 11 was concerned, there had been unanimous agreement that little more could be done than endorse the principles enunciated by the Special Rapporteur. The only concern expressed had been that the article was so concise that its value might be underestimated. In the case of article 12, however, the questions which came “instinctively” to mind were legion. The article should be so revised that nobody would be able to read into it any intention on the part of the Commission to make a rule of law outside the scope of codification. To that end, it might well be advisable to deal with the conduct of organs of other States and that of organs of international organizations in separate paragraphs. For the reasons mentioned by Sir Francis Vallat, Mr. Yasseen and Mr. Tammes, he considered that the question of insurrectional movements should be dealt with in a separate article.

22. In seeking to gain acceptance of the draft articles, the members of the Commission should insist on the purity and logic of the Special Rapporteur's ideas. At the same time, they should bear in mind the less rational reactions which might be occasioned by a reminder of the difficulties that the disruption of a State could entail. Disruption might be the result not only of illegal insurrection, but of the exercise by a non-self-governing territory of its right to self-determination—a right fully recognized by the United Nations. If such a territory chose self-government in association with another State, the question might arise of the distribution of responsibility between the former territory and the State with which it had become associated. It would be entirely wrong for the Commission to go into such matters in the draft articles, so in order to cover the vast range of possibilities in international life, it was correct to employ the undefined term “State”, as had been done in the

Vienna Convention on the Law of Treaties<sup>8</sup> and the draft articles on succession of States in respect of treaties (A/9610/Rev.1, chapter II, section D). What the Commission ought to do, rather than draw attention to the unpleasant “abnormality” of disruption, was to emphasize the principle of the continuity of the State, which was an essential part of the coherence of international society and of orderly relations between States as subjects of international law. It was that which justified the preparation of a carefully worded separate article.

23. Mr. KEARNEY said that he shared the doubts expressed by other members about the words “in the territory of a State”, in paragraph 1. It was clearly necessary to revise the wording of that phrase, but the task of the Drafting Committee would not be an easy one. One had only to think of the case of an act performed by an organ of State A on board a merchant vessel flying the flag of State B, but sailing through a part of the high seas claimed as an exclusive economic zone by State C. It would certainly be difficult to draft a formula covering all such possible cases.

24. With regard to the presentation, he was in sympathy with the idea of dividing article 12 into separate articles dealing with the different subjects now covered by a single article, even though he fully appreciated the logic of the Special Rapporteur's approach.

25. He believed that paragraph 1 of article 12 should be closely connected with article 9 (Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization). Paragraphs 2 and 5 of article 12 were more closely connected with article 13 (Retroactive attribution to a State of the acts of organs of a successful insurrectional movement).

26. The subject of insurrectional movements should undoubtedly be dealt with in the draft articles. The treatment of the subject could, however, be simplified by adopting Mr. Tammes's suggestion that the words “and possessing separate international personality” should be dropped. The removal of those words would make it possible to combine the content of paragraph 2 of article 12 with the contents of paragraphs 1 and 2 of article 13. Paragraph 5 of article 12 could then be eliminated altogether, because the idea it expressed would be conveyed by paragraphs 1 and 2 of article 13, subject to a slight revision of the language of those provisions.

27. He agreed with those members who had criticized the use of the word “structures” in paragraph 5. He also agreed that, in paragraph 2, the reference to an insurrectional movement directed “against the State” was not accurate. Most of the cases envisaged would constitute attempts to replace a government by a new government rather than a State by a new State, except in the particular circumstances where a new State came into being in part of the territory of the pre-existing State against which the insurrectional movement had been directed.

<sup>8</sup> *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.

28. The saving clauses in paragraphs 3 and 4, as he understood them, merely stated that nothing in the provisions of the principal paragraphs 1 and 2 prevented the attribution of certain conduct to the State by virtue of articles 5 to 9, or to the international organization or insurrectional movement of which the authors of that conduct were organs. Those saving clauses did not necessarily mean that, in the cases envisaged, there would be a factual basis for the attribution of the conduct, or indeed a basis for the attribution of responsibility.

29. Lastly, he stressed the great difficulty of avoiding confusion between primary rules and secondary rules. In many cases it was certainly far from easy to distinguish between the two types of rule. For example, the question whether a subject of international law could have responsibility attributed to it would be regarded as being governed by a secondary rule or by a primary rule according to whether one chose to treat the issue as one of international personality or one of attribution. Another hypothetical case was that in which a group of States joined together to form an international organization and adopted a charter which provided that the organization would not be responsible for its conduct. It would be difficult to determine whether a rule that such an organization could or could not be considered as a subject of international law should be applied, or whether its conduct should be attributed to the organization regardless of the limitation in its charter.

30. Mr. TSURUOKA said he was in favour of retaining article 12, which was the result of thorough study of the relevant practice, judicial decisions and doctrine. The principles it stated were at least useful, if not essential. The practical value of those principles could be seen in many cases, including that of Japan, which, under a treaty concluded with the United States, had agreed to the stationing of American armed forces in its territory.

31. At the same time he appreciated the concern expressed by some members of the Commission and recognized that article 12 raised some very difficult problems. For example, it was uncertain what was the capacity of an international organization in international law and what conditions had to be fulfilled by an insurrectional movement in order to be distinguishable from a mere group of persons and to acquire international personality. If those very important questions were not settled, it might be difficult, if not impossible, to apply the rule in article 12. It was true that besides the "dark areas" there were also some "light areas" in which that rule was already applicable. The United Nations, for instance, had some measure of "delictual capacity".

32. As to the form of the article, he saw no objection to dividing it into two or three separate articles, though a decision on that point could be postponed until the Commission came to consider the draft articles as a whole. The word "structures", which appeared in paragraph 5, and about which some members of the Commission had expressed reservations, had already been used in article 7, so he thought it should be retained in article 12.

33. Mr. RAMANGASOAVINA said that article 12 was the logical sequel to the preceding articles, which, starting with article 5, were intended to determine in

which cases the State was responsible for the wrongful acts of its own organs, of organs placed at its disposal, or even, in certain circumstances, of private persons.

34. In their comments on article 12, the members of the Commission had raised several very important and difficult problems. When could an insurrectional movement be considered to possess a separate international personality? By what tests could it be decided that an international organization had a personality such that the State in whose territory it was acting could be relieved of all responsibility? If the territorial State was a member of the international organization, could it be relieved of all responsibility? Like most of the members of the Commission, he believed it would be better not to raise the question of the recognition of international personality; for an insurrectional movement could be recognized by some States and not by others, and it was very hard to determine the proper criteria for granting it international personality. Moreover, in the case of national liberation movements such as the PLO and SWAPO, which had been recognized by the United Nations and consequently had separate international personality, the States in whose territories those movements operated could hardly invoke the responsibility of the movements to deny their own responsibility, for in so doing they would be implicitly recognizing the *de jure* existence of the movements they were fighting.

35. The principle stated in paragraph 1 of article 12 was the corollary of the principle in article 9, for if the conduct of an organ placed at the disposal of a State by another State, or by an international organization, engaged the responsibility of the State at whose disposal it had been placed only in so far as it had acted in the exercise of elements of that State's governmental authority, it followed logically that the conduct of an organ of a State, or of an international organization, acting as such, engaged only the responsibility of the State or the organization to which it belonged. In paragraph 2, that rule had been extended to insurrectional movements which possessed separate international personality, and which it was therefore logical to include among the other subjects of international law covered by article 12. The advisability of dealing with those three subjects of international law in one and the same article was, of course, open to question; but he thought that if there were three separate articles more emphasis would be placed on those entities, whereas it was not their nature that mattered, but their position in the State in whose territory they were situated. Hence he had some reservations about the division of article 12 into several articles and thought that point could be examined by the Drafting Committee.

36. Mr. USHAKOV reiterated his view that paragraphs 1 and 3 of article 12 were entirely unnecessary. It was, indeed, quite impossible to compare, as the Special Rapporteur had done, the situation of an organ of a State or of an international organization acting in that capacity in the territory of another State, with the situation of private persons acting in the territory of a State—the case covered by article 11. The two situations were totally unrelated, since private persons in the territory of a State were subject to that State's authority and jurisdiction, whereas the organs of another State or of



an international organization were not subject to the jurisdiction of the State in whose territory they were situated. The territorial State could prevent and punish the act of a private person, whereas it could neither prevent nor punish the act of an organ of another State or of an international organization acting in that capacity in its territory. It was obvious that a State could neither prevent nor punish the conduct of a representative of a foreign State in its territory, and a host State could neither prevent nor punish the conduct of an international organization located in its territory, since it had no jurisdiction over that organization. Hence there was no reason to repeat in paragraphs 1 and 3 of article 12 the provisions of paragraphs 1 and 2 of article 11, for the two articles dealt with wholly unrelated situations.

37. As to paragraph 2 of article 12, he shared the reservations expressed by some members of the Commission about the words "possessing separate international personality", because such personality seemed to him very difficult to determine. In his opinion, it would be better to say that the conduct of an organ of an insurrectional movement directed against a State could not be attributed to that State "if the insurrectional movement controls part of the territory of the State in question".

The meeting rose at 1 p.m.

### 1315th MEETING

Friday, 23 May 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

#### Eleventh session of the seminar on international law

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

2. Mr. RATON (Secretariat) thanked Mr. Ustor, the Commission's previous Chairman, and Mr. Yasseen for having upheld the cause of the Seminar on International Law at the twenty-ninth session of the General Assembly. The eleventh session of the Seminar would open on Monday, 26 May 1975. There would be 20 participants, coming from different countries, who had been chosen on the basis of geographical and linguistic distribution that was as fair as possible. There would, however, be few representatives of African countries, because those countries had not nominated many candidates for 1975. The organizers of the Seminar had marked the celebration of International Women's Year by inviting six women to participate. There would be eight lecturers from among the members of the Commission: Mr. Martínez

Moreno, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Kearney, Mr. Ustor, Sir Francis Vallat and Mr. Yasseen.

3. The Seminar could not be held without the participation of members of the Commission or without the financial contributions of Governments, which provided students from developing countries with fellowships varying in amount from \$1,200 to \$5,000. The amount of the fellowship awarded by Israel had not changed, but the fellowships awarded by the Netherlands, Norway, Finland and Sweden had been increased from \$1,500 to \$2,000, and the Federal Republic of Germany had raised the value of its fellowship to \$2,500; the most valuable fellowship, of \$5,000, had been awarded by Denmark. Thanks to the personal intervention of Mr. Hambro, Norway had maintained its contribution for 1975. Despite the efforts of those countries, however, the value of the fellowships had become insufficient owing to the fall of the dollar and the increase in the cost of living in Switzerland. Once again, therefore, he made an urgent appeal to Governments to award additional fellowships and to increase the value of the existing ones.

4. The CHAIRMAN expressed his satisfaction at the holding of the Seminar and said it was gratifying that most of the participants were young jurists from the third world. He thanked the donor countries for providing the fellowships, which he hoped would increase in number and value.

#### State responsibility

(A/CN.4/264 and Add.1;<sup>1</sup> A/9610/Rev.1<sup>2</sup>)

[Item 1 of the agenda]

(resumed from the previous meeting)

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 12 (Conduct of other subjects of international law<sup>3</sup> (continued))

5. The CHAIRMAN invited the Commission to resume consideration of draft article 12.

6. Mr. CALLE Y CALLE said that the Special Rapporteur's draft article 12 was the clearest and the best formulated text so far produced on its subject, as could be seen from a comparison with previous attempts at codification. The article dealt with acts committed in the territory of a State by an organ of another subject of international law. Its purpose was to specify that such acts could not be attributed to the territorial State.

7. The provisions of paragraph 1 were in line with those of article 9 (A/9610/Rev.1, chapter III, section B), but they could not be incorporated in that article. Article 9 dealt with the case in which an organ of another State, or of an international organization, was placed at the disposal of the territorial State. The acts of that organ were then attributed to the territorial State because it had acted under the authority or on the instructions of that

<sup>1</sup> Yearbook ... 1972, vol. II, pp. 71-160.

<sup>2</sup> Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 10 (see Yearbook ... 1974, vol. II, Part One, pp. 157-331).

<sup>3</sup> For text, see 1312th meeting, para. 1.



State. Paragraph 1 of article 12, on the other hand, dealt with a situation in which the territorial State had no such authority and had given no such instructions, so that separate treatment was required.

8. During the discussion, there had been some criticism of the expression "in the territory of a State". In his opinion, the use of that expression was fully justified, because the problems dealt with in article 12 related to the non-attribution to the territorial State of certain acts performed by organs of other subjects of international law. Any attempt to replace the reference to "territory" by a reference to "jurisdiction" would create major difficulties.

9. Paragraph 2 dealt with insurrectional movements. Riots and civil strife certainly constituted a broad subject, covering events ranging from mere disorders to situations of civil war. In recent times, liberation movements had acquired a vigour and status which gave them an international standing and which had gained them recognition by States and international organizations.

10. It had been suggested that the words "and possessing separate international personality" should be dropped from paragraph 2. In his opinion, those words were indispensable. The conduct referred to in paragraph 2 was not that of individuals, which would give rise to the responsibility of the State for its failure to prevent internationally wrongful acts. That paragraph was concerned with the acts of organs of movements which had an internationally recognized personality. When an insurrectional movement was recognized by third States as a belligerent, the territorial State was released from liability for any claims arising out of the conduct of the organs of the movement.

11. While he was in favour of retaining the phrase referring to personality, he thought the wording should be improved. The term "separate", which qualified the expression "international personality", was not very apt, particularly in the Spanish version ("*distinta*"). It would be better to use a formula such as "an international personality of its own", or better still, "recognized international personality". That wording would take account of the possible diversity of situations. There had been cases in which an insurrectional movement had been recognized by only one or two States in the region concerned; liberation movements, on the other hand, had been recognized by the General Assembly of the United Nations and had been expressly authorized to participate in international conferences.

12. With regard to riots and civil disturbances, he urged the Special Rapporteur to mention in the commentary that they were covered by the provisions of article 11. A reference of that kind would give satisfaction to Latin American countries. In that region, where disturbances and revolts had been common in the second half of the nineteenth century, claims for alleged injuries suffered by aliens had become a major problem. As a reaction against exaggerated or inflated claims, which had become a regular industry, Latin American countries had included, in their treaties with other countries, clauses whereby the territorial State disclaimed responsibility for damage sustained by aliens as a result of disturbances or revolts.

In his own country, Peru, the Ministry for Foreign Affairs had issued a circular, on 26 October 1897, to all foreign States represented at Lima, warning them that the Peruvian State was not responsible for any damage sustained by aliens as a result of revolts or civil strife. That position had been reiterated since then on a number of occasions, for example, in a note sent to the Italian Legation at Lima in 1934.

13. He found the saving clauses in paragraphs 3, 4 and 5 not only useful, but necessary, in article 12; the rule of non-imputability set out in paragraph 1 of the article could not be absolute. So far as the formulation of those saving clauses was concerned, he was fully satisfied with the Special Rapporteur's proposed text; any attempt to amend it would create more problems than it would solve.

14. Mr. BILGE said that article 12 was an important provision. In his opinion, it had its place in the draft as a whole, because it was a technical article which supplemented the other articles already adopted.

15. It had been argued against article 12 that chapter II of the draft should deal only with the act of the State under international law. In fact, however, it was very difficult, or even impossible, to adhere strictly to methods of pure logic when dealing with such a complex problem, for past confusions and mistakes made it essential to clarify certain particularly delicate questions.

16. As he saw it, article 12 was necessary in so far as it was a corollary of article 9 and also, partly, of article 11. For after settling, in article 9, the question of the attribution to a State of the conduct of an organ placed at its disposal by another State or by an international organization and exercising elements of the governmental authority of the State at whose disposal it had been placed, it was necessary to settle the complementary question of the attribution of the conduct of an organ of a State or of an international organization, likewise present in the territory of another State, but acting rather as an organ of the State or organization to which it belonged. That was precisely the question settled by article 12 in paragraph 1. The article also had some connexion with article 11, for paragraph 2 dealt with the conduct of insurrectional movements, which had first been considered as groups of private persons.

17. Like Mr. Yasseen, he considered that article 12 should not attempt to define the responsibility of international organizations or of insurrectional movements, but should be confined to stating that the conduct of those entities could not be attributed to the State.<sup>4</sup>

18. Mr. Ushakov had strongly opposed the inclusion of paragraph 1 of article 12, on the grounds that in any case an organ of another State or of an international organization was not under the jurisdiction of the territorial State.<sup>5</sup> But everything depended on the meaning given to the term "jurisdiction". Foreign armed forces stationed in the territory of a State were obviously not subject to that State's jurisdiction, but that did not mean that the State which received them had no means of

<sup>4</sup> See previous meeting, paras. 12 and 13.

<sup>5</sup> *Ibid.*, para. 36.

opposing their activities. The same was true of a foreign embassy, for the receiving State could, in certain cases, demand the recall of an ambassador. The receiving State always retained its sovereign rights and could always limit the activities of the organ of the sending State to some extent. In his opinion, paragraph 1 of article 12 was necessary, for it had a useful part to play in clarifying the problem of the attribution of certain kinds of conduct to the State.

19. He agreed that consideration should be given to the possibility of "joint conduct" by the State or international organization to which the organ belonged and the State in whose territory the organ was present. It was also necessary to take into account the very complex question of the relationship between the international organization and its member States. A few years previously, when the establishment of a multinational armed force had been planned, the question had arisen whether the force would have a separate status or would simply take the form of very close co-operation between the armed forces of several countries. The possibility of common or joint conduct by the receiving State and the sending State or organization should be provided for in the draft, for that was not a theoretical case, but one which could always occur in practice.

20. Paragraph 2 was very important, because of the increasing activities of insurrectional movements and of the greater measure of recognition they were receiving at the international level. But the Commission should not take up the question of the recognition of insurrectional movements; there, it should confine itself to affirming that the conduct of an insurrectional movement could not be attributed to the State. In his opinion, paragraph 2 should form a separate article, because the question of insurrectional movements had reached such proportions that it merited separate treatment. The acts of those movements were very close to acts of war, for they took part in an armed conflict and were outside the jurisdiction of the State. Such acts should therefore be treated separately from the other types of conduct referred to in paragraph 1.

21. He could accept paragraphs 1 and 2, but in the form of separate articles. He also accepted the other paragraphs, which he considered necessary for defining the scope of paragraphs 1 and 2.

22. Mr. REUTER said that the question raised by article 12 was both very simple and very difficult. The Special Rapporteur's intentions were indeed very clear, and the article did not raise any problem of substance. On the other hand, it raised a very delicate drafting problem. He would not give an opinion on the question whether the content of article 12 should form one, two or three articles, because he thought that was a question which should be settled later, after the text had been drafted. In drafting it, the Commission should exercise the utmost caution, and follow the example of the General Assembly which, in drafting certain texts, like the definition of aggression,<sup>6</sup> had taken great care to avoid the use of certain terms, such as "international organization".

In the same way, the Commission should avoid using such expressions as "subjects of international law" and "international personality", and try to draft as neutral a text as possible.

23. As to insurrectional movements, he had no doubt that national liberation movements directed against foreign rule of the colonial type now enjoyed international legitimacy, but he thought it would be very dangerous to adopt a formula which might give the impression that the Commission was taking a position, one way or the other, on the legitimacy of insurrectional movements outside the colonial context. The Commission should adopt a neutral formula, in order to stress the relative character of whatever international status an insurrectional movement might enjoy. He was therefore inclined to favour the replacement of the words "possessing separate international personality", in paragraph 2, by the phrase "whose international status is applicable to the relations in question".

24. Mr. HAMBRO said that although he agreed with most of the ideas in that part of the Special Rapporteur's report which dealt with article 12 (A/CN.4/264, paras. 147-192), he nevertheless had serious doubts about the whole of the article. Much of its contents did not belong in the part of the draft under discussion. Some elements belonged to other parts of the draft; some even belonged to topics other than State responsibility. If article 12 were adopted as it stood, the draft would become much more complicated than was necessary; some of the paragraphs of the article would make it more difficult for States to adopt the draft as a whole.

25. Neither the arguments so skilfully put forward by the Special Rapporteur, both in his report and in his oral presentation of article 12,<sup>7</sup> nor the views expressed by other members who supported the article, had been able to convince him of the usefulness of article 12 in the draft. With regret, therefore, he had to place on record his very serious doubts.

26. Mr. EL-ERIAN said that the question of the use of the expression "international organization", raised by Mr. Reuter, called for some comments. At the 1975 United Nations Conference on the Representation of States in their Relations with International Organizations, an attempt had been made by a number of delegations to introduce into the draft convention a definition taken from one of his own reports as Special Rapporteur for the topic.<sup>8</sup> After discussion, however, the majority of the participants had decided to adopt the same approach as the Commission and not to try to define an international organization. The solution adopted had been to include in article 1 (Use of terms) of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,<sup>9</sup> a provision to the effect that, for purposes of that Convention, "international organization" meant an inter-governmental organization. That formula was, of course, taken from the 1969 Vienna Convention on the

<sup>7</sup> See 1312th meeting, paras. 2 *et seq.*

<sup>8</sup> See *Yearbook* . . . 1968, vol. II, p. 124, article 1 (a).

<sup>9</sup> Document A/CONF.67/16.

<sup>6</sup> General Assembly resolution 3314 (XXIX), annex.

Law of Treaties and merely identified an international organization without defining it. He took it that the Commission would adopt the same approach with regard to the draft under consideration.

27. He reiterated the view he had expressed at the previous meeting that paragraphs 2 and 5 of article 12 should be separated from the rest of the article. He remained convinced that article 12 should be split up so as to deal separately with the three different kinds of subject of international law it covered, namely States, international organizations and insurrectional movements, which were governed by very different rules of international law. The subject-matter of article 12 should be divided into three articles, or at least two, if the conduct of another State and that of an international organization were to be treated together.

28. He did not share Mr. Hambro's apprehensions, though he agreed that there was some encroachment on other topics—for example, that of succession of States. If the Commission decided that article 12 should touch on the succession of States, a cross-reference to the relevant rules of international law should be included in paragraph 5.

29. The CHAIRMAN, speaking as a member of the Commission, said he shared the view that article 12 was a useful article which had a place in the draft. The difficulties which had arisen were due to the approach adopted. In drafting article 12, the Special Rapporteur had intended simply to specify that the acts of an organ of another State, of an international organization or of an insurrectional movement were not attributable to the territorial State. That State was clearly not responsible for the conduct of an organ which was not under its control.

30. The rule in paragraph 1 had met with general agreement. Paragraph 2 raised difficulties that were political rather than legal—a circumstance accounting for the shyness of writers on the question of the attribution of responsibility to insurrectional movements, to which the Special Rapporteur had referred in paragraph 188 of his report (A/CN.4/264 and Add.1). Clearly, it was the political implications rather than any legal considerations that had restrained writers from commenting on that question.

31. The matter was further complicated by the fact that insurrectional movements could operate at different levels. Some were internationally recognized and constituted legitimate attempts to assert the right of self-determination embodied in the Charter of the United Nations; others were merely secessionist; and others, again, aimed only at overthrowing the government of a State. Thus it was difficult to know how far to go in dealing with insurrectional movements in general.

32. The question of recognition was also relevant. Not uncommonly, a claim was not made because the State which might have made it considered that by invoking the international responsibility of the insurrectional movement it would be implicitly conferring recognition on it.

33. The case of the United States vessel *Dolphin*, in 1914, which was cited by the Special Rapporteur in

paragraph 181 of his report, illustrated the kind of situation which had occasionally arisen in the days before the adoption of the United Nations Charter. The arrest of some members of the crew of that vessel by armed rebels had led to the occupation of a port in the country concerned. That type of pressure was now totally unlawful under the Charter, which called for the settlement of disputes by peaceful means.

34. In modern times insurrectional movements were in some cases internationally recognized as legitimate uprisings against colonialism to assert the right to self-determination, so some provision should perhaps be made for the registration of claims and complaints, with a view to future settlement. The appropriate authority for the registration of claims would be the United Nations.

35. He agreed that paragraphs 2 and 5 should be separated from the remainder of article 12; possibly they might be combined with the provisions of draft article 13.

36. Mr. AGO (Special Rapporteur), replying to the comments of members on article 12, said that the purpose of the article was mainly to save the Commission from being criticized for leaving a gap in the draft. After dealing, in article 5 and the subsequent articles (A/9610/Rev.1, chapter III, section B), with acts attributable to the State, the Commission had considered the conduct of private persons. It had come to the conclusion that the acts of private persons were not attributable to the State, but that the State's international responsibility might be engaged in connexion with such acts. Article 12 referred to the case in which an act attributed to a foreign State, an international organization or an insurrectional movement, was the occasion for certain conduct on the part of the territorial State which could engage its international responsibility. That case could not be ignored.

37. Obviously, the Commission was not required to define an "international organization" or an "insurrectional movement", to establish how an international organization could become a subject of international law separate from the States composing it, or to indicate when the responsibility of an international organization or its member States could be engaged or what cases might possibly involve joint responsibility. Nor did it have to determine at what moment, or with respect to whom, an insurrectional movement assumed a personality of its own. Moreover, none of the provisions of article 12 were intended to settle those questions. The rules on the possible responsibility of an international organization or an insurrectional movement were certainly not primary rules, but, like the primary rules, they did not have to be defined by the Commission in the context of the present articles, which dealt only with the responsibility of States.

38. In view of the considerations put forward by members of the Commission at the previous meeting, he was not sure whether it would be better to devote one or several articles to the subject-matter of article 12. First, one could imagine an article consisting of two paragraphs, worded roughly on the following lines: "(1) The conduct of an organ of another State acting in that capacity in the territory of a State shall not be considered as an act of that State under international law. (2) The rule

stated in paragraph (1) is without prejudice to the attribution to the State of conduct connected with that referred to in paragraph (1), which must be considered as acts of the State by virtue of articles 5 to 10." Such an article would certainly not be superfluous, even though Mr. Ushakov claimed that when there was an act by another State, it was already attributed to that State under articles 5 to 10, so that everything was provided for in that respect. Mr. Ushakov had added that the fact that the organ in question had acted in the territory of another State did not alter the situation, because it had acted in its capacity as an organ.<sup>10</sup> All that was true, but it was still important to take account, at that point, of cases in which the territorial State might be required to adopt a particular attitude in connexion with the conduct of the organ in question. For example, if an ambassador or other official representative of a State, speaking at a press conference abroad, went so far as to insult the Head of a third State, the territorial State might be required to take certain action, especially if the insults had been uttered in the presence of local authorities. It might, at the very least, be required to dissociate itself from the remarks or to protest. In particularly serious cases, it was even conceivable that the territorial State would have to request the withdrawal of the ambassador. If the territorial State took no action, the injured State might accuse it of having committed an internationally wrongful act connected with the ambassador's conduct.

39. Some members of the Commission had thought it possible that, by permitting the presence of foreign armed forces in its territory, a State might be committing a wrongful act. His reply was that no such general affirmation could be made. At the present time, numerous armed forces were stationed in foreign territory, and their presence did not constitute an internationally wrongful act in itself. Moreover, their function was usually to contribute to the defence of the country, to the balance of power and, in short, to the maintenance of peace in a particular region, rather than to prepare acts of aggression. The presence of such forces was generally the result of an agreement which did not nullify the jurisdiction of the territorial State over their actions, particularly in regard to the punishment of certain offences. That being so, if the territorial State did not itself take the necessary punitive measures, that omission could, in certain circumstances, be attributed to it as a source of international responsibility.

40. Other examples could be cited. A Head of State visiting a foreign country might be kidnapped by a commando operation organized from a third State and carried out by organs of that third State. In such a case, the territorial State might incur international responsibility if it had not taken the necessary precautions to prevent such an act or if, although blameless in that respect, it did not take adequate measures to apprehend the culprits and punish them, or in any case to demand the immediate release of the Head of State concerned. Recently, a vessel of one State had been seized by the armed forces of another State. Having failed to secure its immediate return and the release of the crew, the

State to which the vessel belonged had sent troops into the territory of a third State, from which it had conducted a military operation to recover the vessel and its crew. Was that third State not bound to react in a particular way? If it had not protested and demanded the withdrawal of the armed forces, it might perhaps have been reproached by the neighbouring State.

41. Several members of the Commission had objected to the expression "in the territory of a State". But if those words were deleted, article 12 would lose its *raison d'être*, since it was precisely because the acts complained of were committed in the territory of the State in question that the article could deal with the conduct of that State in connexion with those acts. Nevertheless, he acknowledged that the phrase might seem too restrictive; he therefore suggested the formula "in any territory under its jurisdiction" or any other form of words which would include, in addition to the territory proper, the continental shelf, dependent territories and ships flying the flag of the State.

42. The reason why there were few examples relating to international organizations was that that class of subjects of international law was relatively new. Besides, it must be presumed that by their very nature, international organizations normally acted in such a way as not to commit internationally wrongful acts. Nevertheless, international peace-keeping forces, for example, had been known to commit wrongful acts liable to engage the international responsibility of the organization to which they belonged—as had happened in the Congo—but the Commission was not called upon, in the context of the present articles, to consider cases of international responsibility of an organization. It need only establish the position of the territorial State in such cases. If draft article 12, in its present form, might give the impression of aspiring to solve those problems, any misunderstanding on that point must be removed. The essential point was that article 12 should start from the assumption that the international organization in question was a subject of international law, for otherwise the act complained of could only be the act of an organ of another State or of a private person, and in either case another article of the draft would apply.

43. Referring to insurrectional movements, Mr. Ustor had observed that they were often directed against a government, not against a State, so that the phrase "insurrectional movement directed against a State" was inappropriate.<sup>11</sup> He agreed that the phrase, which had been taken from other codification drafts, should be amended. On the other hand, he was surprised that some members of the Commission had raised the question of the international legitimacy of insurrectional movements, since it was not the Commission's business to establish when an insurrectional movement was or was not legitimate, or when, how, or with respect to whom, it acquired international personality. It need only consider whether the mere fact that an insurrectional movement acted at a certain moment, through its own organs, exonerated the legitimate State of all international responsibility. It seemed that the legitimate State could become responsible

<sup>10</sup> See 1313th meeting, paras. 3 *et seq.*

<sup>11</sup> See 1312th meeting, para. 15.

by reason of certain conduct of its own organs connected with that of the organs of the insurrectional movement; for example, because it did not punish those who had committed acts injurious to a foreign State, once the insurrection had been put down.

44. With regard to the presentation of article 12, he noted that some members of the Commission favoured separate articles, an arrangement which would certainly solve many drafting problems, because certain shades of meaning could thus be better expressed. For whereas the act of an organ of a foreign State was automatically attributable to that State by virtue of the preceding articles, the act of an organ of an international organization or of an insurrectional movement would not be as automatically attributable, at least so long as the responsibility of those other two categories of subjects of international law had not been defined in other drafts.

45. Paragraph 5 of article 12 provided a link with the following article, and the Commission might possibly be able to drop it once it had adopted article 13. The latter provision was in no way concerned with the succession of States, as he had clearly indicated in his report.

46. He suggested that the Chairman should ask the members of the Commission whether they would prefer the subject-matter of article 12 to be dealt with in one, two or three articles and whether they were certain that paragraph 1 was not superfluous. He thought those questions were too important to be decided by the Drafting Committee.

47. The CHAIRMAN put the Special Rapporteur's questions to the Commission.

48. Mr. KEARNEY said that the great majority of the members of the Commission was undoubtedly in favour of the inclusion, at some point in the draft articles, of a number of separate paragraphs containing the substance of article 12. The outstanding problems were admittedly serious, but they should be settled by the Drafting Committee. The Commission should not reopen the discussion on the basic issues.

49. The CHAIRMAN, agreeing with Mr. Kearney, said that the Commission should take its final decision on the basis of the work done by the Drafting Committee.

50. Mr. YASSEEN said he thought that in view of the importance of the questions raised by the Special Rapporteur, the Commission itself should answer them. They could not be settled by the Drafting Committee in spite of the discretion it enjoyed.

51. The CHAIRMAN said that there was no need for a vote, since the majority of the members of the Commission had already expressed their preferences with regard to draft article 12 and it would, of course, be on the basis of their views that the Drafting Committee would proceed.

52. Mr. USHAKOV said that, by virtue of a tacit agreement, the Drafting Committee had always been free to make any proposals it thought desirable. Consequently, the Commission should trust it once again.

53. Mr. ELIAS fully agreed with Mr. Ushakov. The Commission would only hamstring the Drafting Committee by giving it detailed instructions.

54. Mr. USTOR said that he fully agreed with the two previous speakers. Personally, he would prefer the present paragraph 1 to be replaced by two separate articles. The reason was that he still had doubts about the clear statement in that paragraph that the territorial State was not responsible for the acts of an international organization—a statement which might cause problems where the territorial State was itself a member of the organization concerned.

55. Sir Francis VALLAT pointed out that the Commission had had a full discussion on article 12. In his opinion it should be referred to the Drafting Committee without further comment. To give the Committee detailed instructions on what it should do would establish an unfortunate precedent.

56. The CHAIRMAN said there was a general feeling that the text of article 12 should be referred to the Drafting Committee and that the Commission should take a final decision on its disposition on the basis of the work done by that Committee.

*It was so agreed.*<sup>12</sup>

57. Mr. AGO (Special Rapporteur) said he would try to draft three separate articles for submission to the Drafting Committee and to the Commission.

The meeting rose at 12.55 p.m.

<sup>12</sup> For resumption of the discussion see 1345th meeting, para. 19.

## 1316th MEETING

*Monday, 26 May 1975, at 3.10 p.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

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

### Eleventh session of the Seminar on International Law

*(resumed from the previous meeting)*

1. The CHAIRMAN, speaking on behalf of the Commission, welcomed the participants in the eleventh session of the Seminar on International Law, the direction of which would once again be in the capable hands of Mr. Raton. He hoped that the time spent with the Commission by the young torch-bearers, who would spread knowledge of the Commission's work in the legal world and beyond, would be both pleasant and fruitful. He noted with particular pleasure that many of the participants came from countries of the third world, for it had been his ambition, ever since becoming active in the Sixth Committee of the United Nations General Assembly, to see the countries of Africa, Asia and Latin America play a greater role in the field of international law. That field had for centuries been the exclusive preserve of

western and, particularly, of European countries, and the situation had not really begun to change until after the Second World War. The whole idea behind the Seminar was to give young jurists from the third world a chance to express their views and to see how international law was formulated. He hoped that they would come to Geneva in increasing numbers.

### State responsibility

(A/CN.4/264 and Add.1;<sup>1</sup> A/9610/Rev.1<sup>2</sup>)

[Item 1 of the agenda]

(resumed from the previous meeting)

### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPOREUR ARTICLE 13

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

#### Article 13<sup>3</sup>

##### *Retroactive attribution to a State of the acts of organs of a successful insurrectional movement*

1. The conduct of an organ of an insurrectional movement whose structures have subsequently become the structures of a new State constituted in all or part of the territory formerly under the sovereignty of the pre-existing State is retroactively considered to be an act of the newly constituted State.

2. The conduct of an organ of an insurrectional movement whose structures have subsequently been integrated, in whole or in part, with those of the pre-existing State is retroactively considered to be an act of that State. However, such attribution does not preclude the parallel attribution to the said State of the conduct, at the aforementioned time, of organs of the government which was at that time considered to be legitimate.

3. Mr. AGO (Special Rapporteur) said that article 13 dealt with the attribution to a State of acts which, at the time of their commission, had been the acts of organs of an insurrectional movement, but which were retrospectively characterized by the fact that the organization of that movement had subsequently become, in whole or in part, the organization of a State. Various situations were possible. It might be—as not infrequently happened—that the objective of the insurrectional movement was not the total destruction of the pre-existing State or the complete replacement of its government, but to secure independence for a region under colonial rule or the secession of a region. If it was successful, an insurrectional movement of that kind established itself as the government of the region which had seceded or of the colony which had become independent. But it was also possible that the aim of the insurrectional movement might be to replace completely the structure of the State against which it was directed. Several cases must then be distinguished. The success of the insurrectional movement might cause all the structures of the pre-existing State to be replaced by those of the movement. In that event, the pre-existing State ceased to exist, a new

State was substituted for it and there was no continuity between those two subjects of international law. There could then be no problem of attribution to the new State of acts of the pre-existing State. At the most, a question of succession of States might arise, for it was, precisely, the continuity of the State that had been interrupted. The same was not true of the relations between the insurrectional movement and the State to which it had given birth. There was continuity between them, so that the acts of the insurrectional movement must be attributed to the State it had brought into being.

4. The situation might, however, be more complicated. Sometimes the victory of the insurrectional movement did not result in the complete disappearance of the pre-existing State, but in the merging of its structures with those of the insurrectional movement. Some organs of the pre-existing State disappeared, whereas others remained, thus providing continuity. That was what had usually happened in Latin American revolutions: the countries in which those revolutions had taken place had continued to exist, but the structures of the insurrectional movements had been integrated into the pre-existing structures. The new machinery of State was the result of a combination of old and new structures, which might even be confirmed by a formal agreement. In those cases it was natural to attribute to the State not only the acts of its pre-existing organs, in conformity with articles 5 to 10 of the draft, but also the acts of the successful insurrectional movement.

5. International practice and jurisprudence, which were more or less uniform, recognized the principle of the attribution to the State of the acts of organs of a successful insurrectional movement. They varied only in seeking a justification of that principle, and some of the justifications advanced left much to be desired. For instance, it had been argued that at the time when the acts complained of had been committed, the insurgents had already been exercising the authority of a *de facto* government over at least part of the territory. In itself, that justification was not satisfactory. Sometimes an insurrectional movement had never been a *de facto* government. Besides, if everything depended on whether the insurgents had exercised *de facto* authority, there would be no reason to distinguish between successful and unsuccessful movements. It had also been asserted that, when insurgents were victorious, they were supposed to have represented the true will of the nation from the moment of their uprising. But that was not always so; it could not be claimed that certain well known insurrectional movements had represented the true will of the people from the outset. It should also be noted that if that justification were accepted, there would be no way of justifying attribution to the State of acts of the pre-existing government, where only a change of government had resulted from the victory of the insurgents. Must it be concluded that only the acts of the insurgents were attributable to the State and not the acts of organs of a government which had fought against the will of the people? In his view, the only valid justification lay in continuity.

6. For the practice of States, he referred members to the awards made by several mixed commissions early in

<sup>1</sup> Yearbook . . . 1972, vol. II, pp. 71-160.

<sup>2</sup> Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 10 (see Yearbook . . . 1974, vol. II, Part One, pp. 157-331).

<sup>3</sup> Text as revised by the Special Rapporteur.

the twentieth century, which were cited in paragraphs 200 to 206 of his fourth report (A/CN.4/264 and Add.1). The report mentioned, in particular, an exchange of notes between the United States Ambassador to Mexico and the British Minister to Mexico, regarding reparation for damage caused to foreigners during the Mexican Revolution in 1910. The United States Ambassador, who had held that the attribution to the State of the acts of an insurrectional movement did not depend on the success of that movement, had been overruled by the Department of State, which had confirmed the rule set out in article 13.

7. As in the case of previous articles of the draft, it was in the preparatory work for the Hague Codification Conference of 1930 that the opinions of governments should be sought. The great majority of them had affirmed that where an insurrection was successful and the insurrectionist party, having taken power, had become the government of the State, the latter must be held responsible for damage caused by the insurgents to the person or property of foreigners during the civil war. In the light of that position, the Preparatory Committee for the Hague Conference had drafted a basis of discussion which read: "A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops." (*Ibid.*, para. 207.) In the instruction sent in 1959 by the Department of State to the United States Embassy in Cuba, that principle had been reaffirmed in connexion with the Cuban revolution (*ibid.*, para. 208).

8. The same principle had been unanimously accepted by writers. The Harvard Law School had expressed it particularly well in its 1961 draft, in the following terms: "In the event of a revolution or insurrection which brings about a change in the government of a State or the establishment of a new State, an act or omission of an organ, agency, official, or employee of a revolutionary or insurrectionary group is, for the purposes of this Convention, attributable to the State in which the group established itself as the government." (*Ibid.*, para. 212, foot-note 495.)

9. The text of article 13 which he proposed consisted of two paragraphs dealing with two separate cases. In the case contemplated in paragraph 1, the structures of the successful insurrectional movement became those of a new State constituted in all or part of the territory formerly under the sovereignty of the pre-existing State. Some members of the Commission might perhaps wish to change the term "structures", although it had already been adopted in other provisions of the draft. If the word "retroactively" seemed dangerous, it could be deleted without changing the meaning of the article. It would then be for those drafting the commentary to point out that the attribution to the State was retroactive. Paragraph 2 of the article dealt with the case in which the structures of the insurrectional movement were wholly or partly integrated with those of the pre-existing State. It was provided that in such a case the State might be responsible not only for the conduct of organs of the successful insurrectional movement, but also for the

conduct, at the same time, of organs of the government then considered to be legitimate.

10. Mr. YASSEEN said he believed that article 13 had its place in the draft, for it did not deal with the responsibility of subjects of international law other than States, but with the responsibility of a State brought into being by a revolutionary or insurrectional movement. The Special Rapporteur had been careful to exclude cases involving succession of States and to confine himself to cases in which some continuity was discernible.

11. Although the theoretical justifications of the principle proposed in article 13 were not satisfactory, there was no denying that it was confirmed by constant practice. It was open to question, however, whether the State which emerged from an insurrectional movement was really the same entity as that movement. True, an insurrectional movement that was destined to be successful constituted an embryo State; but once that State had been established, it might not be advisable to attribute to it what the insurrectional movement had done in exceptional circumstances. That would be rather like attributing to a person of major age what he had done when he had been a minor and still immature. That observation could not affect the rule which practice had derived from the notion of continuity, but it should be taken into consideration in determining the consequences of responsibility and the amount of reparation due. At that stage, it would not be possible to assimilate responsibility for an act attributed to the State proper, to responsibility based on an act of that State committed during its period of gestation.

12. As to the words "retroactively" and "structures", he thought the first could be deleted without any harm, the second might be retained, as it well conveyed the idea of an essential organization.

13. Mr. AGO (Special Rapporteur) explained that the notion of continuity, as he understood it, was present in all cases, even when a small insurrectional movement became a State *pleno jure*. Article 13 was concerned with the attribution of an act, however, not with responsibility. When the time came to determine the consequences of wrongful conduct, certain extenuating circumstances might have to be taken into account, including, for example, the fact that the insurrectional movement had been fighting against an all-powerful State. Hence attribution to the State of the conduct of an organ of an insurrectional movement did not entail attribution of responsibility equal to that which would be attributed to it for acts of its own organs.

14. Mr. SETTE CÂMARA said that the Special Rapporteur had, as usual, presented the draft article with such thoroughness and lucidity that there could be very little room for doubt about the essence of its underlying principle. To establish the continuity of responsibility when a successful insurrectional movement had set up a new government, some writers spoke of the confirmation of the will of the State and others of the embryo of the new State already existing in the insurrectional movement itself. The Special Rapporteur related the continuity between the former State and the new State to a "potential source of international responsibility" justifying attribution of



the wrongful acts to the new State, which made it necessary to affirm that acts committed by a person or group of persons acting as organs of the insurrectional movement were retroactively considered to be acts of the newly constituted State.

15. He himself had some doubts about the criterion of retroactivity, for explaining the continuity of responsibility. In the first place, what was retroactive? If, as the Special Rapporteur seemed to intend, it was the attribution which took place *a posteriori*, what was assumed was the prior existence of a wrongful act which had not been attributable, at the time of its commission, either to the pre-existing State or to the insurrectional movement itself, even if it had possessed international personality. If it were otherwise, the subsequent attribution would in either case inevitably be considered as a case of succession of the new State or government to the obligations deriving from the responsibility of the former State or government for the wrongful act. On the other hand, it would be going too far to say that it was the existence of the wrongful act that was established retroactively, although such a position would be consistent with the rest of the draft articles, and particularly with article 3 (A/9610/Rev.1, chapter III, section B), since, at the time when the act had been committed, the new State had not existed and consequently could not have had anything attributed to it under international law or have violated an international obligation.

16. The Special Rapporteur had, of course, resorted to the theory of retroactivity in order to avoid the difficulties of dealing with a problem of succession of States or of governments, as the case might be. In the situation under consideration, however, succession did occur, and it would be extremely difficult to separate the problems of responsibility, or rather of obligations flowing from the establishment of responsibility, from the problems of succession themselves.

17. Moreover, in the many arbitral awards cited by the Special Rapporteur there was not a single reference to retroactive attribution to a State of the acts of organs of a successful insurrectional movement. All the umpires concerned had upheld the principle of continuity in their different ways, most of them by affirming that the new government was responsible for the acts of successful revolutionists, which was the approach embodied in Basis of Discussion No. 22 drafted by the Preparatory Committee for the 1930 Codification Conference. (A/CN.4/264, para. 170.)

18. There was no doubt that, if the problem was considered from the point of view of succession, serious difficulties would arise with regard to the theory of retroactivity in cases where the international obligations violated were conventional ones. If, for example, the insurrectional movement was a liberation movement and the revolutionaries violated provisions of an international treaty, thereby committing an internationally wrongful act, such an act could not, in his opinion, be retroactively attributed to the new State in spite of the "clean slate" rule. It would be safer, and more consistent with the positions adopted in previous articles, simply to state the principle that the newly constituted State would be respon-

sible for the conduct of persons or groups of persons who had acted as organs of a successful insurrectional movement, without trying to elaborate theoretical machinery for the enforcement of that principle.

19. The saving clause in paragraph 2 was judicious, except in regard to the problem of retroactivity. Since the State was the same subject of international law, the conduct of persons or groups of persons acting as organs of the former government, which had been considered legitimate at the time of such conduct, was attributable to the State.

20. Mr. USHAKOV said that article 13 raised not only a purely legal problem, but also a politico-legal problem—that of the legitimacy of a successful insurrectional movement. In article 12 it had been possible to avoid the question of the legitimacy of an insurrectional movement, for the State was not responsible for the acts of any insurrectional movement in so far as that movement was outside its jurisdiction and control. But the situation in regard to article 13 was entirely different, since it dealt with successful insurrectional movements and hence raised the question of the legitimacy of such movements. An insurrectional movement could be fomented and directed against a State by another State or by a group of foreign States, and the question therefore arose whether the successful insurrectional movement was legitimate in the eyes of international law. If it was not internationally legitimate, the problem of responsibility and attribution did not arise. In his opinion, the legitimacy of the successful insurrectional movement was the most important issue raised by article 13.

21. The article also raised a legal problem: was it correct to speak, in paragraph 1, of a "new State", rather than a new "subject of international law"? After all, it was not the State itself that changed, since its population and territory remained the same; it was the governmental authority. In his opinion, therefore, it was the same State, but a new subject of international law. However, when a capitalist State changed into a socialist State, for example, it was open to question whether it was the same State or a new one. If it was a new State, the question of succession of States arose. Writers were divided on that issue, which had not been finally settled either in theory or in practice.

22. Paragraph 2 of article 13 was not self-evident, and could only be understood in the light of the Special Rapporteur's commentary.

23. Mr. TAMMES said that article 13 introduced into the draft on State responsibility the time element, to which the Commission had given much attention when discussing succession of States. In the drafts on succession of States, the Commission had attempted to draw up a complete typology of possible cases of the replacement of one sovereignty by another in a certain territory.

24. Paragraph 1 of article 13 dealt with the case of a new State being constituted in part of the territory of a pre-existing State—the case which the Commission had described as "separation" in the context of State succession. In 1974, when adopting article 33 (Succession of States in case of separation of parts of a State) of the draft articles on succession of States in respect of treaties

(A/9610/Rev.1, chapter II, section D), the Commission had accepted some measure of continuity with regard to treaties in cases of separation. Similarly, the Special Rapporteur now proposed continuity of responsibility between what he called, in paragraph 194 of his report, the “embryo State” and the new State formed by separation. Although the object was different, the basic idea of continuity was the same in both cases. The solution proposed by the Special Rapporteur therefore deserved support, in that it proposed the passing of responsibility when the movement preparing the separation had successfully become the structure of the new State.

25. Paragraph 1 of article 13 also dealt with the case in which the change affected the whole territory of the State and was so radical that the continuity of the existence of the State was broken. That situation had not been discussed by the Commission in connexion with State succession, because it was generally considered not to affect the continuity and identity of the State, so that no succession occurred. In the rare cases of a break in continuity, the break had coincided with far-reaching territorial changes, as in the case of Austria after 1918. In the absence of generally recognized precedents of State succession in an identical territory, it would perhaps be better to leave that hypothetical and perhaps controversial case outside the scope of the present draft articles. Moreover, so far as the retroactive effect was concerned, there was no real practical difference between that case and the third type of case considered in article 13—that in which no State succession occurred, there was complete continuity and, in keeping with a long and consistent practice, responsibility passed from the insurgent phase to the phase of recognition of power or participation in power by integration.

26. He suggested that, so far as the diversity of cases was concerned, the draft of article 13 should be simplified to some extent, along the lines of the formulas reproduced by the Special Rapporteur in the foot-notes to paragraph 212 of his report.

27. Mr. RAMANGASOAVINA said that, as usual, the Special Rapporteur’s report gave the historical background of the article under consideration and a detailed analysis of several judicial decisions. Article 13 should not raise many difficulties, since the principles stated, both in paragraph 1 and in paragraph 2, had already been applied in several arbitrations and in the settlement of various disputes. The Special Rapporteur’s report showed, moreover, that similar provisions had already been proposed during the preparatory work for the Hague Codification Conference of 1930.

28. Article 13 did, however, raise some problems of practical application. The acts of an insurrectional movement were attributable to the State only if the movement was successful—either completely, in that it replaced the previous government, or partly, in that it became integrated with the structures of the pre-existing State. If it was not successful, its acts, by virtue of article 12, were not attributable to the State. The problem of the “separate international personality” of the insurrectional movement did not arise in article 13 as it did in article 12, for by reason of its success, the

movement automatically acquired the status of a subject of international law, since it wholly or partly replaced a State which was a subject of international law. Thus what happened to the victims of an insurrectional movement depended, to some extent, on the fortunes of war. If the movement did not succeed, its acts would not be attributable to the State, which would consequently not be bound to make reparation for the damage caused by those acts. For example, if an insurrectional movement caused damage to the staff and property of the embassy of a foreign country, which it accused of supporting the government it was fighting against, and was then defeated, the State would not be required to make reparation for the damage caused by the acts of that movement. If, on the other hand, the insurrectional movement was successful, the State would be required to indemnify the victims. In the first case, the State might, under the terms of an agreement, voluntarily offer compensation to the victims of the insurrectional movement, but it was not required to do so by the draft articles. In such a case, how could the victims obtain reparation? He was accordingly concerned about the practical consequences of article 13, even though he agreed with the principle.

29. Nevertheless, he was prepared to accept draft article 13. In his opinion, the word “retroactively”, in paragraph 1 was superfluous, because the case was one in which retroactivity was necessarily involved, whether it was mentioned in the text or not. He believed that the provision in the second sentence of paragraph 2 was necessary.

30. Mr. KEARNEY said he considered, like Mr. Sette Câmara, that it would not be desirable to emphasize the theoretical bases of the rules under discussion. Some of the illustrations by analogy, such as the comparison with an embryo that became a child, or a child that became a man, were more a source of controversy and confusion than of enlightenment. It would seem enough to note that an insurrectional movement had sufficient identity with the government it later became, to provide an adequate foundation for the rules under discussion.

31. He welcomed Mr. Tammes’s suggestion for simplifying article 13, in the sense that a successful revolution which replaced the governmental structure within an entire country did not affect the continuity of the States; it simply brought about a change of government. On the basis of that widely accepted thesis, paragraph 1 of article 13 might be simplified so as to concentrate on situations in which the new State was constituted by a process of decolonization or separation of part of a State. In cases of that kind, a newly constituted State did emerge.

32. Paragraph 2 should concentrate on changes of government. The Special Rapporteur had not mentioned changes of government, but the introduction of a reference to such changes would clarify the idea conveyed by the phrase “whose structures have subsequently been integrated”. That phrase was presumably intended to refer to changes in governmental structure.

33. In his opinion, the specific reference to retroactivity could be omitted without any substantial effect on the rules proposed. That would make it possible to avoid

the problems which were invariably raised by a specific reference to retroactivity.

34. Mr. HAMBRO said that the Special Rapporteur, in his admirable report, had put forward very convincing arguments in support of the principles stated in article 13. Nevertheless, the article raised in his mind the same doubts as he had expressed about article 12, and for the same reasons. He appreciated that his was a minority view, but he hoped it would be possible for the Drafting Committee to simplify the texts of articles 12 and 13 so as to make it clear that they did not deal with topics other than State responsibility—in particular succession of States and governments. He agreed with Mr. Tammes's suggestion for simplification.

35. He had stronger views on the subject of retroactivity, which involved more than a matter of terminology. The situation contemplated in paragraph 2 of article 13 really involved a question of succession. A State was held responsible for the acts performed by a body which, at the time of performing them, had not been a State organ. Retroactivity was generally recognized by legal opinion as being contrary to fundamental legal principles. Hence he welcomed the Special Rapporteur's willingness to remove the reference to retroactivity from article 13.

36. Mr. ELIAS said that article 13 was generally acceptable subject to some minor changes. The underlying principles were clear and the Special Rapporteur's analysis made their acceptance inevitable.

37. The problem facing the Commission was not, perhaps, as difficult as might at first appear: it had to be decided whether the acts or omissions of a successful insurrectional movement were to be attributed to the State and, if so, for what reasons. The Special Rapporteur's account of the precedents and opinions of writers showed that there was general agreement on the attribution to the State of the acts or omissions in question. He had pointed out in paragraph 212 of his report (A/CN.4/264 and Add.1) that the origin of the matter went back to the text drawn up by the Preparatory Committee for the 1930 Hague Codification Conference and that it had been explicitly dealt with in five subsequent codification drafts: the two Harvard Law School drafts of 1929 and 1961, the Inter-American Juridical Committee draft of 1965 and Mr. García Amador's two drafts of 1958 and 1961.

38. There were three possible cases. The first was that in which the pre-existing State ultimately succeeded in its fight against the insurgents and the structure of the State continued unchanged; in that case it was only right that the State should be held responsible only for the acts or omissions of its own organs during the revolutionary period. The second case was that in which the insurrectional movement succeeded in overthrowing the government and replaced it; in that case the acts of the organs which had been replaced could not be attributed to the successful insurrectional movement. The third case was that of the partial success of the insurrectional movement and the amalgamation of the two contending forces; in that case, the acts of all organs that had taken part in the struggle should be attributed to the new State formed of elements of both parties. The system proposed

by the Special Rapporteur in article 13 conformed with that approach. The third case was covered by paragraph 2 of the article.

39. In paragraph 199 of his report the Special Rapporteur clearly indicated that the decisive criterion for attribution to the new State of acts or omissions of the organs of an insurrectional movement was the idea of continuity. The idea of legitimacy, to which Mr. Ushakov had drawn attention, should be duly taken into consideration, but should not be over-emphasized; it had not troubled the Commission in connexion with paragraph 2 of article 12.<sup>4</sup> The Commission should not get involved in a discussion on questions of the legitimacy or legality of revolutionary governments; delving into such problems could only lead to the adoption of unsound solutions. It should concentrate on the concept of continuity, which made it possible to attribute to the new State the acts of the successful insurrectional movement.

40. He agreed that the word "structure" should be replaced by a more neutral term, even though it had already been used in other articles. Expressions such as "apparatus of government" or "machinery of government", which the Special Rapporteur himself had used in his report, might prove helpful.

41. He agreed that the reference to retroactivity should be dropped, as it was unnecessary. The temporal issue was not of primary importance in that particular context; what mattered was that the acts of an insurrectional movement which had succeeded should be attributed to the new State. The concept of retroactivity, if retained in the article, would give rise to intractable problems.

42. Mr. CALLE Y CALLE said that he supported article 13, which followed on the provision, in article 12, that the conduct of the organs of an insurrectional movement could not be attributed to the State.

43. Latin America, had produced a wealth of legal writings on the subject of insurrectional movements, uprisings and disturbances. The general rule was that a State was not responsible for injuries resulting from such events, except in the case of negligence on the part of its organs. Where no such negligence existed, the injuries in question were deemed to result from acts by private individuals.

44. Article 12, paragraph 2, and article 13 dealt with a special category of insurrectional movements—those which had acquired legal personality in consequence of recognition by States and by the international community. Such movements had the capacity to engage their international responsibility for wrongful acts; they had a responsibility of their own while the insurrection lasted. If the movement was successful, it filled the vacuum created by the displacement of the State structures. The case was clearly not one of State succession, because there was legal continuity despite the restructuring of the State.

45. Paragraph 1 of article 13 dealt with two cases: the first was that in which a "new State" was constituted in the entire territory formerly under the sovereignty of the pre-existing State; the second was that of the

<sup>4</sup> For text see 1312th meeting, para. 1.

emergence of a new State in part of the territory of the pre-existing State. It was appropriate to refer to the emergence of a new State in the second case, but not in the first. Where the whole of the territory was affected, there was no change either in territory or in population; there was only a change of government. The provisions of paragraph 1, which were adequate for the case of separation of part of the territory of a State, were unsuitable for the case in which the whole territory was taken over by a successful insurrectional movement.

46. The continuity of the State was even clearer in the case envisaged in paragraph 2. In that paragraph, the use of the term "structures" was acceptable, and preferable to the enumeration in the 1961 Harvard draft: "an organ, agency, official or employee" (A/CN.4/264, para. 212, foot-note 495). It would be even more unsatisfactory to refer to an "organization".

47. He supported the text of article 13 proposed by the Special Rapporteur. Its contents were in line with earlier codification drafts, but the formulation was clearer and consistent with the provisions of the preceding articles.

The meeting rose at 6 p.m.

### 1317th MEETING

*Tuesday, 27 May 1975, at 10.10 a.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

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

#### State responsibility

(A/CN.4/264 and Add.1;<sup>1</sup> A/9610/Rev.1<sup>2</sup>)

[Item 1 of the agenda]

(continued)

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 13 (Retroactive attribution to a State of the acts of organs of a successful insurrectional movement)<sup>3</sup> (continued)

1. Mr. QUENTIN-BAXTER said he approved of article 13, which was supported by a learned commentary prepared by the Special Rapporteur. That commentary, like the entire report (A/CN.4/264 and Add.1), was in itself a remarkable contribution to international law. The report would be of great value not only to scholars and university students everywhere, but also to legal advisers to States. Studies of that kind had the further

advantage that, being published in the *Yearbooks* of the Commission, they could be obtained in several languages, both easily and cheaply.

2. In formulating the text of article 13, the Special Rapporteur had wisely avoided theoretical controversies and had based its provisions on what was virtually a uniform State practice. It might at first sight appear arbitrary that the nature of a claim should depend on the success of an insurrectional movement. On reflection, however, it would be seen that the risk involved was inherent in life and common to all systems of law. If the person or entity against whom a claim had been lodged disappeared and could not be reached through the channels of the law, the victim had no redress. If, on the other hand, that person or entity existed and was not protected by any lack of status, it was right and proper that a claim should be possible. It was instinctively on that basis that State practice had evolved the two essential rules in the matter. The first was the rule of the immediate responsibility of the State for the actions of its organs. The second was the residual rule of the responsibility of the State for matters arising within its jurisdiction.

3. In line with those thoughts, he shared the views of those who had criticized the reference to retroactivity. It was not just a matter of avoiding an unsatisfactory and somewhat alarming term. The very concept of retroactivity was out of place in that context. It was not the purpose of article 13 to attribute responsibility retrospectively to an entity which had not previously had such responsibility. The provisions of the article merely recognized the sensible principle that one had to wait for the domestic situation to become clear before attaching an international obligation. That approach was based on the fundamental principle of non-interference in the domestic affairs of a State. The provisions of article 13 thus achieved a delicate balance between matters of domestic concern and matters which involved international responsibility.

4. For his part, he found article 13 easier to accept than the principle in paragraph 2 of article 12,<sup>4</sup> which dealt with a situation of disequilibrium where one of the actors on the international stage was not a State. The situation contemplated in article 13 had its origin in the attempts made by the international community to draw a line between matters of international interest and matters which should be settled at the domestic level. It should be remembered that the United Nations had views about the state of the world which sometimes involved a characterization of international status. Those views coexisted with the older rules of an international society which had not been institutionalized at the international level. As a result, there existed certain very sensitive areas presenting considerable difficulties. It was for that reason that the topics of recognition and personality of the State had not been accepted as priority topics for codification. For the same reason, the Commission, when dealing with a particular topic, had always taken care not to trespass inadvertently on matters which were not strictly within the scope of that topic. Paragraph 2 of article 12 gave rise to problems of that order. It was difficult to

<sup>1</sup> *Yearbook* . . . 1972, vol. II, pp. 71-160.

<sup>2</sup> *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 10* (see *Yearbook* . . . 1974, vol. II, Part One, pp. 157-331).

<sup>3</sup> For text see previous meeting, para. 2.

<sup>4</sup> For text see 1312th meeting, para. 1.

discuss a subject of international law that was not a State, without evoking controversial matters in which there was no well-ordered State practice.

5. He did not believe that article 13 raised difficulties of the same order; it dealt with a situation of restored equilibrium. It would suffice for the Commission to avoid any implications regarding questions outside the present draft. He therefore shared the views of those who had questioned the need for a specific reference to a new State constituted "in all or part" of the territory formerly under the sovereignty of the pre-existing State. As Mr. Tammes had pointed out, the draft articles on succession of States in respect of treaties adopted by the Commission in 1974 showed a realization that the Commission had an equal loyalty to United Nations doctrine and to rules originating in older law. Thus any draft rules adopted by the Commission had to be consistent with the doctrine of decolonization and, at the same time, should not encourage any break in the continuity of obligations in an increasingly interdependent world.

6. In the situation dealt with in article 13, certain events in a State created uncertainty regarding continuity. Those events might sometimes lead to an abrupt change in the governmental structure of the State concerned. It was important not to encourage the idea that in such a situation a State could cast off its identity because of the change that had taken place. His views were strengthened by the important saving clause in the second sentence of paragraph 2 of the article, which safeguarded the parallel attribution to the State of the acts of the former legal government. It would be a totally unintended and undesirable result if article 13 was thought to encourage the view that a State could rely on its provisions to escape responsibility by claiming that there had been a succession.

7. Subject to those points of detail, he supported article 13.

8. Sir Francis VALLAT said that there appeared to be general agreement in the Commission regarding the essence of article 13. The article might well raise serious difficulties, but the Special Rapporteur had skilfully avoided most of them, while retaining its essential purpose.

9. In other contexts, the problem of legitimacy, to which Mr. Ushakov<sup>5</sup> had drawn attention, might well be of vital importance. It was not, however, an element to be introduced into article 13; in that respect, he agreed with Mr. Elias.<sup>6</sup>

10. On a broader view, article 13 stood on the borderline between the principle of continuity and State succession. In the form in which it was drafted, the article nevertheless generally succeeded in keeping within the borders of continuity, because it had been framed so as to deal with the commonest cases. The destruction of an old State by revolution, resulting in the creation of an entirely new State, was an extremely rare occurrence. Indeed, he shared the view that a revolutionary change of government never really destroyed the identity of the old State. At any rate, the question was a controversial one, as

Mr. Ushakov himself had pointed out. That being so, it would be generally agreed that, in considering article 13, the Commission should concentrate on the continuity of the State, rather than on the exceptional cases of the destruction of an old State.

11. As other members had said, the Commission had faced the same basic problem in 1974 in connexion with the topic of succession of States in respect of treaties. It had then taken the view that no attempt should be made to differentiate between various kinds of revolutionary movements. It was true that there had been some criticism in the Sixth Committee's debates, but he believed that the Commission should adhere to that view; the excellent reasons given in support of it in the Commission's report for the previous session remained valid (A/9610/Rev.1, chapter II, para. 66). He would recommend the same approach with regard to article 13. That applied particularly to paragraph 1 of the article; the element of continuity was especially important in that provision, which related to the acts of an insurrectional movement and the continued burden of those acts on the State when the insurrectional movement became the government.

12. The various points raised during the discussion regarding the language of the article should be carefully considered. In the second sentence of paragraph 2, in which the adjective "parallel" was used, he had difficulty in appreciating the significance of that term in the context. As to the concluding words of the same sentence, "considered to be legitimate", it might be asked who considered the government to be legitimate. That phrase raised the question of recognition, and he suggested that an effort should be made to dispense with it.

13. As a matter of substance, he suggested that the provisions of the second sentence of paragraph 2 should be broadened. As it stood, the sentence meant that nothing in article 13 excluded the continued application of article 5. It was possible, however, to attribute conduct to the State under other articles of the draft, such as article 7 (Attribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority) and article 8 (Attribution to the State of the conduct of persons acting in fact on behalf of the State) (*ibid.*, chapter III, section B). The provisions of the last sentence of paragraph 2 should therefore be so framed as to cover all cases of attribution to the State, not just those coming under article 5.

14. In conclusion, he stressed the crucial importance of the question of continuity. The conduct of the organs of government was attributed to the State, and the destruction of the government did not imply the destruction of the State; hence the attribution stood, irrespective of the change of government.

15. Mr. ŠAHOVIĆ said he agreed with the Special Rapporteur that the phenomenon of successful insurrectional movements had its place in the draft articles, from three points of view: that of existing States, which were subjects of international law; that of the position of insurrectional movements in positive international law; and that of international law proper and the theory of State responsibility. He himself did not think that the

<sup>5</sup> See previous meeting, para. 20.

<sup>6</sup> *Ibid.*, para. 39.

situation referred to in paragraph 2 of article 12 and that referred to in article 13 should be assessed and compared from the point of view of the legitimacy of the insurrectional movement. In his opinion, those different situations were only different aspects of the position of the insurrectional movement. Hence it would be preferable to deal with them from the point of view of State responsibility. For the different stages in the development of an insurrectional movement were but the reflection of the movement's position in law. The problem of the international personality of the insurrectional movement clearly did not arise in article 13 as it did in article 12, since the successful insurrectional movement had become, in whole or in part, a State which was a subject of international law.

16. He thought the phenomenon of insurrectional movements should perhaps be treated in the draft articles as a single phenomenon. It would then be possible to deal in one and the same article with all questions concerning insurrectional movements, while differentiating, as the Special Rapporteur had done, between the successive stages of development of such movements. If that were done, it would be necessary to find wording which brought out more clearly the difference between the situations referred to in article 12, paragraph 2, and those referred to in article 13.

17. With regard to the justification for article 13, he was not sure that the principles stated in paragraphs 1 and 2, which dealt with two very different situations, could be justified in the same way. Paragraph 1 dealt with a new State constituted by the successful insurrectional movement, whereas paragraph 2 dealt with one and the same State, the structures of which were different because the structures of the insurrectional movement had been wholly or partly integrated with those of the pre-existing State. He thought that the position taken by the Special Rapporteur in that respect was correct and in accordance with practice.

18. He agreed that the word "retroactively" could be dropped from the text, but he was not sure that the idea of retroactivity itself could be dispensed with. The Special Rapporteur had been right to emphasize the idea of continuity; but there was a difference between the idea of continuity and that of retroactivity, the legal and political consequences of which were very serious, particularly in regard to the problem of State succession. In the final text, it would probably be necessary to elucidate the different problems raised by article 13, in particular the problem of State succession and the problem of the legitimacy of the insurrectional movement, raised by Mr. Ushakov. In his opinion, the wording would have to be simplified, taking especial account of the Special Rapporteur's intentions. He shared Mr. Ramangasoavina's concern about the possible effects of certain expressions, but he was sure the Drafting Committee would be able to solve those problems.

19. Mr. BILGE said that article 13 completed the set of provisions on attribution to the State of the conduct of its organs. He had no difficulty in accepting the principle stated in the article, for it was a simple and well-established principle, already crystallized in practice

and in various codification drafts, as the Special Rapporteur had shown in his report. All the members of the Commission seemed to be in agreement on the principle, but some of them had expressed objections to its formulation and to its inclusion in the draft.

20. He thought that article 13 was necessary in order to define the scope of chapter II and complete the range of situations in which the conduct of its agents could be attributed to the State. The article did not raise the problem of State succession, for the principle of continuity justified the attribution of the conduct of an insurrectional movement to the new State which was the outcome of that movement. The insurrectional movement in question was not intermittent, but had a certain continuity. Thus there was continuity in the authorship of the conduct of the unsurrectional movement which became a State, in so far as the organ of the movement became a genuine organ of the State. The name of the author of the conduct changed, but the author remained the same. Damage caused by an insurrectional movement must therefore be repaired by the State which was the outcome of that movement. In that connexion he observed that the adjective "successful" had no moral significance, but merely meant that the insurrectional movement had become master of all or part of the territory of the pre-existing State. What mattered was that it became a State. Perhaps that point should be explained in the commentary.

21. He was not sure that the question of the legitimacy of a successful insurrectional movement should be raised in connexion with article 13, as Mr. Ushakov wished. In his opinion, that question had no important bearing on the attribution of responsibility to an insurrectional movement which had become a new State, for whether it was legitimate or not, the movement had caused damage for which reparation must be made. In the case of an insurrectional movement fomented by another State, it might be possible to speak of common or joint conduct of the insurrectional movement and that other State, but that did not prevent the attribution of the conduct to the insurrectional movement, whether it was legitimate or not. He did not think that, in the attribution of responsibility, a distinction should be made between an insurrectional movement of the classical revolutionary type and a liberation movement. There might be a difference in the case of State succession, but in the present instance there was no succession of States, since there was continuity in the conversion of the insurrectional movement into a State. Hence there was no reason to treat insurrectional movements differently according to their nature. For instance, an insurrectional movement could not be exonerated because it was a liberation movement.

22. Paragraph 2 dealt with the case in which an insurrectional movement, instead of replacing the pre-existing State, had been integrated with the structures of that State, which it had thus profoundly changed. The paragraph accordingly raised the problem of the attribution of the acts of a successful insurrectional movement to the pre-existing State. In that case, too, the Special Rapporteur had proposed a just solution, which reflected the practice of States.



23. He accepted the principle stated in article 13 and would leave it to the Drafting Committee to improve the wording.

24. Mr. TSURUOKA said he willingly accepted the rules set out in paragraphs 1 and 2 of article 13. The principle stated in paragraph 1 was supported by abundant practice, jurisprudence and doctrine. He also accepted the justification for that principle put forward by the Special Rapporteur, namely, the idea of continuity. The rule stated in paragraph 2 was supported by less abundant practice and jurisprudence than the rule in paragraph 1; it reflected the Special Rapporteur's concern not to leave persons injured by insurrectional movements unprotected.

25. He wished to draw attention to a few points of drafting. First of all, he had reservations about the expression "new State", used in paragraph 1. For instance, could the present State of Cambodia be called a new State? It would be easier to speak of a new State in the case of Bangladesh, which represented only part of the pre-existing State. Next, he wondered whether, in paragraphs 1 and 2, the words "acting in that capacity" should not be added after the words "The conduct of of an organ of an insurrectional movement", as in other articles. For the text as it stood did not specify that the organ of the insurrectional movement was acting as such and not merely as a private person. Lastly, he saw difficulties in the phrase "whose structures have subsequently been integrated, in whole or in part, with those of the pre-existing State", in paragraph 2. If the elements of the insurrectional movement represented only a small minority in the new government, the rule stated in the first sentence of paragraph 2 would be difficult to apply. Conversely, the rule stated in the second sentence of paragraph 2 would be difficult to apply if the elements of the insurrectional movement represented an overwhelming majority in the new organs of the State.

26. Mr. USHAKOV said he wished to explain his position on the problem of the legitimacy of a successful insurrectional movement. In his opinion, it was a politico-legal problem which could not be disregarded in determining the attribution of responsibility. It was, indeed, impossible to ignore the nature of the insurrectional movement and to treat all successful insurrectional movements in the same way. For instance, if a fascist *coup d'état* was organized by part of the army of a State, with the support of a foreign State, could one speak of a successful insurrectional movement in the same sense as when a national liberation movement had succeeded in overcoming a colonial Power? It was surely impossible not to make a distinction between such movements, since some of them were internationally wrongful, and to treat them in the same way as the others would be to approve them. That was a very difficult problem which the Commission ought to consider.

27. The CHAIRMAN, speaking as a member of the Commission, said he wished to join in the tributes which had been paid to the Special Rapporteur for the skilful manner in which he had drafted article 13 and for his very learned commentary.

28. There was a close organic link between article 13, which completed chapter II of the draft, and article 12 and previous articles. Leaving political considerations aside, the problem dealt with in article 13 was that of the attribution of international responsibility according to the success or failure of an insurrectional movement. Article 13 made it clear that, if the insurrectional movement succeeded, the State was responsible for the conduct of the organs of the movement. If the movement failed, the State was responsible for the conduct of State organs. In the event of conciliation, a new governmental apparatus was created which would be held internationally responsible. If the insurrectional movement resulted in the separation of part of the State, the new State thus created would be internationally responsible.

29. The two paragraphs of article 13 thus covered the idea that governmental changes made no difference to the obligations of the State. Where an insurrectional movement replaced the organs of the State, no succession was involved; the case was one of continuity, not of State succession. He would accept the balanced text of article 13.

30. With regard to the drafting, he favoured the proposed simplification, which would further emphasize the element of continuity and the exclusion of the concept of succession. He also supported Mr. Quentin-Baxter's remarks; the United Nations resolutions on decolonization reflected a rule of *jus cogens*.

31. Mr. AGO (Special Rapporteur), replying to the comments made during the discussion, said that what should be regarded as retroactive was not the attribution of certain acts to the State, but the attribution of statehood to the insurrectional movement. When the structures of that movement became the machinery of a State, the movement was in fact considered to have had, since the beginning of its existence, the quality of statehood for which it had fought.

32. As to the relationship between the provisions of articles 12 and 13 concerning insurrectional movements, those provisions covered quite different cases. Article 12 referred to conduct which was in no way attributable to the State. If the insurrectional movement was not a separate subject of international law, its conduct was that of a group of private individuals; if it had asserted its authority over a certain territory and had had applied to it, for example, certain rules of the international law of war and of peace, its conduct was that of a subject of international law other than a State. In either case, so long as that situation continued, the only conduct attributable to the State was that of its own organs in connexion with the doings of the insurrectional movement, such as failure to take preventive or punitive measures, tolerance or complicity. Article 13, on the other hand, was concerned with attribution to the State of the conduct of an organ of an insurrectional movement which had subsequently become a new government of the State or a new State. The basis for that attribution was the continuity between the insurrectional movement and the State which it had brought into being, or with which it had been integrated. That distinction militated against the drafting of a single article to cover both cases, as suggested by Mr. Šahović.



33. All the members of the Commission seemed to have accepted that the sole basis for attribution to the State of the acts of organs of a successful insurrectional movement was the continuity between that movement and the State to which the acts were attributed. As Mr. Ramangasoavina had said, that solution might, in some cases, leave the victims without redress, but it did not seem possible to remedy that defect.

34. The two paragraphs of article 13 covered different categories of cases. Paragraph 1 dealt with all cases in which the insurrectional movement brought about the formation of a new State, thus causing a break in continuity with the pre-existing State, even though in other respects it might be held that the same State continued to exist. Paragraph 2 covered cases of change of government which did not entail any break in continuity. It did not, as some members of the Commission had thought, cover only the case in which the insurrectional movement had been partly successful, but also the case of total success, provided that the personality of the State remained unchanged.

35. Mr. Tammes and Mr. Kearney had suggested simplifying paragraph 1 of article 13,<sup>7</sup> but he thought that solution would only shift the problem. Paragraph 1 could, indeed, be made to cover only cases of secession or decolonization, in which the insurrectional movement had manifestly resulted in the creation of a new State, but decolonization would reappear in paragraph 2. That paragraph dealt with cases in which a new government was formed. Normally, that situation did not cause any break in the continuity of the State, but doctrine and practice were rather divided on the matter. Some writers held that such a situation never entailed a break in personality, but others maintained that any victory by an insurrectional movement led to the creation of a new State. Except in cases of rupture of the continuity of the State, however, it was important to reserve the responsibility of the State for acts of the government up to the time when it had been replaced by the insurrectional movement. It would be dangerous to affirm that the State was not responsible for such acts. In cases of total revolution and breaking of the continuity of the State, on the other hand, it would be difficult to make the State responsible for acts committed by the very organization against which the insurgents had fought and which they had destroyed. Perhaps the Commission should try to find subtle wording which would reserve attribution to the State of acts of the pre-existing government solely for cases in which the revolutionary movement had been integrated with the organization of the pre-existing State, but without any resultant break in continuity. It was to that delicate task that the Drafting Committee should devote itself.

36. Most of the purely drafting questions raised during the discussion would be automatically eliminated if the Drafting Committee succeeded in redrafting the two paragraphs of article 13 in the way he suggested. The phrase "organs of the government which was at that time considered to be legitimate", which he had taken from international practice and doctrine, would probably have

to be amended in order to avoid possible misunderstandings.

37. Referring to the question of the legitimacy of insurrectional movements raised by Mr. Ushakov, he pointed out that all the cases cited as examples involved the intervention of a foreign State. In such cases, one could not really speak of wrongful conduct on the part of the insurrectional movement. What was wrongful was the intervention of a foreign Power to change the government of a country or cause a province to secede. When a military movement overthrew a government, for example, it was sometimes helped by the intervention of a foreign State, which thus committed a wrongful act. But while there was wrongful conduct by the foreign State, it could hardly be maintained that the existence of the insurrectional movement was itself wrongful and that the movement should be held responsible for it. Nevertheless, he shared the concern expressed by Mr. Ushakov: if an insurrectional movement succeeded thanks to wrongful assistance from abroad and part of the international community was not prepared to recognize that *de facto* situation, would the movement which had taken power be regarded as constituting the government of the State, as it would be if it had taken power without foreign intervention? Any move to attribute responsibility to a government meant recognition of its existence. On the other hand, the Commission should not come to the opposite conclusion and leave exempt from all responsibility a government which had come to power through the wrongful intervention of another State.

38. In the circumstances, he thought it might be advisable to distinguish the problem of attribution to the State of the insurrectional movement, from the problem of the possible wrongfulness of the establishment of the insurrectional movement as the government of the State. It would then be possible to introduce another saving clause, reserving any problems and consequences arising out of the internationally wrongful aspects of the movement's success. That solution would make it possible to attribute responsibility to the foreign State which had provided assistance to an insurrectional movement by wrongfully interfering in the affairs of the State against which that movement had been directed.

39. The Drafting Committee would have to work patiently to find wording that would make the article acceptable not only to the members of the Commission, but also to the governments which would examine its report.

40. The CHAIRMAN suggested that article 13 should be submitted to the Drafting Committee, which would meet the following day.<sup>8</sup>

*It was so agreed.*

41. Speaking on behalf of the Commission, he congratulated the Special Rapporteur on his masterly commentary and statements. All members of the Commission had benefited from his skill and knowledge and would be proud to have his work included in the Commission's report to the General Assembly.

<sup>7</sup> See previous meeting, paras. 26 and 31.

<sup>8</sup> For resumption of the discussion see 1345th meeting, para. 52.

42. Speaking as a citizen of a developing country, he observed that the foreign ministries of developing countries would not adopt a position on the draft articles until they had received a full translation of the commentary. It would therefore be helpful if the Special Rapporteur would be good enough to condense the great wealth of material he had submitted.

The meeting rose at 12.45 p.m.

### 1318th MEETING

Thursday, 29 May 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

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

#### Succession of States in respect of matters other than treaties

(A/CN.4/282)<sup>1</sup>

[Item 2 of the agenda]

#### INTRODUCTION BY THE SPECIAL RAPPORTEUR

1. The CHAIRMAN said that at its twenty-fifth session the Commission had begun consideration, on first reading, of the draft articles on succession of States in respect of matters other than treaties submitted by Mr. Bedjaoui, and had adopted articles 1 to 8 with the commentaries thereto.<sup>2</sup> He invited the Special Rapporteur to introduce his seventh report (A/CN.4/282) and article 9 of the draft.

2. Mr. BEDJAOUI (Special Rapporteur) reminded the Commission that it had decided to give priority to succession of States in respect of economic and financial matters; it had begun to examine the provisions relating to succession to State property, leaving open the possibility of considering later, first, the property of territorial authorities, such as provinces, districts, communes or regions and of public enterprises or public bodies, and secondly, the property belonging to the territory. The first three of the eight articles which the Commission had provisionally adopted formed the introduction to the draft; they related to the whole of the topic entrusted to him. Article 1 concerned the scope of the draft; article 2 concerned the cases of succession covered by the draft; and article 3 dealt with the use of terms. Those articles

were followed by part I, entitled "Succession to State property", which began with section 1, "General provisions". Article 4, the first of those provisions, defined the scope of the articles relating to succession to State property; article 5 defined the meaning of "State property"; article 6 provided that a succession of States entailed the extinction of the rights of the predecessor State and the arising of the rights of the successor State to the State property; article 7 determined the date of the passing of State property; and article 8 stated the principle of the passing of State property without compensation.

3. To complete the general provisions, four problems remained to be considered. Articles 6 to 8 assumed that the question what property passed to the successor State was settled, and dealt only with the consequences of the passing. First, it was necessary to establish, in an article 9, what property passed. Secondly, the question of rights in respect of the authority to grant concessions had to be considered; for when defining the notion of State property the Commission had referred to the property, rights and interests of the predecessor State, and that enumeration included the rights attaching to the authority to grant concessions. Thirdly, it was necessary to consider, for each of the four types of succession dealt with, the general rule applicable to debt-claims, which he had derived from internal and international judicial decisions and from the practice of States. Fourthly, the Commission still had to examine the question of the property of third States, as dealt with in draft articles X, Y and Z. Those provisions concerned the definition of a third State, the determination of its property and the treatment of that property in the event of a succession of States.

4. In section 2, which contained provisions relating to each type of succession of States, he had taken the fullest possible account of a wish expressed by the Commission at its twenty-fifth session: he had adopted the typology used in the draft articles on succession of States in respect of treaties. Accordingly, the case of the disappearance of a State by absorption or partition had been eliminated, since it was of historical interest only and was, on principle, contrary to contemporary international law.

5. As it would be wearisome to review all the classes of property with respect to each type of succession, he had included only four classes: currency, treasury and State funds, State archives and libraries, and State property situated outside the transferred territory. For each type of succession, a separate article was devoted to each of those classes of property. Inevitably, several provisions were similar, but some of them could perhaps be regrouped later in a single article. His method nevertheless had the advantage that the problems could be dealt with *seriatim*.

6. It would be wrong to assume that each of the first three classes of property he had adopted called for the formulation of a *lex specialis*, whereas the fourth class, that of State property situated abroad, called for a *lex generalis*. In fact, property in the latter class raised specific questions, such as that of recognition, although it might come into one or more of the other classes.

<sup>1</sup> Yearbook . . . 1974, vol. II, Part One, pp. 91-115.

<sup>2</sup> Yearbook . . . 1973, vol. II, pp. 203-209.

## DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

7. He then introduced article 9, which read:

*Article 9*

*General principle of the passing of all State property*

State property necessary for the exercise of sovereignty over the territory to which the succession of States relates shall pass from the predecessor State to the successor State.

8. In drafting that provision he had had to ignore a distinction found in some systems of law, which divided State property into a public domain and a private domain. Draft article 9 referred to the passing of State property such as watercourses, administrative buildings of the State, State enterprises, barracks, highways, bridges, dams and railway installations. It was obvious that such property must pass to the successor State; that was a principle which had been consistently confirmed by writers and by the numerous devolution agreements concluded. Many of those agreements had gone further than the rule proposed in article 9. The Malaysia Act of 1963 provided that property of the States of Borneo and Singapore which had been occupied or used by the United Kingdom in those countries, would devolve to the Federation. Some agreements contained a general clause renouncing all rights and titles whatsoever in or concerning the territory. Libya had received the movable and immovable property situated in the country which had been owned by the Italian State. In Burma, all the property of the colonial Government had passed to the newly independent State, including the immovable military installations of the United Kingdom. The same had happened in Cyprus, and in Indonesia under the Batavia agreements of 1949. A Soviet-Czechoslovak treaty, signed on 29 June 1945, concerning the cession of the Sub-Carpathian Ukraine to the Soviet Union, contained a protocol providing for the transfer, without payment, of the ownership of State property in that region. The Soviet-Finnish treaty of 12 March 1940 provided for reciprocal cessions; the property in question had included bridges, dams, aerodromes, barracks, warehouses, railway junctions, industrial undertakings, telegraph installations and electric power stations. The special devolution and co-operation agreements concluded between France and French-speaking republics in Africa in the sixties, corroborated *a contrario* the principle laid down in article 9. In those cases, the agreements had provided that the devolution should operate on the basis of the determination of the respective needs of the partners, but they had later been amended to conform with the principle of general transfer stated in article 9.

9. International jurisprudence also confirmed that principle. In its judgement in the *Péter Pázmány University case*, in 1933, the Permanent Court of International Justice had stated that it was a "principle of the generally accepted law of State succession".<sup>3</sup> Examples of internal law cases were given in his third report.<sup>4</sup>

10. The rule in article 9 should not be regarded as a *lex generalis* making it possible to dispense with the

*leges speciales* that followed. Conversely, the general principle stated in article 9 should not be regarded as unnecessary because it was followed by special provisions. In fact, the scope of article 9 was precise. It did not apply to all State property—which would make the subsequent articles unnecessary—but only to State property "necessary for the exercise of sovereignty over the territory to which the succession of States relates". The reason why he had referred to property necessary for the exercise of sovereignty was that he did not wish to introduce the distinction made in some systems of law between the public domain and the private domain. The difficulty was how to define State property which, being linked with the *imperium* of the State, clearly could not remain in the ownership of the predecessor State after the change of sovereignty, in other words after its *imperium* had disappeared. The distinction between the public domain and the private domain could not be introduced into article 9, because it was not made in all national systems of law and varied from one system to another, and also because the draft should not refer to a notion of internal law. It would be better to rely on the notion of sovereignty as understood in international law. As international law had no criteria for distinguishing the public domain from the private domain, a provision based on that distinction might be differently applied by different States. In addition, it would be necessary to decide what law should be applied in determining the public domain and the private domain: would it be the law of the predecessor State or that of the successor State?

11. In his previous reports he had first suggested the expression "property appertaining to sovereignty",<sup>5</sup> but it had later seemed too loose and he had proposed that it should be replaced by "property necessary for the exercise of sovereignty", a formula which brought out the patrimonial aspect of the problem. For the performance of activities which a State considered to be strategic, it must possess certain movable and immovable property, which it defined according to its political philosophy and used for general duties such as defence, security of the territory, and the promotion of health or education. Although the new formula was narrower than the previous one, it still did not make it possible to determine what property was necessary for the exercise of sovereignty or what authority could decide that question. International law did not provide a solution: it was necessary to refer to internal law, which the formula used did not prevent. The proposed expression suggested a related notion taken from international jurisprudence: that of property necessary for the viability of a local territorial authority. That notion had been established by the Franco-Italian Conciliation Commission set up under the Peace Treaty with Italy of 10 February 1947, in a case cited in his sixth report.<sup>6</sup> Strictly speaking, that case could only be taken into consideration *mutatis mutandis*, since it related not to State property, but to municipal property, and had been concerned with the apportionment of property between communes territorially divided by a new frontier, not between States. Nevertheless, it was interesting to

<sup>3</sup> P.C.I.J. Series A/B, No. 61, p. 237.

<sup>4</sup> See *Yearbook* . . . 1970, vol. II, pp. 136 et seq.

<sup>5</sup> *Ibid.*, p. 143, article 2.

<sup>6</sup> See *Yearbook* . . . 1973, vol. II, p. 24, para. (12).

note that the Conciliation Commission had rejected the argument of the Italian Government and referred expressly to State property; it had ruled that the successor State received the State property without payment. The position generally adopted by that Commission thus supported the rule stated in article 9.

12. The CHAIRMAN congratulated the Special Rapporteur on his seventh report and his lucid introduction of article 9. He hoped that the illustrative cases cited in connexion with the article would be mentioned in the commentary.

13. Mr. HAMBRO said that the Special Rapporteur had once again brought his legal acumen and encyclopaedic knowledge to bear on a most difficult subject. He thanked him for having taken account in his work of the views expressed by other members of the Commission and for having tried to simplify questions which had been found too complex during earlier discussions.

14. While he agreed with the object of draft article 9, he was unhappy about the terminology employed. The Special Rapporteur had spoken of the difficulties connected with the use of the words "necessary" and "sovereignty". He (Mr. Hambro) was particularly worried by the use of the term "sovereignty", the definition of which depended on the political, sociological or ideological context. For example, the word had been variously interpreted in United Nations debates and in the often bitter struggle of colonial countries for independence, and it was now being employed in entirely different ways by the proponents and opponents of United Kingdom membership in the European Economic Community. As stated in a recent leading article on that subject in *The Times*, "When respectable publicists of honest purpose flatly contradict each other, some claiming of a course of action that it will lead to more, and some that it will lead to less, enjoyment of the same general political good, one may be sure that under the same name they are talking of different things. So it is with 'sovereignty'." Differing definitions of "sovereignty" could be found in such basic reference works as the *Dictionnaire de la terminologie du droit international*<sup>7</sup> and Oppenheim.<sup>8</sup> Not only were there numerous definitions of "sovereignty", but not one of the *dicta* of the International Court of Justice or the Permanent International Court of Justice on the subject contained anything which would help the Commission in determining what property was necessary for the exercise of sovereignty. In his own view, sovereignty could be exercised without the possession of any property whatsoever; the Icelandic Althing, for example, had met and exercised legislative and judicial power in the open air. The Special Rapporteur had stated in his sixth report that the expression of the domestic sovereignty of the State might differ, but that it had "the characteristic of covering everything that the State, in accordance with its own guiding philosophy, regards as a 'strategic' activity which cannot be entrusted to a private person".<sup>9</sup>

15. It was clear, however—most obviously from the difference between capitalist and socialist societies—that certain things might be considered necessary for the exercise of sovereignty in one type of State and not in another—a point the Special Rapporteur had recognized in the commentary to article 9 (A/CN.4/282, chapter IV, A).

16. His own difficulties in regard to draft article 9 would be resolved and, he thought, the Special Rapporteur's object would largely be achieved, if the article were redrafted to read: "State property used for the performance of State tasks according to the internal law of the predecessor State shall pass from that State to the successor State".

17. Mr. KEARNEY said that, like Mr. Hambro, he approved of the object of the draft of article 9. He was doubtful, however, whether the Special Rapporteur's definition of the property that passed to the successor State would in fact enable the passage to occur smoothly.

18. As Mr. Hambro had shown, the stipulation that the property in question should be that which was "necessary for the exercise of sovereignty" would cause dissension, because the test to be applied was so vague and general. The Special Rapporteur had recognized the difficulty in paragraph (10) of the commentary to article 9 in his sixth report.<sup>10</sup> If, as he (Mr. Kearney) believed, the view there expressed was correct, the test proposed in article 9 was bound to lead to extreme differences of opinion as to whether it was the law of the predecessor State or that of the successor State that should apply. In paragraph (11) of the same commentary the Special Rapporteur seemed to be talking not of State succession, but of what might be an aspect of the primary rules of State responsibility. If, on the other hand, he was proposing that there should be retroactive determination by the successor State of what constituted State property, that again would complicate rather than simplify passage. For a combination of those reasons and in the light of Mr. Hambro's comments, he considered that the test proposed by the Special Rapporteur should be abandoned and replaced by a more simple and workable rule based on the property owned by the predecessor State at the time of the succession, and not on the property it might have possessed if its economic or social system had been different.

19. While Mr. Hambro's proposal went quite far in the right direction, it still reflected something of the distinction between the private and the public property of the State which, he thought, was at the root of the Special Rapporteur's difficulties in dealing with the subject. That distinction should be eliminated, for the nature of the State property which passed was immaterial; if the property was in the possession of the predecessor State at the time of the succession, it should be transferred. If the Commission accepted that suggestion it would have to bear in mind, in drafting a new article, that there were three categories of State property: property situated in the territory affected by the succession and covered by the definition in article 5; State property which was situated in the predecessor State, but had some connexion with

<sup>7</sup> Union académique internationale, *op. cit.* (1960), pp. 573 *et seq.*

<sup>8</sup> *International Law* (8th ed.), vol. I, p. 286.

<sup>9</sup> See *Yearbook* . . . 1973, vol. II, p. 22, para. (4).

<sup>10</sup> *Ibid.*, p. 24.

the successor State; and property of the predecessor State which was situated in a third State.

20. The object of article 9 was to lay down a general residual rule, and it would be impossible to do so in a way which adequately covered all those different situations. The Special Rapporteur seemed to have covered the question of State property outside the transferred territory in one of his "special articles", but he (Mr. Kearney) considered that article 9 should concern only property located in the territory to which the succession related, and that the remaining problems should form the subject of separate rules.

21. The effect of retaining a general rule like that proposed in article 9 would be that, in the absence of an agreed solution, the predecessor and the successor States would each keep all the property remaining in its territory. Article 9 might therefore consist of a main clause reading: "State property in the territory to which the succession relates shall pass from the predecessor State to the successor State"; and of two saving clauses, reading, respectively: "except as otherwise provided in these articles" and "unless otherwise agreed or decided". The second of those saving clauses was particularly important, for most future cases of succession would result from the union or dissolution of existing States—situations which would be far too complex to be covered by universal rules of law or settled otherwise than by agreement between the parties.

22. Mr. USTOR said that article 9 dealt with a difficult matter, on which he found most of the Special Rapporteur's views acceptable.

23. The Special Rapporteur had done well to follow the system adopted by the Commission for the topic of succession of States in respect of treaties. That system was to begin by stating certain general principles applicable to all types of succession of States and then to set out the separate rules for each type of succession. On the topic of succession of States in respect of matters other than treaties, the Commission had adopted a number of general principles in 1973.<sup>11</sup> The purpose of article 9 was to state an additional principle applicable to all types of succession.

24. The title of the article did not fully correspond to the contents, since it referred to the passing of "all" State property. The meaning of the term "State property" was defined in article 5, and an examination of various types of succession, showed that not all State property as thus defined passed to the successor State in every case. In the case of a union of States, it would be true to say that all the property of the uniting States would pass to the State formed by the union; but the position would not be the same in other types of succession.

25. The text of article 9 clearly showed that its provisions did not apply to all State property, as defined in article 5. The article covered only State property that was "necessary for the exercise of sovereignty over the territory" to which the succession related. If the Commission adopted an article of that kind, which applied only to a certain kind of State property, it would be necessary

to make provision for other types of State property as well. Failing such provision, it might be inferred, according to the maxim *inclusio unius est exclusio alterius*, that the rule did not apply to those other types of State property.

26. The Special Rapporteur admitted that it was not easy to determine what State property was "necessary for the exercise of sovereignty", and the meaning of that expression was certainly debatable. Moreover, although he did not have the same difficulties as Mr. Hambro with the use of the term "sovereignty", he shared his concern about the appropriateness of that term to express the underlying idea of article 9.

27. He agreed with Mr. Kearney on the need to differentiate between State property in the territory to which the succession of States related and State property outside that territory. Different rules would clearly have to be applied to the two classes of property, especially in the case of a separation of States. At the time of the dissolution of the Austro-Hungarian monarchy, no general principle had been found for determining how to distribute the State property located outside the old frontiers, such as embassy buildings; it was only by agreement between the successor States that it had been possible to make the apportionment. For those reasons, he supported Mr. Kearney's suggestion that the general principle stated in article 9 should be framed in terms restricting its application to State property in the territory of the successor State. He also supported Mr. Kearney's suggested addition of a reservation relating to special agreements on particular kinds of property. Such agreements were, of course, possible, since the rule in article 9 was not one of *jus cogens*.

28. State property raised the question of the distinction between the public and the private domain of the State, which existed in one form or another in practically all States, including socialist States. Under Hungarian law, for example, the estate of a person who had no legal heirs and died intestate reverted to the State. As a result, the State might find itself the owner of a private dwelling, jewellery or a small shop. Normally, such property would be disposed of by the State without delay; but it could happen that, at the time of a succession of States, property of that kind was held by the predecessor State in the territory to which the succession related. Clearly, the property would have to pass to the successor State; no other solution was possible. For that reason, consideration should be given to broadening the scope of article 9 so that it did not appear to be limited to property held *jure imperii*. On the other hand, he thought it would be very useful, and might even be indispensable, to restrict the rule in article 9 to property situated in the territory of the successor State. It would be extremely difficult to accept the application of that general rule to State property situated outside the borders of the successor State.

29. The formula proposed by the Special Rapporteur, which made it essential to determine whether an item of State property was necessary for the exercise of sovereignty, contemplated the case of a newly independent State. The question of property claimed by a newly independent State as necessary for the exercise of its

<sup>11</sup> *Ibid.*, pp. 198-209.

sovereignty could be dealt with in the articles on newly independent States. In other types of succession, like a union of States, the only question which arose was what property belonged to the State. Clearly, only property owned by the State could pass to the successor State, in accordance with the maxim *nemo plus juris ad alium transferre potest quam ipse habet*.

30. Mr. RAMANGASOAVINA congratulated the Special Rapporteur on the remarkable work he had submitted to the Commission in his seventh report, which bore witness to a fresh effort to clarify the subject under study. He fully supported the principle stated in article 9, for he considered that a new State should have all the necessary guarantees to enable it to operate normally and to exercise its sovereignty fully in the territory assigned to it.

31. He had some reservations, however, about the formulation of the principle. In article 5, State property was very clearly defined as meaning "property, rights and interests which, on the date of the succession of States, were according to the internal law of the predecessor State, owned by that State". All property capable of passing from the predecessor State to the successor State and necessary for the exercise of the sovereignty of the new State could be covered by that definition. Hence it was questionable whether article 9 really added anything to the definition in article 5. He did not think so. In his opinion the word "sovereignty" had political, economic and social connotations that differed according to the conception of the State and the way in which the leaders of the new State regarded its future. Thus it was open to very different interpretations. It might also be asked whether the words "necessary for the exercise of sovereignty" did not to some extent limit the State property capable of passing from the predecessor State to the successor State, since they implied the existence of property that was not necessary for the exercise of sovereignty.

32. Moreover, some cases of secession or the dissolution of a union raised the question how to apportion the property between the different States created by the secession or dissolution, for certain property might be necessary for the sovereignty of some of the States, but not for the sovereignty of others. For example, if a State was divided into two States, one with a coast and the other land-locked, the ships of the predecessor State would have to be awarded to the coastal State, since they were necessary for the exercise of its sovereignty. Similarly, if a waterway was indispensable to the economy of one of the States resulting from a secession or the dissolution of a union, it would have to be allotted to that State rather than to the others. He therefore considered that, if it was not possible to state the principle of the passing of State property in each particular case according to the purpose for which the property was to be used, where the successors were seceding States or States resulting from the dissolution of a union, the principle in article 9 might be incorporated in the definition of State property contained in article 5. It would be necessary to specify the authority responsible for apportioning the property of the predecessor State, because that was not a matter for general provisions, but one involving the modalities of execution of the succession in respect of State property. In that connexion, he thought the

text proposed by Mr. Hambro, which referred to the internal law of the predecessor State, did not add much to what was said in article 5.

33. He approved of the principle stated in article 9, for a newly independent State, whether it was a new State or a State resulting from a secession or from the dissolution of a union, should have all the elements necessary for the exercise of its sovereignty. But he thought those elements were already contained *in posse* in the definition in article 5. That definition covered all the property necessary to the new State, whether it was public property or private property—between which the Special Rapporteur had rightly not wished to make any distinction, because such a distinction was not made in all systems of law. The definition also covered the rights and interests of the predecessor State, which included debt-claims, property outside the territory of the predecessor State and property granted in the form of concessions. He therefore considered that the principle stated in article 9 should be formulated differently, avoiding the word "sovereignty", which was controversial because of its political overtones.

34. Mr. ELIAS said that articles 6, 7 and 8 were based on the assumption that State property passed from the predecessor State to the successor State. A substantive article was therefore necessary to state that the property in question actually passed from one State to the other. Article 9 was thus essential in the draft, and the question before the Commission was whether the language in which it was couched expressed that important idea.

35. For the reasons given by Mr. Hambro and Mr. Kearney, he objected to the formula "necessary for the exercise of sovereignty". Nor could he endorse the idea that the provisions of the article should be confined to State property in the territory to which the succession related. A State might have large assets in the form of securities deposited abroad, and it was necessary to make provision for the passing of such important property. As defined by article 5, the term "State property" included all "rights and interests" owned by the predecessor State according to its internal law. It was thus necessary to refer to that internal law to determine what could be regarded as State property of the predecessor State.

36. For the purposes of article 9, it was not necessary to go into questions of sovereignty. The only purpose of the article was to deal with the actual passing of State property from one State to another. He therefore suggested that article 9 should be redrafted to read: "State property as defined in article 5, which belonged to the predecessor State, shall pass to the successor State".

37. He agreed that the distinction between the public and the private domain was not relevant in the context of article 9. In his view, the formula proposed by Mr. Hambro, which referred to State property "used for the performance of State tasks", tended to introduce that same distinction by implication. The only difference between that proposal and the Special Rapporteur's article 9 was that it avoided the use of the term "sovereignty".

38. He agreed with Mr. Ustor that the title of the article, inasmuch as it referred to the passing of "all" State



property, conflicted with the text, which limited the scope of the article to State property necessary for the exercise of sovereignty.

39. Mr. AGO said he agreed with the Special Rapporteur that it was essential to settle the question of the passing of all State property. He was not sure, however, that it could be settled in a single rule or that the place chosen for the statement of the rule was really the most appropriate. The Special Rapporteur had tried to formulate in article 9 a general rule applicable to any type of State succession, to be followed, in different chapters relating to different types of succession, by supplementary rules on particular problems. It was debatable, however, whether it was possible to establish a single general rule for all types of succession and whether it would not be better to formulate different rules applying to the different types of succession.

40. The situation differed according to the type of succession considered. Where two States succeeded one another in the same territory—a rare, but not impossible case, involving the extinction of one subject of international law and the creation of another—everything which had belonged to the predecessor State, by whatever right, passed to the successor State. In such a case, it was not only the property situated in the territory of the predecessor State that passed to the successor State, but also the property outside its territory, such as embassy and consulate buildings in foreign countries.

41. Similarly, in the case mentioned by Mr. Ustor—that of the dissolution of a unitary State and the creation of a plurality of States—all the property of the predecessor State, without any possible exception, passed to the successor States, including property outside the territory of the predecessor State. In that case, however, a question arose: that of the apportionment of the property among the successor States.

42. The case of secession or decolonization, which the Special Rapporteur had had more particularly in mind, involved the formation of a new State in part of the territory which had been under the jurisdiction of the predecessor State. In that case it was clear, as Mr. Kearney had said, that reference should be made only to property situated in the territory of the new State, for it was hardly conceivable that that State could succeed to property situated in third States. Hence, he wondered whether it would really be possible to devise a single rule covering all those different cases.

43. Article 9 also raised the problem of a possible distinction to be made between types of State property. In that connexion, he was grateful to the Special Rapporteur for making an effort to define and distinguish, which had not been made in articles 5 and 8. Like Mr. Elias, he noted a certain conflict between those two articles and article 9, but, unlike Mr. Elias, he considered that it was articles 5 and 8 that should be corrected, not article 9.

44. The Special Rapporteur had tried to find wording to replace the distinction made, in systems based on Roman law, between domainial property and patrimonial property—a distinction which did not exist in some other systems of law. He had tried to introduce an objective

criterion by referring to State property “necessary for the exercise of sovereignty”. It should be noted, however, that until the precise moment when the succession of States took place, the only legal order which existed was that of the predecessor State. Manifestly, therefore, any reference to public property or State property meant property so characterized in the legal order of the predecessor State. But the words “necessary for the exercise of sovereignty” might be misconstrued to mean property necessary for the exercise of the sovereignty of the successor State, whereas in fact they meant the property which the predecessor State had used for the exercise of its sovereignty.

45. Like Mr. Hambro, he thought that the word “sovereignty” was open to very different interpretations and that its meaning was difficult to define. The wording proposed by Mr. Hambro was hardly more satisfactory, for it was just as difficult to define the meaning of “State tasks”. He wondered whether it would not be better to follow the wording used in the draft articles on State responsibility, and speak of “property used for the exercise of the governmental authority”. It was obvious that all such property must pass automatically and without compensation from the predecessor to the successor State. But what happened to property not in that category? Was it normal that property which had nothing to do with the exercise of sovereignty or the governmental authority, or with the performance of State tasks, should pass automatically and without compensation from the predecessor to the successor State? He thought that in cases of that kind it might be necessary to provide for an adequate minimum of compensation. Thus in that respect, too, there was a distinction to be made between cases of total succession and cases of secession or dissolution of a unitary State.

46. To sum up, he was not sure whether a single rule should be laid down in article 9, or whether a series of different rules should be provided for different types of succession. Furthermore, even if the rule in article 9 was limited to the single case of formation of a new State in part of the territory previously under the jurisdiction of the predecessor State, should a single rule be laid down or two rules—one on property necessary for the exercise of the governmental authority and the other on property which did not fall within that category? He hoped that the Special Rapporteur would take those two questions into consideration.

The meeting rose at 1.5 p.m.

## 1319th MEETING

*Friday, 30 May 1975, at 10.15 a.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

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



**Succession of States in respect of matters  
other than treaties**

(A/CN.4/282)<sup>1</sup>

[Item 2 of the agenda]

(continued)

**DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR**

**ARTICLE 9 (General principle of the passing of all State property)<sup>2</sup> (continued)**

1. Mr. SETTE CÂMARA said that article 9 dealt with a very complex subject on which State practice was scanty, judicial precedent virtually non-existent and the legal literature meagre.

2. He fully agreed with the Special Rapporteur about the need for an article on the passing of State property; such an article was necessary to fill a gap in the draft, after the adoption of articles 1 to 8 (A/CN.4/282, chapter III). He welcomed the Special Rapporteur's cautious approach in avoiding the traditional distinction between the public domain and the private domain of the State. In consequence of the evolution from the old liberal *laissez-faire* State to the modern welfare State or socialist State, that distinction had become obsolete.

3. Instead of an obsolete criterion, the Special Rapporteur proposed a new one in the words "necessary for the exercise of sovereignty". That formula, unfortunately, did not fully solve the problem; besides, it still contained some elements of the old distinction. There was a vestige of the concept of the public domain in the idea of State property necessary for the exercise of sovereignty. The Special Rapporteur himself had offered that formula with an open mind; he had stated in paragraph (5) of his commentary that he had "not reached a final position" and had referred to "the vagueness of the expression 'State property necessary for the exercise of sovereignty'" (*ibid.*, chapter III, A). The Commission might therefore respond by endeavouring to agree on rather different wording.

4. Mr. HAMBRO had proposed a text which was an improvement in so far as it avoided the use of the problematical term "sovereignty".<sup>3</sup> But that proposal had the drawback of leaving open the question that was meant by "State property used for the performance of State tasks". It would certainly not be an easy matter to distinguish State property used for that purpose from other State property. The proposed criterion in fact echoed the traditional distinction between the public and the private domain of the State.

5. The language proposed by Mr. Kearney<sup>4</sup> would be more appropriate, but had the disadvantage of confining the scope of article 9 to property in the territory to which the succession of States related, so that State property elsewhere would have to be the subject of separate provisions. In his opinion, the best solution would be a general formula, more or less on the lines suggested by

Mr. Elias,<sup>5</sup> combined with the saving clauses proposed by Mr. Kearney. A formulation of that kind would fill the gap in the draft without raising any new difficulties.

6. Mr. USHAKOV said that in his new report the Special Rapporteur had made a commendable effort to take account of the different types of succession, whereas in his previous reports he had confined himself to establishing general rules without considering the different forms succession might take. The Commission should follow the method it had already adopted in its work on the representation of States in their relations with international organizations and on succession of States in respect of treaties. Contrary to the Special Rapporteur's approach, it should first establish special rules for the different types of succession and then derive from them general rules valid for all types of succession. Experience with the previous drafts had shown that approach to be preferable to that method advocated by the Special Rapporteur.

7. When the Commission had tried, at the beginning of its work, to delimit the topic under study, it had decided to confine itself to public property and public debts.<sup>6</sup> But the idea of public property having proved too broad, it had decided to limit the subject still further and to deal only with State property.<sup>7</sup> Now the Special Rapporteur had once again widened the subject by referring, in article 9 to State property necessary for the exercise of sovereignty, in article 10 to the management of public services and the exploitation of natural resources, and in article 11 to State debt-claims. Natural resources, however, were not property in so far as they were not as yet owned by anyone, and the régime of their exploitation depended on the political, economic and social system of the State: in the socialist States, natural resources were necessarily public property, whereas in the capitalist States they could be private property. He therefore believed that for the time being it would be better to deal only with State property.

8. In article 5, State property was defined "according to the internal law of the predecessor State". That definition was logical, since State property did not exist as international property and so could not be defined according to international law. A distinction should, however, be made between immovable property which could not be attached to the territory of the predecessor State, and movable property which could be repatriated.

9. Whereas article 5 defined State property "according to the internal law of the predecessor State", article 9 referred to property "necessary for the exercise of sovereignty", without specifying what sovereignty was meant. Was it the sovereignty of the predecessor State or that of the successor State? The property capable of passing from the predecessor to the successor State was thus defined by reference to the sovereignty of any State whatsoever. But the notion of property necessary for the exercise of sovereignty differed considerably in different States, and was not the same in capitalist countries as in socialist countries. The only property neces-

<sup>1</sup> *Yearbook* . . . 1974, vol. II, Part One, pp. 91-115.

<sup>2</sup> For text see previous meeting, para. 7.

<sup>3</sup> *Ibid.*, para. 16.

<sup>4</sup> *Ibid.*, para. 21.

<sup>5</sup> *Ibid.*, para. 36.

<sup>6</sup> *Yearbook* . . . 1969, vol. II, p. 228, para. 62.

<sup>7</sup> *Yearbook* . . . 1971, vol. II, Part One, p. 340, para. 71.

sary for the exercise of sovereignty by all States, whatever their political, economic or social régime, was armaments, since the State, whatever its nature, must exercise power of enforcement. The other property necessary for exercising the sovereignty of the State was not the same in socialist countries as in capitalist countries. In the socialist countries the abolition of private property was necessary for exercising the sovereignty of the State, whereas the capitalist States could dispense with public property other than armaments and make do with private property. Hence State property should always be defined according to the internal law of the predecessor State. He therefore believed that it would be better not to try to distinguish between public property and private property, and for the time being to deal only with State property as defined in article 5.

10. Mr. YASSEEN said there could be no doubt about the principle on which article 9 was based, for if there was a succession of States it must certainly apply to State property. The question was how to formulate the rule of succession to State property. Should the Commission state a general rule and confine itself to affirming that State property passed from the predecessor State to the successor State, or should it enumerate State property item by item, reserving the possibility of drafting a residuary rule to cover possible omissions? The Special Rapporteur might have been content to provide only that State property passed from the predecessor State to the successor State, but he had preferred to begin with the property that was unquestionably State property, namely, State property "necessary for the exercise of sovereignty". Mr. Hambro had proposed another criterion, that of property used to perform the tasks of the predecessor State. He himself thought the latter particular superfluous, since the definition of State property in article 5 made it unnecessary to specify in article 9 that the reference was to the predecessor State.

11. It would have been easy, as Mr. Ago had noted, to make a distinction, as in the internal law of some States, between "property in the public domain" and "property in the private domain". But those were terms of internal law which were not known to some legal systems and the use of which might cause difficulties. The Special Rapporteur had therefore tried to find a criterion based on the vocabulary of international law and proposed the formula "State property necessary for the exercise of sovereignty". In his (Mr. Yasseen's) view the Commission should not hesitate to use the term "sovereignty", since it was in current use in international law. Opinions might be divided on the definition of sovereignty, for doctrine on the subject varied; sovereignty might be regarded as the absolute power or as the "paramount competence" (*compétence majeure*). But the fact remained that the notion of sovereignty existed and that at some time or other every State had occasion to exercise its sovereignty.

12. Admittedly, the criterion proposed by the Special Rapporteur might cause difficulties in practice, since a term which could have several different meanings in internal law could not be used in international law. It was inadmissible that sovereignty, as a term of international law, should be differently understood according

to whether it was the sovereignty of the predecessor State or that of the successor State. Hence the use of the term "sovereignty" might cause difficulties in that respect if article 5 did not very clearly specify that State property was property which, according to the internal law of the predecessor State, was owned by that State. Thus the problem raised by the word "sovereignty" in article 9 was solved by the definition of "State property" given in article 5.

13. He thought that the expression "State property" could be considered as a criterion, especially if it was specified that what was meant was State property according to the internal law of the predecessor State. The formula proposed by Mr. Elias seemed satisfactory in that respect; but it was perhaps too general, and did not allow for the case in which the new State was formed in only part of the territory of the former State. He thought that Mr. Elias's proposal was useful, however, and that it could serve as a basis of discussion for the Drafting Committee.

14. Sir Francis VALLAT said that the subject-matter of article 9 was extremely difficult and much more complicated than the crystal clarity of the Special Rapporteur's text and presentation would suggest. The Special Rapporteur had performed a great service by simplifying and clarifying the problem, but further reflection would be necessary before it could be disposed of.

15. It was agreed by all that some provision was necessary in the draft to cover the passing of State property in the territory of the successor State, as a support to article 8 and the earlier articles already adopted. Unfortunately, the more one examined particular cases, and the complicated and baffling problems involved, the more difficult it became to devise a rule for general application. An examination of the abundant material on succession of States assembled by the Secretariat<sup>8</sup> clearly showed that no uniform State practice existed in the matter. Consequently, in dealing with article 9 the Commission was concerned more with the progressive development of international law than with its codification; hence the need for additional caution.

16. State practice in the matter of succession also showed that in most cases the passing of State property was settled by some form of agreement. Sometimes the settlement took the form of a declaration or of legislation, but there was nearly always some agreement between the predecessor State and the successor State. That very important point supported the idea put forward by Mr. Kearney that article 9 ought to be a residuary rule. He himself would go even further and suggest that suitable language should be introduced to indicate that it was preferable for the predecessor State and the successor State to act by way of agreement.

17. There was an additional practical reason for adopting that approach. The question of the passing of State property did not arise in isolation; it arose in the context of a particular situation: for example, where a State was already virtually independent at the time of the succession. In some cases the newly independent State consisted of

<sup>8</sup> *Yearbook* . . . 1962, vol. II, pp. 131-151 and *Yearbook* . . . 1970, vol. II, pp. 170-175.

a federation of a number of previously autonomous or virtually independent territories. A further complication was that the passing of State property was often dealt with in the context of complex financial settlements between the parties. That being so, the basic principle should always be emphasized that, wherever possible, matters of passing of State property ought to be settled by agreement. The residuary rule was still necessary, however, to deal with exceptional cases in which no agreement was reached and with those cases in which the particular circumstances at the time of the succession made it virtually impossible for the parties to enter into an agreement.

18. The agreements made in specific cases differed in points of detail, but they would be found to apply three main tests to State property: first, the test of ownership by the State, which was the pivot of the formulation proposed by Mr. Elias; secondly, the test of the use or purpose of the State property in question; and thirdly, the test of location. In studying those cases, he had gained the clear impression that it would not be possible to devise a single short rule which would cover all cases. For example, the language proposed by Mr. Elias, to the effect that all the property of the predecessor State would pass to the successor State, would clearly be entirely satisfactory in the event of a union of States, which would have the effect of vesting in the newly formed State or union, all the State property of the component States. In the case of separation, however, that formula would be quite unworkable. For example, most of the State property in the United Kingdom was concentrated in one part of the country; in the hypothetical event of the separation of another part of the country, it would be unthinkable that all State property throughout the United Kingdom should become the property of the successor State which had seceded.

19. For those reasons, he associated himself with those members who had suggested that the subject under consideration should be dealt with in the same way as succession of States in respect of treaties, in the draft adopted in 1974.<sup>9</sup> The disposal of the various kinds of property would then be determined by separate provisions for each type of succession; that approach would be better than trying to formulate a single rule applicable to all types of succession. In preparing such a text, the Drafting Committee should take into account the tests of ownership, use or purpose of the property and location; it should also stress the need for agreement between the parties wherever possible.

20. Mr. ŠAHOVIĆ said he noted that in his oral introduction and in the commentary to article 9, the Special Rapporteur had expressed the same doubts as the members of the Commission. He had been uncertain whether all State property passed to the successor State (A/CN.4/282, chapter IV A, para. (2) of the commentary to article 9), whether a *lex specialis* or a *lex generalis* on the matter should be envisaged (*ibid.*, para. (3)), whether it was a question of State succession (*ibid.*, para. (4)) and, lastly, whether article 9 should be dropped (*ibid.*, para. (5)).

21. Thus the first question that arose about article 9 was whether the passing of State property should be the subject of a general rule. He was not yet certain, and shared the doubts of other members of the Commission. The wording proposed by the Special Rapporteur seemed logical, because succession should be accompanied by the passing of State property; but in his view the passing was only the logical consequence and expression of the notion of succession. Hence it might not be necessary to formulate a general rule on the matter. Moreover, it seemed that when adopting articles 7 and 8, the Commission had not considered it necessary to formulate a general rule on the passing of State property, for that general rule ought logically to have preceded the provisions relating to the date of the passing and to compensation. So he wondered whether it was really necessary to lay down such a general rule in the draft articles.

22. The difference between the title and the text of article 9 showed that the Special Rapporteur had had doubts on that point. All State property was not necessarily situated in the territory of the State. Indeed, in other articles the Special Rapporteur had referred to State property situated outside the territory of the State. But if it was intended to lay down a general rule in article 9, that rule should cover all State property, so the wording proposed by the Special Rapporteur would have to be amplified. That was a further reason for pondering the need for a general rule.

23. In his opinion, the other questions should be settled before the rule in article 9 was inserted in the general provisions. The words "necessary for the exercise of sovereignty" seemed logical if the intention was to distinguish between certain categories of State property, such as property in the public domain and property in the private domain; but that distinction was not necessary. On the other hand, the concept of sovereignty was well known and generally accepted, and it played an important role in political and legal life. Hence it was acceptable. But the nature of the State and differences between legal systems should first be taken into consideration; for the definition of State property in internal law depended on the nature of the State: it was not the same in socialist and capitalist States and differed even within those two classes of States. It was not necessary to go into those details, however, and for the time being it would be better to speak of State property in general. In that regard he was satisfied by the definition given in article 5. The wording proposed by Mr. Elias was very general and emphasized the importance of the passing of State property. Nevertheless, he doubted whether article 9 was really necessary.

24. Mr. TSURUOKA said he thought the draft articles under consideration should be modelled as closely as possible on the draft articles on succession of States in respect of treaties. The Special Rapporteur should continue his efforts in that direction, so that the structure of the two drafts might be alike and the terminology the same. With regard to the latter point, he noted that article 2 of the draft on succession of States in respect of treaties, adopted at the previous session,<sup>10</sup> defined the

<sup>9</sup> Yearbook . . . 1974, vol. II, Part One, document A/9610/Rev.1, chapter II, section D.

<sup>10</sup> *Ibid.*

expression “newly independent State”, whereas article 16 of the draft under consideration referred to “the territory which has become independent”, although that expression was not defined. Again, the notion of the transfer of part of a territory was explained in article 14 of the draft on succession of States in respect of treaties, whereas it was merely mentioned in articles 12 and 15 of the draft under consideration. Similarly, articles 30, paragraph 1, and 33, paragraph 1, of the draft already adopted, which dealt, respectively, with the uniting of States to form one State and the separation of a State to form one or more States, were more detailed than article 20 and the subsequent articles of the draft under consideration, which referred to a union of States without defining its meaning.

25. As to article 9, he thought it was only after it had examined the whole draft, or at least the provisions on succession to State property, that the Commission would be able to decide whether to retain that article. He was not opposed to the provisional adoption of article 9; but the words “the exercise of sovereignty over the territory to which the succession of States relates” should be amended on the lines suggested by Mr. Elias, with the addition of the saving clause “unless it is otherwise agreed or decided”, and the three criteria proposed by Sir Francis Vallat should be taken into account. Suitable wording would have to be chosen if the principle in article 9 was to be correctly applied. The commentary to the article might give some explanations and indicate that, in case of doubt, property should be presumed to be public rather than private.

26. Mr. REUTER, referring to the questions of principle and method raised by the Special Rapporteur, said that, whenever possible, it was better to state a general rule than a special rule.

27. He was not opposed to retaining article 9, but would not be able to give a final opinion until its consequences became clear. There was no reason why article 9 should not be referred to the Drafting Committee, though the Commission would have to reconsider it after examining all the other articles of the draft. The succession of States to property was clearly much more complicated than succession to treaties. In addition, article 9 could apply to different types of succession, which should be duly taken into consideration.

28. The Special Rapporteur had also raised the question whether the rules of his draft should be set solely within the framework of international law or should refer to internal law. Unlike treaties, property was governed more by internal than by international law. Depending on the articles concerned, it would sometimes be better to formulate rules of pure international law, and sometimes to refer to internal law. A close examination of other rather complicated fields, such as economic rights and human rights, showed that at the international level there was a constant mixture of *renvois* to internal law and formulation of new principles.

29. Like other articles of the draft, article 9 referred to the territory. It spoke of “sovereignty over the territory”, which should be distinguished from “sovereignty in the territory”. For example, in his draft article 16 the

Special Rapporteur applied the principle stated in article 9. Article 16 provided that the successor State should have at its disposal the currency, gold and foreign exchange reserves placed in circulation or stored in the territory which had become independent and allocated to that territory. That currency and those reserves had certainly enabled the predecessor State to exercise its sovereignty in the territory which had become independent, and the new State should naturally be able to claim such property. Although that principle had not often been recognized in practice in the case of a territory which had become independent, it was at least well established so far as unions of States were concerned. Article 9 was therefore in keeping with that solution. But it might happen that the property in question, while permitting the exercise of sovereignty over the territory which had become independent, was not situated in that territory. So it seemed that a seceding State could claim the weapons which had been used to exercise the sovereignty of the former State over the territory that had become independent. Such claims would be particularly astonishing if they related to air or naval forces of the former State. That was why it was important to consider all the possible implications of the principle stated in article 9, especially those which, although logical, might give offence to States.

30. Draft article 11, under which the successor State became the beneficiary of the debt-claims receivable by the predecessor State by virtue of its sovereignty or its activity in the territory, was based on a territorial link less close than that required for physical property, and it could be seen that throughout the draft articles the closeness of the territorial link depended on the particular case concerned. He well understood those differences in treatment but thought they called for an evaluation of the principle under consideration in the different situations that might arise.

31. Mr. CALLE Y CALLE congratulated the Special Rapporteur on his report and on having taken account in his work of the new methods of formation of a State which were likely to predominate in the future and which made the codification of rules governing succession so interesting. Oppenheim and other writers had said that there were no general rules of succession and that each case was *sui generis*; <sup>11</sup> the Commission itself had expressed a preference for examining the *leges speciales* before determining whether there were general principles which the international community as a whole could apply.

32. The object of article 9 should be to establish clearly the principle that the successor State should receive all the property, of whatever type or class, used by the predecessor State in the exercise of the public authority inherent in sovereignty. According to the provisions already approved by the Commission (A/CN.4/282, chapter III), such property should pass automatically, without compensation, to the successor State, except as otherwise agreed or decided by the parties concerned, and without prejudice to the rights of third parties. From the general rather than the legal point of view, he believed

<sup>11</sup> See Oppenheim, *International Law* (8th ed.), vol. I, p. 158, section 81.

that such a rule was necessary. It seemed, however, that the order of articles 8 and 9 should be reversed: the provision that State property passed to the successor State should come first, and be followed by a provision specifying how the passing was to take place.

33. The *raison d'être* of article 9 was the phrase "State property necessary for the exercise of sovereignty over the territory to which the succession of States relates". The word "territory" was important, first because there was no succession if no territory passed from one sovereignty to another, and secondly because it served to localize the property subject to succession. It was essential to determine whether the word "sovereignty" meant the exercise of sovereignty within the territory concerned or the sovereignty of the territory itself. Colonies had formerly been considered as an integral part of the metropolitan country, but the modern view, confirmed by United Nations declarations, was that the colonial Power merely administered a territory and that sovereignty was vested in the territory itself and, by extension, in its inhabitants.

34. It was important that the word "sovereignty" should be retained in the article, for sovereignty constituted the reason why a State existed and why it had property, some property being virtually essential for the manifestation of sovereignty. As the Special Rapporteur had clearly explained, property so closely linked to the exercise of sovereign power could not be left in the hands of the predecessor State; if it were, there would be no succession, since there would be no transfer of sovereignty. The Commission itself had defined "succession" as "the replacement of one State by another in the responsibility for the international relations of territory".<sup>12</sup>

35. With regard to the amended text proposed by Mr. Hambro, Mr. Ago had suggested that the expression "performance of State tasks" might be replaced by a more precise phrase such as "the exercise of governmental authority".<sup>13</sup> In addition, Mr. Ustor had pointed out that a State might acquire property which was neither necessary nor used for the performance of State tasks, but which it would be reasonable to transfer.<sup>14</sup> Noting that the title of draft article 9 spoke of the passing of "all" State property, but that the word "all" did not appear in the body of the article, he reiterated his view that all State property connected with the exercise of governmental authority in the territory to which the succession related, and belonging to the predecessor State, should pass to the successor State. That being so, he found the amendment proposed by Mr. Elias both succinct and essentially correct, particularly in view of its reference to the definition of State property given in article 5.

36. Mr. HAMBRO said that apparently he had been unclear in his statement at the previous meeting,<sup>15</sup> for he had been misunderstood. He had neither said that sovereignty did not exist, nor tried to abolish the concept.

What he had said—and his view had been confirmed by subsequent speakers—was that the concept of sovereignty was so disputed and so vague that it could not possibly be used as a frame of reference for legal rules. He still held that view.

37. Furthermore, the criticism that the phrase "used for the performance of State tasks" was as vague as the words it was designed to replace was unjustified, for in making his proposal he had added that the property in question must be "necessary" for the performance of State tasks, an idea that should be understood in the light of the internal law of the State concerned. There could be no once-and-for-all definition of the State property concerned, since the situation varied according to the nature of the State.

The meeting rose at 12.55 p.m.

### 1320th MEETING

*Monday, 2 June 1975, at 3.10 p.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

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

### Succession of States in respect of matters other than treaties

(A/CN.4/282)<sup>1</sup>

[Item 2 of the agenda]

(continued)

### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 9 (General principle of the passing of all State property)<sup>2</sup> (continued)

1. The CHAIRMAN invited the Commission to continue consideration of draft article 9.

2. Mr. QUENTIN-BAXTER said he was struck by the importance assumed by the situation of sovereignty over a piece of territory. Where there were no special circumstances and where no special rules applied, the new sovereign in the territory to which the succession of States related would succeed to the State property situated in that territory. That would be so in all cases, ranging from one extreme to the other. The first extreme was that of an orderly devolution, where a newly independent State emerged from a slow and disciplined process of development of autonomous institutions; in cases of that kind, the vast preponderance of State property, especially corporeal property, in the territory to which the succession related, would pass to the new sovereign. At the other extreme, there were the cases of emergence of a new

<sup>12</sup> See document A/9610/Rev.1, chapter II, section D, article 2.

<sup>13</sup> See previous meeting, para. 45.

<sup>14</sup> *Ibid.*, para. 28.

<sup>15</sup> *Ibid.*, paras. 13-16.

<sup>1</sup> *Yearbook . . . 1974*, vol. II, Part One, pp. 91-115.

<sup>2</sup> For text see 1318th meeting, para. 7.

international personality as a result of internal dissension; there was no agreement and no good will, and all matters had to be settled after the event, but even in those cases State property situated in the territory would normally fall within the patrimony of the new sovereign. Article 9 thus covered cases in which might and right were allied, and the rule of international law stated in the article reflected reality.

3. It would therefore be perfectly logical to adopt the text of article 9 proposed by the Special Rapporteur, after adding the necessary qualifications. The first proviso would be that the property must be situated in the territory to which the succession related. The second would relate to agreements or decisions of the parties. The third would make the rule in article 9 subject to the special rules in subsequent articles. Lastly, it would have to be made clear that the State property covered by article 9 was State property as defined in article 5.

4. The rule in article 9 would apply to the simple core of cases that solved themselves; those which caused anxiety and which complicated the subject would need to be settled by special agreements entered into by the predecessor State and the successor State. It should be the Commission's aim to encourage such understandings between the States concerned, bearing in mind that the making of special agreements would be influenced to some extent by the kind of residuary rule embodied in article 9. That rule would indicate what was reasonable and provide general guidance; hence every effort should be made to narrow the range of the differences revealed by the discussion.

5. A rule that the new sovereign had a prior right to State property in the territory to which the succession related would not imply that the new State might not have rights in State property outside that territory. That thought strengthened his doubts about the position in the draft of the residuary rule in article 9. The value of the Commission's draft, both in its own right and as an inspiration for special agreements, would depend on the manner in which it would deal with the various types of special case covered by section 2. Only after the Commission had dealt with all the special cases would it be able to reach a definite conclusion on the general rule in article 9. As he saw it, the formulation of article 9 at the present stage was not so important as the question whether it would lead to an orderly discussion of the special cases.

6. The Commission should take full advantage of the definition of State property in article 5, on which it had already agreed. Article 9 was concerned solely with the rights and interests that arose because the internal law of the predecessor State made that State capable of owning property. Article 9 should therefore deal only with property owned by the predecessor State according to its internal law. In that connexion, he noted that the Special Rapporteur would shortly be introducing a redraft of article 10 without the former paragraph 3 dealing with the right of eminent domain of the State over public property and natural resources in its territory. That reformulation would help to solve the conceptual problems involved and facilitate the Commission's work.

7. Mr. TAMMES said that in 1973, during the discussion on the former article 9 (now article 8), he had stated his preference for the test of sovereignty in the present context.<sup>3</sup> The interesting debate now proceeding had not given any promise of a better criterion. The test of sovereignty was used in international law for the purpose of delimiting acts of State, for example. It had been long used in legal documents to indicate appurtenances to the public domain. Sovereignty was referred to for the same purposes in specialized works on State succession: O'Connell, for instance, spoke of "such property as pertains to sovereignty" passing to the successor State *ipso jure*.<sup>4</sup> The Commission was therefore likely to reach the conclusion that some reference to sovereignty was necessary in the formulation of article 9 and the following articles.

8. Apart from that, the question arose whether a general article on the lines of article 9 was really necessary, and Mr. Elias had proposed that it should be replaced by a simple reference to article 5, which contained a definition of State property.<sup>5</sup> He (Mr. Tammes) was not certain that such a reference would be sufficient. There were cases in which property that was not State property under the internal law of the predecessor State became State property by the very fact of the change of sovereignty.

9. An interesting example was the case of State archives and libraries, which was covered by four articles in section 2 of the draft (A/CN.4/282). Sometimes those documents and collections were placed in the charge of foundations in the predecessor State and hence were not State property according to its internal law; often the purpose of the foundation was, precisely, to detach the property from the State. The collections in question might, however, be essential to the successor State because they went back to the roots of its cultural history. An example was the 1600 invaluable Icelandic parchments brought to Copenhagen during the period of union between Iceland and Denmark and bequeathed in perpetuity to a university foundation. Upon the dissolution of the union, pursuant to a decision by the Danish High Court, those documents had been restored to the successor State. They were not State property, but had nevertheless passed to the successor State by the very fact of its becoming sovereign. That example was mentioned in several passages in the Special Rapporteur's reports, notably in paragraph (3) of the commentary to article 22 of his seventh report (A/CN.4/282, chapter IV). Comparable cases were pending between the Netherlands and Indonesia; they would have to be settled, and had been partly settled already, as a matter of principle and without litigation.

10. In the light of those examples, he preferred the Special Rapporteur's original and broader wording "Property appertaining to sovereignty over the territory"<sup>6</sup> to the latest, more utilitarian formula "State property necessary for the exercise of sovereignty over the territory".

<sup>3</sup> *Yearbook* . . . 1973, vol. I, p. 154, para. 8.

<sup>4</sup> D. P. O'Connell, *State Succession in Municipal Law and International Law* (1967), vol. I, pp. 199-200.

<sup>5</sup> See 1318th meeting, para. 36.

<sup>6</sup> *Yearbook* . . . 1970, vol. II, p. 143, article 2.



Subject to that preference, he believed that article 9 would be a useful supplement to article 5, particularly if it started with the word "Property" instead of "State property". That would make it clear that sovereignty was an autonomous source of conversion of property into State property, quite apart from its characterization as such by the predecessor State.

11. Mr. BILGE said that the difficulties inherent in the subject entrusted to the Special Rapporteur were particularly evident in article 9. All the members of the Commission seemed to be in agreement on the principle stated in that provision, but not on its formulation. The differences of opinion revolved round three questions: Should the property passing to the successor State be differentiated? Should each type of succession be taken into account? Should the article be restricted to property situated in the territory affected by the succession?

12. Neither international jurisprudence and doctrine nor the practice of States was of much help in answering those questions, as they did not provide uniform solutions. The practice of one and the same State might change. For example, after the First World War Turkey, as heir to the Ottoman Empire, had surrendered public and private property without payment by virtue of article 60 of the Lausanne Peace Treaty;<sup>7</sup> whereas in 1939, at the time of the retrocession to Turkey of the Sanjak of Alexandretta, Turkey had paid an aggregate compensation in respect of the property inherited from Syria and France. Furthermore, the Commission should take into account the provisions of the articles already considered: not only article 5, which defined "State property", but also article 6, which provided for the extinction of the rights of the predecessor State and the arising of the rights of the successor State, and article 8, which laid down the principle of the passing of State property without compensation.

13. The first of the three questions he had mentioned had been deliberately avoided by the Special Rapporteur, because all legal systems did not distinguish between property in the public domain and property in the private domain. That was why he had used the expression "State property necessary for the exercise of sovereignty". In his commentary to article 9 the Special Rapporteur indicated that the article was intended to supplement article 8 which, as adopted by the Commission, did not provide the key to automatic identification of the State property which actually passed to the successor State. The property in question was that used by the State for a public service or property which served the general interest, and it was, precisely, to the use made of the property, rather than to the notion of sovereignty, that article 9 should refer. Of all the criteria suggested, that seemed to be the most appropriate.

14. The second question raised even greater difficulties. It would, indeed, be difficult to draft a rule applicable to all types of succession, especially where the case of total disappearance of the predecessor State was concerned.

15. As to the question whether article 9 should be restricted to property situated in the territory to which the succession of States related, he was not convinced

that such a limitation would provide an equitable solution in all cases. Perhaps the principle should be broadened so as to apply to cases like that of a predecessor State that had inherited some private property under civil or public law, which might be either in the territory affected by the succession or outside that territory.

16. In view of the drafting difficulties which article 9 involved, no decision should be taken on it until the other draft articles had been discussed.

17. The CHAIRMAN, speaking as a member of the Commission, said that the question of State property was very complicated, because it was directly connected with the social, economic and political life of the State. It was difficult, for that reason, to formulate rules satisfactory for all States.

18. Like other members of the Commission he thought that article 9 should be retained. The issues mentioned during the discussion were terminological, the most crucial one being the use of the term "sovereignty". The notion of sovereignty was important to all States, particularly young States. As a citizen of a small country, he shared the feelings to which that notion gave rise, which were intimately associated with the very idea of independence. Over the years, however, experience had shown that the best safeguard for small countries was the rule of law under the United Nations Charter. Hence the Commission should stress the new concept of the sovereign equality of States, which meant that all States were equal before the law and before justice. That concept was a better shield than the notion of sovereignty by itself, for in defence of its sovereignty, a strong country could use its strength to override the sovereignty of a small country. It was only the rule of law under the United Nations Charter, so staunchly defended by President Tito of Yugoslavia and the other leaders of the non-aligned world, which could afford adequate protection to all.

19. The old theory of sovereignty, as expounded by European jurists from the sixteenth century onwards, was essentially associated with the idea of the absolute power of the individual sovereign, who admitted no limitation of his sovereignty. In the seventeenth century, some European thinkers had gone so far as to proclaim the sovereign power of kings and princes over religion. It was in those circumstances that sovereignty had emerged as the first principle of international law in Europe. It had not, however, remained totally unchallenged and it had been the merit of Grotius to proclaim the freedom of the high seas, in opposition to Selden who had claimed that the open seas were subject to sovereignty.

20. His own views on the question of sovereignty had undergone a change in 1949 when, as a member of the Sixth Committee of the General Assembly, he had been privileged to witness the introduction, by the late Manley O. Hudson, of the first report of the International Law Commission, containing the Draft Declaration on Rights and Duties of States.<sup>8</sup> Article 14 of that Declaration affirmed the duty of every State "to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State

<sup>7</sup> League of Nations, *Treaty Series*, vol. XXVIII, at p. 53.

<sup>8</sup> *Yearbook* . . . 1949, p. 287.



is subject to the supremacy of international law". The preamble to the Declaration also referred to the supremacy of international law.

21. From that time on, he had been convinced of the vital importance of the rule of the sovereign equality of States, under which all States were equal before the law and before justice. Absolute sovereignty had given way to the rule of international law, and he accordingly believed that there was no place in the article under discussion for the phrase "necessary for the exercise of sovereignty". He welcomed the proposals by Mr. Hambro and Mr. Elias, which retained the essential idea of article 9, but without that phrase.

22. Mr. BEDJAOUI (Special Rapporteur), replying to the comments made during the discussion on article 9, said that although that provision raised objective difficulties inherent in the subject, it concealed no pitfalls. Furthermore, he had tried to establish a principle valid for all cases of succession, and not to treat the problem from the point of view of decolonization only, as some members of the Commission might have supposed he would.

23. As to the question of method raised by Mr. Ushakov at the previous meeting,<sup>9</sup> he had preferred to proceed from the general to the particular. Perhaps it was too soon to establish a general rule applicable to all cases of succession, but the principle of the passing of State property from the predecessor State to the successor State was so well established that it was important to recognize it from the outset. The Permanent Court of International Justice had regarded it as a generally accepted principle of law,<sup>10</sup> and both writers and States considered it to be unchallenged. As Mr. Quentin-Baxter had pointed out, article 9 really stated no more than an obvious rule: State property could not remain under the authority of the predecessor State. If, in certain cases and for certain types of State succession, the principle had to be moderated, the Commission might later find it necessary to amend article 9.

24. Referring to the statement made at the previous meeting by Mr. Šahović,<sup>11</sup> who believed that the passing of property was only a consequence of the succession of States and doubted the need for a general rule on the subject, he said that succession created new legal situations which ought to be studied, and which had effects on the property, rights and interests of States. Article 5 only contained a definition; it did not settle the question.

25. When drafting article 9 he had considered whether it should be restricted to property in the territory to which the succession related, or extend to property outside the territory; he had also considered whether the article should be made applicable to all State property, like article 8. Since practice was not uniform and only some systems of law had recourse to the notions of the public domain and the private domain, he had preferred to restrict article 9 to State property "necessary for the exercise of sovereignty". The principle stated in article 9 was clearly applicable to that class of property, but as one moved further away from it the principle became

increasingly vague. The whole difficulty arose from possible references to internal law; for in internal law there was a great variety of political and philosophical ideas which affected the concept of ownership. Hence it was important to refer to internal law as little as possible. To refer indiscriminately to State property which belonged to the predecessor State, as Mr. Elias had proposed, did not solve the problem, since the passing of property other than that necessary for the exercise of sovereignty occurred frequently, but not always.

26. As to the concept of sovereignty, he was not surprised that many members of the Commission had rejected it, since he himself had said in his commentary that it was only for want of a better expression that he had used that term. He thought, however, that the fears expressed by some members of the Commission were exaggerated. If the term "sovereignty" had to be dropped, it might be replaced by the expression "governmental authority", as suggested by Mr. Ago,<sup>12</sup> or by a reference to the purpose for which the property was used, as suggested by Mr. Bilge.

27. All the members of the Commission seemed to think that a distinction between the public domain and the private domain should not be introduced into article 9. Many of them had referred to the links between article 5 and article 9; but the only link between those two articles was the fact that article 5 contained a definition and article 9 an application of that definition. That did not justify the conclusion that one article was more useful than the other, or that one could replace the other. In particular, article 5 could not be amended in such a way as to make article 9 unnecessary. On the other hand, the Commission might consider drafting other articles referring to State property other than that necessary for the exercise of sovereignty. Perhaps the misunderstanding was due to the fact that the title of article 9, which would have to be amended, was not in harmony with the content of the article.

28. The question of the law applicable seemed to be already settled by article 5, which defined "State property" by reference to the internal law of the predecessor State. When the Commission had opted for internal law, he had stressed that the practice of States was by no means uniform.<sup>13</sup> Referring to the comments made by Mr. Kearney,<sup>14</sup> he said that it was certainly the internal law of the predecessor State which made it possible to determine what property passed to the successor State under the conditions laid down in article 9, even if the successor State established a different political régime. The principle mentioned by Mr. Ustor, that no one could transfer a greater right than he had, was in fact applied in article 9: the predecessor State could give only that property which, under its law, was State property to the successor State.

29. In reply to the members of the Commission who had questioned whether there was any State property which was not necessary for the exercise of sovereignty, he said

<sup>9</sup> Para. 6.

<sup>10</sup> *P.C.I.J. Series A/B*, No. 61, p. 237.

<sup>11</sup> Paras. 20-23.

<sup>12</sup> See 1318th meeting, para. 45.

<sup>13</sup> *Yearbook . . . 1973*, vol. I, p. 150, para. 55 *et seq.*

<sup>14</sup> See 1318th meeting, paras. 17-21.

that property which, under certain legal systems, belonged to the private domain of the State, came into that class. It was to be found, for example, where a State engaged in commercial activities. It was precisely because of the existence of that class of property that he had used the expression "State property necessary for the exercise of sovereignty".

30. So far as the location of the State property was concerned, article 9 should relate essentially to the property within the territory affected by the succession. That was why he had not mentioned embassies, for example, among the property covered by the article. The treatment of property situated outside the territory in question was the subject of four separate provisions corresponding to the four types of succession, namely articles 15, 19, 23 and 31.

31. The principle stated in article 9 was thus limited, first, by the exclusion of property outside the territory to which the succession related, and secondly, by the fact that it applied only to State property necessary for the exercise of sovereignty, in other words, property considered, in certain legal systems, to be in the public domain. Some members of the Commission would prefer article 9 to deal with all State property, as defined in article 5. Others would like to insert a new provision on State property not covered by article 9. State practice showed that State property used for the exercise of governmental authority always passed to the successor State, without compensation. In that respect, article 9 was consistent with article 8. Other property, which was in the private domain of the State, generally passed to the successor State, sometimes with and sometimes without compensation. It was because of that uncertainty that he had not been able to draft a general rule confirming the passing of all State property without compensation.

32. The practice of States which did not distinguish between the public domain and the private domain seemed, however, to suggest a trend towards the passing of all State property without compensation; hence it had been necessary to restrict the rule in article 9 to property necessary for the exercise of sovereignty or of governmental authority. But as practice seemed close to acknowledging the passing of all State property to the successor State without compensation, he was not in favour of drafting a provision which would enable the successor State to receive the classes of property not covered by article 9, subject to payment of compensation to the predecessor State. That solution would be equivalent to establishing a rule which was applied only occasionally. For the time being it would be better to leave the parties to settle the question as they saw fit.

33. He hoped that the Drafting Committee would find a satisfactory solution taking account of the discussion and of the variants proposed by several members of the Commission.

34. The CHAIRMAN proposed that draft article 9 should be referred to the Drafting Committee.

*It was so agreed.*<sup>15</sup>

<sup>15</sup> For resumption of the discussion see 1329th meeting, para. 2.

## ARTICLE 10

35. The CHAIRMAN invited the Special Rapporteur to introduce draft article 10, which read:

### *Article 10*<sup>16</sup>

#### *Rights in respect of the authority to grant concessions*

1. For the purposes of the present article, the term "concession" means the act whereby the State confers, in the territory within its national jurisdiction, on a private enterprise, a person in private law or another State, the management of a public service or the exploitation of a natural resource.

2. Irrespective of the type of succession of States, the rights in respect of authority to grant concessions exercised by the predecessor State shall be extinguished and those of the successor State shall come into being in the territory to which the succession of States relates.

36. Mr. BEDJAOUI (Special Rapporteur) said that article 10 gave rise to special difficulties, because several problems converged on it. The first was whether the authority to grant concessions came within the scope of the topic of State succession. By its nature the successor State, like any other State, enjoyed rights in respect of authority to grant concessions as an attribute of its sovereignty. Hence it was open to question whether article 10 was really necessary. A second problem was that of acquired rights: could the concession be maintained by the successor State? The article also raised the problem of the international responsibility of States. And lastly, it might be asked whether the authority to grant concessions did not come within the sphere of State property; for the definition of State property given in article 5 included not only property in the strict sense of the term, but also rights and interests.

37. The definition of the term "concession", given in paragraph 1 of article 10, might later be included in the article on the "Use of terms". That definition was relatively simple. From the standpoint of the beneficiary, a concession could be regarded as an authorization to manage a public service or a right to work mineral deposits; from the standpoint of the conceding State, a concession was the act by which the governmental authority to a private enterprise, or a person in private law, the right to undertake work of a public nature, to exploit natural resources or to manage a public service.

38. He would deal only with the second aspect of that definition, the only one which concerned the Commission. The problem that arose was what happened to the rights of the conceding State in the event of a succession of States. It was a problem relating to State property. True, the right in question was not property: it was a right relating to property—part of the eminent domain of the State. To determine what happened to that right, a concession must be regarded as the juxtaposition of a contract and an act of sovereignty. If the question of the contract of concession and what happened to it in the event of a succession was left aside and only the act of sovereignty was considered, it would be found that no problem of State succession arose. For the successor State, like any other State, was sovereign and, as such, could express its will in the matter of concessions without

<sup>16</sup> Text as revised by the Special Rapporteur.

any restriction but that which might be imposed on it by contemporary international law or which it might freely impose on itself.

39. He wished to remove a possible doubt by pointing out that that right of eminent domain of the State, or the rights of "authority to grant concessions" amounted to an act of sovereignty. In a succession of States, there was never a transfer of sovereignty from the predecessor State to the successor State; there was substitution of one sovereignty—that of the successor State—for another—that of the predecessor State. The successor State which exercised its own sovereignty over the territory, would thus be exercising its own rights in respect of the authority to grant concessions. There was no subrogation of the successor State for the predecessor State in its rights as conceding authority; nor was there any transfer or succession from one to the other. It was by virtue of its own sovereignty that the successor State acquired title to the soil and subsoil of the territory to which the succession of States related. There was no "passing" of the rights of the governmental or conceding authority. Similarly, the soil and subsoil did not pass as though they were movable or immovable property: they constituted the territory which represented the territorial basis necessary for the exercise of the new sovereignty and the rights of the new governmental conceding authority.

40. That being so, it might be asked why article 10 was necessary. United Nations practice showed that for about fifteen years the General Assembly had been referring, in numerous resolutions, to "permanent sovereignty over natural resources". That sovereignty might be defined as the use by the State of the sum total of its powers—its "paramount competence" (*compétence majeure*)—to regulate the status of natural resources. Why, then, speak of "permanent sovereignty over natural resources"? Resources were not an additional attribute of sovereignty, but an object, or subject-matter, over which single and indivisible sovereignty was exercised. And yet the expression "sovereignty over resources" was used, as though it referred to some particular kind of sovereignty. In fact, the word "sovereignty" in that instance meant "ownership" of natural resources, and the words "permanent sovereignty" meant that such sovereignty was inalienable, although to say so might be thought redundant.

41. The Secretary-General of the United Nations had said that "Sovereignty over natural resources is inherent in the quality of statehood and is part and parcel of territorial sovereignty, that is 'the power of a State to exercise supreme authority over all persons and things within its territory'".<sup>17</sup> Thus, to understand the evolution of United Nations doctrine in the last fifteen years, one must not rely only on classical international law, whose conception of sovereignty had been based essentially on political criteria. The Charter defined sovereignty by its political elements, to the exclusion of its economic aspects. It condemned only infringements of political sovereignty: the sanctions it provided were for the breach of political

obligations only, economic duties being excluded. Nevertheless, the Charter regarded the problem of underdevelopment and economic backwardness as a major problem of concern to the international community. That showed—and there lay the paradox of the Charter—how great a distance separated the affirmation of the principle of international economic co-operation from its realization through the application of operational rules.

42. An effort was now being made in the United Nations to state the problem of sovereignty in other terms. The traditional conception of sovereignty, disembodied, formal and based on the rules of classical law, was giving way, together with the problem of natural resources, to a new conception based on the principle of national economic independence. That principle had been given a new and very important legal function and had thus been erected into a principle of modern public international law.

43. The new version of article 10 was simpler than the previous one (A/CN.4/282): he had merely taken the consequences of article 6 and applied them to the particular case of rights in respect of the authority to grant concessions. In that context, paragraph 2 stated a self-evident truth. Paragraph 1 defined a concession, both as an act of the public authorities—in accordance with the arbitral award of 3 September 1924 rendered in the *German Reparations case*<sup>18</sup>—and as an act authorizing the management of a public service or the exploitation of a natural resource. It also specified that the concessionaire could be a person, a private enterprise or a State.

44. Mr. CALLE Y CALLE agreed with the Special Rapporteur that the principle stated in article 10 might not belong specifically to the topic of State succession. The successor State had the right to grant concessions, not by virtue of its succession, but by virtue of its statehood. It was not a question of a right passing from one State to another, but of the replacement by a legal entity, the successor State, of an earlier legal entity, the predecessor State, which had exercised the right to grant concessions. Those concessions lapsed on succession.

45. The article proposed by the Special Rapporteur stated the principle in simple terms. The expression "national jurisdiction", which appeared in paragraph 1, was rather imprecise, however, and in his opinion it would be better simply to say "jurisdiction", "competence" or even "jurisdictional competence".

46. Mr. ELIAS said he shared the Special Rapporteur's doubts about the appropriateness of article 10. Its substance was not of obvious relevance to State succession in respect of rights other than those conferred by treaties. He would comment later on the definition of the term "concession" in paragraph 1, and deal only with paragraph 2, about which he had doubts. Was it intended to regulate the right of the successor State to grant concessions, or to specify whether, and in what circumstances, the concessions granted by the predecessor State remained binding on the successor State? Since the sovereign rights of the successor State obviously included the right

<sup>17</sup> *Yearbook* . . . 1973, vol. II, p. 27, para. (13).

<sup>18</sup> *Ibid.*, p. 25, para. (3).

to grant concessions, there was no need for a provision on the passing of the predecessor State's rights in that respect. If draft article 9<sup>19</sup> was accepted, with or without the amendments suggested by some members, the predecessor State's property, rights and interests, as defined in article 5, would pass to the successor State on succession. Logically, therefore, if there was to be an article on concessions, it should be concerned with the status of the concessions granted by the predecessor State and with the circumstances in which those concessions would or would not be binding on the successor State after succession.

47. Mr. BEDJAOUI (Special Rapporteur) said that, unlike Mr. Elias, he did not think the issue was whether the successor State continued to be bound by concessions granted by its predecessor. That was not the object of article 10 and the other articles submitted in his seventh report (A/CN.4/282), which dealt with the problem of property and not with the obligations which the successor State might assume. The question whether a concession was binding on the successor State was an entirely different one, which, for the time being, the Commission should not consider.

The meeting rose at 5.55 p.m.

<sup>19</sup> For text see 1318th meeting, para. 7.

### 1321st MEETING

Tuesday, 3 June 1975, at 10.15 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuoruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

#### Succession of States in respect of matters other than treaties

(A/CN.4/282)<sup>1</sup>

[Item 2 of the agenda]

(continued)

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

##### ARTICLE 10 (Rights in respect of the authority to grant concessions)<sup>2</sup> (continued)

1. The CHAIRMAN invited the Commission to continue consideration of draft article 10.

2. Mr. HAMBRO said he agreed with the Special Rapporteur that within its territory the successor State had all rights in the matter of granting concessions, which was part of the ordinary exercise of sovereignty by any independent State. Thus draft article 10 stated what would seem obvious to some lawyers. It had also been

rightly pointed out that the article concerned areas of international law other than that of State succession. But a complete, self-sufficient treaty sometimes had to state the obvious or to overlap with rules in other fields of international law. When the whole draft had been completed, the Commission would be in a better position to decide whether such provisions should be included in the final text.

3. A bald statement to the effect that the successor State had rights in regard to the granting of concessions might seem surprising if no reference was made to the more difficult problem of the rights of concessionaires and the possible payment of compensation when concessions were cancelled or replaced by new ones. As the Special Rapporteur had said, that aspect of concessions related, not to State property, but to the obligations of States, and perhaps to State responsibility. Hence the subject-matter of article 10 did not, strictly speaking, belong to the series of draft articles under consideration, and if the other members agreed, the Commission should say so clearly in its commentary.

4. Mr. SETTE CÂMARA also expressed doubt about the need for draft article 10 in its present form, especially in view of the economy with which the articles provisionally adopted by the Commission had been formulated (A/CN.4/282, chapter III). The inclusion of the article might be justified if the Commission adopted the approach to State property originally proposed by the Special Rapporteur, which was based on the distinction between State property "necessary for the exercise of sovereignty" and other classes of State property. Only the former class of State property would then pass automatically and without compensation to the successor State, and a provision would be needed to deal with other classes of property subject to the régime of concession. But that distinction had been discarded, and if article 9 was based, as proposed, on the definition of State property in article 5, all property of the State, even if a concession had been granted on it, would be automatically transferred. Thus the right of eminent domain, which corresponded to the *nuda proprietas* of private law, would pass to the successor State and there would be no need for a specific provision to that effect.

5. As it stood, the draft article raised some difficulties. The definition in paragraph 1—which, if the article was retained, should be moved to article 3, as suggested by the Special Rapporteur—contained ideas that would be misleading, because of the diversity of legal systems and political régimes. The reference to "a private enterprise", for example, would make the provision inapplicable to socialist régimes, which did not recognize private enterprises.

6. The Special Rapporteur had explained in his sixth report why article 10 dealt with the right of the conceding State to grant concessions only as an act of sovereignty and not with the contractual aspects of concessions.<sup>3</sup> The right to grant concessions passed, on succession, with the State property as defined in article 5, from the predecessor State to the successor State. Recognizing the advisability of applying, *mutatis mutandis*, the rules

<sup>1</sup> Yearbook . . . 1974, vol. II, Part One, pp. 91-115.

<sup>2</sup> For text see previous meeting, para. 35.

<sup>3</sup> See Yearbook . . . 1973, vol. II, pp. 24-25, para. (2).

adopted by the Commission on succession in respect of treaties to contracts or treaties of concession,<sup>4</sup> the Special Rapporteur had excluded that aspect from the scope of article 10. Under that article the successor State merely acquired, by virtue of its sovereignty, ownership of the soil and subsoil of the transferred territory and the rights pertaining thereto, as the new conceding authority. Moreover, that was not a case of subrogation, for according to the United Nations Committee on Natural Resources, sovereignty over natural resources was inherent in the quality of statehood and part and parcel of territorial sovereignty.<sup>5</sup>

7. The problem of concessions was an internal juridical matter and not within the scope of the topic of State succession, except where the concessionaire was a State, in which case the matter came within the scope of the topic of succession in respect of treaties. There was therefore no reason to include an article on concessions, even as amended by the Special Rapporteur, if it dealt only with the passing of the right to grant concessions and was a corollary of articles 5 and 9.

8. Mr. KEARNEY said he shared the concern expressed by Mr. Sette Câmara about draft article 10. If the substance of the article was strictly confined to the sovereignty of the successor State over its natural resources it would serve little purpose unless there were special legal reasons for including an article on concessions, as the point was already adequately covered by article 9. It would be difficult to deal with non-legal problems in the context of public property. For example, the public service mentioned in the definition of the term "concession" might be that provided by an airline, a railway or even a factory operating under contract and, although involving the use of public property, it would have only a remote bearing on the State's ownership of, and control over, its natural resources.

9. The combination of subjects which the article was intended to cover was difficult to deal with in the context of the set of articles under discussion. As Mr. Elias had pointed out, the basic issue in regard to concessions was what action a successor State might wish to take regarding concessions, its authority in the matter and the restrictions on that authority. The problem was not necessarily one of State succession and certainly not one of succession to public property. He agreed with Mr. Sette Câmara that if the subject was to be dealt with at all, it should be treated in the context of the obligations of successor States, as the Special Rapporteur himself had suggested, and not in the present context.

10. Mr. TSURUOKA said that in view of the concern expressed by the Special Rapporteur and other members of the Commission, he thought it would be better to delete article 10 or to study its content after the other related articles had been considered. From the theoretical point of view, the authority to grant concessions was manifestly an attribute of State sovereignty, so that it was unnecessary to state that principle in an article.

The draft should be confined to matters directly related to State succession; rights in respect of the authority to grant concessions were only indirectly related to succession. If article 10 had any practical value, it lay in the aspect to which Mr. Elias had drawn attention.<sup>6</sup> Personally, he was in favour of deleting the article.

11. Mr. ŠAHOVIĆ said he had studied article 10, both in the first version (A/CN.4/282, chapter IV), and in the new version submitted by the Special Rapporteur. At first, he had wondered why the Special Rapporteur had wished to formulate the principle of the successor State's rights in respect of the authority to grant concessions. In view of the structure of the general provisions, he thought the Special Rapporteur had wished to mention, in the last part of those provisions, a few special problems, like that of rights in respect of the authority to grant concessions and State debt-claims, which required special attention.

12. In the second version of paragraph 2, the Special Rapporteur had meant to emphasize a general principle which, as he had pointed out in his oral introduction, was already stated in article 6. By doing so, he had intended to stress the need to apply article 6 in regard to rights in respect of the authority to grant concessions. It was open to question, however, whether an article on concessions was necessary in view of article 5, which contained the definition of State property. The definition of the term "concession", in paragraph 1, showed that the reference was not to rights of ownership, but to rights of enjoyment and exploitation. The principle of the sovereignty of States over their natural resources was beyond dispute, for nobody contested the State's right of eminent domain. Hence there was no need to state the principle in the draft articles, though it would be useful to mention it in the commentary or elsewhere, and not in connexion with concessions.

13. The definition of the term "concession" raised the problem of concessions granted to other States, which the Special Rapporteur had discussed in his sixth report.<sup>7</sup> It also raised the question of servitudes. That question was different from the question of concessions, but the relationship between concessions granted to other States and servitudes should be indicated.

14. He thought that in paragraph 2 the Special Rapporteur had intended to affirm the "clean slate" principle in regard to rights in respect of the authority to grant concessions; but the paragraph began with an allusion to the existence of different types of State succession, which was not mentioned in the preceding articles. In his opinion, the problems relating to concessions should be examined from the point of view not only of rights, but also of obligations, in order to clarify the question and to weigh up all the consequences of the proposed rule.

15. Mr. USTOR said that the Special Rapporteur's doubts about the appropriateness of dealing with the problem of concessions were justified: it was outside the scope of the study of State succession. Article 5 defined "State property" as property, rights and interests owned

<sup>4</sup> *Yearbook . . . 1974*, vol. II, Part One, document A/9610/Rev.1, chapter II, section D.

<sup>5</sup> See *Official Records of the Economic and Social Council, Fifty-ninth Session, Supplement No. 3*, p. 7, draft resolution III.

<sup>6</sup> See previous meeting, para. 46.

<sup>7</sup> *Yearbook . . . 1973*, vol. II, p. 26, paras. (8)-(11).

by the State—in other words, what had been called *dominium* as distinct from *imperium*. The right to grant concessions did not form part of State property, but was part of the *imperium* of the State and hence outside the scope of the present study. The Special Rapporteur, while recognizing that fact, had relied on the generally accepted principle of permanent sovereignty over natural resources as a reason for including a special provision on concessions; but the acceptance of that principle did not alter the fact that the right to grant concessions was not a right to State property and had no place among the provisions under consideration.

16. Mr. RAMANGASOAVINA noted that the members of the Commission had all expressed doubts about the usefulness of article 10 and its place in the draft as a whole. He thought the definition of a “concession” in paragraph 1 might be acceptable, for it was broad enough and included not only State property in the strict sense, but also the rights of the State in all property, whether existing as such or in the form of eminent domain, as in the case of concessions. On the other hand, it was open to question whether the principle stated in article 10 belonged in that article, since the preceding articles, and in particular article 9, stated general principles relating to all State property. He understood the hesitation of members of the Commission and of the Special Rapporteur himself, who had expressed doubts about the scope of article 10 and its place in the draft as a whole. Nevertheless, some principle relating to that class of property ought to be stated, for the question of concessions, even though they formed a special class of property, was controversial and important and could not be avoided.

17. The new paragraph 2 proposed by the Special Rapporteur confirmed the principle that every State exercised its sovereignty over its territory and over the natural resources belonging to it. The principle stated in paragraph 2 followed from that stated in article 6, which defined succession of States as “the extinction of the rights of the predecessor State and the arising of the rights of the successor State”. Thus, as the Special Rapporteur had said, the predecessor State was replaced by the successor State in the rights relating to property situated in the territory to which the succession of States related. Some members of the Commission had accordingly been able to argue that the principle in article 10 was merely a repetition of that already stated in article 6. But in paragraph 2 of article 10 the Special Rapporteur had tried to deduce the consequences of the definition in paragraph 1 and to state a principle that applied to a special class of State property.

18. He noted that in article 3, on the use of terms, the Commission had reproduced the terms and definitions it had used in the draft articles on succession of States in respect of treaties; in particular, article 3, sub-paragraph (a) defined succession of States as “the replacement of one State by another in the responsibility for the international relations of territory”. He thought that the definition ought to have included confirmation of the principle of the sovereignty of every State over its property, instead of being confined to responsibility for international relations. That was the principle the Special Rapporteur had meant to state in article 10, with regard

to the transfer of property forming the subject of a concession, without, however, taking any position on the obligations of the conceding authority that devolved on the successor State.

19. The problem of concessions could arise in all types of State succession, whether the States involved were newly independent or had resulted from a uniting of States or from the dissolution of a union. He recognized that the position which article 10 should occupy in the draft as a whole was debatable, but reference to concessions could not be avoided, for the subject was important and raised many problems; the Commission should take a decision on it later, when the work was further advanced.

20. He therefore reserved his position on article 10, although he approved of the definition of the term “concession” in paragraph 1, and of the principle that property which was the subject of a concession constituted a special class of property over which the permanent sovereignty of the State should be exercised, as the Special Rapporteur had said.

21. Mr. USHAKOV said he deduced from the definition in paragraph 1 of article 10 that concessions were not part of State property. He also considered that the question of concessions did not belong to the topic of State succession, but rather to the subject of acquired rights, which was not at issue.

22. Mr. CALLE y CALLE asked the Special Rapporteur why he had decided to delete paragraph 3 of draft article 10. That paragraph was of special importance in an article dealing with the successor State's replacement of the predecessor State in its rights of ownership of public property covered by a concession. The Commission was drafting rules for the whole field of State succession to protect the basic rights of the successor State and, to a reasonable degree, any residual rights passing from the predecessor to the successor State. Rules were needed on such matters as the right of eminent domain, to ensure the proper transfer of public property to the successor State, since many economic interests were often involved in such transfers.

23. Mr. BEDJAOUI (Special Rapporteur) said he gathered that the members of the Commission, while recognizing that sooner or later they would have to deal with the problem raised by article 10, wished, if not to delete that article, at least to leave it aside for the time being, while keeping open the possibility of reverting to it later. As he had said himself, he had been hesitant to submit draft articles on the problem of concessions, and he saw no objection to dropping article 10 for the time being and not referring it to the Drafting Committee. Nevertheless, he urged the Commission to stress the principle of the sovereignty of States over their natural resources by indicating in the commentary that it had been considered unnecessary to affirm, in article 10, the incontestable principle of the right of eminent domain of the successor State over its natural resources—a right which was inherent in the quality of statehood. If the Commission succeeded in drawing attention to that point, he would have attained his object.

24. He wished to distinguish the problem of concessions from that of servitudes and that of enclaves, for they were

three different problems. The problem of concessions did not arise in the same terms as those of servitudes and enclaves. There was no alienation of sovereignty in the case of concessions and servitudes, but the same was not true of enclaves. The problems of servitudes and enclaves, which had been discussed in his first report in 1968,<sup>8</sup> were to be the subject of a separate chapter on problems of State succession connected with strictly territorial questions.

25. The reason why he had deleted paragraph 3 of article 10 was to avoid complicating the Commission's task by posing the problem of concessions in connexion with the obligations of the successor State. The sole purpose of article 10 was to settle the fate of concessions.

26. Sir Francis VALLAT said that he shared the misgivings expressed by other members about the inclusion of draft article 10, but agreed with the Special Rapporteur that the subject of the article should not be overlooked. The Commission should record the presentation of the article and the ensuing discussion in its report, and consider the possibility of including a reference to the subject in its commentaries.

27. The CHAIRMAN said he thought appropriate references to the subject could be made in the commentaries and in the final report on the draft articles. He thanked the Special Rapporteur for acceding to the wishes of the other members of the Commission; if there were no objections, the procedure suggested by the Special Rapporteur would be followed.

*It was so agreed.*

#### **Co-operation with other bodies**

[Item 8 of the agenda]

*(resumed from the 1310th meeting)*

#### **STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE**

28. The CHAIRMAN invited Mr. Ricaldoni, Observer for the Inter-American Juridical Committee, to address the Commission.

29. Mr. RICARDONI (Observer for the Inter-American Juridical Committee) said that he welcomed the opportunity of returning, on behalf of the Inter-American Juridical Committee, the visit which Mr. Martínez Moreno had paid to it as the Commission's observer.

30. In 1974, the Committee had adopted a statement of reasons attached to a list, which it had also adopted, of examples or "cases" of violation of the principle of non-intervention. That list had had its origin in a draft which the Committee itself had prepared as far back as 1959, for submission to the Ninth Inter-American Conference, but which had remained in abeyance because the conference had not been held. The General Assembly of the Organization of American States (OAS), at its second session, held in 1972, had requested the OAS Council to

study the 1959 draft and to report to that Assembly at its third session. The Council had then asked the Inter-American Juridical Committee to review the 1959 draft, and the Committee, at its session in January and February 1973, had appointed as Rapporteur for the topic, Mr. Vargas Carreño, its Chilean member.

31. After the submission of a preliminary report by the Rapporteur, and after the report had been considered by a working group, the Committee had adopted, on 12 February 1974, a final list of 21 cases which the majority of the Committee regarded as examples of breaches of the principle of non-intervention. The Committee had clearly specified that the list in question was not exhaustive and merely enumerated a number of examples of situations which constituted breaches of the rules of international law governing non-intervention. The Committee had envisaged only violations by a State or a group of States. Although it recognized that certain types of conduct by private undertakings might be regarded as cases of intervention, it had decided to postpone consideration of that matter and to consider it in conjunction with the subject of multinational corporations.

32. The first item on the list adopted by the Committee was more a general definition than an example. A breach of the principle of non-intervention was defined as any form of interference with, or attack upon, the personality of the State or any of its constituent elements—political, economic, social or cultural. Among the means used to commit acts of intervention, the Committee had noted that recourse to subversion and economic and financial weapons was becoming more common than military action. Acts of intervention constituted violations of a well-established rule of international law which demanded full respect for the sovereign will of States. Not all violations of international law constituted acts of intervention, however, and the Committee had stressed that breaches of the principle of non-intervention should be distinguished from breaches of other principles and rules of international law. In addition, the Statement of reasons recognized the difficulty of drawing a distinction between lawful and unlawful conduct, for an act which was lawful if performed with moderation, might become unlawful or constitute an abuse if there was excess or distortion.

33. Out of the 21 cases adopted in 1974, nine had been taken virtually unchanged from the 1959 list: they included the use of force; recourse to economic, political or other forms of pressure to coerce the sovereign will of a State; the organization or support of armed, subversive or terrorist activities; an attempt by a State to prevent a particular form of government from prevailing in another State, or certain social and economic changes from occurring; coercion to impose a particular government or system upon another State; and a number of other examples of coercion or pressure.

34. The Committee had thus added 12 new cases to the 1959 list. Three of them related to military acts of intimidation, such as troop concentrations and naval or air manœuvres in the vicinity of the threatened State. Those cases were of course quite distinct from territorial

<sup>8</sup> *Yearbook* . . . 1968, vol. II, p. 113, paras. 129-130.



violations and related to acts outside the territorial jurisdiction of the threatened State. Two other cases related to acts committed with the intention of altering the political structure or disrupting the normal operation of the institutions of a State. The first was the attempt to prevent the emergence of a particular form of government or the carrying out of certain social and economic changes; the second related to interference with, or pressure on, political parties or trade unions in the threatened country. The statement of reasons made it clear that undue pressure constituted an abuse and hence an intervention in the internal affairs of the injured State.

35. A third group of three cases consisted of acts of intervention committed by means of sanctions or discriminatory measures, such as economic and financial measures. They included economic sanctions and other discriminatory measures taken against a State in retaliation for acts performed by that State in the exercise of its sovereignty; the organization of an economic or financial boycott against a State on political grounds or in retaliation for economic or social measures taken by its government; and the imposition of extraneous conditions for the granting of loans or the transfer of technology, when those conditions amounted to undue interference with the sovereign decisions of the State concerned. The statement of reasons indicated, however, that the rules reflected in the first two of those cases did not cover internal measures which themselves violated fundamental principles or rules of international law.

36. Four of the remaining five cases related to misleading propaganda; the incitement of subversion; the misuse of intelligence and espionage services; and interference by the diplomatic or other representatives of a State in the internal affairs of another State. With regard to intelligence and espionage operations, the majority of the Committee had decided that not all such operations constituted violations of the principle of non-intervention. A number of members of the Committee, himself included, did not share that view. As to acts of interference by diplomatic agents, the statement of reasons made it clear that the text adopted should not be interpreted so as to hamper normal diplomatic relations between States. In that connexion, it referred to the rule in article 41 of the Vienna Convention on Diplomatic Relations.<sup>9</sup>

37. Lastly, mention was made of any action by a State which constituted a breach of the immunity from jurisdiction enjoyed by another State under international law. In the statement of reasons, the Committee explained that an action by the organs of a State—usually judicial organs—asserting jurisdiction over another State, would be a violation of the principle of non-intervention if adjudication upon the acts of another State involved interference in matters within the exclusive competence of that State.

38. In accordance with the Committee's practice, separate opinions had been placed on record by three members who had cast affirmative votes, and one member who had abstained had explained the grounds for his abstention. The Peruvian and Colombian members, who had voted

in favour, had expressed the view that transnational undertakings should have been recognized as capable of committing acts of intervention. The United States member of the Committee had explained that one of the reasons for his abstention was the inclusion of the example concerning the immunity of foreign States from jurisdiction. He himself had voted in favour, but had recorded his disagreement with the method of listing cases, which had originated in the 1959 text.

39. At its 1974 session, the Committee had also dealt with the question of transnational undertakings. It had noted with alarm that a report had been submitted on that question to the OAS Council, in which it had been recommended that the co-operation of transnational corporations should be sought in order to facilitate the study of the whole problem. The Committee had expressed its concern by a resolution adopted on 24 October 1974, in which it had pointed out that the recommendation was at variance with the terms of the relevant resolutions of the United Nations General Assembly. The Committee had also expressed regret that the methods it had followed in the study of the activities of multinational corporations had been ignored, and that it had not been consulted about the study of a subject that had legal aspects, several of which were under consideration by the Committee as the foremost legal organ of OAS.

40. The Committee had been considering questions relating to multinational corporations for some years, and had received a number of interesting reports on the subject. One of those reports, prepared by its Chairman, Mr. Galindo Pohl, which dealt with international production undertakings, including those of the "joint venture" type, pointed out that strained relations between such corporations and the States in which they operated did not usually develop where international production undertakings were established under integration schemes.

41. Another report, by Mr. Ruiz Eldredge, the Committee's Peruvian member, dealt with interference by transnational corporations in the sovereignty of States. It included a draft convention for consideration by the States members of OAS, under the terms of which the signatories would undertake to adopt measures to prevent and punish any acts by transnational corporations that interfered, or attempted to interfere, directly or indirectly, in matters pertaining to the sovereignty of any of the contracting States.

42. The United States member of the Committee, Mr. Rubin, had submitted a study on the structure and operation of multinational corporations, in which he advised caution in the interpretation of data concerning such corporations and their activities, investments and conduct. The Colombian member, Mr. Caicedo Castilla, had submitted a preliminary draft on multinational companies, giving his views on the advantages and disadvantages of such companies for the States in which they operated, and suggesting certain protective measures of an economic and legislative character.

43. Mr. Aja Espil, of Argentina, in his study on the transfer and monopoly of technology, had recommended the preparation of a code of conduct for the transfer of technology. He had also suggested that the study on

<sup>9</sup> United Nations, *Treaty Series*, vol. 500, p. 96.

multinational undertakings should use the term “multinational” in preference to “transnational”, and that it should deal with all the undertakings concerned, regardless of whether they had the legal status of companies or that of commercial corporations. On that last point, the author’s views had been based on the United States doctrine of “disregard of legal entity”.

44. On another topic, Mr. Ruiz Eldredge, the Peruvian member, had submitted a study of the immunity of States from jurisdiction, in which he urged that the distinction between acts *jure gestionis* and acts *jure imperii* should be abandoned as artificial, since it was based on the fiction of the dual personality of the State underlying certain international conventions on the subject, such as that signed at Havana in 1928.<sup>10</sup>

45. Another study by Mr. Galindo Pohl concerned the settlement of disputes relating to the law of the sea. After reviewing traditional methods of settlement under international law, the writer suggested that it would be preferable to seek other solutions, taking into account the work of the Third United Nations Conference on the Law of the Sea. The law of the sea was developing extremely fast, and there was bound to be a stage of consolidation of the new rules that would be adopted *de lege ferenda*. The proposed rules on the international sea-bed zone, for example, would constitute an entirely new chapter of international law. In the circumstances, it would be appropriate to make provision for compulsory arbitration or judicial settlement by the International Court of Justice or by a special tribunal; there were also good grounds for prohibiting all reservations to such arbitration and judicial settlement clauses.

46. The Inter-American Juridical Committee had also carried on, in 1974, its usual activities relating to research and to the dissemination and teaching of international law through courses of study organized at Rio de Janeiro in co-operation with the Getulio Vargas Foundation. The subjects covered in 1974 included the law of the sea, the law of international economic integration and specific questions of private international law. Fellowships had been granted to 12 out of the 62 participants. The next courses would begin on 21 July 1975 and would cover five general topics: multinational corporations or undertakings; legal aspects of economic integration; evaluation of the work of the Inter-American Specialized Conference on Private International Law held at Panama in January 1975; the inter-American system; and the law of the sea.

47. The next session of the Inter-American Juridical Committee would begin on 14 July 1975. The agenda would include the topic of multinational corporations, which had been sub-divided and allocated to seven rapporteurs. The other subjects were: the immunity of States from jurisdiction; legal aspects of international problems connected with the full development of the American nations; nationalization and expropriation of foreign property in international law; the revision, modernization and evaluation of the inter-American conventions on industrial property; legal aspects of pro-

gressive harmonization of the educational systems of the American countries and of the validity and equivalence of qualifications and degrees; revision of the Inter-American Juridical Committee’s rules of procedure; territorial colonialism in America; the principle of self-determination and its field of application; the settlement of disputes relating to the law of the sea; a draft convention on conflict of laws relating to cheques in international circulation and a draft uniform law on that subject; identification, protection and supervision of the archaeological, historical and artistic heritage of the American nations; and the function of law in social change.

48. In conclusion, he expressed the hope that the close and fruitful co-operation between the International Law Commission and the Inter-American Juridical Committee would continue to develop, as an expression of the firm conviction that there could be no justice, peace or freedom without law.

49. The CHAIRMAN thanked the Observer for the Inter-American Juridical Committee for his lucid statement on the accomplishments of that Committee. Co-operation between the Commission and the regional bodies should continue and be further strengthened. It was particularly important that the views and requirements of the regional bodies should be reflected in the Commission’s universal approach to the codification and development of international law.

50. He had been much impressed by the work done by the Inter-American Juridical Committee and by the range of topics on its agenda. It was significant that the Organization of American States and the Committee, as its legal organ, should pay such close attention to the important principle of non-intervention. That principle was, of course, vital to the peace and security of the region concerned, and he hoped that the work undertaken by the Committee would be completed as soon as possible in the interests of Latin America and the rest of the world.

51. Latin-American jurists had played a very important part in the progress of international law, as was shown by two examples. The first was that of the 1949 draft Declaration on the Rights and Duties of States adopted by the International Law Commission at its very first session,<sup>11</sup> based on a draft and submitted by a Latin-American jurist, Mr. Alfaro. The second was the system of reservations, of Latin-American origin, which had been incorporated in the 1969 Vienna Convention on the Law of Treaties.<sup>12</sup>

52. He asked the Observer for the Inter-American Juridical Committee to convey to that Committee the expression of the Commission’s most cordial feelings; the mutual exchange of observers at the annual sessions of the two bodies was particularly gratifying.

The meeting rose at 12.50 p.m.

<sup>11</sup> *Yearbook . . . 1949*, p. 287.

<sup>12</sup> 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), pp. 291-292, articles 19-23.

<sup>10</sup> League of Nations, *Treaty Series*, vol. CLV, p. 261.

## 1322nd MEETING

Wednesday, 4 June 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

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

Succession of States in respect of matters  
other than treaties

(A/CN.4/282)<sup>1</sup>

[Item 2 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR  
ARTICLE 11

1. The CHAIRMAN invited the Special Rapporteur to introduce draft article 11, which read:

Article 11

State debt-claims

The successor State shall become the beneficiary of the (State) debt-claims of all kinds receivable by the predecessor State by virtue of the exercise of its sovereignty or its activity in the territory to which the succession of States relates.

2. Mr. BEDJAOUI (Special Rapporteur) explained that article 11 should be understood in the light of article 9 (A/CN.4/282), which stated the principle of the passing of State property from the predecessor State to the successor State. As in article 9, he had used the word "sovereignty" in article 11, but he would agree to its being replaced, for the reasons put forward in the discussion on article 9, by a reference to the exercise of governmental authority. The term "debt-claims" was used in the broadest sense: it denoted all sums of money due to the predecessor State by reason of its State activities or of the exercise of governmental authority in the territory to which the succession related. The term could apply to domanial resources, such as revenue from State forests and proceeds of the granting of hunting or fishing rights; to income from financial participation of the State in private enterprises, such as income from industrial and commercial operations and from industrial public services, where such income was represented by claims; to administrative charges and other remuneration of services rendered by the State to private persons; and, especially, to taxes and fiscal receipts in general, the collection of which was the expression *par excellence* of the predecessor State's sovereignty, for the threefold reason that they were required by authority, permanently and without any direct counterpart. Such debt-claims were incorporeal property of which the predecessor State was the holder by reason of the exercise of governmental authority and of its activities in the territory in question—

in other words by reason of its *jus imperii* and its *jus gestionis*.

3. In the light of international jurisprudence and doctrine and of the practice of States, he believed that there was a customary rule of succession to taxation or to the claim representing it. Article 11 was thus in conformity with article 9, which confirmed the passing of State property to the successor State. Moreover, one writer, Daniel Bardonnnet, considered that there was a presumption of succession to public property in general and that exceptions must be expressly provided for in treaties and strictly interpreted.<sup>2</sup> The idea of the passing of debt-claims from the predecessor State to the successor State was based on considerations of equity, common sense and the viability of the successor State, and likewise on the fact that the predecessor State could not be allowed to use its power of coercion to recover a debt in a territory over which it had lost all sovereignty. Besides, the territory to which the succession related must pass under the authority of the successor State in normal conditions of operation and viability of the administrative machinery, as it had previously existed. It was that idea which was expressed—although in terms reminiscent of commercial law—in a letter sent in 1962 by the British Ambassador at Addis Ababa to the Ethiopian Minister for Foreign Affairs. Referring to Eritrea, the Ambassador had specified that the transfer of power in the territory should take place on a "going concern" basis.<sup>3</sup>

4. The existence of a customary rule on the passing of debt-claims to the successor State having been established, the next question was whether the debt-claims must be legally determined at the time of the succession of States. Some devolution agreements and territorial treaties provided for the passing to the successor State of "all existing and future rights", which wording was not in conflict with the formula "property, rights and interests" used in article 5.

5. In order to pass to the successor State, debts must be due to the predecessor State and result from its activities or from its exercise of governmental authority in the territory in question; for not all debt claims of the predecessor State passed to the successor State. In the event of secession, decolonization or transfer of part of a territory, the predecessor State, which continued to exist, might retain debt-claims resulting from activities carried out elsewhere than in the territory to which the succession related. Thus article 11 was not applicable to debt-claims not directly connected with the territory. Admittedly, the territory might have contributed indirectly to the formation of the predecessor State's assets, and therefore be able to claim part of the debts owing to the State, but he had deliberately left that question aside.

6. The debt-claims need not necessarily be "located" in the territory to which the succession related. Since they were incorporeal assets, the claims could not, strictly speaking, have a location; only the debtor, the title to the debt and the pledged security, if any, could be located. For the purposes of article 11, it was sufficient that the debt-claims should result from the activity of the predecessor

<sup>1</sup> Yearbook . . . 1974, vol. II, Part One, pp. 91-115.

<sup>2</sup> Yearbook . . . 1973, vol. II, p. 29, foot-note 79.

<sup>3</sup> Ibid., p. 29, foot-note 74.

sor State or from its exercise of the governmental authority in the territory in question. The precedents were quite clear on that point, and he referred members to a decision of the Supreme Court of Poland, cited in his fourth report.<sup>4</sup> The debt-claims covered by article 11 were those of the predecessor State only. Accordingly, claims proper to the territory itself, such as those of a colony which had become independent, of a secessionist province or of ceded territory, should be excluded. The holder of such debt-claims was the territory, and hence the successor State.

7. The expression "debt-claims of all kinds" was intended to cover all the debts receivable by the predecessor State by reason of its activity in the territory, regardless of their geographical location. He had preferred the term "receivable" to the words "actually owed", because it had a broader meaning. The words "of all kinds" meant that it was immaterial what was the origin of the claim, the status of the debtor—who might be a natural or a legal person, a national of the predecessor State or a foreigner—or the legal nature of the claim, which could relate to a mortgage debt, a stock, a bond, a share, a government bond or a tax. State practice confirmed the existence of a customary rule, as was shown by the three examples cited in his fourth report, namely, the cession of the French Establishments in India in 1954, the cession of the southern Dobruja by Romania to Bulgaria in 1940 and the Belgo-Congolese Convention of 1965.<sup>5</sup>

8. So far as tax claims were concerned, there was a customary rule of succession to all taxes and, in general, to all debt-claims appertaining to the prerogatives of sovereignty. The change of sovereignty did not dispense anyone from payment of taxes and duties payable under the previous laws, so long as they had not been repealed or amended by the successor State. In France, for example, the *Cour de Cassation* had ruled that the annexation of Savoy to France in 1860 did not release a petitioner from the registration taxes he had owed under Sardinian law.<sup>6</sup> When Alsace-Lorraine had been annexed by the German Empire in 1871, a distinction had been made by treaty between private debt-claims of the French Treasury against industrialists established in Alsace-Lorraine, which could be recovered by the French Treasury, and debt-claims relating to taxes and other levies, which had passed to the German State.<sup>7</sup> In the case of the first category of debt-claims, the so-called private debt-claims which could arise from loans, there had been a change of attitude after the First World War. Under the Treaty of Saint-Germain-en-Laye and the Treaty of Trianon, funds advanced by the ceding States to private persons or local authorities could not be claimed by those States, especially as private persons and administrative authorities of the ceding States had had large claims against the ceding States arising out of their compulsory war loans.

9. A question of date could arise in connexion with taxes, for it sometimes happened that between the date of the agreement on the cession of a territory and the date of the actual succession, the predecessor State levied taxes in the territory. The fact that claims for tax refunds had been submitted to the predecessor State by private persons from whom the successor State claimed the same taxes, proved the existence of the customary rule stated in article 11. If the tax had been paid to the predecessor State, the claim of the successor State was not considered to be extinguished. In 1871, a dispute between France and Germany, which had arisen in consequence of war, had been settled in accordance with the customary rule.<sup>8</sup>

10. The situation varied according to the type of succession. In the case of transfer of part of a territory, tax claims should not pass to the successor State until the date of the succession, since before that date the proceeds of taxation could have been used for the territory to which the succession related, as well as for the rest of the territory of the predecessor State. In some cases, tax claims which had by law arisen and accrued to the predecessor State before the date of the succession agreement, and which had been paid before the date of the actual succession, had been successfully enforced by the successor State. In that connexion, he referred to the judgements of the Supreme Administrative Court of Czechoslovakia and the Supreme Court of Poland, cited in his fourth report.<sup>9</sup> Cases of decolonization should not give rise to any difficulties, since both before and after the succession of States taxes were collected by a territorial authority possessing a legal personality, at least from the fiscal point of view. Those tax claims were therefore debt-claims attaching to the territory. Complications might arise when there were transfers of population, as had occurred in Algeria. In that country, the disorders which had preceded independence, had made it impossible to collect taxes in full for two or three years. After independence, the Algerian Government had sought the help of the French Government and had proposed—without success—the establishment of a fund for the settlement of unpaid debts. The Algerian authorities had subsequently required French nationals finally leaving Algeria to produce, at the frontier post, a "tax clearance certificate", which had later been replaced by a simple unsworn declaration countersigned by the French Embassy at Algiers. That had been a kind of subrogation or guarantee by the French Government, but it had not proved to be a very satisfactory solution. In 1969, a tax agreement had been signed by the two countries, under which the Algerian and French Treasuries were required to recover, on each other's behalf, any tax owed by private persons in their respective territories. Nevertheless, taxes owing from the past had been very difficult to recover.

11. Draft article 11 also applied to cases in which more than one successor State was involved, such as those cited

<sup>4</sup> See *Yearbook* ... 1971, vol. II, Part One, p. 186, paras. (5) and (6).

<sup>5</sup> *Ibid.*, pp. 187-188, paras. (13) and (14).

<sup>6</sup> *Ibid.*, p. 188 para. (15).

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, para. (17) and p. 189, para. (18).

<sup>9</sup> *Ibid.*, p. 189, para. (20).

in his fourth report.<sup>10</sup> Those cases had given rise to an equitable distribution of debt-claims between the successor States—a solution with which article 11 was not incompatible, since it merely provided that each successor State would become the beneficiary of the debt-claims of the predecessor State. After the succession of India and Pakistan to the United Kingdom, the two successor States had continued to levy taxes in accordance with the previous laws and on their respective territorial bases.

12. Mr. TAMMES said that article 11 was a useful article in the draft: it served to specify that incorporeal State property, especially in the form of debt-claims, was part of the assets which passed from one sovereign to the other. That rule had to be stated expressly, because there had been some controversy in the past regarding the extent to which the transfer of title took place. The article was in its right context among the general provisions applicable to all types of succession of States. It was backed by a very thorough study which went back to the Special Rapporteur's fourth report.

13. That being said, he still had some doubts about the scope of article 11. The text as it stood would not have the clear effect of making all the predecessor State's debt-claims pass to the successor State. The words "debt-claims . . . receivable by the predecessor State by virtue of the exercise of its sovereignty" would cover tax claims, since taxes were imposed by virtue of sovereignty. The reference to the predecessor State's "activity in the territory to which the succession of States relates" would cover outstanding administrative fees or amounts due for services rendered. There remained, however, a third category of debt-claims which fell outside those two definitions: for example, claims arising from the possession of real estate or from financial holdings of the State in commercial enterprises. Those claims did not arise from acts of sovereignty; not could they be said to be receivable by virtue of the predecessor State's activity in the territory to which the succession of States related. He did not intend to reintroduce into the discussion the distinction between the public domain and the private domain of the State, or that between acts performed *jure gestionis* and acts performed *jure imperii*, but he thought the text of article 11 needed clarification. As it stood, it could be interpreted as excluding certain debt-claims like those specifically excluded by agreements between States in the past, a number of examples of which were given in the Special Rapporteur's reports.

14. Mr. KEARNEY said that article 11 dealt with problems which, to a large extent, fell within the scope of private international law. It should be noted that there was a great difference between conventions of private international law and conventions relating to matters of public international law. To give but one example, the 1974 Convention on the Limitation Period in the International Sale of Goods, which had been adopted as a result of the work of UNCITRAL,<sup>11</sup> contained some 40 articles dealing with the period within

which legal actions on claims arising from international sales must be brought. The present draft attempted to cover problems of at least equal complexity in a single article. His concern was similar to that expressed by Mr. Tammes, but somewhat broader. The text of article 11 seemed to him neither sufficiently clear nor sufficiently precise to achieve the desired result; he agreed, of course, that the object was desirable.

15. He was afraid that the provisions of article 11 would give rise to difficulties of interpretation. He understood that the Special Rapporteur had used the term "beneficiary" in order to allow some latitude in the application of the provisions; but the use of that term raised the important question whether the successor State became the actual creditor with regard to the debts in question or whether the predecessor State remained the creditor against whom the successor State had a right. The point was of considerable practical importance at a time when a great deal of trade was channelled through State trading organizations. An illustrative example would be that of goods produced in the territory to which the succession related and sold by the predecessor State before the succession, but which were being shipped at the time of the succession. The predecessor State would have certain rights under the negotiable bill of lading and other documents; the provisions of article 11, as proposed, would purport to substitute the successor State for the predecessor State in those rights. Such a result could not be achieved in practice under the existing rules and usages governing trade.

16. It was clear that article 11 needed improvement. A clearer and more precise rule was necessary to enable States whose system required it to enact appropriate legislation. In the absence of such clarification, each State would interpret the article in its own way and the solutions adopted would vary. Clarity was equally necessary for States in which international conventions that had been ratified were deemed to form part of internal law; it was necessary to avoid divergent interpretations of the same text in different States.

17. With regard to the scope of draft article 11, Mr. Tammes had construed the term "activity" very narrowly. For his part, he thought it could be given a very broad meaning. A problem of timing would arise, however. As an example, he mentioned the case of a twenty-year loan originally made, at least in part, from tax revenues of the territory to which the succession of States related. If, at the date of succession, eighteen annual instalments had been paid and two remained outstanding, would the successor State share in the last two amortization payments? If so, on what basis?

18. A further problem was that of mixed claims by the successor State and the predecessor State that antedated the succession; article 11 provided no guidance on how to deal with such claims. The respective rights of the predecessor State and the successor State would have to be determined. He had no specific wording to propose, but wished to draw attention to the need for fuller study of that aspect of the question.

19. Mr. ELIAS said that the principle underlying article 11 was acceptable; it supplemented the general

<sup>10</sup> *Ibid.*, p. 190, para. (24).

<sup>11</sup> See *Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods* (United Nations publication, Sales No. E.74.V.8) document A/CONF.63/15.

principle of the passing of all State property from the predecessor State to the successor State, which was laid down in article 9.

20. He was not satisfied, however, with the use of the term "debt-claim" which he found ambiguous. The term would have to be carefully defined or, better still, replaced by a different one. In his opinion, the passing of all assets from the predecessor State to the successor State necessarily implied the passing of all corresponding liabilities. Hence provision should be made not only for the passing of all claims, but also for the passing of all debts, and there appeared to be no justification for limiting the scope of the rule in article 11 to claims receivable. For example, a transferee of property took the property with the obligations attached to it; if the property was subject to a mortgage, the new owner would be liable for the mortgage debt. Clearly, the successor State could not succeed by virtue of article 9 to all State property in the territory to which the succession related and at the same time renounce all debts owed by the predecessor State. He had examined the series of articles in the section entitled "Property of third States" (A/CN.4/282, chapter IV.D) and had found that the provisions contained in them, particularly article Z (Treatment of the property of a third State), apparently did not cover the matter to which he had drawn attention.

21. Although the principle embodied in article 11 was generally acceptable, subject to adoption of some of the suggestions made by Mr. Tammes and Mr. Kearney, and his own suggestions, he thought the article should be framed as a residual rule and begin with the proviso "Unless otherwise agreed". Many of the matters mentioned by Mr. Tammes and Mr. Kearney, particularly the question of timing, were matters which States usually settled by agreement. The States concerned would always be anxious to remove those questions from the area of controversy, but a residual rule was necessary to deal with cases in which no provision was made on the subject in the devolution agreement or other instrument.

22. Mr. HAMBRO said that the principle of succession in regard to debts, as stated in draft article 11, was acceptable, but might be difficult to apply in the particular cases that were likely to arise. While he agreed that article 11 should be considered in conjunction with article 9, he was not sure that—as had been claimed—article 11 was a natural consequence of article 9. The provision that State property necessary for the exercise of sovereignty should pass to the successor State did not necessarily mean that debts which had accrued to that property would also be taken over by the successor State. If that was the intention, it should be made clear by amending the wording of either article 9 or article 11. Although both articles referred to sovereignty, two different aspects of sovereignty were involved, and they should be differentiated. In the light of the State practice cited by the Special Rapporteur, the term "beneficiary" appeared to mean that the successor State became a creditor in the place of the predecessor State. That point should also be made clear. As Mr. Elias had pointed out, draft article 11 was a residual article, but so were most of the articles on State succession.

23. The French text of draft article 11 used the terminology of French public international law and French administrative law, and had clearly been difficult to render into correct legal English. For example, he did not know the precise meaning of the term "State debt-claims" or to what branch of law it belonged. It had often been suggested that the meaning of texts could be clarified in the Commission's commentary, but that was a dangerous practice, as the commentary was not normally read by government officials, diplomats or the legal staff of ministries of foreign affairs. Texts to be used by governments must be clear, simple and self-sufficient. Draft article 11 dealt with a complicated matter, and its wording would have to be very carefully considered. That difficult task could be left to the Drafting Committee.

24. Mr. USHAKOV said that, in his opinion, article 11 did not concern the question of State property, which the Commission was considering at the moment. A State debt-claim, in the event of a succession of States, was a public debt contracted by a third State to the predecessor State. But could the debt-claim be said to be receivable by the predecessor State "by virtue of the exercise of its sovereignty . . . in the territory to which the succession of States relates"? He did not think so, because the debt was due to the State as a whole, and not to only a part of its territory. Nor could the successor State be said to be the beneficiary of debt-claims receivable by the predecessor State by virtue of the exercise of its sovereignty in the territory to which the succession of States related. After the succession of States, the predecessor State could no longer collect taxes in the territory to which the succession related, for that part of its territory had passed under the sovereignty of the successor State. Hence the successor State could not become the beneficiary of the proceeds of the taxes of the predecessor State, because those taxes no longer existed.

25. Exceptions to that rule could, of course, be found in practice. For example, during the transitional period when Czechoslovakia had existed *de jure* but not yet *de facto*, the Austro-Hungarian monarchy had still exercised governmental authority *de facto* in Czechoslovak territory and had accordingly collected the taxes which ought to have been collected *de jure* by Czechoslovakia. But that had been a transitional period and an exceptional case: normally, the successor State could not become the beneficiary of the tax revenue of the predecessor State in the territory to which the succession of States related, because that tax revenue ceased to exist after the transfer of the territory. The successor State could only become the beneficiary of its own taxes, under its internal law. Thus, the successor State could not, as provided in article 11, become the beneficiary of the debt-claims receivable by the predecessor State by virtue of the exercise of its sovereignty in the territory to which the succession of States related.

26. It might also be asked what was the nature of the "activity" referred to in article 11 as being carried on by the predecessor State in the territory to which the succession of States related. It could no longer be public activity, because the territory in question had passed under the sovereignty of another State. Hence, in the case of capitalist countries, it must be private activity,



and in the case of socialist countries, activity by a legal person in civil law in the territory which had belonged to the predecessor State and to which the succession of States related. For example, if a State had invested capital abroad in a civil-law company, could that capital be regarded as State property? Certainly not, for in that case, the State had not acted as a State, but as a legal person under its own civil law. The capital invested by a State in a civil-law company could not, therefore, be transferred to the successor State as State property, since it was not State property. Thus, if the successor State decided to nationalize a private enterprise, the capital invested in that enterprise by the predecessor State as a legal person in civil law could be nationalized without any compensation. It followed that the question of State debt-claims referred to in article 11 did not really belong to the topic of succession of States.

27. For the time being, he thought the Commission should keep to the question of State property in the strict sense; it should wait until it had disposed of that question before trying to settle the matter of State debt-claims. He agreed with Mr. Hambro that the French term "*créances d'Etat*" was much broader than the English expression "State debt-claims".

28. Mr. TSURUOKA said he shared most of the doubts expressed about article 11. As in the case of article 10, he urged the Commission to defer its decision on the question whether article 11 should be retained as one of the general provisions and, if so, in what form. He wondered whether what was to be said in article 11 had not already been said in the previous articles, in particular in article 9, as amended by the Drafting Committee<sup>12</sup> in the light of the proposal by Mr. Elias and the comments by Mr. Kearney and Sir Francis Vallat.

29. Most members of the Commission had taken the view that article 9 should refer only to the passing of State property in general, without touching on the question of the substitution of sovereignties. The Special Rapporteur himself had said that article 11 was only an application of the general rule in article 9. As it stood, therefore, article 11 was not justified, since it related not only to *lex gestionis*, but also to *lex imperialis*. In the second case, what was involved was not the effects of the succession of States, but the succession of States as such—in other words, the substitution of one sovereignty for another. But article 11 was meant to deal with State property, not with sovereignty itself. Consequently, everything pertaining to *lex imperialis* should be excluded from the article, and only what pertained to *lex gestionis* should be retained.

30. He recognized, if not the necessity, at least the practical advantage of formulating a general rule on State debt-claims; but he thought that such a general rule could not be worked out until the many problems it raised had been examined and settled one by one. The Commission should therefore defer its decision on article 11.

31. Sir Francis VALLAT said that most questions arising in connexion with State succession in general, and

with succession to State property in particular, would be settled by agreement or by the exercise of sovereign powers, and the Commission was really trying to make provision for the exceptional cases. It was drafting residual rules, and the fact that draft article 11 would apply only to exceptional cases was no reason for omitting it. He agreed with its underlying principle, which should be expressed somewhere in the draft articles. Whether it should be left in article 11, subsumed under article 9, or placed elsewhere, was a drafting question. The Commission should not be afraid to deal with particular concrete problems, but should resist the tendency to present governments with abstract rules that would be difficult to understand and apply.

32. Draft article 11 was clearly related to article 5 and to article 9. It also had links with articles yet to be considered, especially articles 13, 17, 21 and 29 (A/CN.4/282). For example, it would be difficult to invest funds, as contemplated in article 13, without creating a debt-claim in some form. When draft article 13 came to be considered, its terms would have to be brought into line with those of draft article 11 or vice versa; at the moment, the two articles applied to quite different situations, inasmuch as one referred to sovereignty and activities in the transferred territory, and the other to funds situated in, or allocated to, the transferred territory. Paragraph 2 of article 13 also introduced the question of costs and liabilities. References to assets, rights and debt-claims might create the impression that only the positive side of succession to State property was considered important and that such property could be taken over free of all obligations attaching to it. Such an emphasis could have unfortunate implications regarding the negative side of succession.

33. He shared Mr. Ushakov's doubts about the equivalence of the terms "*créances d'Etat*" and "State debt-claims". The latter was not an English legal term: English lawyers would speak of "liquidated" or "unliquidated" claims. He was not sure whether the term "debt-claims" would include unpaid claims for damages, for example. If article 11 was retained, it should not give the impression that certain kinds of claim would pass to the successor State while others, equally justified in principle, would not. That point should be considered by the Drafting Committee.

The meeting rose at 1 p.m.

### 1323rd MEETING

Thursday, 5 June 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

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

<sup>12</sup> See 1329th meeting, para. 2.



### Organization of work

(resumed from the 1313th meeting)

1. Mr. KEARNEY said that the small advisory group of the Enlarged Bureau had discussed ways of speeding up consideration of the draft articles on State succession and had concluded that those in section 2, "Provisions relating to each type of succession of States" (A/CN.4/282), could be more expeditiously dealt with if they were reproduced in a comparative table, using a separate column for each type of succession. The corresponding articles, for example, articles 12, 16, 20 and 28, would be on the same line, so that their differences and resemblances would be easy to see. In that way, the Commission might even be able to consider four articles at a time.
2. Sir Francis VALLAT supported that procedure and suggested that the work might be speeded up further, at that stage, by leaving aside the general articles on third States, consideration of which might take some time.
3. Mr. BEDJAOUÏ said he was grateful to the advisory group for its proposal, as he was in favour of any arrangement which could help the Commission to save time. He pointed out, however, that the three articles X, Y and Z, relating to the property of third States, had been suggested to him by comments made by members of the Commission in 1973. By those articles he had tried to dissipate certain anxieties which had then been expressed. The three articles should not take up much time, as they raised no major problems. Moreover, he feared that when the Commission took up the different types of State succession and the different classes of State property, it might need to consider what happened to the property of third States. In his opinion it would therefore be preferable to deal with that question quickly, before passing on to the different types of succession. Consideration of the three articles on the property of third States would make the Commission's work easier later on.
4. Mr. KEARNEY said that, since the proposed comparative table could not be prepared before Monday, the Commission would still have time to discuss draft articles X, Y and Z, perhaps taking them up together.
5. The CHAIRMAN said he took it that the Commission wished the Secretariat to prepare the proposed comparative table of the draft articles in section 2.

*It was so agreed.*

### Succession of States in respect of matters other than treaties

(A/CN.4/282)<sup>1</sup>

[Item 2 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR  
ARTICLE 11 (State debt-claims)<sup>2</sup> (continued)

6. Mr. SETTE CÂMARA said he had no difficulty in accepting the rule in article 11, though it was so obvious that he doubted whether the article was necessary. The question it dealt with was already settled by

articles 5 and 9 (A/CN.4/282). The subject of debts in State succession was extensive and complicated, and it might be misleading to devote only one article to it, dealing solely with the position of creditor States. The nature of the succession played an important part in the matter of debt: for example, the position would depend on whether the predecessor State disappeared or retained its personality, and even on the viability of the predecessor State. There were also many kinds of debt. As the principle was already laid down in articles 5 and 9, it seemed unwise to deal with a particular aspect of the matter.

7. He suggested that draft article 11, like draft article 10, should be placed in square brackets and left aside until examination of the other articles had shown whether a special article on debts was needed.

8. Mr. RAMANGASOAVINA said he thought article 11 was very important, because the successor State must be able to rely on debt-claims which had arisen before the date of the succession, but were needed to ensure the continuity of the State despite the change of sovereignty over the territory. To question the need for the article would amount to presenting the choice between the principle of continuity and the "clean slate" principle in regard to that particular aspect of State property. But as several members of the Commission had emphasized, the sovereignty of the State entailed continuity of its services and institutions. It was, indeed, obvious that in order to survive, the successor State must have the means necessary for the performance of its tasks and the functioning of its services, its institutions and its defence. Hence it must be able to count, immediately, not only on the patrimonial property left by the predecessor State, but also on the resources—taxation, revenue, duties and other receipts—which it was entitled to expect from its nationals and from its property in its territory, and sometimes even outside its territory.

9. Since the succession of States meant replacement of sovereignty and of responsibility, the successor State was entitled, from the date of the succession, to collect debts which were owing—just as it was entitled to levy taxes and to mint money. It had a perfectly legitimate right of succession to debts owing to the predecessor State. The debts in question were fiscal or other debts, the amount of which had been determined before the succession of States, but which had not been collected before the succession. The right to collect those debts guaranteed the continuity of the life of the State, since a break in continuity in the collection of debts might be fatal to the successor State.

10. It might, of course, be found surprising that article 11 referred to claims without mentioning debts—in other words, that it referred to rights without mentioning the obligations which were their necessary counterpart—for a patrimonial succession necessarily included both assets and liabilities. But a reading of the later articles showed that the Special Rapporteur had not lost sight of the successor State's obligations. They were dealt with in article 13, on treasury and State funds, that was to say, public debts. Hence, article 11 was necessary.

11. With regard to terminology, several members of the Commission had made reservations regarding the

<sup>1</sup> Yearbook . . . 1974, vol. II, Part One, pp. 91-115.

<sup>2</sup> For text see previous meeting, para. 1.

expression "State debt-claims" used in the English text of the article. In French law the word *créance* and the word *dette* certainly had very precise meanings: a *créance* was the right to demand payment in money or in kind from another person, whereas a *dette*, which was its counterpart, was the obligation to pay in money or in kind. Thus it seemed that the expression "State debt-claims" did not correspond exactly to the French expression *créances d'Etat*. In that respect, as in the case of movable and immovable property, the common law systems were not quite the same as the code systems, and the terminology was not entirely equivalent. He believed, however, that in the French text the word *créances* was perfectly correct and had a very precise meaning. On the other hand, he had reservations about the term *redévenables*, which in his opinion could only be applied to persons, and which he proposed should be replaced by the word *dues*. In addition, he would prefer article 11 to refer to debt-claims receivable by the predecessor State "by virtue of the exercise of its sovereignty and its activity in the territory", because "sovereignty" and "activity" were two necessary terms which were not mutually exclusive, but complementary, sovereignty being the basis of the right to collect debts and activity being the purpose of that right, since it meant the functioning and the very life of the State.

12. He considered that article 11 was necessary and perfectly appropriate in the draft articles, since it was an essential article which could be applied to all the types of succession contemplated. With a few changes in terminology its wording seemed perfectly acceptable.

13. Mr. USTOR said that the opening phrase of paragraph 1 of the original version of draft article 11,<sup>3</sup> "Irrespective of the type of succession", indicated that the article had been intended as a general rule. In his sixth report, however, the Special Rapporteur had stated in his commentary to article 11 that that article and the following articles to some extent represented *lex specialis*, as opposed to the *lex generalis* laid down in article 9.<sup>4</sup> But a special rule was justified only if it provided a solution different from that provided by the general rule, and that did not seem to be true of the present wording of article 11. It was obviously difficult, if not impossible, to formulate articles of general validity for all types of succession.

14. In citing instances of the treatment of State property, the Special Rapporteur had often referred to peace treaties; the Commission should, however, be very cautious about accepting peace treaties as precedents or as proof of custom, because they rarely reflected customary international law and very often contained rules conflicting with general international law.

15. Mr. CALLE Y CALLE said he thought that the intended meaning of the proposed rule on the complex and delicate problem of debt-claims in cases of succession was conveyed more accurately in the Spanish version than in the other two languages. *Los créditos ... de que era titular el Estado* accurately described what should

pass to the successor State as part of the property, rights and interests previously owned by the predecessor State. Such claims would include claims to unpaid taxes, but also, for example, income from real property and the proceeds of sales. Draft article 11 rightly covered all kinds of claims that had previously been vested in the predecessor State by virtue of its sovereignty or its activity in the territory concerned.

16. It would be desirable to apply some test other than that of sovereignty, for the article was intended to apply to all types of succession, including cases involving newly-independent States. It was undesirable to give the impression that there had been sovereignty prior to succession in all cases. The term "activity", however, was not entirely satisfactory as an alternative to the sovereignty test and should perhaps be replaced by the word "administration", since debt-claims arose as often from the predecessor State's administration of the territory as from its commercial activities in the territory.

17. Although draft article 11 laid down an accepted general rule, it was also a residual rule, in that debt-claims were in practice often the subject of special agreements or settlements. It would therefore be appropriate to insert some such phrase as "unless otherwise agreed", as Mr. Elias had suggested.<sup>5</sup>

18. Mr. BILGE said that article 11 was useful and that it complemented article 9 in so far as it dealt with one of the classes of State property. He therefore accepted it, subject to certain reservations already made by other members of the Commission.

19. He agreed with Mr. Kearney that it was necessary first to define the legal nature of the acquisition by the successor State of the claims of the predecessor State. In that matter, the Commission should be guided by article 6. It would also be necessary, as Mr. Tammes had said, to determine which claims passed to the successor State.<sup>6</sup> That should not be difficult, since the notion of State debt-claims was well defined. In that respect the Commission should be guided by article 9. In addition, as Mr. Elias had said, article 11 should refer not only to State claims, but also to the obligations attaching to those claims.

20. He wondered whether, as in the case of article 9, succession to claims could not perhaps be geographically limited to the territory to which the succession of States related. He did not think that limitation could be applied to all types of succession, especially not to cases in which the predecessor State disappeared completely.

21. Mr. QUENTIN-BAXTER said that obviously neither article 11 nor any other article on State debt-claims could be regarded as a fetter on the sovereignty of a State, affecting its autonomy as the law-maker in its territory. If the new sovereign acted wrongly, it might engage its international responsibility, but that was a matter outside the field of succession to State property. The same question had arisen in the case of article 10 and, in his opinion, draft article 11 could also be dispensed with. The subject of debts could be dealt

<sup>3</sup> Yearbook ... 1971, vol. II, Part One, p. 185, article 9.

<sup>4</sup> Yearbook ... 1973, vol. II, p. 28, para. (2).

<sup>5</sup> See previous meeting, para. 21.

<sup>6</sup> Ibid., para. 13.

with in the context of article 5; but in the realm of State property matters were clearly defined, and any rule must be made to mean what was intended.

22. Draft article 11 could not properly be described as a particular application of the general rule in article 9, which, although not yet in its final form, would probably lay down a norm subject to exceptions. It was important to avoid the implication that draft article 11 was to be construed as a limitation on article 9: it was intended to complement that article by clarifying a difficult area. The two articles were interdependent and should therefore be very carefully drafted. No decision had yet been reached on where the boundary between general rules and special rules lay, or on the relationship between them. The Commission's attitude in the present instance should be the same as that which it expected to adopt in regard to the draft articles yet to be considered. If retained, draft article 11 should add substance to the bare principles laid down in articles 5 and 9.

23. Mr. BEDJAOUI (Special Rapporteur) observed that, on the whole, the members of the Commission considered that draft article 11 was useful and necessary and that it should be referred to the Drafting Committee. Some of the comments made during the discussion nevertheless called for clarification.

24. For example, Mr. Ushakov had tried to show that the article did not concern State property, and to that end had advanced three arguments.<sup>7</sup> First, he had contended that, in so far as it related to tax claims, article 11 dealt only with an exceptional case. But if one examined what happened in reality, three stages could be distinguished: the arising of the right to levy a tax, the tax declaration and the collection of the tax. In the first stage, the State decided to levy a tax for a certain period, such as one year. In the second, the taxpayer filed a tax declaration for the previous year; that second stage could itself last for one year. The third stage was the collection of the tax, which could last another year. Thus the collection of taxes by the successor State on the basis of an act of sovereignty by the predecessor State, was not carried out only during a transitional period, such as the time between the *de jure* separation and the *de facto* separation of a State, but often over a much longer period. It should not be concluded from those facts that the predecessor State was entitled to collect taxes owing after the succession had occurred, but rather that the successor State might be left with declarations in respect of which the tax had not yet been collected. The taxes collected in the first year after the succession of States were often taxes due from private persons or companies on their income for the previous two years. In fact, the tax debts collected during the transitional period between the *de jure* creation and the *de facto* creation of the successor State were relatively few, whereas the tax debts arising under the legal order of the predecessor State and collected by the successor State during the next few years following the succession, represented large amounts. They comprised all the taxation of a State for several years.

25. Secondly, Mr. Ushakov had observed that the debt-claims of the predecessor State could not be due to it by virtue of its activity in the territory in question, because it had withdrawn from that territory at the time of succession. The answer to that argument was that it was the activity of the predecessor State before the succession which was referred to. The predecessor State could never collect all its debt-claims or liquidate all its patrimonial rights before withdrawing from the territory. There were thus three possible solutions: to let the predecessor State collect its debt-claims after the succession, which would infringe the sovereignty of the successor State; to regard the claims as being extinguished, which would not be satisfactory either; or to let the successor State collect the debts as proposed in article 11. In addition, Mr. Ushakov had argued that any private activities carried on by the predecessor State in the territory in question must necessarily have been conducted through a legal person under its civil law, so that State property was not involved. In that connexion, allowance had to be made for all the legal concepts applied in the different systems of law, even if they differed widely from concepts familiar to individual members of the Commission. Article 11 took account of the fact that, in some systems of law, the State could carry on a commercial or industrial activity without acting through a legal person in private law.

26. Thirdly, Mr. Ushakov had remarked that debts owed to the predecessor State by a third State as the result of a loan, for example, could not be receivable by the successor State only. He (the Special Rapporteur) had been aware of that problem but had not wished to settle it in article 11. A claim of that kind did not pass to the successor State under article 11, because the debt was not owed to the predecessor State by virtue of "its activity in the territory". However, if the loan made by the predecessor State to the third State had some connexion with the territory, the successor State might become the beneficiary of the claim to the extent of that connexion. In any case, article 11 applied to State debt-claims only in so far as they were connected with the territory.

27. The use of the words "shall become the beneficiary of" had caused Mr. Kearney to ask whether, under article 11, the successor State was considered as the only real creditor after the succession.<sup>8</sup> Mr. Kearney had wondered whether the successor State would have a claim against the predecessor State if the latter had collected the debt during the "transitional period". On that point, he (the Special Rapporteur) referred to draft article 6, according to which a succession of States entailed the extinction of the rights of the predecessor State; it followed, in particular, that its right to recover debts disappeared. According to article 7, the rights of the predecessor State became extinct on the date of the succession of States, whereupon the successor State became the owner of the claim. As was shown by the Czechoslovak, Polish and French judicial decisions he had cited at the previous meeting,<sup>9</sup> the payment of debts to the predecessor State did not constitute a discharge

<sup>7</sup> *Ibid.*, paras. 24 et seq.

<sup>8</sup> *Ibid.*, para. 15.

<sup>9</sup> *Ibid.*, paras. 6-10.

vis-à-vis the successor State. On the strength of article 6 it would be open to the successor State to apply to the predecessor State for reimbursement of the amount improperly collected.

28. In fact, Mr. Kearney's question indirectly raised the problem of the possible offsetting of the debt which a State or individual owed to the predecessor State against any claim such a State or individual might have against the predecessor State. According to the Czechoslovak judgements,<sup>10</sup> a private individual was not entitled to do such offsetting, though the situation was quite different when a third State was both a creditor and a debtor. Under article 11, the successor State could not be held liable for debts which the predecessor State owed to a third State. That question would be dealt with in the provisions of the draft relating to State debts. It was only after it had dealt with State debts that the Commission would be in a position to consider the possibility of offsetting operations. It was necessary to distinguish between a debt-claim of the predecessor State owed to the successor State by a third State in accordance with article 11, and a debt which the predecessor State might have contracted to the third State.

29. The English translation of article 11 seemed to be the source of certain misunderstandings. For example, Mr. Elias had observed that the claims passing to the successor State should be accompanied by any outstanding charges. In his previous reports, however, he had stated that the property which passed to the successor State passed to it as such; that was true of debt-claims in particular. Moreover, in introducing draft article 11 at the previous meeting, he had expressly referred to mortgage debts.<sup>11</sup> Mr. Tammes had questioned whether article 11 was general enough to cover, in addition to income from State property, income from non-State property, such as that from a State's financial participation in industrial enterprises. He (the Special Rapporteur) considered that such income should pass normally to the successor State if it was derived from an activity carried on in the territory to which the succession related. Moreover, neither article 11 nor article 9 excluded such income.

30. In view of a suggestion made by some members of the Commission who wished to make article 11 a residual rule, he suggested that the Drafting Committee might consider the possibility of adding the words "unless otherwise agreed".

31. In his sixth report, the rule in article 11 had been termed *lex specialis*. When he had prepared that report, his draft had been divided into general provisions, provisions common to all types of succession of States and provisions relating to each type of succession. At the commission's request, he had subsequently recast the text by eliminating the provisions common to all four types of succession. That was why the article relating to State debt-claims, which had been among the provisions common to the various types of succession, had then constituted *lex specialis*, whereas it should now be

regarded as stating *lex generalis*, since it was among the general provisions. That would explain the point raised by Mr. Ustor.

32. Although the question of claims and the question of debts might be interrelated, he did not think that article 11 should be left aside until the Commission had considered the provisions relating to debts, as Mr. Sette Câmara had suggested. In law, claims were distinct from debts, and they should be studied separately. In particular, localized debts, State debts and government debts, which had nothing to do with the subject dealt with in article 11, would have to be studied separately later. There again, the English version of article 11 might account for the difficulties encountered by some members of the Commission.

33. In reply to a comment by Mr. Ramangasoavina, he explained that in the expression "its sovereignty or its activity" the conjunction "or" was intended to be cumulative, not to denote an alternative. The term "sovereignty" could be replaced by the expression "governmental authority", since it did not apply to cases of decolonization; for according to the Declaration on the Granting of Independence to Colonial Countries and Peoples<sup>12</sup> and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,<sup>13</sup> the colonizing State did not exercise real sovereignty over a non-self-governing territory, but acted as an administering authority.

34. The French term "*redevenables*", the Spanish equivalent of which Mr. Calle y Calle considered satisfactory, had been criticized by Mr. Ramangasoavina. The reason why it had been preferred to the word "*dues*" was that its meaning was broad enough to cover not only existing rights, but also future rights.

35. He appreciated that, as Mr. Ustor had said, peace treaties should be interpreted with great caution. His purpose in mentioning them had been to show that they did not always confirm the solution adopted in article 11. Since his very first report, he had warned against the solutions appearing in peace treaties, and against "abortive or precarious solutions" which would inevitably be called in question again soon by the successor State.<sup>14</sup>

36. Mr. KEARNEY said that, having heard the Special Rapporteur's enlightening remarks on the wording used in article 11, he was in a position to make a number of comments.

37. In the first place, since article 11 governed problems which largely affected questions of private law, the wording should be very precise as to the rights and obligations covered by its provisions. In the absence of such precision, those provisions could prove totally ineffective. For example, the transfer envisaged in article 11 might include claims to debts under a formal instrument of the type of a trust indenture. If under such an instrument

<sup>10</sup> Yearbook . . . 1971, vol. II, Part One, p. 189, para. (20).

<sup>11</sup> See previous meeting, para. 7.

<sup>12</sup> General Assembly resolution 1514 (XV).

<sup>13</sup> General Assembly resolution 2625 (XXV), annex.

<sup>14</sup> Yearbook . . . 1968, vol. II, p. 100, para. 35.

a bank was required to make payments to a particular State, it would not make payments to any other State because vague language in an international convention could be interpreted to the effect that it should do so. In order to achieve that result—in other words, in order that the successor State should become the beneficiary in the place of the predecessor State in the circumstances envisaged in article 11—the international convention would have to give legal protection to the bank that made the payment. Failing such protection, the bank would simply pay the amount due into court and allow the two States concerned to fight out the issue between themselves. That problem was a very real one and could not be avoided when article 11 came to be redrafted. The text should make it perfectly clear that, from the legal point of view, the successor State became the actual creditor. It should also specify unambiguously that payment made to the successor State discharged the debtor from all liability towards any other claimants.

38. There was a second matter for which specific provision should be made. Article 11 should state that if, under the conditions governing the debt, the debtor had no other choice than to make payment to the predecessor State, then that State was under an obligation to pay the proceeds to the successor State without delay.

39. A third problem was that of mixed claims arising from activities carried on before the succession by the predecessor State in the territory to which the succession related, combined with activities in the remainder of the predecessor State's territory. A complication was that the activities in question could be continuing. It would not be easy to make due allowance for that problem; one possibility would be to hold the matter over until the Commission had considered the question of public debts. If that course was adopted, a full explanation should be given in the commentary to article 11.

40. Lastly, it was important to clarify the references to the "sovereignty" and the "activity" of the predecessor State in the territory to which the succession of States related.

41. He hoped that the Drafting Committee would take all those points into account when redrafting article 11.

42. Mr. USHAKOV, after thanking the Special Rapporteur for his explanations, said that the English expression "debt-claims" was misleading because the article was not concerned with debts.

43. Furthermore, under Soviet law, as under the law of some other countries, the State could act either as a public authority or as a person in civil law. In the first case, it was subject neither to the jurisdiction of the Soviet Union nor to that of any other State; in the second case, it was subject to a national jurisdiction. For example, when the Soviet State concluded a treaty with another State, it acted as a State and was accordingly subject to international law. On the other hand, when it concluded a contract with a foreign company, it could agree to be subject either to the jurisdiction of the Soviet Union or to that of another State. In that case, it was acting as a legal person under private law. Hence, it was not always State property that was involved, but the property of a legal person subject to private-law jurisdiction.

44. Mr. BEDJAOUÏ (Special Rapporteur) replied that a State could indeed act as a legal person and be treated almost like a private person, particularly in the case of a dispute with a foreign company or even with a domestic company. That showed how complex the problem was. Without going into details of the situations that could arise in different States, the essential point was that, where State debt-claims were concerned, article 11 applied.

45. The CHAIRMAN proposed that draft article 11 should be referred to the Drafting Committee.

*It was so agreed.*<sup>15</sup>

The meeting rose at 12.50 p.m.

<sup>15</sup> For resumption of the discussion see 1329th meeting, para. 9.

## 1324th MEETING

Friday, 6 June 1975, at 10.15 a.m.

*Chairman:* Mr. Abdul Hakim TABIBI

*Members present:* Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

### Succession of States in respect of matters other than treaties

(A/CN.4/282)<sup>1</sup>

[Item 2 of the agenda]

(continued)

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR ARTICLE X

1. The CHAIRMAN invited the Special Rapporteur to introduce draft article X, which read:

*Article X<sup>2</sup>*

*Definition of a third State*

For the purposes of the articles in the present Part, "third State" means a State which is neither the predecessor State nor the successor State.

2. Mr. BEDJAOUÏ (Special Rapporteur) reminded the Commission that it had been because of the concern expressed by certain members at its twenty-fifth session<sup>3</sup> that he had introduced into his draft three articles relating to the property of third States: articles X, Y, and Z (A/CN.4/282). Those provisions, which had been drafted in haste, dealt only with property of third States situated in the territory to which the succession related. Several of the provisions relating to the different types of succession, however, referred to a third State not only because it owned property in the territory to which the succession related, but also because property which had belonged to the predecessor State at the time of the succession was

<sup>1</sup> *Yearbook* . . . 1974, vol. II, Part One, pp. 91-115.

<sup>2</sup> Text as revised by the Special Rapporteur.

<sup>3</sup> *Yearbook* . . . 1973, vol. I, 1240th meeting.

situated in the territory of the third State. He had therefore amended the definition of a third State given in article X so that it would cover both those cases. Various situations could arise. It sometimes happened that a third State did not own any property in the territory to which the succession of States related or that the property it owned was situated in the part of the territory retained by the predecessor State after the succession. Those two situations were not affected by the change of sovereignty. On the other hand, it was important to consider what happened to property of a third State which was situated in the territory to which the succession related and to property which had belonged to the predecessor State and was situated in the territory of a third State.

3. In paragraph (5) of the commentary to article X (A/CN.4/282, chapter IV.D) he had mentioned that the Commission had adopted different definitions of a third State according to the subject-matter dealt with. A third State could, indeed, be defined only in relation to a particular situation or legal act; that was why a specific definition was proposed in the draft. Where State property was concerned, the third State was a former partner of the predecessor State, either because it had owned property in the territory affected by the change of sovereignty, or because property which had belonged to the predecessor State was situated in its territory. It was not necessary to consider the whole of the real relations, including those concerning property of the third State situated in the territory or part of the territory of the predecessor State which was not affected by the succession of States. The succession had no effect on the legal status of such property. The third State was characterized by the fact that it was extraneous to the succession. It was neither the ceding nor the succeeding State; nor was it the subject, or a beneficiary, of the territorial change. Consequently, the new definition of a third State which he had proposed was cast in negative form. It could later become a sub-paragraph of article 3, on the use of terms.

4. Sir Francis VALLAT said that he would speak on all three articles of the section entitled "Property of a third State", not only on article X, containing the definition. He had considerable doubts as to whether those articles, and more particularly the substantive article Z, were really essential in the draft. If one State replaced another in the responsibility for the international relations of a territory, that replacement could not possibly have any legal effect on the property of a third State. The succession produced effects only between the successor State and the predecessor State. It was accordingly a wrong approach to think of succession as capable of affecting the rights of any State other than the successor State and the predecessor State, and the adoption of that approach might have the serious implication that property rights of third parties of any kind could be affected by the succession. If the Commission found it necessary to make specific provision for third States in its draft, it would also have to consider the position regarding the property of other third parties such as companies, individuals and institutions.

5. The basic principle in the matter was that, after the succession of States, the legal situation in the territory

to which the succession related continued unchanged so long as the new sovereign took no action to alter it. Indeed, there might be room in the draft for a clear statement of that important legal principle.

6. Mr. USHAKOV said that in normal circumstances general rules should not be drafted before special rules, but that in that particular instance it was advisable to introduce a definition of a third State into the draft at once. Nevertheless, the draft articles on the property of third States seemed to be inadequate, since they did not cover the case of property situated in the territory of the predecessor State or of the successor State; and it was not impossible that such property might be affected by a succession of States. Consequently, draft article Z should be more general and should not be confined to property situated in the territory to which the succession of States related.

7. Furthermore, the words "except where this is contrary to the public policy (*ordre public*) of the successor State", at the end of article Z, were not justified. For the principle that the third State's property in the territory of the predecessor or the successor State was not affected by the succession of States should not suffer any limitation, and in any case the application of that principle could not be contrary to the public policy of the successor State. Nor were the words "The rights of a third State pertaining to its property", at the beginning of article Z, satisfactory. It should be made clear that the reference was to the State property of the third State.

8. With regard to article Y, he reminded the Commission that at its twenty-fifth session he had raised objections to the wording of article 5.<sup>4</sup> Under the terms of that article, "State property" meant the property, rights and interests of the predecessor State. If the expression "State property of the third State" were now used in article Y, the words "State property" would mean, in accordance with article 5, State property of the predecessor State, which would be absurd. That difficulty was due to the fact that the definition of State property in article 5 applied to State property of the predecessor State, not to State property in general. Moreover, as it stood, that definition was not satisfactory even in regard to State property of the predecessor State. In the case of decolonization, it was not the internal law of the predecessor State that applied in determining the State property situated in the newly independent territory, but the law applicable to that territory. The Commission should therefore draft a new definition of State property of the predecessor State when it came to examine the provisions relating to newly independent States.

9. While he approved of the substance of article Z, he would prefer it to be drafted in more general terms. He proposed the following text: "A succession of States shall not as such affect the rights of a third State pertaining to its State property situated in the territory of the predecessor State or of the successor State".

10. Mr. HAMBRO said he fully agreed with the views expressed by Sir Francis Vallat. The draft articles under consideration applied only to the relations between the

<sup>4</sup> *Ibid.*, p. 108, paras. 43 *et seq.*

predecessor State and the successor State in the context of the succession of States. The question of the property of third States was wholly outside the subject. Consequently, despite the laudable efforts made by the Special Rapporteur, draft articles X, Y and Z were not necessary or even useful in the context of the draft. Moreover, as those provisions referred only to the property of third States, what would happen to the property of national or international companies, or the property of private persons who were nationals of a third State? There was no obvious reason for drawing a distinction between the property of a third State and the property of other third parties. As it enjoyed all the attributes of sovereignty, the successor State was free to take whatever measures it saw fit to take in its territory with regard to the property of third States and the property of foreign private persons. In particular, it could acquire such property or nationalize it. The questions of price and compensation which might then arise had no connexion with the phenomenon of succession. He therefore considered that the three articles X, Y and Z should be omitted from the draft.

11. Mr. ELIAS said it would be helpful to the Commission if the Special Rapporteur were invited to introduce articles Y and Z at that stage. Articles X, Y and Z constituted a set of new articles intended to supplement the Special Rapporteur's sixth report. Many members, including himself, would wish to comment on all three articles and it would facilitate the discussion if the Special Rapporteur had an opportunity of explaining in greater detail his reasons for proposing the whole set.

12. With regard to article X, he noted the Special Rapporteur's own hesitations, expressed in paragraph (9) of the commentary, where he proposed that the definition contained in the article should be used only provisionally and should not be included in a separate paragraph for insertion in draft article 3, on the use of terms.

13. The main clause of the substantive article Z adequately expressed the essential idea of continuity. As to the concluding exception "except where this is contrary to the public policy (*ordre public*) of the successor State", he noted that the Special Rapporteur himself had serious doubts, for the reasons indicated in paragraphs (7) and (8) of the commentary. Paragraph (8) showed that he had no intention of suggesting that the successor State should be given a free hand in regard to the property of a third State.

14. Unless article Z was heavily revised, in particular by removing the controversial exception concerning public policy, it should have no place in the draft articles.

#### ARTICLES Y AND Z

15. The CHAIRMAN invited the Special Rapporteur to introduce articles Y and Z, which read:

##### *Article Y*

##### *Determination of the property of a third State*

For the purposes of the articles in the present Part, "property of a third State" means property, rights and interests which, on the date of the succession of States, were, according to the internal law of the predecessor State, owned by the third State in the territory to which the succession of States relates.

##### *Article Z*

##### *Treatment of the property of a third State*

The rights of a third State pertaining to its property situated in the territory to which the succession of States relates shall not be affected by the succession, except where this is contrary to the public policy (*ordre public*) of the successor State.

16. Mr. BEDJAOUI (Special Rapporteur) said that the determination of the property of a third State, which was the subject of article Y, could be effected only in the light of the definition of State property formulated by the Commission in article 5. During the long discussions on that definition he had emphasized the difficulty of determining State property solely by reference to the internal law of the predecessor State. In his third report, he had cited numerous examples of the practice of successor States which had applied their own internal law to determine what property had passed to them.<sup>5</sup> In addition, he had emphasized that, even within the legal order of the predecessor State, a distinction must be made in the case of dependent territories. In that case, two legal orders co-existed, in so far as a colonial State applied in a dependent territory specific legislation different from the more liberal laws in force in the "metropolitan" country. Nevertheless, the Commission had taken the view that reference should be made to the law of the predecessor State, and it was that choice which was the origin of the anomaly pointed out by Mr. Ushakov. In fact, article 5 related to the State property of the predecessor State which could pass to the successor State, but that did not mean that the property of a third State referred to in article Y was not State property. If article Y simply provided that "property of a third State" meant property, rights and interests which, on the date of the succession of States, were, according to the internal law of the predecessor State, owned by the third State, the difficulty would not be removed, since the property of the third State, wherever it might be situated, including property in its own territory, could not all be defined by reference to the internal law of the predecessor State. Hence it was essential to refer expressly to the property of the third State which was situated in the territory the succession of States related to, and which might be affected by that succession. Thus the property in the territory in question included State property which had been owned by the predecessor State under its internal law, as provided in article 5, and the State property which had been owned by a third State under the same law, as provided in article Y.

17. Referring to Mr. Ushakov's comments, he urged the need to avoid going into details of the legal concepts peculiar to each system of law. The Commission should not inquire whether property was in the public domain or the private domain, or whether a State acted as a sovereign State or as a legal person in private law; it should start from the principle that it was State property according to the internal law of the predecessor State that was concerned, and then consider what happened to it.

18. As to article Z, he stressed that it had been in deference to the Commission's wish that he had introduced

<sup>5</sup> *Yearbook* . . . 1970, vol. II, p. 137, section C.



that article into the draft. Hence he was surprised that some members of the Commission now thought that provision superfluous and feared that it might be interpreted *a contrario* as meaning that the successor State could take over foreign private property. In fact, private property was not dealt with in the part of the draft now being examined, which dealt exclusively with State property. Perhaps that point should be mentioned in the commentary.

19. With regard to the reservation in article Z concerning the public policy of the successor State, to which Mr. Ushakov had referred, he explained that he had in mind cases in which successor States enacted laws preventing the presence in their territory of certain property of a foreign State. It might happen that a State could not tolerate the continued presence in its territory of a mixed State company, because a certain third State had a share in it. In that connexion, he referred to paragraph (4) of the commentary to article Z (A/CN.4/282, chapter IV.D). As Mr. Hambro had rightly observed, a case of that kind had no relation to succession of States. The rights of third States in their property were inviolable, but if the successor State interfered with such property, it did so as a sovereign State, not as a successor State. If article Z only provided that the property of a third State was in no circumstances affected by the succession of States, it might give the impression that the successor State could not touch that property in any way, even if it was not in conformity with its public policy. Consequently, if the reservation concerning the public policy of the successor State was deleted, it would be necessary to explain, in the commentary on article Z, that by virtue of its attributes as a sovereign State, the successor State could, after the succession, take certain action in regard to the rights of a third State.

20. Mr. TSURUOKA considered that the definition of a third State given in article X was acceptable, subject to minor drafting amendments. In the French text, the words *l'Etat tiers désigne un Etat . . .* might be replaced by the words *l'Etat tiers s'entend d'un Etat . . .* already used in other articles. In addition, to avoid giving article X an unduly negative form, a third State might be defined as "a State other than the predecessor State or the successor State".

21. Since article Y was mainly a linking article, it might usefully be merged with article Z. With regard to the latter provision, he endorsed the principle that the property of a third State was not affected by the succession. He was glad the Special Rapporteur was willing to delete the clause "except where this is contrary to the public policy (*ordre public*) of the successor State", which expressed an idea foreign to succession of States properly so called.

22. He proposed that articles Y and Z should be combined in a single provision which would read: "The succession of States as such shall not affect property, rights or interests which, on the date of the succession, were, according to the internal law of the predecessor State, owned by a third State and were situated in the territory to which the succession of States relates". That wording was consistent with article 12 of the draft

articles on succession of States in respect of treaties, according to which territorial treaties were not, in principle, affected by a succession of States.<sup>6</sup> The provisions of the draft under study should be aligned as closely as possible with those of the draft on succession of States in respect of treaties.

23. Sir Francis VALLAT said he wished to reply briefly to the Special Rapporteur's remarks. He was very conscious of the framework in which the Commission was at present working. Article 4 (Scope of the articles in the present Part) and article 5 (State property) had been adopted precisely for the purpose of specifying that framework. State property was defined in article 5 in terms of the predecessor State, and the scope of the articles, as laid down in article 4, was conditioned by that definition. Since the scope of the draft articles was thus confined to the effects of a succession of States on State property as defined in article 5, the subject-matter of article Z was completely outside the subject under discussion. If that article were retained in the draft, it would have the implications to which he had drawn attention earlier.

24. Mr. ŠAHOVIĆ, referring to article X, said that the definition of a third State, in its amended form, was general enough to be introduced into article 3 of the draft. Since a third State was mentioned in several parts of the draft, the definition should apply to all the articles.

25. Articles Y and Z could be merged, as proposed by Mr. Tsuruoka, provided that they remained within the limits of State succession. He gathered from the commentary to article Z that the Special Rapporteur had hesitated before introducing the reservation relating to the public policy of the successor State. He had first referred to property which was unquestionably State property of the third State, such as consulates, and had then considered whether the rule in article Z should not be limited, having regard to the public policy of the successor State. He (Mr. Šahović) believed that the problems which might be raised by the public policy of that State did not belong to State succession proper, even though, in the practical affairs of certain countries, they might be involved in matters of pure succession. For the Commission, however, it was important to distinguish between those two classes of questions and to emphasize the general rule; it might then refer to the other aspect of the problem in the commentary. Personally, he would agree to State property of the third State being accorded the same treatment as the property of aliens. In paragraph (4) of his commentary to article Y, the Special Rapporteur had indicated how he thought the property of a third State should be determined under the legislation of the predecessor State. His explanations suggested that the property in question was State property belonging to the private domain, which seemed to be yet another reason why there was no need for the last clause in article Z, referring to the public policy of the successor State. The question could not be settled however, until after the articles relating to the various types of succession had been considered.

<sup>6</sup> Yearbook . . . 1974, vol. II, Part One, document A/9610/Rev.1, chapter II, section D, articles 11 and 12.

26. He noted, lastly, that in his observations on the property of a third State (A/CN.4/282, chapter IV.D), the Special Rapporteur had indicated that there were two ways in which a third State might be affected by a succession of States in respect of State property. He had added that the second aspect of the question could not be examined in the context of the general provisions governing the part of the draft concerning State property. It was precisely because he (Mr. Šahović) was generally in favour of examining each phenomenon as a whole that he now proposed that one provision of article 3 should be devoted to the definition of a third State.

27. Mr. KEARNEY said that, although draft articles X, Y and Z and the Special Rapporteur's commentaries on them showed how the problem of the property of third States was related to the general subject of State property in cases of succession, the articles themselves led into an area of great complexity, beyond the scope of the subject with which the Commission was dealing. In defending the reference to public policy in draft article Z, the Special Rapporteur had spoken of the realities of the situations which the articles were intended to provide for, but the reality to which they related was, in effect, not so much the public property aspect of succession as the relationship between the legal régime of the predecessor State and that of the successor State. One example would be a transfer of territory in which a legal régime permitting the ownership of property by foreign State trading organizations was replaced, on succession, by a different legal régime which did not allow foreign States to own property in the territory for commercial purposes. An attempt to work out rules providing for the problems which could arise from the substitution of one legal régime for another would take the Commission outside the field with which it was concerned—succession to State property. It might be unwise, therefore, to introduce the issue of the property of third States into the series of draft articles under consideration.

28. The Special Rapporteur had said that the provisions were not, as yet, concerned with the kind of property involved or with the question whether it was owned by State trading agencies, but dealt only with the effect of succession on State property. But if the problem of the property of third States was provided for, it would be relevant to know whether that property came under *jus imperii* or *jus gestionis*, for different rules might apply. The rules governing sovereign immunity, for example, differentiated between two types of State ownership. If the rules the Commission was drafting were to apply to the property of third States, such differences would have to be taken into account. That problem would also arise in the case of the other types of property mentioned by Sir Francis Vallat. When once distinctions were made as to the use and ownership of property, they would have to be applied to all property, covered by the provisions, which would then be dealing with the effect of the replacement of one legal régime by another, rather than with the effect of the succession of States.

29. Mr. QUENTIN-BAXTER said that his views on draft articles X, Y and Z followed from what he had said

about draft article 11.<sup>7</sup> Any approach to the problem of the property of third States should avoid enlarging the range of variables. The draft should in no way imply that a new sovereign State might be in a different position from that of any other sovereign State. For example, he would find it difficult to agree to the exception at the end of draft article Z. The rule in that article was itself so plainly in conformity with general law that it did not need to be stated, or could be stated in more general terms.

30. As the Special Rapporteur had said, the preparation of the draft articles and commentaries had involved a wide inquiry and a useful review of the definitions and working hypotheses already adopted. The subject had certain parallels in the field of succession in respect of treaties, although care should be taken not to draw false analogies. The provisions relating to the different kinds of succession in the draft on succession in respect of treaties would help the Commission to distinguish the effects of different kinds of succession in matters other than treaties. In drafting the rules on succession in respect of treaties, the Commission had rightly tried to ensure that there would be the minimum disturbance of legal relations between members of the international community, and had therefore been more concerned with the position of third States than in the present series of articles. It was now primarily concerned with the relationship between the predecessor State and the successor State within the framework of the working hypotheses it had adopted, and matters outside that relationship should perhaps be considered as beyond the scope of its present concern. However, it need not take a final decision in the matter at the present stage; it should continue to prepare definitions and adopt working hypotheses for the work in hand.

31. Mr. USHAKOV said that he had no difficulty with the principle stated in article Z, not only where the property of a third State was concerned, but also in regard to any property belonging to a third party—whether it was a State or a private individual. In his opinion, it could even be said that a succession of States as such did not affect foreign property, whether private or public.

32. Mr. SETTE CÂMARA observed that the views of members on the subject under consideration had not changed since the Commission had last discussed it in 1973. In his opinion, the definition in article X was necessary and useful. The draft articles would be incomplete without provisions concerning the position of third States and the preservation of the *status quo* of the State property of third States. The amended version of the definition proposed by the Special Rapporteur was clear and simple. It was almost self-evident, but together with the other two draft articles, if they were combined as proposed by Mr. Tsuruoka, would provide a very good solution. The Drafting Committee should study that proposal and take Mr. Ushakov's suggestion into account.

33. He did not share the concern of some members who thought that if a draft article on third States was included, but no reference was made to the property of foreign legal persons in a territory affected by a succession, that

<sup>7</sup> See previous meeting, paras. 21 and 22.

property would not be protected by international law. The present series of draft articles was concerned only with State property and consequently dealt with the problem of third States in that context. Only States could own State property. He agreed with other speakers that the exception at the end of draft article Z would allow the State too much discretion in matters of public policy, which was an ill-defined concept in law, and would defeat the purpose of the article. He was glad to note that the Special Rapporteur was considering the possibility of deleting that exception and inserting an appropriate passage in the commentary to cover the exceptional situations he had mentioned. Even in the commentary it would be wise to avoid using such terms as "public policy", which could be dangerous or misleading. Such exceptional situations were normally dealt with individually as they arose in practice and, to his knowledge, had caused no difficulties. For example, in Czechoslovakia, under the 1948 Constitution, foreign governments were not allowed to own real property. Several States had already owned property in Czechoslovakia, such as embassies and consulates, when the régime had changed, but their position had been respected and they still owned the property, although foreign States could no longer buy property in Czechoslovakia.

34. Mr. USTOR said he thought it would be useful to include a rule expressing the intention of draft article Z, although it might seem self-evident. He agreed that the reference to public policy was inappropriate and should be deleted. The series of articles under examination was concerned with what happened to State property recognized as such under the internal law of the predecessor State on the date of succession. The successor State's laws came into effect after the moment of succession and could not produce any retroactive or extraterritorial effect. Consequently, no reference or allusion should be made to them in the present context. The Commission had followed the same reasoning when it had adopted the text of article 5.

35. Mr. AGO considered that Mr. Ushakov's proposal for article Z was, on the whole, an excellent formula. He had reservations, however, about the last phrase, "situated in the territory of the predecessor State or of the successor State", which seemed to enlarge the scope of the rule. In his opinion, it would be better to say "situated in the territory to which the succession of States relates".

36. Mr. USHAKOV observed that the rule in question was a very general one which applied not only to property in the territory to which the succession of States related, but also to any property whatever situated in the territory of the predecessor State or of the successor State.

37. Mr. AGO said he was not entirely convinced by that argument, since the succession of States concerned property situated in the territory to which the succession related. The question of State property situated in the rest of the predecessor State's territory was not a matter of State succession, and the Commission should deal only with what came within that topic.

38. Mr. BEDJAoui (Special Rapporteur) said he noted that all the members of the Commission seemed to agree

on the principle that should govern the treatment of the property of the third State.

39. So far as the definition of a third State was concerned, the provision in article X could, as Mr. Šahović had suggested, be put in article 3 (Use of terms) and be amended as suggested by Mr. Tsuruoka, to read: "For the purposes of the articles in the present Part, 'third State' means a State other than the predecessor State or the successor State".

40. Articles Y and Z might be combined in a single article, in accordance with the proposals made by Mr. Tsuruoka and Mr. Ushakov. With regard to Mr. Ushakov's proposal, he shared Mr. Ago's doubts about the advisability of referring to the part of the territory retained by the predecessor State after the succession of States, because the property of the third State situated in that part of the territory did not come within the subject under study. He appreciated Mr. Ushakov's concern that a general rule should be laid down, but thought the Commission should confine itself to property affected by the succession of States. He was sure, however, that Mr. Ushakov's proposal, and that submitted by Mr. Tsuruoka, would provide a useful basis for the work of the Drafting Committee.

41. The CHAIRMAN suggested that draft articles X, Y and Z should be referred to the Drafting Committee.

*It was so agreed.*<sup>8</sup>

The meeting rose at 12.55 p.m.

<sup>8</sup> For resumption of the discussion see 1329th meeting, para. 19.

## 1325th MEETING

*Monday, 9 June 1975, at 3.10 p.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

*Members present:* Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor.

### Succession of States in respect of matters other than treaties

(A/CN.4/282)<sup>1</sup>

[Item 2 of the agenda]

(continued)

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

1. The CHAIRMAN said that before inviting the Commission to consider article 12, he would give the floor to Mr. Pinto, who wished to speak on the previous articles.

2. Mr. PINTO said that to his regret he had not been able to attend the discussion on the previous articles. He thanked the Chairman for giving him an opportunity to make some comments, which would be mainly on

<sup>1</sup> Yearbook . . . 1974, vol. II, Part One, pp. 91-115.

articles 9 and 10 (A/CN.4/282), for the attention of the Drafting Committee.

3. Article 9 (General principle of the passing of all State property) referred to State property “necessary for the exercise of sovereignty” over the territory to which the succession of States related; all such property passed from the predecessor State to the successor State. In article 5, however, the term “State property” was defined as meaning property owned by the predecessor State according to its internal law. He had some difficulty in appreciating the distinction between rights to property that were rights of ownership and rights to property that were rights of sovereignty. The definition in article 5, which spoke of property “owned” and specifically referred to the “internal law of the predecessor State” appeared to cover only rights of ownership and not rights of sovereignty. In his view, rights of sovereignty should also be mentioned. Article 10 (Rights in respect of the authority to grant concessions) was particularly significant in that respect, because authority to grant concessions was a sovereign right rather than a right of ownership. Paragraph 3 of that article<sup>2</sup> reserved the “right of eminent domain” of the State over public property and natural resources in its territory.

4. Consideration should be given to the inclusion in the draft—in article 10 or elsewhere—of a general provision on the passing of sovereign rights, especially rights over natural resources, from the predecessor State to the successor State. In that connexion, it was not possible to ignore the Declaration on the Establishment of a New International Economic Order, adopted in 1974 by the General Assembly of the United Nations,<sup>3</sup> operative paragraph 4(e) of which proclaimed “Full permanent sovereignty of every State over its natural resources and all economic activities”, as one of the fundamental principles of the new international economic order. The same paragraph provided that “In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State”. The provision concluded with the statement that “No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right”. That concluding passage was especially significant, in that it spoke of an “inalienable right”. Indeed, throughout the Declaration the term “right” was consistently used to describe what States, or at least most of them, regarded as a right.

5. He suggested that the use of the term “concession” should be avoided in article 10 and elsewhere; it might perhaps be replaced by the formula “rights of exploration, exploitation, management or use”.

#### ARTICLE 12

6. The CHAIRMAN invited the Special Rapporteur to introduce article 12, which read:

#### Article 12

##### Currency

1. Currency, gold and foreign exchange reserves, and, in general, monetary tokens of all kinds placed in circulation or stored by the predecessor State in the transferred territory and allocated to that territory shall pass to the successor State.

2. The assets of the central institution of issue in the predecessor State, including those allocated for the backing of issues for the transferred territory, shall be apportioned in proportion to the volume of currency circulating or held in the territory in question.

7. Mr. BEDJAOUI (Special Rapporteur) said that with article 12 the Commission was taking up the typology of succession. The first type of State succession considered was the case of transfer of part of the territory of one State to another State. In that case, two States, generally neighbours, carried out a correction of their common frontier that might involve the transfer of a greater or smaller part of the territory of the predecessor State to the successor State. It was also possible that the two States might not be neighbours—for instance, in the case of cession of an island. It might be a small commune or a whole province that was transferred, but neither State disappeared and there was no change in the status of the predecessor or the successor State as a subject of international law. In the case considered, there were two pre-existing States, two separate legal orders and two sovereignties at the moment of the succession of States. There were also two currencies, generally different, and each State exercised separately the privilege of issue in the territory under its jurisdiction. In that situation what happened, first, to the currency in the part of the territory transferred, and secondly, to the currency in the part of the territory remaining under the authority of the predecessor State? That was the two-fold question which was answered by paragraphs 1 and 2 of article 12.

8. In the transferred territory it was possible to distinguish, at the moment of the succession of States, the currency in circulation; the reserves of gold and foreign exchange stored or held in the territory and allocated to that territory; and reserves of gold and foreign exchange which happened to be in the territory, but belonged to the predecessor State.

9. A further point to be considered was what happened to the privilege of issue of the predecessor State in the transferred territory. As he had said in paragraph (5) of the commentary to article 12 in his sixth report,<sup>4</sup> it was obvious that the privilege of issue could belong only to the new sovereign in the transferred territory. He had refrained from stating that obvious rule, because what was involved was a regalian right, an attribute of sovereignty vested by its very nature in the State which exercised authority over the territory. As he had pointed out in his previous reports, that privilege of the successor State was sometimes subject to conventional limitations which might cast doubt on its recognition. But the successor State enjoyed the privilege of issue, even if it delegated the exercise of that privilege to another State by treaty. The rule that the privilege of issue belonged to the successor State was a primary rule which derived from the constituent aspects of the State, since competence in

<sup>2</sup> Deleted by the Special Rapporteur in his revised text; see 1320th meeting, para. 35.

<sup>3</sup> General Assembly resolution 3201 (S-VI).

<sup>4</sup> *Yearbook* . . . 1973, vol. II, p. 35.

monetary matters was a fundamental element of the sovereignty of the State. He had therefore considered it unnecessary to state the rule in article 12.

10. The sovereign exercise of the successor State's privilege of issue had sometimes in the past been limited by treaty, as he had pointed out in his sixth report.<sup>5</sup> For instance, under the terms of the Convention between the United States of America and Denmark providing for the cession of the Danish West Indies, the United States had agreed to maintain the privilege of issue conferred by Denmark on a bank. When Genoa had been ceded to the King of Sardinia in 1814, it had been decided, at the Congress of Vienna, that "the gold and silver currency of the ancient state of Genoa" would be accepted by the public treasury concurrently with the currency of Piedmont. And at the time of the cession of Smyrna to Greece, the treaty of peace with Turkey, signed in 1920, had provided that Turkish currency would be maintained for five years in the territory of Smyrna. But those cases involved rules of public internal law, rather than a rule of public international law.

11. What happened to the currency in circulation in the territory at the time of the succession of States? It should be borne in mind that currency had three characteristics: it was an attribute of sovereignty; it circulated in a particular territory; and it represented purchasing power and means of payment. It was obvious that the successor State could not, from one day to the next, wipe out all the currency in circulation in the territory and replace it by another currency. Moreover, as Max Huber had said, currency represented a debt rather than an asset.<sup>6</sup> But the problem connected with that "public debt" aspect of currency arose mainly for the counterpart of currency—monetary tokens and reserves of gold and foreign exchange backing the currency in circulation.

12. A distinction should be made between reserves of gold and foreign exchange and monetary tokens in general which were allocated to the territory, and those which happened to be in the territory at the moment of the succession of States. Only reserves allocated to the territory passed to the successor State, because there was a direct relation between those reserves and the territory. That requirement of allocation to the territory must not be dropped, because certain provinces of a State might have a special régime, and in the case of a confederation or a federation of States it might happen that the predecessor State had a local issuing institution in part of its territory which was subsequently ceded to a neighbouring State as a rectification of the frontier. If that requirement was not satisfied, the reserves of gold and foreign exchange would not pass, since there was no direct link between them and the territory. The reserves in question were, of course, those belonging to the predecessor State, not gold and foreign exchange belonging to private persons or to a third State. Thus, under paragraph 1 of article 12, the successor State did not succeed to gold and foreign exchange reserves which were in the transferred territory temporarily or by chance.

13. Another question was what happened to the currency in circulation, and the gold and foreign exchange reserves stored, in the part of the territory which remained under the authority of the predecessor State and in which the central issuing institution was situated. Were the assets of the central issuing institution affected by the succession of States? That was the question answered by paragraph 2 of article 12. The part of the territory transferred might be large or small; it might formerly have contributed significantly to the predecessor State's prosperity and thus to the formation of its gold and foreign exchange reserves. It seemed equitable to provide for the apportionment of the gold and foreign exchange reserves between the predecessor and the successor States, in proportion to the volume of currency circulating or held in the territory in question.

14. Mr. USHAKOV said he considered that the decisive factor was the type of succession, and that for one and the same class of property it would be impossible to deal simultaneously with all the types of succession. In his opinion it would accordingly be better to confine the discussion, for the moment, to the passing of the different kinds of State property in the case of a transfer of part of the territory.

15. The CHAIRMAN drew attention to an informal Secretariat paper setting out in four columns the draft articles dealing with each of the four types of succession of States: transfer of part of a territory; newly independent States; uniting of States and dissolution of unions; and secession or separation of one or more parts of one or more States.<sup>7</sup> The purpose of the paper was to facilitate comparison of four articles dealing with the same problem, such as articles 12, 16, 20 and 28 concerning currency, for each of the four types of succession of States.

16. Mr. KEARNEY suggested that each problem, such as currency, or treasury and State funds, should be considered in relation to the four types of succession—in other words that the articles should be taken up according to the class of property, not according to type of succession. The latter approach, which would mean taking up articles 12 to 15 together, would lead to a diffuse and not very orderly discussion, because it would oblige the Commission to deal with four quite different problems at the same time. On the other hand, the resemblances between the four articles concerning currency far outweighed the differences. In particular, one feature which all four articles on the currency problem should have in common was that they should be framed as residuary rules, applicable only where no other rule had been agreed or decided on by the States concerned. That point was specifically mentioned in paragraph 1 of article 20, which made an exception for the case in which "treaty provisions allow each State to retain all or part of such State property". It was obviously much more convenient to deal with a question of that type by taking the four articles on currency together.

17. Mr. USTOR said that a number of preliminary questions would have to be settled before the Commission could usefully discuss particular problems. The first was

<sup>5</sup> *Ibid.*, paras. (7) and (8).

<sup>6</sup> *Ibid.*, p. 34, para. (4).

<sup>7</sup> See 1323rd meeting, paras. 1 *et seq.*

why the draft articles were arranged under the present headings—an arrangement which differed from that adopted in 1974 for the draft articles on succession of States in respect of treaties.<sup>8</sup>

18. The second question was on what basis the particular classes of State property had been singled out—currency, treasury and State funds, State archives and libraries, and State property outside the territory to which the succession of States related.

19. Mr. BEDJAOUI (Special Rapporteur) said that the Commission had the choice between two formulas: Mr. Kearney's formula, which grouped together the articles dealing with the same class of State property; and Mr. Ushakov's formula, which grouped together the articles dealing with the same type of State succession. His personal preference would be for Mr. Kearney's formula, which would enable the Commission, when considering a particular class of State property, to see how the emphasis varied according to the type of succession. The four articles relating to the same class of State property could perhaps later be rearranged in a single article. He would therefore prefer the "horizontal" formula. Mr. Ushakov's "vertical" formula had the advantage of putting a particular type of State succession before the Commission. But it would be difficult to deal simultaneously with matters so different as currency, treasury and State funds, State archives and libraries, and State property situated outside the territory affected by the succession of States. It would be just as difficult to consider simultaneously the different types of State succession with respect to one particular question. That was why he had dealt with the four classes of property separately for each of the four types of State succession.

20. Since the Commission had adopted, in article 9, a general provision on the passing of all State property, it would be sufficient to supplement it by provisions relating specifically to each type of succession of States as it affected certain classes of State property: currency, treasury, State archives and State property outside the territory affected by the succession. There were, of course, other classes of State property, but it was impossible to take them all into account, and he had thought it reasonable to confine his work to four essential classes. All States did not, for example, possess a navy; but all States had currency and a treasury. In his opinion, article 12 should therefore be examined in the light of the other articles concerning currency.

21. Mr. BILGE said that the type of State succession was very important and might affect the choice of the State property that should pass to the successor State. He therefore agreed with Mr. Ushakov that the different types of succession should be studied separately. The Commission should discuss all the articles relating to the passing of the different classes of State property in the event of one particular type of succession before taking up another type.

22. Mr. KEARNEY said that, since his proposal gave rise to difficulties, he would withdraw it; he had made it only to save the Commission's time.

23. Mr. PINTO said that the two suggested methods of work might perhaps be combined.

24. He asked what was the legal distinction between "transfer of part of a territory" and "secession or separation of one or more parts of one or more States". There might be differences in political climate between the two situations, but from the legal point of view both were cases in which part of a State separated from the whole. In most cases, but by no means all, the predecessor State would be the larger of the parts resulting from the separation.

25. Mr. ŠAHOVIĆ agreed with the Special Rapporteur that it would be difficult to deal with the different types of State succession all together, and that the Commission should try to work out the general rules on the passing of State property with due attention to certain problems raised by different classes of State property. To make the Commission's task easier, however, the Special Rapporteur might perhaps indicate—for example, by comparing article 12 with articles 16, 20 and 28—how the solutions of each of those problems differed according to the type of succession.

26. Mr. TSURUOKA said he thought the articles in the table prepared by the Secretariat on Mr. Kearney's proposal should be examined "vertically", column by column. The table would make it easier to examine the articles, because it would enable the Commission to see, opposite each article, the corresponding articles in the other columns. The title of the first column would lead the Commission to inquire, as Mr. Ustor had done, whether four types of succession of States should be distinguished. The title of article 12 would lead it to consider the choice of classes of State property.

27. Mr. USHAKOV said he thought that the articles relating to the transfer of part of a territory should be examined first, and that the most important point was to define the notion of "transfer of part of a territory". The Commission could take as a guide the draft articles on succession of States in respect of treaties, which it had adopted at its twenty-sixth session. Part II of that draft, entitled "Succession in respect of part of territory", contained an article 14, which had the same title and dealt with two cases: the transfer of part of the territory of one State to another, and the transfer of territory not part of the territory of a State, for the international relations of which that State was responsible. The second case was that the transfer of a dependent territory, which passed from the administration of the metropolitan State to the sovereignty of a pre-existing State. Both cases should be considered in the context of succession of States in respect of State property. It was possible, moreover, that the two cases ought to be considered from different angles in the draft now under study. For that reason, it was important to define what was meant by "transfer of part of territory" and to distinguish clearly between the two cases.

28. The transfer of part of the territory of one existing State to another existing State was generally effected by an agreement between the two States concerned. Normally, questions of succession, and more particularly questions concerning State property, were settled by

<sup>8</sup> *Yearbook* . . . 1974, vol. II, Part One, document A/9610/Rev.1, chapter II, section D.



agreement. Consequently, the definition of the expression "transfer of part of a territory" should be followed by an article stipulating that the subsequent provisions relating to State property applied only in the absence of an agreement between the parties. Next, immovable State property should be distinguished from movable State property situated in the part of territory passing from one State to another. A third article should provide that, in the absence of an agreement between the States concerned, immovable property situated in the territory in question passed from the predecessor to the successor State. The treatment of movable State property situated in the part of territory transferred was a more delicate matter. Being movable, such property might be situated only temporarily in the transferred territory, and the predecessor State could easily remove it. Consequently, it could not be dealt with in the same way as immovable property. Furthermore, movable property might belong to the transferred part of territory, but be situated in the territory of the predecessor State or in that of a third State. One article of the draft should deal with that situation and provide that, in such circumstances, the property would pass from the predecessor State to the successor State. Yet another provision might deal with movable State property, such as currency or securities, some of which might belong to the transferred part of territory. Such property should pass from the predecessor State to the successor State, possibly after apportionment.

29. The question of State archives and libraries was often insignificant in practice. Referring to the transfer of part of the territory of West Berlin to the German Democratic Republic, he observed that the size of the territory transferred was sometimes so small that the question of the transfer of State archives or libraries did not even arise. Besides, libraries which were State property were regarded as immovable property and passed to the successor State. Libraries owned by private persons should not be dealt with in the draft. As to archives, it was not necessary to make provision for them in the case of transfer of part of a territory.

30. The second case to be taken into consideration—the transfer of territory not part of the territory of a State, for the international relations of which that State was responsible—raised a difficult problem. As that case was related to the case of decolonization, the Commission would perhaps be in a better position to study it after it had examined the draft articles concerning newly independent States. The definition of State property in draft article 5 would then have to be re-examined, since it referred to the internal law of the predecessor State, whereas for the purpose of determining State property situated in a dependent territory, it was not the internal law of the metropolitan State that must be consulted, but the particular legislation applicable to the territory. Consequently, the Commission would either have to redraft article 5 to cover all foreseeable cases, or formulate a specific definition of the State property of the predecessor State when the latter was an administering authority.

31. Mr. CALLE Y CALLE said he approved of the way in which the articles on the various types of succession

had been set out. He thought, however, that the final commentary should contain a few paragraphs explaining why the Commission had decided to make provision for four types of succession, whereas it had been content to deal with only three in the draft articles on succession of States in respect of treaties. The Commission should refer, for that purpose, to the Special Rapporteur's previous reports. The sub-division according to type of succession should be explained, for it was unsatisfactory to refer to the type of succession in the titles of the sub-sections, but not in the texts of the articles. Descriptions of the various types of succession had been given in the draft articles on succession of States in respect of treaties.

32. Mr. KEARNEY said he agreed with Mr. Calle y Calle and Mr. Ushakov that it would not be sufficient to mention the various types of succession only in the sub-headings; each sub-section should contain a precise description of what it covered. He differed from Mr. Calle y Calle, however, in considering that the Commission had in fact defined four types of succession of States in respect of treaties, since it had made provision, in article 14 of its draft on that topic, for the moving frontier situation. Those four definitions could reasonably be applied in the present draft and he hoped the Commission would adopt that course. For example, Mr. Ushakov's point, that the transfer of part of a territory involved two distinct situations—the transfer of part of the predecessor State and the transfer of a dependent territory administered by the predecessor State—was covered by the pre-ambular paragraph of article 14 of the set of draft articles on succession in respect of treaties, the other sections of which also contained material of value for defining the areas the Commission was considering.

33. Mr. REUTER said that the Commission should first define the notion of "transfer of part of a territory" and then consider the draft articles relating to that type of succession. As the articles were introduced, the Special Rapporteur could indicate whether the corresponding provisions for each of the other types of succession showed any marked similarities or differences. He could thus introduce his text both vertically and horizontally.

34. It was especially important to guard against excessive generalizations. A solution that was valid for one class of State property, such as currency, would not necessarily be valid for other classes. With great ability, the Special Rapporteur had sought a number of links tying the property to the territory. The Commission should wait until he had outlined all the situations contemplated, which might differ very widely. State archives, for example, could raise problems much knottier than, and very different from, those raised by State libraries. For cases in which a State took proceedings against a newly independent State to gain access to its archives and in which the archives were held by the Power previously responsible for the new State's international relations, the Special Rapporteur proposed several rules, including apportionment. That solution would be unfair to the newly independent State. For the former administering authority would be called upon to hand over the archives, not only by the newly independent State, but also by the State with which it was involved in litigation; and if, with a view to equal treatment, the former administering



authority decided to communicate the archives to both States, and they concerned the future of the newly independent State, that State might suffer. In any event, it would not be on an equal footing with the State which had taken proceedings against it, because it would not be able to obtain access to that State's archives. Perhaps a special status, analogous to that of joint property, should be accorded to the archives of which the predecessor State was the depositary, but not the sole owner.

The meeting rose at 5.50 p.m.

### 1326th MEETING

*Tuesday, 10 June 1975, at 10.20 a.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

*Members present:* Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor.

#### Succession of States in respect of matters other than treaties

(A/CN.4/282)<sup>1</sup>

[Item 2 of the agenda]

(continued)

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR ARTICLE 12 (Currency)<sup>2</sup> (continued)

1. Mr. PINTO said there were a number of points he hoped the Special Rapporteur would clarify. First, he found difficulty in distinguishing, in legal terms, between transfer of part of a territory—articles 12 to 15—and secession or separation of one or more parts of one or more States—articles 28 to 31 (A/CN.4/282). He assumed that in the first case a State, acting voluntarily, ceded part of its territory to another State by treaty. If that was so, it would seem that the difference between the two cases was that transfer involved a fusion of the detached territory with another State, whereas in secession, the detached territory did not join another State, but became a viable separate entity. That view was supported by the inclusion in article 13, paragraph 2, and the absence from article 29, paragraph 2, of a stipulation imposing certain liabilities on the successor State.

2. Articles 12 to 15 referred to specific types of State property, in contrast with articles 8 and 9, which established the general principles of the passing of State property. He assumed that the “monetary tokens of all kinds” mentioned in article 12, paragraph 1, were paper obligations such as bills and the like, and that the “assets of the central institution of issue” mentioned in paragraph 2 were the assets of the central bank. He further

assumed that the difference between the “liquid or invested funds” mentioned in article 13, paragraph 1, and “currency”, was that the former belonged to the State, whereas “currency” might belong to anyone at all. No doubt the various kinds of property discussed in articles 12 to 15 had been treated separately because the mode of passing was different in each case. The rule stated in article 15, though worthy of consideration, would be very difficult to apply; presumably, preference would be given to the principle of equity in the event of union.

3. If the Commission decided to retain draft articles of the type proposed, provisions would have to be included concerning, for example, immovable property belonging to a municipality rather than to the State, museums and *objets d'art*. The need for a detailed classification of property could be avoided by simply distinguishing between movable and immovable property.

4. He reiterated his view that the draft articles should include a rule relating to sovereignty over natural resources in the event of succession. He would have expected such a rule to be included among the general principles governing the passing of State property. At all events, the matter was far too important to be ignored.

5. Mr. SETTE CÂMARA, speaking on a point of order, said that the Commission appeared to be embarking on a discussion of the whole sub-section concerning the transfer of part of a territory. He had no objection to that, although he preferred the traditional procedure of discussing draft articles one by one. If the discussion was to be on the whole sub-section, however, the Special Rapporteur should be given an opportunity to introduce the remaining articles.

#### ARTICLES 13, 14 AND 15

6. The CHAIRMAN invited the Special Rapporteur to introduce draft articles 13, 14 and 15, which read:

##### Article 13

###### *Treasury and State funds*

1. Liquid or invested funds of the predecessor State, situated in the transferred territory and allocated to that territory, shall pass to the successor State.

2. The successor State shall receive the assets of the Treasury and shall assume responsibility for costs relating thereto and for budgetary and Treasury deficits. It shall also assume the liabilities on such terms and in accordance with such rules as apply to succession to the public debt.

##### Article 14

###### *State archives and libraries*

1. State archives and libraries of every kind relating directly to or belonging to the transferred territory shall, irrespective of where they are situated, pass to the successor State.

2. Indivisible State archives shall be copied and apportioned.

##### Article 15

###### *State property situated outside the transferred territory*

The ownership of property belonging to the predecessor State which is situated in a third State shall pass to the successor State in the proportion indicated by the contribution of the transferred territory to the creation of such property.

7. Mr. BEDJAOUÏ (Special Rapporteur) said that the typology he had adopted should not raise difficulties for

<sup>1</sup> *Yearbook* . . . 1974, vol. II, Part One, pp. 91-115.

<sup>2</sup> For text see previous meeting, para. 6.

the time being, since it corresponded to that which the Commission had initially adopted for the draft articles on succession of States in respect of treaties. Since 1968, the Commission had distinguished four types of succession: the transfer of part of a territory, newly independent States, uniting of States and the dissolution of unions, and secession or separation of one or more parts of one or more States. On the second reading of the draft on succession of States in respect of treaties, in 1974, the Commission had entitled the first type "Succession in respect of part of territory" and had joined together the last two types under the heading "Uniting and separation of States". The fourth type of succession he had adopted, namely "secession or separation of one or more parts of one or more States", had thus been envisaged by the Commission up to 1974. The draft adopted on first reading had contained an article 28 entitled "Separation of part of a State", paragraph (1) of the commentary to which had indicated that the article applied to the case in which "a part of the territory of a State separates from it and becomes itself an independent State, but the State from which it has sprung, the predecessor State, continues its existence unchanged except for its diminished territory".<sup>3</sup> The Commission had thus distinguished that type of succession from the particular case of decolonization referred to under the heading "Newly independent States". Since the articles under consideration had been drafted before the Commission had decided to merge the third and fourth types of succession, it was clear that could only have been based on the initial typology. Hence the draft should be examined in its present form, although the Commission might later have to carry out some re-arrangement, as it had done with the draft articles on succession in respect of treaties. Moreover, it was in deference to the Commission's wish that he had followed the four-part presentation it had chosen. Personally, he had always had doubts about the advisability of that classification and he had expressed them in his sixth report.<sup>4</sup>

8. In the draft articles on succession of States in respect of treaties, the Commission had dealt, in article 14, with the case in which "any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State".<sup>5</sup> That complicated wording simply referred to the case of a non-self-governing territory which achieved decolonization by integrating with a State other than the colonizing State. It was not a case of "transfer of part of a territory" or of "succession in respect of part of territory"; for the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations<sup>6</sup> provided that a non-self-governing territory could not be treated as part of the metropolitan territory. Nor was it part of the territory of the successor State; it could not be that until the succession had taken place. Besides, the Commission was studying succession of States as a phenomenon affecting

the territory for which the predecessor State was responsible, not as a phenomenon affecting the territory of the successor State. Lastly, the reference was not to a part of the territory to which the succession related, but to the whole territory. That example was sufficient to show the limitations of the four-part typology.

9. Referring to the comments made at the previous meeting by Mr. Ushakov, he said it would indeed be necessary to define each of the types of succession considered. The reason why he had not already done so was that he had thought the Commission would probably have to regroup articles relating to different types of succession.

10. So far as the substance of the problem was concerned, treaties and textbooks of public international law dealt with it only briefly, but always recognized that State property must pass to the successor State. The general principle was that of passing, even in cases of uniting of States. That was the idea he had tried to establish in the articles under consideration, though he had had to introduce some nuances. He thought he had succeeded in identifying, first, a principle of the passing of property to the successor State, applying the criterion of attachment to the territory, and secondly, a principle of the sharing of property, applying the criterion of equity. Taking those two criteria as a guide and sometimes combining them, he had presented the material broken down both according to class of State property and according to type of succession. In view of the resultant repetitions, that presentation might appear simple. But the Commission should make no mistake: the subject was extremely complicated and could not be studied schematically.

11. At the previous meeting, Mr. Ushakov had proposed that a small number of residuary rules should be drafted for each type of succession, distinguishing between movable and immovable property.<sup>7</sup> Those rules would be applicable only in the absence of agreement between the parties concerned. In his (the Special Rapporteur's) opinion, the articles under consideration should certainly apply only in the absence of agreement; that would have to be specified later. It was not possible, however, to dispense with an examination of each class of State property *in concreto*. That solution would no doubt have made his task easier: it would have saved him the trouble of studying monetary, economic, financial and other problems, with which he had had to familiarize himself. It would also have avoided the question put by Mr. Ustor, who had asked why he had confined himself to certain classes of State property to the exclusion of others.<sup>8</sup> Nevertheless, the solution advocated by Mr. Ushakov would encounter a number of obstacles. New definitions of movable and immovable property would be needed, for which it would be necessary to refer to the internal law of a State, and everyone knew the difficulties involved in such a *renvoi* because of the diversity of national laws. It was true that the localization of movable property in a territory was a fiction since, by definition, such property could be moved; thus before the succession occurred, the predecessor State could remove all movable property liable to be affected by the succession. The main reason

<sup>3</sup> Yearbook . . . 1972, vol. II, p. 296.

<sup>4</sup> Yearbook . . . 1973, vol. II, pp. 30 *et seq.*

<sup>5</sup> Yearbook . . . 1974, vol. II, Part One, document A/9610/Rev.1, chapter II, section D.

<sup>6</sup> General Assembly resolution 2625 (XXV), annex.

<sup>7</sup> See previous meeting, para. 28.

<sup>8</sup> *Ibid.*, para. 18.

why he had not put his articles in the form suggested by Mr. Ushakov was that it would have involved great drafting difficulties. If an article provided that movable property passed to the successor State, the predecessor State would hasten to remove it during the so-called transitional period, and would sell immovable property to save it from the succession.

12. Referring to the comments made by Mr. Ustor at the previous meeting, he said it was essential to consider *in concreto* a certain number of classes of State property rather than state a general principle. That was the approach adopted by writers, though the literature was very terse and incomplete on that point; the only State property it dealt with was the treasury, currency and, especially, State archives. The articles he proposed also reflected State practice, as expressed in a certain number of agreements in which State property was specifically designated. He was prepared to deal in his draft with any important State property he might have omitted. *Objets d'art* and State museums, however, to which Mr. Pinto had referred, did not form a class of property separate from State archives and libraries.

13. The articles under consideration showed similarities, both within one type of succession and between different types. For example, in the case of transfer of part of a territory, the principle of the passing of State property was settled, because the property was allocated to the territory by the predecessor State, whether it belonged to that territory or was connected with it. It was immaterial whether the property consisted of currency, the treasury, State funds or archives. The same idea of a territorial link arose in two other types of succession—newly independent States and secession or separation of one or more parts of one or more States. On the other hand, in regard to State property situated in the part of the territory for which the predecessor State remained responsible, he had applied the principle of equitable apportionment, although that principle was not definitely and absolutely applicable to each of those three types of succession.

14. The similarities between the different types of succession also derived from the fundamental principle of attachment to the territory and from the secondary principle of equitable apportionment. The differences between the types of succession were appreciable if cases of the uniting or merging of States were compared with the three other types of succession. In the case of a union, the principle of attachment to the territory could not apply; everything, in theory, passed to the new successor State. In the other types of succession, State property also passed to the successor State, but only to the extent that it was attached to the territory. It was then that the question arose what happened to State property situated in the part of the territory retained by the predecessor State. For that situation, it was possible to apply the rule of equitable apportionment.

15. He hoped that the members of the Commission would agree to consider, first, only the transfer of part of a territory and, in particular, article 12, even if they needed to refer incidentally to one or other of the provisions relating to each type of succession.

16. Mr. USHAKOV, speaking on a point of order, requested the Chairman to invite the Special Rapporteur to submit in writing a definition of what he meant by "transfer of part of a territory".

17. Mr. BEDJAOUI (Special Rapporteur) said that it had been at the Commission's request, and in the precise meaning it had given to that expression, that he had dealt with the case of "transfer of part of a territory", which the Commission had subsequently called "Succession in respect of part of territory". Consequently, he had drafted the relevant articles from the point of view of a predecessor State which surrendered part of its territory to another pre-existing State. He hoped that made the position perfectly clear.

18. Mr. TSURUOKA said that, in the light of the Special Rapporteur's explanations, he thought it would be better to consider each type of succession separately. Two points should nevertheless be settled previously. First there was the question of the relationship between section 1 and section 2 of Part I of the draft entitled "Succession to State property". Were the provisions in section 2, relating to each type of State succession, examples of the application of the general provisions in section 1, or did they relate to cases different from those to which the general provisions applied? Secondly, it was important to align the draft under consideration as closely as possible with the draft on succession of States in respect of treaties. In particular, each type of succession should be defined, otherwise it might be difficult to understand and apply the articles. The Commission would not be able to begin its examination of section 2 article by article until both these points had been cleared up.

19. Mr. KEARNEY said he assumed that article 12 would be preceded by an article introducing the subsection on transfer of part of a territory. That article would reproduce substantially the opening passage of article 14 (Succession in respect of part of territory) of the Commission's draft articles on succession of States in respect of treaties.<sup>9</sup> The passage in question read: "When part of the territory of a State, or when any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State".

20. A succession of that type raised problems relating to currency, treasury and State funds, and the other items covered by articles 12 to 15; those problems were specific to each category of assets and could not be dealt with easily in a general article.

21. Article 12, concerning currency, illustrated that point very well. Paragraph 1 of the article dealt in one sentence with "Currency, gold and foreign exchange reserves and, in general, monetary tokens of all kinds". But it was not possible to put all those items on the same level and give the same treatment to issued currency on the one hand, and to gold and foreign exchange reserves on the other. Issued currency was a liability, not an asset of the State. In the absence of a promise to redeem the currency in gold or foreign exchange it was,

<sup>9</sup> *Yearbook* . . . 1974, vol. II, Part One, document A/9610/Rev.1, chapter II, section D.

admittedly, an obligation which the issuing State would never have to meet. Nevertheless, although it was a somewhat notional obligation, it could not be combined with the assets which article 12 purported to cover.

22. In the same paragraph, the statement that the items in question "shall pass to the successor State" was much too general. It was necessary to specify whether it was the ownership of the currency, control over currency, or the obligation relating to issued currency, which passed from one State to the other. As far as currency in circulation was concerned, its ownership remained in the hands of the persons holding it. The shift of frontier did not affect that ownership. It did, however, affect the legal régime applicable to the actual circulation of the currency. From the moment of the succession, the laws of the successor State applied for the purpose of determining what constituted legal tender in the transferred territory. The currency of the successor State replaced that of the predecessor State as legal tender in the territory. A further question was whether the provision in paragraph 1 meant that the successor State undertook responsibility for converting the currency of the predecessor State, previously in circulation in the transferred territory, into the currency of the successor State. If that was so, it would be necessary to determine the rate at which the conversion would take place.

23. Paragraph 2 of article 12 related to the "assets of the central institution of issue in the predecessor State". If it was agreed that there should be a proportional transfer of those assets to the successor State, it followed that the successor State must have a corresponding obligation in respect of the currency issued by the predecessor State. Only in that way could it be ensured that the operation would not result in unjust enrichment of the successor State and a loss for the predecessor State. The approach adopted by the Special Rapporteur was a different one. He took the view that the successor State was the new sovereign over the transferred territory, with the consequence that the currency passed into its jurisdiction. In logic, that position was defensible, but he (Mr. Kearney) would prefer the question of currency in circulation to be treated separately from that of gold and foreign exchange reserves, in an article which would provide some degree of protection for the predecessor State.

24. State practice in the matter was meagre. The few cases mentioned by the Special Rapporteur in his sixth report<sup>10</sup> threw little light on the question; one of the examples given went back to 1898 and another dealt with a very special case. Without the guidance of practice, the Commission was obliged to rely on logic. He therefore proposed that article 12 should be redrafted so as to remove the reference to currency from paragraph 1; the paragraph would then refer exclusively to gold and foreign exchange reserves.

25. In paragraph 2 the central idea should be retained, but language should be introduced to clarify the temporal element involved and to lay down a suitable basis for establishing the ratio of apportionment. He therefore

proposed that the last part of that paragraph should be amended to read:

"... in the proportion which the average volume of currency in circulation in the transferred territory during the six months prior to the date of succession bears to the average volume of currency in circulation in the predecessor State as a whole during the same period".

He was suggesting a six-month period in order to avoid the effect of erratic fluctuations which might result, precisely, from the contemplated transfer of territory.

26. It was necessary to deal with the problem of the currency backed by the allocated reserves and to eliminate that currency as a charge against the predecessor State. In the absence of a provision having that effect, the balance of payments of the predecessor State would be adversely affected by claims on its currency. He therefore suggested the insertion of an additional paragraph drafted on the following lines:

"Currency and monetary tokens of the predecessor State that are in circulation in the transferred territory on the date of succession shall be converted into the currency of the successor State at the exchange rate notified to the International Monetary Fund or, if there is no such exchange rate, at the average of the middle rate in the financial markets of the predecessor State and of the successor State on the date of succession. Currency and tokens acquired by the successor State in the conversion shall be delivered to the predecessor State together with any gold and foreign exchange reserves stored in the transferred territory but not allocated to that territory."

In a world in which exchange rates were not pegged, a complicated formula on those lines was necessary. Where the exchange rate was notified to the IMF, that rate would be taken. Otherwise, it would be necessary to adopt the middle rate between the selling rate and the buying rate prevailing in the appropriate financial markets on the date of succession.

27. Mr. USTOR said that he would comment on the whole set of articles concerning transfer of part of a territory, namely, articles 12 to 15. Those articles related to the case in which part of the territory of one State became part of the territory of another State. The case was one of simple transfer of territory, not the case contemplated in article 14 of the 1974 draft articles on succession of States in respect of treaties. A transfer of that kind was effected in most cases by means of a treaty whereby the predecessor State and the successor State agreed that a part of the territory of the former would pass to the latter.

28. In reply to a question he had asked at the previous meeting, the Special Rapporteur had said that certain assets had been selected because State practice showed that, in the treaties relating to the voluntary transfer of territory, the parties usually made express provision for the disposition of those assets. That explanation raised an issue which concerned all of articles 12 to 15. Those articles had been drafted as residuary rules on the assumption that, except as otherwise provided in the treaty between the States concerned, the various items in question

<sup>10</sup> *Yearbook* ... 1973, vol. II, pp. 34-57, commentaries to articles 12, 16, 20, 24 and 28.

passed from the predecessor State to the successor State. His own view was different. Under contemporary customary international law, the predecessor State had no obligation to transfer the currency, treasury, State funds and other items in question. It was precisely because no such obligation existed under international law that the States concerned found it necessary to settle those questions expressly by treaty.

29. Mr. SETTE CÂMARA said he had no difficulty about the principle underlying article 12. An article of that kind would be necessary if the Commission decided to make specific provision for the transfer of the various kinds of State property, though it was doubtful whether currency could be described as State property.

30. He supported the Special Rapporteur's decision to drop from article 12 the former paragraph 1 which stated that the privilege of issue belonged to the successor State throughout the transferred territory.<sup>11</sup> The right to issue currency was an inherent sovereign right; it did not depend on any rule.

31. In the new text of paragraph 1, the reference to the transferred territory was a source of difficulty. The provision related to currency and gold reserves in the transferred territory; but in modern times most States kept considerable reserves abroad, including much of their gold. For example, all the members of the International Monetary Fund had to keep their IMF quotas with that organization; one quarter of those reserves consisted of gold and the remainder of certain currencies. It would be necessary to clarify paragraph 1 in that respect, for as the text now stood, no part of the reserves held abroad would pass from the predecessor State to the successor State. Another difficulty was created by the reference to currency and other reserves "allocated to" the transferred territory. In a modern State, it was not possible to determine the share of the currency, gold and foreign exchange reserves allocated to a particular territory.

32. Paragraph 2 of article 12 provided that the assets of the central institution of issue in the predecessor State would be apportioned "in proportion to the volume of currency circulating or held" in the transferred territory. In view of the high mobility of currency, it would be virtually impossible to ascertain what amount was in circulation on the date of succession. Hence Mr. Kearney's suggestion that an average for a period of six months should be taken seemed realistic, despite the practical difficulties involved. But he did not see any justification for adopting a ratio based on the volume of currency circulating or held in the transferred territory. That criterion was inappropriate because a financial centre would have an enormous amount of money in circulation, whereas an industrial area making a much greater contribution to the economy of the country would have far less. A number of other criteria had been suggested, such as the gross national products of the country and of the transferred territory. Other factors which could be taken into account were taxation revenue and population.

The meeting rose at 12.50 p.m.

## 1327th MEETING

Wednesday, 11 June 1975, at 10.20 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor.

### Succession of States in respect of matters other than treaties

(A/CN.4/282)<sup>1</sup>

[Item 2 of the agenda]

(continued)

### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR ARTICLE 12 (Currency)<sup>2</sup> (continued)

1. Mr. TSURUOKA said that the rule stated in article 12 was not the only possible solution for the currency problem. It should therefore be presented as a residuary rule, with the addition of the proviso "unless otherwise agreed". In his opinion, the Special Rapporteur had over-stressed the claim and debt aspect of currency; for its nature had changed considerably in recent years. A distinction should be made between currencies that were traded on the world market and other currencies. In the case of a worldwide currency like the dollar, it was not necessary to make provision for compensation in gold or foreign exchange; but where a currency was not in worldwide use, the question of compensation might arise. For example, when the island of Okinawa had been returned to Japan, since the dollar was a worldwide currency universally accepted as means of payment, the agreement concluded between Japan and the United States of America had not contained any special provision concerning currency. As an internal measure, however, the Japanese Government had decided to make up the difference between the dollar rate of exchange prevailing at the date of the return of the island—305 yen—and the rate before the monetary crisis—360 yen. It had accordingly paid the difference of 55 yen to all dollar holders who wished to convert their dollars into yen. On the other hand, when the island of Amami Ōshima had been returned to Japan, the currency question had been settled differently, because the American occupation authorities had issued a currency which had been legal tender in that island only. The Japanese Government, by the agreement concluded on the matter with the United States, had waived all claim against the United States Government for monetary compensation.

2. Those examples showed that the currency problem could not be settled in the same way in all cases, even when the same countries were involved, and that each case required separate treatment. Thus the Commission should be extremely cautious about stating a rule

<sup>11</sup> *Ibid.*, p. 34, article 12.

<sup>1</sup> *Yearbook* . . . 1974, vol. II, Part One, pp. 91-115.

<sup>2</sup> For text see 1325th meeting, para. 6.

on currency, for the diversity of situations was such that it was difficult to establish a uniform rule. He was not opposed to stating a residuary rule, however, with the addition of the necessary proviso to paragraph 1 of article 12.

3. As to paragraph 2 of article 12, it was very difficult to decide what criteria should be adopted for the apportionment of the assets of the central institution of issue. The ratios between gold and foreign exchange reserves and the currency in circulation had changed so much in recent times that the assets of the central issuing institution could hardly be regarded as backing for the currency. It would be better to provide that the assets of the central issuing institution of the predecessor State were not affected by the succession of States.

4. It was also necessary to define what was meant by "transfer of part of a territory". For that purpose the Commission should revert to the formula it had adopted in 1974 in the draft articles on succession of States in respect of treaties.<sup>3</sup>

5. He noted, incidentally, that article 13 contained a reference to the public debt, which was not mentioned in article 12. The two articles should be brought into line.

6. It was difficult to lay down, in article 12, a uniform rule applicable in all circumstances, for allowance had to be made for the diversity of situations and possible solutions. Hence it should be clearly stated that in most cases currency questions were settled by an international agreement. Even if a residuary rule was laid down, its practical value would be slight, for recent examples showed that the transfer of part of a territory, within the meaning of article 12, gave the successor State such advantages that it seldom claimed monetary compensation from the predecessor State. Great caution should therefore be exercised in laying down any rule on the subject.

7. Mr. QUENTIN-BAXTER, referring to the important question of the relationship between the draft articles under discussion and the doctrine of sovereignty over natural resources, which had been raised by Mr. Pinto,<sup>4</sup> said that at some future stage in its work the Commission should consider the principle of sovereignty over natural resources. There were good reasons, however, why it had not so far included a statement of that principle in the draft. The first of those reasons was undoubtedly the generality of the principle, which the Commission had taken into account in deciding not to enunciate it in article 10, in the limited context of the authority to grant concessions. The Special Rapporteur had agreed to drop from that article the former paragraph 3 (A/CN.4/282), which had reserved "the right of eminent domain of the State over public property and natural resources in its territory"; that provision had been a clear reference to the question of sovereignty, which went much deeper than that of ownership. Similarly, in the case of article 12, the same considerations had led the Special Rapporteur

to drop the reference to the right to issue currency which had appeared in the version of that article in his sixth report.<sup>5</sup>

8. Another sound reason for not stating the principle of sovereignty over natural resources was that such a statement would involve the danger of mixing two levels of rules: those relating to sovereignty and those relating to ownership. In his view, a clear distinction had to be maintained between the plane of sovereignty and the plane of ownership. The purpose of the draft articles was to trace the consequences of the change of sovereignty over the territory to which the succession of States related; those consequences were examined at the level of domestic law. In a sense, the topic under discussion was at the intersection of international law and domestic law. The rules of international law that were being framed related to property, which had to be identified by the form given to it in municipal law. He considered that the Commission had been entirely correct in deciding to confine the provisions of the draft to State property defined as such by the law of the predecessor State, which was the law in force at the time of the succession.

9. In his opinion the Commission should not, at that stage, discuss the question of resources which had not been reduced to ownership under the domestic law of the predecessor State. Systems of internal law differed greatly, particularly with regard to the extent of private property rights. In the common law countries, rights of ownership in land, whether vested in a private person or in a public body, were always subject to the sovereign's right of eminent domain. In his own country, New Zealand, the right of eminent domain had existed from the outset. Land was held under Crown grants by individuals or by the State itself, but behind the grant there was the right of the sovereign to interfere with the ownership of the land for reasons connected with the public interest. Moreover, vast areas of mountain and other land remained in sovereignty and had never been reduced to ownership. The draft articles now under discussion were concerned with the passing, at the level of ownership, of certain property from the predecessor State to the successor State. The question of the sovereign's residual right behind ownership was outside the scope of the draft.

10. It was significant that the Commission had instinctively refrained from entering into the distinction between the public domain and the private domain of the State. That distinction was peculiarly a matter of domestic law; indeed, it was totally alien to, or even in conflict with, the basic tenets of constitutional theory in some countries. If the Commission were to go beyond the question of ownership under domestic law, it was likely to get involved once more in that distinction and the difficulties to which it gave rise. He appreciated the concern of those who suggested that the distinction between movable and immovable property should be introduced into the draft; but views on that distinction were coloured, if not governed, by the varying conceptions of domestic law, and for that reason he did not favour its introduction. The Commission should move

<sup>3</sup> *Yearbook* . . . 1974, vol. II, Part One, document A/9610/Rev.1, chapter II, section D, article 14.

<sup>4</sup> See 1325th meeting, paras. 3 and 4.

<sup>5</sup> *Yearbook* . . . 1973, vol. II, p. 34.

towards a mixed solution; the physical presence of property in the territory to which the succession related should not be the only criterion to be taken into consideration. The Special Rapporteur himself had suggested some other means of attachment to, or connexion with, the territory.

11. He had been impressed by Mr. Kearney's remarks on the danger of attempting to deal in a single article with several rather specialized subjects.<sup>6</sup> The Commission was expected to draw up rules that would be applicable at the level of domestic law. The issue was not just what attitude would be adopted by States that enacted legislation in order to give effect to their obligations under international law. There was the very much more mechanical process of actually applying the rules in question in commercial and fiscal relations. Mr. Kearney had also pointed out that, in conventions on private international law, a long series of articles had often been found necessary to deal with questions that were dismissed in a single article in the present draft.<sup>7</sup> But the Commission had neither the means nor the time to enter into those questions in great detail.

12. The Commission generally worked on the assumption that the rules it drafted would be in the nature of residuary rules, and there was certainly much merit in that approach. The situations that arose in regard to State succession were so complex and so individual that in almost every case the States concerned would be well advised to enter into special agreements. Sir Francis Vallat had suggested that suitable language should be included in the draft articles to encourage the making of such agreements.<sup>8</sup> At the same time it was agreed by all that any set of rules drawn up by the Commission must influence States by identifying principles according to which they should act and which they should incorporate in the instruments they adopted. A rather similar task had been performed by the International Court of Justice when it had dealt with the problems of the North Sea continental shelf.<sup>9</sup> The Court had not restricted in any way the freedom of sovereign States to make any arrangements they considered satisfactory; it had, however, insisted that the parties must agree and that, unless there were good reasons for departing from the normal criteria, they should follow certain principles. Such being the scope of the Commission's task, it should endeavour to formulate precise and detailed articles that would operate automatically when the States concerned did not elaborate their own régime. The Commission should say expressly that States had to formulate a régime of their own and that its task was essentially to point the way and to provide guidelines for them.

13. Where matters like currency were concerned, the Commission could hardly dismiss them with broad generalities. Mr. Kearney had demonstrated the need to expand the present text of article 12, for as it stood it did not state a balanced principle on the subject of currency.

14. With regard to the point raised by Mr. Ustor,<sup>10</sup> he thought that the Commission's decision to ask the Special Rapporteur to adopt as a working arrangement the four types of succession of States already adopted for the draft articles on succession of States in respect of treaties had been based on sound reasons of doctrine and practical convenience. From the standpoint of doctrine, the Commission should pay due regard to fundamental principles, such as United Nations doctrine and law on decolonization and the principle of sovereignty over natural resources, as it had in its work on succession of States in respect of treaties.

15. There were also reasons of practical convenience for dividing cases of succession into four types. The case of a union of States differed from the other cases of succession of States in that no predecessor State remained and there was therefore no problem of apportionment of property. In a succession of the moving-treaty-frontier type, on the other hand, two sovereign States were involved and they were able to make the necessary arrangements before succession. The case of the newly independent State was likewise a separate one. In that case, there was a decision on the apportionment of property as between the predecessor State and the State which came into being as a result of the succession. The apportionment was usually determined by a decision embodied in an instrument other than an agreement between the States. It was precisely in order to cover that point that the formula "unless otherwise agreed or decided" had been suggested. The reference to agreement in that convenient formula covered situations of the moving-treaty-frontier type; the reference to decision covered the case of the newly independent State.

16. Both at the first reading and at the second reading of the draft articles on succession of States in respect of treaties the Commission had recognized that there could be cases of separation under conditions of disorder and unfriendly relations, in which the principles to be applied must be very much the same as those which governed a newly independent State. Throughout its work, the Commission had stressed the need to keep in close touch with the realities of international life, and it had accordingly striven to ascertain existing rules of customary international law by reference to the actual practice of States. He had therefore found somewhat disturbing the suggestion made during the discussion that for cases of the moving-treaty-frontier type there was no need to draft elaborate rules. The same applied to the idea that the rules being drafted should not be assumed to be applicable in matters with which the interested States chose not to deal. If that approach were adopted, the significance of the draft articles and their commentaries would be considerably impaired.

17. The four-column table of provisions relating to each type of succession of States<sup>11</sup> facilitated comparison of the rules, which showed that neither State practice nor logic dictated very different rules for the different types of succession. The Special Rapporteur had wisely left

<sup>6</sup> See previous meeting, paras. 20 and 21.

<sup>7</sup> See 1322nd meeting, para. 14.

<sup>8</sup> See 1319th meeting, para. 16.

<sup>9</sup> *I.C.J. Reports* 1969, p. 3.

<sup>10</sup> See 1325th meeting, para. 17.

<sup>11</sup> See 1323rd meeting, paras. 1-5, and 1325th meeting, paras. 15-22.



open the possibility of merging the four articles on any one class of State property. For his part, he very much welcomed that approach and urged that careful note be taken of all similarities and differences, with a view to merging articles wherever possible. In the process of drafting appropriate rules, an attempt to go into great detail was not without risk. A set of elaborate rules formulated *a priori* might prove unsuited to the needs of the predecessor State and successor States concerned; the two States would then be inclined to agree to disregard the rules. Nor did he believe that the Commission had the means or the time to produce a set of residuary rules applicable as a sort of safety net in the variety of situations which occurred in international life. But if the Commission's intention was to produce a set of guiding principles to help States reach equitable solutions, the arguments put forward by Mr. Ustor appeared less persuasive.

18. There were minor cases of succession of States in which most of the problems dealt with in articles 12 to 15 would probably not arise. An example was the transfer of a small piece of river bed never reduced to ownership, in consequence of a change in a river's course which had altered an inter-State boundary. The problems in question arose in the larger cases of succession, such as that of the absorption of Newfoundland by Canada—an example which, incidentally, showed how difficult it was to classify particular cases in the somewhat arbitrary system of four types of succession.

19. In cases in which a territory with a life and population of its own was transferred from one sovereignty to another, the question of sovereignty over natural resources would arise. He considered that in the United Nations era the major concern should be with people, not merely with States. The problems involved concerned the relationship between the geographical configuration of the territory and the local population.

20. Whatever modifications were made to meet the needs of the various types of succession of States, it had to be recognized that there were certain underlying principles which were not contradicted by State practice. That consideration tended to support the approach adopted by the Special Rapporteur. The Commission should proceed with great caution, because any concrete rules it might devise were bound to contain an important element of progressive development of international law. He therefore suggested that, in its work, the Commission should think in terms of moving-treaty-frontier cases and leave the other possible cases in abeyance. The Commission should explore the means of giving practical help in cases of succession without undertaking a task so detailed and extensive as to be unsuited to its working methods and beyond the limits of its time schedule.

21. Mr. RAMANGASOAVINA said that currency was very important State property because it was the manifestation of a regalian right of the State—an outward sign of its sovereignty. In his commentary to article 12 (A/CN.4/282, chapter IV) and in his oral presentation, the Special Rapporteur had explained the nature of currency, and that it must enable services and institutions to continue to operate in the territory to which the succession

related. When one sovereignty replaced another in a particular territory, what happened to the currency and the gold and foreign exchange reserves was of capital importance, and the State assumed an obligation to back the monetary tokens it had placed in circulation. In most cases of a change of sovereignty over a territory, monetary matters were the subject of an agreement between the predecessor State and the successor State, but it was nevertheless necessary to draft residuary rules.

22. One case, which was related both to transfer of part of a territory and to secession, could be added to the types of succession adopted by the Special Rapporteur. That was the case in which a country, after acceding to independence, agreed by treaty to continue to form part of a certain monetary area and thus to maintain ties with the predecessor State. A problem of succession in respect of currency arose only when it decided to leave the monetary area in question and to have its own currency, backed, for example, by special drawing rights. That would be a kind of monetary secession or transfer of monetary sovereignty which did not, strictly speaking, affect a newly independent State. When the State in question acquired its monetary independence, the currency in circulation, even if given its own name, was still associated with the area to which it had formerly belonged and continued to be backed by a stock of gold or foreign exchange. The successor State must therefore hold its own reserves constituting a counterpart for the currency in circulation and foreign exchange claims.

23. A country's currency not only determined its credit rating abroad, but was also a reflexion of its economy and national wealth. A State which exploited its natural resources and sold them abroad obtained, as a counterpart, foreign exchange which it usually converted into the national currency, but which was backed by reserves. The accumulation of wealth, particularly in young African countries like Madagascar, sometimes took the form of the acquisition of physical property. Some inhabitants preferred to deposit their savings in banks, while others preferred to buy property, such as draught animals. In the event of a change of sovereignty, the property of the inhabitants should continue to benefit from monetary backing in the form of the reserves held by the State.

24. The principle stated in article 12, that the full ownership of currency placed in circulation and gold and foreign exchange reserves stored in the territory passed from the predecessor State to the successor State, met a need: the viability of the successor State. The same was true of the assets of the central institution of issue, for the placing of currency in circulation was justified only if it was backed by a counterpart held by the State. It was not unnecessary to state those principles in an article, even though the great majority of States took the precaution of settling questions of succession relating to currency by agreement. The negotiations preceding such agreements were usually conducted on amicable terms, but the bargaining strength of those concerned was not always satisfactorily balanced. Thus it was important that when a country wished to enjoy its full sovereignty it should be sure that its currency was not only paper, but was backed by the gold and foreign exchange reserves of the predecessor State.

25. Mr. BILGE said he thought the discussion on the typology of succession had not been in vain, as it had enabled the Commission to clarify a number of points. The question of currency was a very delicate one involving notions which were very technical, but which the Special Rapporteur had successfully mastered.

26. Generally speaking, the members of the Commission now seemed to be agreed on the need for residuary rules to cover each type of succession. That represented considerable progress, for in considering any particular type of succession it was especially important to allow for the possible existence of an agreement between the predecessor State and the successor State.

27. Since he was in favour of specific rules for each type of succession, he could only approve of the wording of article 12. The article covered a quite particular type of succession which involved neither the disappearance of a State nor the creation of a State; hence it should lay down rules of limited scope. It was essential to refine the rules relating to each type of succession as much as possible. Other provisions, such as article 13, might be amended in that way, and still others, like article 15, could even be deleted.

28. In addition, the commentary to article 12 should explain that the provision did not cover transfers of small parcels of territory, such as frontier rectifications, since they did not involve true successions of States. For instance, the exchange of certain small islands and small areas of land which had taken place in 1974 between the Soviet Union and Turkey, would not come within the scope of the article.

29. He approved of the Special Rapporteur's choice of certain classes of State property which had been the subject of succession agreements. The Commission could, of course, merely deal in general terms with movable and immovable property, but it would be better to concentrate attention on the difficulties experienced by States in negotiating and concluding of agreements. That pragmatic method called for great caution, however, because certain classes of State property, such as currency, raised very technical questions. The functions of currency were found to multiply as new social and political needs arose. Consequently, the Commission should not enter into the details and, in particular, should consider the criteria suggested by Mr. Kearney only with the utmost circumspection.

30. The essential provision of article 12 seemed to be that in paragraph 2, which stated the principle of the passing from the predecessor State to the successor State of the assets of the central institution of issue. Paragraph 1 was only a rather vague introduction concerning the passing of currency to the successor State. With regard to that paragraph, he was not sure whether it was the currency in circulation which passed to the successor State, or the rights in that currency, including the privilege of issue. That privilege, which the Special Rapporteur had not mentioned in the new version of article 12, was an attribute of sovereignty, and there was no reason why it should not pass by succession. Naturally, the privilege of issue should be distinguished from the full freedom to legislate possessed by the successor State

after the succession. If article 12 was to cover only the currency in circulation, difficulties might arise during the consideration of article 13 relating to treasury and State funds

31. The Special Rapporteur had been right to add the word "allocated" in both paragraphs of article 12,<sup>12</sup> because it was always important, in the type of succession concerned, to establish a close link between State property and the territory. That point should be stressed in the commentary.

32. The principle stated in paragraph 2 of article 12, that the assets of the central institution of issue in the predecessor State should be apportioned in proportion to the volume of currency circulating or held in the territory to which the succession related, was in keeping with considerations of justice. Nevertheless, the volume of currency was only one of a number of criteria and it might lead to injustice in certain cases. It might perhaps be better to rely on the concept of equitable apportionment, which would make it possible to take into consideration, according to circumstances, either the volume attained by the currency during a certain time or other criteria.

33. Mr. ŠAHOVIĆ, noting that all the questions which article 12 might raise appeared to have been mentioned, said he would only stress the fact that the Commission was tending to consider the provisions relating to each type of succession as residuary rules. That tendency was understandable, since the agreements which could be concluded between the States concerned were of a mandatory nature. Nevertheless a problem of codification technique arose. In codifying international law, the Commission had always tried to state general rules, after having studied State practice, judicial decisions and doctrine. In order to reconcile those traditional methods of codification with the technique now envisaged, the Commission should, in the rest of its work, take care to state as many general rules as possible. The subject of succession of States in respect of State property was so complex, however, that it might be better, for the time being, to concentrate on the rules applicable to each type of succession, while at the same time trying to formulate general rules valid for as many situations as possible. The Commission could always draft rules on particular aspects of the subject.

34. With regard more particularly to currency, the Commission could compare the solution proposed by the Special Rapporteur for the case of transfer of part of a territory with the solutions he proposed for the other types of succession. That comparison might even show whether currency should really be treated as a truly separate class of State property.

35. Mr. EL-ERIAN said that the Special Rapporteur had very commendably agreed to study one of the most complex and least explored areas of international law, to which the Commission could make a valuable contribution. He approved of article 12 as drafted by the Special Rapporteur.

The meeting rose at 12.50 p.m.

<sup>12</sup> For previous text see *Yearbook* . . . 1973, vol. II, p. 34.

## 1328th MEETING

Thursday, 12 June 1975, at 10.15 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor.

**Succession of States in respect of matters  
other than treaties**

(A/CN.4/282)<sup>1</sup>

[Item 2 of the agenda]

(continued)

**DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR  
ARTICLE 12 (Currency)<sup>2</sup> (continued)**

1. The CHAIRMAN invited the Special Rapporteur to reply to the comments made by members of the Commission on article 12.

2. Mr. BEDJAOUI (Special Rapporteur) said that the first point to note about article 12 was that it dealt with a very special kind of succession. Many of the difficulties encountered by members of the Commission, and many of their doubts about the soundness of the rules stated in article 12 and the subsequent articles (A/CN.4/282) and the advisability of laying down those rules, were due to the peculiarities of that type of succession. Some members took the view that the problems relating to currency and the other classes of State property dealt with in those articles did not arise in practice in a succession affecting a part of a territory. They were thinking of areas that were very small compared with the whole of the predecessor State's territory and, in particular, of frontier rectifications. Since their reasoning was based on such cases, it seemed to them that the questions covered by article 12 and the subsequent articles should not arise in practice. They also pointed out that when such questions arose they were settled by a treaty between the predecessor State and the successor State. Moreover, such treaties often dealt with matters other than those covered by article 12 and the subsequent articles. Consequently, they regarded the rules stated in those provisions as being far removed from reality. Mr. Ustor, for example, had questioned whether there was good reason to believe that the classes of State property referred to in the articles under consideration passed to the successor State in the absence of provisions to that effect in the succession agreement:<sup>3</sup> for the silence of such agreements might equally well be taken to mean that the property did not pass to the successor State.

3. There could be no doubt that a succession affecting part of a territory was often the consequence of a frontier rectification, that the States concerned often entered into an agreement to settle the fate of State property, and that in many cases those agreements did not mention the

classes of property referred to in the articles under consideration, for the simple reason that they did not raise any problem of succession. Nevertheless, successions of that type could involve large provinces and a major part of the predecessor State's territory. In such cases, the questions dealt with in article 12 and the subsequent articles certainly arose. In short, whether the questions dealt with in those articles arose, and how important they were, depended on the size of the territory transferred. The existence of those questions should not be denied merely because they did not arise in all cases. The special nature of successions affecting part of a territory lay in the fact that the size of the territory to which the succession related was decisive, whereas for the three other types of succession it was immaterial, the essential factor being the creation or the disappearance of a State.

4. That being so, there were several ways of solving the problems raised by the transfer of part of a territory. Some members of the Commission thought it was incumbent on the predecessor State and the successor State to conclude an agreement. If that were so, the rules drafted by the Commission would have to be residuary rules. The silence of the agreement, however, could be interpreted as establishing a presumption that the State property was bound to pass to the successor State only in so far as the problem of such passing really arose—that was to say in cases other than ordinary frontier rectifications. It was precisely for that reason that article 12 and the subsequent articles referred to State property situated in the territory to which the succession related and “allocated” to that territory. Under article 12, if there were no gold or foreign exchange reserves, or if such reserves were not allocated to the territory in question, those assets clearly would not pass to the successor State. The silence of the agreement would not imply any presumption of passing: it would simply mean that the problem did not arise.

5. Other members of the Commission considered that the questions dealt with in article 12 and the subsequent articles were so technical and complex that the conclusion of agreements to settle them should even be encouraged by means of a special provision. In his opinion it would not be easy to achieve that result. In the *North Sea Continental Shelf cases* the International Court of Justice had stated that the delimitation of the continental shelf should be effected by agreement between the parties in accordance with equitable principles.<sup>4</sup> It was true that the Court had given its judgement in a very special context. The Commission could, of course, encourage the conclusion of agreements, but it was obvious that in some situations it could not be expected that agreements would be concluded. Frontier rectifications were often effected by agreements, but it was when a large part of the predecessor State's territory passed to the successor State that it was especially important to settle the question of the passing of State property. Yet in such cases an agreement was often lacking.

6. The possibility of a succession affecting a large part of a territory could not be excluded in modern international law, even though the annexation of territory by

<sup>1</sup> Yearbook . . . 1974, vol. II, Part One, pp. 91-115.

<sup>2</sup> For text see 1325th meeting, para. 6.

<sup>3</sup> See 1326th meeting, para. 28.

<sup>4</sup> See *I.C.J. Reports 1969*, at p. 54.

force was now prohibited. By the application of a modern principle of international law, that of self-determination, a territory might be separated from one State and attached to another as a result of a referendum. It was also possible that part of the population of a State might secede and that the territory it occupied might be attached to another State. In view of the often dramatic political circumstances attending such changes of sovereignty, it would then be vain to hope for the conclusion of an agreement.

7. Several members of the Commission did not deny that a succession resulting from the transfer of part of a territory might raise the problems dealt with in article 12 and the subsequent articles, but had pointed out that other questions might also arise. Hence, they suggested either that an article should be drafted stating the general principle of the passing of State property in that particular type of succession, or that the list of classes of State property covered by article 12 and the subsequent articles should be extended. The reason why he had dealt with only a few classes of State property and had not mentioned either public property belonging to territorial authorities or public bodies or property of the territory itself, was that the Commission had drawn those distinctions at its twenty-fifth session, and had decided for the time being to consider only State property in the strict sense.<sup>5</sup> Consequently, the disposal of railways—to which Mr. Ustor had alluded—would have to be considered later, since under the law of many countries railways were not State property, but the property of public bodies or public companies. In reality, there were no other important kinds of State property than those mentioned in article 12 and the subsequent articles.

8. Referring to Mr. Pinto's comments,<sup>6</sup> he said that a succession resulting from the transfer of part of a territory differed from a succession resulting from secession in that it did not involve the formation of a new State. Mr. Pinto had also asked in what way currency, referred to in article 12, differed from State funds, which were dealt with in the next article. In that connexion it should be borne in mind that currency was more in the nature of a debt, as Mr. Kearney had pointed out. The passing of currency to the successor State had been mentioned in the draft only in order to justify the passing of gold and foreign exchange reserves. Draft article 13 treated State funds as an asset, not as a liability or debt. Perhaps article 12 should be recast as Mr. Kearney had suggested,<sup>7</sup> so that a first paragraph would deal with gold and foreign exchange, a second with the assets of the institution of issue and a third with currency properly so called.

9. He had never concealed the difficulties and anxieties he had experienced in dealing with the very technical questions covered by article 12 and the subsequent articles. His fears had been strengthened by the suggestions of Mr. Kearney and Mr. Sette Câmara,<sup>8</sup> which would make article 12 even more complicated. In addition, Mr. Tsuruoka had told how the same problem, that of

currency, had been dealt with differently between the same countries in the case of the island of Okinawa and that of Amami Oshima.<sup>9</sup> The occupation of Japan by the United States of America was not, of course, an example of a succession of States, but the case presented a useful analogy.

10. The time had come for the Commission to make a choice: either it should refer article 12 to the Drafting Committee, asking it to draft an article as non-technical as possible on currency, or it should prepare a general draft article covering all cases of succession resulting from the transfer of part of a territory. The second course would be consistent with the proposals made by Mr. Šahović<sup>10</sup> and by Mr. Ushakov, who had even submitted a single draft article to him, which read:

#### Article 12

1. When part of a State's territory becomes part of the territory of another State, the passing of the State property of the predecessor State to the successor State shall be settled by agreement between the predecessor and successor States.

2. In the absence of the agreement referred to in paragraph 1:

(a) the immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(b) the movable State property of the predecessor State connected with the activity of the predecessor State in the territory to which the succession of States relates shall pass to the successor State;

(c) the movable State property other than that mentioned in sub-paragraph (b) shall pass to the successor State in an equitable proportion.

11. If the Commission continued along the lines he had indicated and took account of suggestions like those made by Mr. Kearney, it would have to draft some very technical articles. If it decided to draft, for each type of succession, no more than one or two general articles like that proposed by Mr. Ushakov, without going into the details of different classes of property, its work would be simplified, it would save time and its draft articles would be kept to more modest proportions. He had deliberately not chosen the easy way, and to avoid exposing himself to criticism had followed the course traced out by doctrine, which had so far been concerned with only a few classes of State property. The choice before the Commission was of capital importance for the future of the whole draft and would be decisive for the continuation of his own work. It was for the Commission, not the Drafting Committee, to make that choice.

12. In conclusion, he stressed the value of Mr. Quentin-Baxter's comments on the problem of sovereignty over natural resources, on the distinction between sovereignty and ownership rights and on the question of the right of eminent domain of the State.<sup>11</sup> The considerations he had put forward, which were in accord with Mr. Pinto's

<sup>5</sup> *Yearbook* . . . 1973, vol. II, p. 202, para. 87.

<sup>6</sup> See 1326th meeting, paras. 1-4.

<sup>7</sup> *Ibid.*, paras. 21-26.

<sup>8</sup> *Ibid.*, paras. 31 and 32.

<sup>9</sup> See previous meeting, para. 1.

<sup>10</sup> *Ibid.*, paras. 33 and 34.

<sup>11</sup> *Ibid.*, paras. 7-20.

remarks, would be most useful for drafting the commentary.

13. Mr. USTOR said that the Commission had to take a stand on the question so lucidly put to it by the Special Rapporteur, which affected the whole draft. As he saw it, there were at least two valid arguments in favour of adopting a general approach to succession to State property. The first was that the classes of State property dealt with in articles 12 to 15 had been selected more or less at random and in fact amounted to only three kinds of State property; there were many other kinds, and it would be difficult to explain why the Commission had not dealt with them. Currency, State funds and State archives were no doubt important forms of State property, but they were not the only ones. He had mentioned earlier the example of railways which might, of course, be privately owned, but which were more often State property. He had in mind particularly the question of rolling stock, which had created great problems in Europe after the Second World War. Armaments, naval vessels and merchant ships were further examples.

14. The second reason for adopting a general approach was the highly technical character of the questions dealt with in articles 12 to 15, which could only be settled with the help of experts. That applied to currency, State funds, archives, rolling stock, weapons and ships. The Commission's work would be more productive and the results more likely to prove acceptable to the General Assembly if it abandoned the ambitious plan of trying to solve a series of difficult technical problems, which called for specialized knowledge he thought he did not possess.

15. Mr. TSURUOKA agreed with Mr. Ustor. He suggested, however, that before entirely abandoning the idea of dealing separately with the different classes of State property, the Commission should ask the Secretariat to draft a report on the question, after taking expert advice. That course was particularly advisable in regard to currency questions, because of the extremely precarious international monetary situation.

16. Mr. BEDJAOUI (Special Rapporteur) welcomed Mr. Tsuruoka's suggestion, but pointed out that the General Assembly had recommended the Commission to proceed with the preparation, on a priority basis, of draft articles on succession of States in respect of matters other than treaties and had placed that topic immediately after the high priority topic of State responsibility.<sup>12</sup> It would be regrettable if the Commission were to defer for a year a decision which, if taken at once, would enable it to submit to the General Assembly, at its thirtieth session, either a general article on succession in the case of transfer of part of a territory or several special articles on that type of succession. So long as he did not know the results of the study to be made by the Secretariat, which was overloaded with work at the present, he would not know how to proceed. In any event, a Secretariat study could be expected to reach the conclusion that the questions under consideration were even more complex than they seemed.

17. Mr. KEARNEY asked the Special Rapporteur to explain what distinction he made between State property and public property, and the effect of that distinction on article 9. That article, if adopted in its new text,<sup>13</sup> would specify that State property which, on the date of succession of States, was situated in the territory to which the succession of States related, passed to the successor State. The question arose whether that provision would cover a corporation or similar entity performing an economic function, such as production or marketing, completely within the territory to which the succession of States related.

18. Mr. BEDJAOUI (Special Rapporteur) said that in his sixth report he had submitted some very detailed articles dealing collectively with all questions relating to public property.<sup>14</sup> After a long discussion, the Commission had decided to consider, first, public property which really belonged to the State, in other words, State property. It had been pursuant to that decision that article 5 (A/CN.4/282), which contained a definition of State property, had been drafted. The disposal of property belonging to the patrimony of an entity other than the State would not be considered until later. Personally, he considered that the fate of such property was not affected by a succession of States. It changed "nationality" in consequence of the change of sovereignty, but it did not pass in full ownership to the successor State.

19. Mr. KEARNEY explained that he had not been referring to the items of property belonging to a corporation, but to the stocks or other securities representing the ownership of the corporation itself.

20. Mr. BEDJAOUI (Special Rapporteur) pointed out that in his sixth report he had laid down, in article 8, a rule that public property belonging to public bodies remained their property, but passed within the juridical order of the successor State. Because that wording had been considered vague, he had dropped it. He had used it to mean that such property was governed by the new laws of the successor State. Once a territory was affected by a change of sovereignty, public companies were governed by the juridical order of the successor State, not only in regard to ownership, but also in regard to supervision and the legislation applicable. It was obvious that after a succession of States, the successor State could change its juridical order as it saw fit.

21. Mr. KEARNEY said that the question he had raised had a bearing on the problem mentioned by Mr. Ustor and also on Mr. Ushakov's proposal for a general article. To take the example of rolling stock belonging to a railway company, if the ownership of the company passed to the successor State, the ownership of the rolling stock would pass with it. The proposal by Mr. Ushakov that State property should be divided into movables and immovables would affect the operation of article 9 which, as it stood, would cover both movables and immovables. In his opinion, the introduction of such a sub-division would not add anything of value to article 9. It had been suggested during the discussion that the predecessor State might remove movables from

<sup>12</sup> See General Assembly resolution 3315 (XXIX), section I, para. 4.

<sup>13</sup> See next meeting, para. 2.

<sup>14</sup> *Yearbook* . . . 1973, vol. II, pp. 9-12.

the territory before the passing of sovereignty and that some provision should be included in the draft to deal with that contingency. As he saw it, the problem was connected with that of property which was outside the transferred territory and in which the successor State had or ought to have some interest. Problems of that kind could give rise to conflicts with other treaties in force.

22. With regard to the method to be adopted, he was not at all certain that working out general principles would necessarily be easier than dealing with specific problems. Articles 12 to 15 dealt with somewhat marginal cases, and there might be no need for provisions specifying what would happen in those cases in the event of transfer of part of a territory. If the currency of the predecessor State previously in circulation in the transferred territory was to remain a charge on the predecessor State, there was no need to provide for the transfer of any part of the gold and foreign exchange backing of that currency. Only if the successor State intended to withdraw the currency and replace it with its own currency would it be entitled to part of those reserves. The matter was one which could well be left to the decision of the States concerned. The example given by Mr. Tsuruoka illustrated that point. In the case of Okinawa no problem had arisen, because the United States dollars in circulation in that island could continue to be freely used by their holders and thus remained an obligation of the United States after the succession. The position had been different in the case of other islands, in which a special currency called B yen had been in circulation and which had moved into the Japanese currency system. The long negotiations between the two countries concerned had resulted in an arrangement covering a great many issues; the concession made by Japan on the currency question had been matched by advantages secured by that country on other points. His conclusion was that States were well aware of the problems involved; there appeared to be no need for a residuary rule to cover the situation if they decided to take no action regarding currency. In fact, the States concerned might find it unacceptable to be told what rules to apply where they themselves considered that no problem existed.

23. There might be some advantage in dealing with all the articles on currency together. One good reason for doing so was that the position was not the same in the case of newly independent States as it was in that of the transfer of part of a territory. When a new State attained independence, the hostility prevailing between the parties concerned might make it impossible to arrive at an agreed solution. A residuary rule on currency for newly independent States might therefore be useful.

24. Article 20 (A/CN.4/282) was almost certainly unnecessary. An article on currency was pointless in the case of uniting of States: all gold and currency reserves would come under the legal régime of the newly-formed union, which was the successor State. That State might decide to continue with separate currencies in the various component parts of the union, or it might decide to replace the old currencies by a new one. There was no logical need to include in the draft, provisions covering matters that came within the internal law of the successor State.

Where the dissolution of a union was concerned, experience since the end of the Second World War had shown that questions of currency were usually dealt with by agreement. In the fourth type of succession—the separation of part of a State—a provision on currency would be needed only if the separation took place in circumstances similar to those attending the emergence of a new State. He was thinking of a case of the kind described in article 33, paragraph 3 of the Commission's 1974 draft articles on succession of State in respect of treaties.<sup>15</sup> In other cases of secession, there was no need for the Commission to substitute its judgement for that of the States concerned.

25. At a previous meeting, he had suggested a rewording of the article on currency,<sup>16</sup> which raised a number of problems. The first was whether special drawing rights should be included among the reserves, together with gold and foreign exchange; the second was whether gold should be valued at the market price or at the official price. The answer to those and similar questions would, of course, affect the manner in which currency reserves were apportioned as between the States concerned. Considerations of that kind indicated that there was merit in Mr. Tsuruoka's suggestion that technical experts should be consulted. Those problems could be avoided if a general rule was adopted which would rely on the good faith of the parties concerned, but unfortunately such a rule would offer no guarantee of equitable action in particular cases.

26. Mr. USHAKOV said that the Special Rapporteur should not regard the wording of the draft article he had submitted to him as final. He had taken that step on realizing that it was not possible to deal separately with all classes of State property. Such an approach would mean drawing up an exhaustive list of State property, which was impossible; hence it would be better to deal with State property in general, distinguishing only between movable and immovable property. No matter how laws might differ, immovable property was always attached to a territory; in the absence of agreement, it must obviously pass to the successor State. Movable State property—the only kind which articles 12 to 15 appeared to cover—could not, being movable, be considered to be situated in a territory. In the absence of agreement it passed to the successor State, no matter where it was situated. If not connected with the activity of the predecessor State in the territory in question, however, it passed to the successor State in an equitable proportion. It was not possible to establish in advance how movable State property should be connected with the activity of the predecessor State in the territory in question, or to determine what an "equitable proportion" would be. Those notions could only be defined precisely in concrete cases, though some examples could be given in the commentary to the article he had proposed.

27. Mr. EL-ERIAN said he wished to deal briefly with a few questions of method and approach. In the first place, the question whether it was necessary to consult

<sup>15</sup> *Yearbook* . . . 1974, vol. II, Part One, document A/9610/Rev.1, chapter II, section D.

<sup>16</sup> See 1326th meeting, paras. 24-26.

experts should be left to the Special Rapporteur. It was the Commission's practice to leave Special Rapporteurs free to decide what kind of assistance they required from the Secretariat.

28. He had himself taken part in negotiations concerning the uniting of States and the dissolution of unions. That experience showed how desirable it was that the draft should contain a residuary rule offering guidance to States. It was not at all easy for the States concerned to settle all the complex problems which arose in situations of that kind, so the existence of residuary rules would be very helpful.

29. He supported the general approach. The Commission should not undertake the drafting of a series of detailed provisions, which would be better suited to a contract than to a codifying convention. The draft should contain only general norms and should not go into such matters as would be covered by an instrument settling a particular succession.

30. The CHAIRMAN suggested that, in view of the short time left for the consideration of the topic of succession of States in respect of matters other than treaties, all the articles in section 2 of the draft (A/CN.4/282) should be referred to the Drafting Committee.

*It was so agreed.*<sup>17</sup>

The meeting rose at 12.20 p.m.

<sup>17</sup> For resumption of the discussion on article 12 see next meeting, para. 46.

## 1329th MEETING

*Friday, 13 June 1975, at 10.10 a.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

*Members present:* Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor.

### Eleventh session of the Seminar on International Law

*(resumed from the 1316th meeting)*

1. The CHAIRMAN said that at the close of the Seminar on International Law, he had been asked to express the gratitude of Mr. Raton, the Senior Legal Officer in charge, to the members of the Commission who had given lectures. The Seminar not only provided instruction for young jurists from different continents, but also afforded an opportunity for members of the Commission to hold a useful exchange of views with the younger generation. He wished the participants every success in their careers and hoped to see them again at other United Nations meetings.

### Succession of States in respect of matters other than treaties

(A/CN.4/282;<sup>1</sup> A/CN.4/L.226 and Add.1)

[Item 2 of the agenda]

*(resumed from the previous meeting)*

#### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

##### ARTICLE 9<sup>2</sup>

2. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 9 as proposed by the Drafting Committee, which read:

##### *Article 9*

##### *General principle of the passing of State property*

Subject to the articles of the present Part and unless otherwise agreed or decided, State property which, on the date of the succession of States, is situated in the territory to which the succession of States relates, shall pass to the successor State.

3. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that in the light of the discussion in the Commission, the Drafting Committee had decided not to retain in article 9 the phrase "State property necessary for the exercise of sovereignty" originally proposed by the Special Rapporteur, and had found that the phrase "State property used for the exercise of governmental authority" did not constitute an adequate alternative. The article, as adopted by the Committee, referred simply to "State property", which had been defined in article 5 (A/CN.4/282). The word "all" had been deleted from the title in order to bring it into line with the text. The Committee had added the introductory phrase "Subject to the articles of the present Part and unless otherwise agreed or decided"; in order to stress the residual nature of the article, in accordance with the general trend of the Commission's discussion. It was the belief of the Committee that, in an article of very general scope, it was preferable to use the formula "State property which, on the date of the succession of States, is situated in the territory to which the succession of States relates". The Committee had recognized that the question of property situated outside that territory and the general question of distinguishing between movable and immovable property would have to be considered in more specific contexts at a later stage.

4. Mr. USHAKOV said that he accepted the text of article 9 proposed by the Drafting Committee, subject, however, to a reservation concerning the word "situated", which was unsuitable for movable property. As a matter of drafting he suggested that the opening words of the article should read "Subject to the provisions of the articles of the present Part . . .".

5. Mr. BEDJAOUÏ (Special Rapporteur) said he accepted the drafting change suggested by Mr. Ushakov.

6. Mr. USTOR said that his support for article 9 as proposed by the Drafting Committee was provisional, since its exact form would depend on that of subsequent articles. The effect of the phrase "Subject to the articles

<sup>1</sup> *Yearbook . . . 1974*, vol. II, Part One, pp. 91-115.

<sup>2</sup> For previous discussion see 1318th meeting, paras. 7 *et seq* and following meetings.



of the present Part” was that the provisions of articles 12 to 15 would prevail. Those articles provided that certain types of property situated in the territory of the predecessor State on the date of succession would pass in a specified proportion to the successor State. That implied *a contrario* that other property likewise situated in that territory—mostly movable property like railway rolling stock and arms—would not pass to the successor State in any proportion whatsoever. The attention of States should be drawn to that point by a note in the commentary.

7. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said he would gladly take note of Mr. Ustor’s comment, which reflected a concern that had been expressed in the Commission and had been very much in the minds of the Drafting Committee.

8. The CHAIRMAN said that if there was no objection he would take it that the Commission approved article 9, subject to the comments made at that meeting.

*It was so agreed.*

#### ARTICLE 11<sup>3</sup>

9. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 11 as proposed by the Drafting Committee, which read:

##### *Article 11*

##### *[Passing of debts owed to the State]*

[Subject to the articles of the present Part and unless otherwise agreed or decided, the debts owed (*créances dues*) to the predecessor State by virtue of its sovereignty over, or its activity in, the territory to which the succession of States relates shall pass to the successor State.]

10. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the title and text of article 11 had been placed in square brackets because the Drafting Committee had not felt that it was on firm enough ground to dispose of all the questions to which the proposed article might give rise. Outstanding problems included the question of the difference in nature and substance between movable and immovable property; the fact that in certain legal systems the term “debts” (*créances*) might give rise to difficulties; doubts about the adequacy of the word “pass” in the context of article 11 to indicate clearly to debtors of the predecessor State exactly their obligations were; and concern that even in its new version the draft article might not cover all the possible cases it was intended to cover.

11. Textual changes included the addition of the saving clauses “Subject to the articles of the present Part” and “unless otherwise agreed or decided”, which already appeared in article 9. The Committee had considered that, unless there was some difference in scope between the French term “*créances*” and the English notion of “debts”, it would be wise to include, after the words “debts owed” in the English version of the article, the French expression “*créances dues*”, to indicate that it was the concept of *créances* which had guided the Commission. The article had been reworded to avoid the phrase “shall become the beneficiary” and the French term “*redevable*”, which some members had considered ambiguous. On the other hand,

the phrase “by virtue of its sovereignty over, or its activity in, the territory to which the succession of States relates” had been retained, as it had been thought necessary to specify the essential links between the debts owed to the predecessor State and the territory.

12. The CHAIRMAN observed that the drafting amendment to article 9 proposed by Mr. Ushakov would also apply to article 11.

13. Mr. KEARNEY said he could agree that the Commission should simply state a general principle in an article like article 9, but he could not accept a like procedure in article 11, which dealt with a specific category of obligations. While the proposed text also had other deficiencies, his greatest concern was what was meant by the “passing of debts”. Most of the members of the Commission seemed to believe that article 11 would have the magical effect of ensuring the legal transfer to the successor State of the title to debts owed to the predecessor State, but he thought the language of the article was too imprecise to achieve that object. In the first place, what would be the possible consequences of the article for States whose constitutions provided that treaties seen as self-executing became part of internal law by virtue of ratification, without implementing legislation? He also wondered whether other States would really be prepared to amend their internal law relating to trade, negotiable instruments and sales in order to implement the article. He hoped that States would make it clear in their comments whether they considered that a general article of the type proposed was sufficient.

14. Mr. AGO said he thought that article 11, as proposed by the Drafting Committee, should be included in the draft; he agreed that the Commission should consult States on the text, for in his opinion it raised serious problems. For example, if the predecessor State had a claim against one of its provinces, which subsequently became the successor State, it would be absurd to say that the predecessor’s claim passed to the successor State, for the successor State would itself be the debtor. The only solution would be to provide, if absolutely necessary, that the claim was simply extinguished, though it was open to question whether that would be equitable. Another possible situation was one in which the predecessor State had made a loan to a private person or enterprise in order to promote industry in one of its provinces, which subsequently seceded. Could it be held, in such a case, that the successor State inherited the claim, when most probably it was the savings of an entirely different province of the predecessor State which had made the loan possible? In his opinion, the attention of States should be drawn to those problems before a final position was taken on the subject.

15. It was true, as the Special Rapporteur himself had said, that the rule in article 11 was merely a residuary rule, applicable only in the absence of an agreement between the parties. But that was precisely where the main difficulty lay. For up to the present, in the absence of any formulation of the general rule on the subject, agreements had been freely made between the parties, so it might be asked whether the very existence of such a rule would not make the conclusion of agreements much more

<sup>3</sup> For previous discussion see 1322nd and 1323rd meetings.

difficult. The successor State, knowing that there was a rule applicable in the absence of an agreement, would be little disposed to conclude with the predecessor State an agreement departing from that rule, since any such departure would certainly be to its disadvantage. Thus instead of helping to clarify and facilitate the relations between the parties, the rule stated in article 11 might create additional difficulties. He hoped the Special Rapporteur would give some idea of those difficulties in the commentary, in order to draw the attention of States to the problems that arose and to enable them to express an informed opinion on the matter.

16. Mr. BEDJAOUI (Special Rapporteur) noted that article 11 had given rise to lively discussion in the Drafting Committee, as it had in the Commission. When the successor and predecessor States were dealing with each other, the passing of State property did not raise many difficulties, since only two partners were involved. But where certain classes of State property were concerned there was a third partner: the party liable for the debt contracted to the predecessor State. There was then a triangular relationship, which raised difficulties for Mr. Kearney.<sup>4</sup> Those difficulties should not be exaggerated, however. Admittedly, under some political systems difficulties might arise from the fact that, under the constitution, normally ratified treaties automatically became part of internal law. But even in the case of the triangular relationship which then existed between the successor State, the predecessor State and a third party—legal or natural—which was a debtor to the predecessor State, recourse could always be had to article 6, which provided that the succession of States entailed *ipso facto* the extinction of the rights of the predecessor State and the arising of the rights of the successor State to State property—that was to say, in the case in point, to State debt-claims. The idea of passing thus necessarily implied the transfer of the claim from the predecessor to the successor State. If the third party discharged its debt to the predecessor State, the problem of reimbursement should normally arise, particularly in the case of fiscal claims. He referred in that regard to the judgments of the Supreme Administrative Courts of Czechoslovakia and Poland.<sup>5</sup> In his opinion, therefore, the triangular relationship contemplated in article 11 should not cause excessive difficulties; the Commission's commentary should stress that there was no other solution than that proposed in article 11.

17. The case mentioned by Mr. Ago—that of a loan granted by the predecessor State to one of its provinces, which subsequently seceded to become a new State—was not strictly speaking within the scope of article 11, since it did not involve an act of sovereignty or direct activity of the predecessor State in the territory to which the succession related. The reason why State claims passed from the predecessor to the successor State was, precisely, that there was a link between the territory and the claim, and the link consisted in the fact that the predecessor State had carried out an activity, or exercised its *imperium*,

in the territory in question. That link was the basis of the rule stated in article 11 and it must be shown to exist when the article was invoked.

18. The CHAIRMAN said that Mr. Ago's point would be mentioned in the commentary for the attention of States. If there was no objection, he would take it that the Commission approved article 11, with the amendment proposed by Mr. Ushakov.

*It was so agreed.*

SUB-PARAGRAPH (e) OF ARTICLE 3 AND ARTICLE X<sup>6</sup>.

19. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce sub-paragraph (e) of article 3 and article X as proposed by the Drafting Committee, which read:

*Article 3 (Use of terms)*

...

(e) "third State" means any State other than the predecessor State or the successor State;

*Article X*

*Absence of effect of a succession of States  
on third State property*

A succession of States shall not as such affect property, rights and interests which, on the date of the succession of States, are situated in the territory [of the predecessor State or] of the successor State and which, according to the internal laws of the territory in which they are situated, are owned by a third State.

20. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that sub-paragraph (e) of article 3 corresponded to the article X proposed by the Special Rapporteur (A/CN.4/282). A few drafting changes had been made to clarify the text.

21. The CHAIRMAN said that, if there was no objection, he would take it that the Commission approved sub-paragraph (e) of article 3.

*It was so agreed.*

22. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee had found merit in the proposal made by Mr. Tsuruoka<sup>7</sup> and other members that articles Y and Z, dealing with the determination and treatment of the property of a third State, should be combined, and had combined them in article X. Following the clear trend of the Commission's discussion, the Committee had not retained the qualification relating to the public policy (*ordre public*) of the successor State. The title of the proposed article read simply "Absence of effect of a succession of States on third State property"; some reservations had been expressed in the Committee about the absolute nature of the proposed rule.

23. Members of the Committee had differed as to whether or not the scope of the article should be confined to property situated in the territory to which the succession related; that was why the words "of the predecessor State or" appeared in square brackets.

<sup>4</sup> See 1323rd meeting, paras. 37 and 38.

<sup>5</sup> *Yearbook* ... 1971, vol. II, p. 186, paras. (5) and (6) and p. 189, para. (20).

<sup>6</sup> For previous discussion see 1324th meeting, para. 1.

<sup>7</sup> *Ibid.*, paras. 21 and 22.

24. Mr. TAMMES, referring to comments he had made in the Drafting Committee, said he was still not sure that the phrase "shall not as such affect" would produce the expected result in regard to the property of a foreign State which became a third State in a case of succession. It was an essential element of succession that the legal system of the old sovereign State was replaced by the legal system of the new sovereign State. If the new legal system restricted the ownership of property by another State in the new State's territory—a possibility mentioned in paragraph (6) of the commentary to article Z (A/CN.4/282, chapter IV)—the property of the third State, other than that required for its official representation, would automatically be affected by the succession. For that reason, he would have preferred the wording originally proposed by the Special Rapporteur in article Z to stand.

25. Mr. USHAKOV pointed out that Mr. Tammes himself had said that it was not the succession of States as such which could produce effects on the property of a third State, but the legislation of the successor State—in other words, its own internal law.

26. Mr. AGO said he had some reservations about the phrase "the internal laws of the territory in which they are situated", because it did not specify that the internal law recognizing the ownership of certain property by a third State must be the law in force at the time of the succession. He thought it would be better to refer to "the law in force at the place where the property was situated on the date of the succession of States".

27. Mr. BEDJAOUÏ (Special Rapporteur) said he could agree to specify that the law referred to was "the law in force in the territory on the date of the succession of States". He pointed out, however, that other articles referred to "internal law"; for example, article 5 defined State property "according to the internal law of the predecessor State".

28. Mr. AGO said he considered it necessary to refer to the place where the property of the third State was situated, for although no problem arose in regard to immovable property, which passed with the territory in which it was situated, there might be a problem in the case of movable property, which could be in the part of the predecessor State's territory which was not transferred. Hence the expression "internal law of the territory" would be ambiguous, for it could refer to the whole of the predecessor State's territory just as well as to the territory which passed to the successor State.

29. Mr. USHAKOV agreed with Mr. Ago. The expression "the internal laws of the territory in which they are situated" was meaningless in law. The reference should be to the internal law of the predecessor State or of the successor State, as the case might be.

30. Mr. BEDJAOUÏ (Special Rapporteur) proposed, as a compromise, the following text for the new article X:

*Absence of effect of a succession of States on third State property.*

A succession of States shall not as such affect property, rights and interests which, on the date of the succession of States, are situated in the territory [of the predecessor State or] of the successor State and which, on

that date, are owned by a third State according to the internal law of the predecessor State or of the successor State, as the case may be.

31. Mr. KEARNEY said that formulas such as "according to the internal law of the predecessor State or of the successor State, as the case may be" might be a source of difficulties, because the words "of the predecessor State" had been placed in square brackets earlier in the article. He therefore suggested that the last phrase of the article should read "according to the applicable internal law", it being understood that the reference was to the internal law of the predecessor or of the successor State, depending on where the third State's property was situated.

32. Mr. BEDJAOUÏ (Special Rapporteur) found that amendment acceptable.

33. Mr. USHAKOV said the thought Mr. Kearney's proposal would give rise to further difficulties. If it saw fit, the Commission might put the second reference to the predecessor State in square brackets also.

34. Mr. CALLE Y CALLE said that he could accept the proposed redraft of article X, but requested that a full explanation of two points should be given in the commentary. The first point was the inclusion of a reference to property situated in the territory of the predecessor State; the second was the mention of the internal law of the successor State.

35. Article X had been introduced into the draft only to make it clear that, in all types of succession of States, when State property passed from the predecessor State to the successor State, there were some items of property which the predecessor State could not transfer because they belonged to third States. The question of ownership under the law of the predecessor State and the fate of the property under the legal system of the successor State were entirely different matters.

36. In his view, the third State's property covered by article X was the property of that State under the law of the predecessor State, and the predecessor State would continue to be answerable for it to the third State. Article X should specify simply that the succession—the replacement of one sovereignty by another in the territory—did not in any way affect the predecessor State's responsibility towards third States. It was inappropriate to make any reference in the article to the internal law of the successor State, since the rights of third States existed under the law of the predecessor State and of that State alone.

37. Mr. USHAKOV said that article X applied to all property of a third State wherever it was situated, in the territory of the predecessor State or the successor State. That was why it was necessary to mention both the predecessor State and the successor State. For example, a province of State A might secede and become part of State B; if assets of a third State were held in the central bank of State A, State B might contend that State A had not transmitted to it titles or claims to those assets and had appropriated them. The same charges might be brought by State A against State B, if the assets of the third State were held in the central bank of State B. Hence it was important to lay down the principle that the property of a third State situated in the territory of

the predecessor State or of the successor State was not affected by the relations between those two States. On the occasion of a succession of States, both the predecessor State and the successor State could unlawfully interfere with property of a third State situated in their territory.

38. Mr. KEARNEY said that despite the explanation given by Mr. Ushakov, he agreed with Mr. Calle y Calle, for he failed to see how a third State's property in the territory of the predecessor State could possibly be affected by the succession. After the succession, the property of a third State in the territory of the predecessor State remained under precisely the same legal régime as before the succession. No change in sovereignty or in legal régime had taken place in the territory of the predecessor State. Possibly some new claims might be made, but that was a problem to be settled under the law of the predecessor State.

39. In the light of those considerations, he suggested that the wording of the article should be simplified so as to eliminate the inaccurate references to the territory of the predecessor State and to the law of the successor State. It was the law of the predecessor State which determined what property belonged to a third State and it would merely confuse matters to make a totally unnecessary reference to the law of the successor State.

40. Mr. TSURUOKA said that if the Commission chose to use square brackets, it could put the words "or of the successor State, as the case may be" in square brackets.

41. Mr. USHAKOV noted that some members of the Commission wished the passages they found inappropriate to be placed in square brackets, whereas others would like the text to be retained in its entirety. He was not opposed to the use of square brackets, provided that the text could still be read in its final version.

42. Mr. SETTE CÂMARA said that article X would probably be the only article in the draft dealing with the protection of the interests of third States. In order to identify the property covered by the provisions of the article, a territorial criterion had been adopted. But a predecessor State might own, outside its territory, property encumbered by rights of a third State. That property might be a consignment of gold taken from its gold reserves and pledged to a third State as security for a loan made by that State. To deal with cases of that kind the draft articles should contain some provision protecting the rights of a third State in property deposited with it as security.

43. Mr. KEARNEY suggested that a suitable reference should be made to that question in the commentary to article X, and that the matter should be kept in mind in the discussion of article 15 and the other articles dealing with State property situated outside the transferred territory (A/CN.4/282).

44. The CHAIRMAN said that the Special Rapporteur would take note of that point for the purposes of article 15.

45. If there were no further comments, he would take it that the Commission agreed to approve article X as

redrafted by the Special Rapporteur, the words "or of the successor State, as the case may be" being placed in square brackets, as suggested by Mr. Tsuruoka.

*It was so agreed.*

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

##### ARTICLE 12 (Currency) <sup>8</sup> (*continued*)

46. The CHAIRMAN reminded the Commission that two different approaches to article 12 had been suggested by members. Mr. Ushakov had submitted a single article to replace articles 12 to 15, the text of which had been read out by the Special Rapporteur.<sup>9</sup> The other approach was to retain article 12 as a specific article on currency problems, and Mr. Kearney had proposed certain amendments,<sup>10</sup> with which the text of the article would read:

1. Gold and foreign exchange reserves stored by the predecessor State in the transferred territory and allocated to that territory shall pass to the successor State.

2. The assets of the central institution of issue in the predecessor State, including those allocated for the backing of issues for the transferred territory, shall be apportioned in the proportion which the average volume of currency in circulation in the transferred territory during the six months prior to the date of succession bears to the average volume of currency in circulation in the predecessor State as a whole during the same period.

3. Currency and monetary tokens of the predecessor State that are in circulation in the transferred territory on the date of succession shall be converted into the currency of the successor State at the exchange rate notified to the International Monetary Fund or, if there is no such exchange rate, at the average of the middle rate in the financial markets of the predecessor State and of the successor State on the date of succession. Currency and tokens acquired by the successor State in the conversion shall be delivered to the predecessor State together with any gold and foreign exchange reserves stored in the transferred territory but not allocated to that territory.

47. Mr. KEARNEY said that the suggested text read out by the Chairman did not constitute a formal proposal. It had been put forward merely to assist the Drafting Committee in its work.

48. Mr. USHAKOV explained that the draft of article 12 he had submitted to the Special Rapporteur was only a suggestion.

49. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee had had very little time to examine the texts of article 12 drafted by Mr. Kearney and Mr. Ushakov. Consequently, he was not yet in a position to report on article 12 and would like to hear the views of the Special Rapporteur.

<sup>8</sup> For text see 1325th meeting, para. 6.

<sup>9</sup> See previous meeting, para. 10.

<sup>10</sup> See 1326th meeting, paras. 19-26.

50. Mr. BEDJAOUI (Special Rapporteur) said that many members of the Commission were wondering how the choice of the few classes of State property he had adopted for his draft could be justified before the General Assembly; they feared that his choice might appear arbitrary. He did not share that view. State property not specifically mentioned in his text, such as warships, merchant vessels and armaments, was State property covered by draft article 9. Moreover, such property was less important than that expressly covered by specific provisions of the draft, because not all States possessed such property, whereas they all possessed currency, a treasury and archives. Thus his choice was not arbitrary at all.

51. Under article 9 as adopted by the Drafting Committee (A/CN.4/L.226), all State property which, on the date of the succession of States, was situated in the territory to which the succession of States related, passed to the successor State "subject to the articles of the present Part and unless otherwise agreed or decided". Consequently, the classes of State property not mentioned in the draft and not covered by article 9 could form the subject of other specific provisions.

52. To deal with the case of a succession affecting part of a territory, the Commission might also prepare only one general draft article. It might perhaps be necessary to add a specific article on one class of State property, such as currency, but a single general article might suffice. As the Commission was about to suspend consideration of the topic of the succession of States in respect of matters other than treaties, those questions could be considered by the Drafting Committee, before the Commission took them up again in a few weeks' time. To continue his work, he needed to know which solution the Drafting Committee and the Commission preferred.

53. Mr. USHAKOV said that it would be difficult for the Commission to take a decision on that question without knowing the Special Rapporteur's opinion.

54. Mr. USTOR said he hoped that the Special Rapporteur would be able to make proposals to the Drafting Committee and that a set of articles would result from the work of that Committee at the present session.

55. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to await the Drafting Committee's report on article 12 and on the texts drafted by Mr. Kearney and Mr. Ushakov.

*It was so agreed.*<sup>11</sup>

The meeting rose at 12.50 p.m.

<sup>11</sup> For resumption of the discussion see 1351st meeting, para. 50.

### 1330th MEETING

*Monday, 16 June 1975, at 3.10 p.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

*Members present:* Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović,

Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

### Succession of States in respect of matters other than treaties

[Item 2 of the agenda]

(continued)

#### PRODUCTION OF RUSSIAN TEXTS OF ARTICLES

1. Mr. USHAKOV said he hoped that a document would soon be circulated containing the articles provisionally adopted on the topic of succession of States in respect of matters other than treaties. Whenever the Drafting Committee or the Commission adopted an article, he provided the Russian text in his capacity as a member of the Drafting Committee and of the Commission. Not infrequently, the Russian translation section at Geneva or New York took the liberty of changing his texts to such an extent that they became unrecognizable and even contained serious mistakes when published.

2. He thought that, to stop that practice, the Commission should adopt the following decision and bring it to the attention of those concerned at Geneva and New York: "The Russian translation section of the United Nations has no right to change the texts of articles drafted in the Russian version by Mr. Ushakov as a member of the Drafting Committee and of the Commission. No correction is permissible without his express authorization".

3. The CHAIRMAN said he felt sure the Commission was in full agreement with Mr. Ushakov on the question of the Russian texts. The Secretary to the Commission would bring the matter to the attention of the appropriate Secretariat authorities in New York and at Geneva.

### Most-favoured-nation clause

(A/CN.4/266;<sup>1</sup> A/CN.4/280;<sup>2</sup> A/CN.4/286)

[Item 3 of the agenda]

#### INTRODUCTORY STATEMENT BY THE SPECIAL RAPPORTEUR

4. The CHAIRMAN invited the Special Rapporteur to report on the progress of his work on the most-favoured-nation clause.

5. Mr. USTOR (Special Rapporteur) said that in its 1973 report on the work of its twenty-fifth session, the Commission had restated the ideas which were to guide it in the study of the most-favoured-nation clause. In that report the Commission had said that "it understood its task as being to deal with the clause as an aspect of the law of treaties".<sup>3</sup> While recognizing the fundamental importance of the role of the clause in international trade, it had not wished to confine the study to its operation in that field, but "to extend the study to the operation of the clause in as many fields as possible".<sup>4</sup> Lastly, the Commission had said that it wished to devote special attention

<sup>1</sup> *Yearbook* ... 1973, vol. II, pp. 97-116.

<sup>2</sup> *Yearbook* ... 1974, vol. II, Part One, pp. 117-134.

<sup>3</sup> *Yearbook* ... 1973, vol. II, p. 211, para. 112.

<sup>4</sup> *Ibid.*, para. 113.

to "the manner in which the need of developing countries for preferences in the form of exceptions to the most-favoured-nation clause in the field of international trade, can be given expression in legal rules".<sup>5</sup>

6. Guided by those principles, he had submitted a number of reports to the Commission and in 1973 it had adopted articles 1 to 7 on the most-favoured-nation clause, with commentaries.<sup>6</sup> Those seven articles were based on articles 1 to 5 of his third report.<sup>7</sup> The Commission had yet to examine his fourth report (A/CN.4/266), his fifth report (A/CN.4/280) and his sixth report (A/CN.4/286). The three articles in his fourth report had been numbered 6, 7 and 8, and he had retained that numbering in his subsequent work. In preparing his fifth and sixth reports, he had felt the need to reconsider the drafting of the seven articles adopted in 1973, and had submitted new versions of some of those articles as well as supplementary articles in his sixth report.

7. He suggested that the Commission should now examine article 9 (National treatment clause), article 10 (National treatment) and article 10 *bis* (National treatment in federal States) which he had submitted in his fifth report. The need to deal with national treatment and national treatment clauses had become apparent in the course of his work. There were a number of reasons for doing so. The first was that a great many clauses were cumulative, dealing both with most-favoured-nation treatment and with national treatment, and the problems arising from those cumulative clauses could not be avoided. A second reason was the need to consider the question whether a simple most-favoured-nation clause did or did not attract the benefits granted under a national treatment clause. For instance, where the granting State had promised national treatment to one State and most-favoured nation treatment to another, the question arose whether the latter State could invoke the most-favoured-nation clause in order to claim national treatment, on the grounds that that was the most-favoured-nation treatment granted to another State. Another important reason for dealing with national treatment was that the Commission was studying the most-favoured-nation clause as part of the law of treaties and not from the point of view of international trade and economic relations. Seen in that light, the question of national treatment and of national treatment clauses was very close to the topic of the most-favoured-nation clause, and it would be extremely artificial to exclude it from the present set of draft articles.

8. His own conclusion was that it would be awkward to confine the Commission's study exclusively to most-favoured-nation clauses and not to adopt any rules on national treatment clauses, which usually had the same effect. If the Commission shared that view, it should take up draft articles 9, 10 and 10 *bis* at the present stage, instead of examining article 6 and those which followed. If it adopted articles 9, 10 and 10 *bis* on national treatment, the Commission would have to consider the proposals in

his sixth report concerning revision of the texts of articles 1, 2 3 and 6 adopted in 1973 (A/CN.4/286, chapter I).

9. The CHAIRMAN invited members to express their views on the question whether the Commission should take up articles 9, 10 and 10 *bis*, the articles on national treatment proposed by the Special Rapporteur in his fifth report, instead of article 6 and the following articles.

10. Mr. USHAKOV said that he preferred the approach suggested by the Special Rapporteur, but that if it was adopted, the title of the draft articles should be amended to read "Draft articles on the most-favoured-nation and national treatment clauses".

11. Mr. SETTE CÂMARA said he fully agreed with the approach suggested by the Special Rapporteur. If it was adopted, it would be advisable to consider, at the same time as draft articles 9, 10 and 10 *bis*, the Special Rapporteur's proposed new article X (The source and scope of national treatment).

12. Mr. BILGE said he was not opposed to studying the national treatment clause, but he thought the Commission should consider it only from the point of view of its relationship with the most-favoured-nation clause. The national treatment clause could have a very wide scope in international law. The Commission had decided to study the most-favoured-nation clause generally, in all fields in which it applied, but it should restrict the study of the national treatment clause.

13. Mr. ŠAHOVIĆ noted that the Special Rapporteur had opened up a new field of study which extended the Commission's task considerably. It was not only a matter of amending the title of the draft; the scope of the discussions would be much wider than had been expected. Members of the Commission should therefore reflect carefully on the Special Rapporteur's proposal before starting the discussion he proposed.

14. Mr. KEARNEY said that he had no fundamental objection to the inclusion of draft articles on national treatment, but would welcome an explanation by the Special Rapporteur, or by the members who supported his approach, of the limits that would be set to the study of the question of national treatment.

15. Mr. CALLE Y CALLE said that the topic of the most-favoured-nation clause had followed from the Commission's consideration of the law of treaties. The Commission would be concerned more with most-favoured-nation treatment than with the clause, but the title "most-favoured-nation clause" had been retained because it was established by usage. If it was decided also to cover the question of national treatment, that would have to be made clear by changing the title of the draft.

16. The question of national treatment to be examined in the present context was quite distinct from the principle of equality of nationals and aliens, which applied to State responsibility for injuries to aliens. In the context of the present topic, the term "national treatment" was used simply to indicate an upper limit to the benefits extended under a clause.

17. Mr. AGO said he found the Special Rapporteur's proposal attractive, but he did not yet feel able to express

<sup>5</sup> *Ibid.*, p. 212, para. 114.

<sup>6</sup> *Ibid.*, pp. 213-223.

<sup>7</sup> *Yearbook* . . . 1972, vol. II, pp. 162-170.

a final opinion on it. The resemblances between the most-favoured-nation clause and the national treatment clause were more apparent than real. Apart from the fact that both were conventional clauses and that their practical effect was to accord a particular treatment to foreign nationals or goods, the clauses did not resemble each other. Although probably narrower in scope than the national treatment clause, the most-favoured-nation clause could offer much more or much less. Besides, the treatment to be accorded under the most-favoured-nation clause did not necessarily always remain the same; on the contrary, its characteristic feature was that it changed when the granting State later decided to grant more favourable treatment to third States, which would entail an improvement in the treatment accorded to the beneficiary State.

18. The national treatment clause operated solely under internal law: a State accorded to the goods or persons of another State treatment identical with that which it accorded to its own nationals. The operation of the most-favoured-nation clause depended on the treatment accorded internationally to other States. Hence its content varied, not according to a particular country's internal legislation, but according to international treaties.

19. He feared that if it decided to study the national treatment clause, the Commission might be drawn into a very wide field—that of the status of aliens. It was, indeed, open to question whether national treatment resulted only from a conventional clause or was laid down by some general rule of customary law governing the status of aliens. It was not possible, at the present stage, to answer that question. Moreover, States might have entirely different views on it, and the Commission should not put itself in the position of having to express an opinion on general rules of the law relating to aliens.

20. He considered that the Special Rapporteur's proposal was attractive, but that it involved some risks.

21. Mr. REUTER said he thought the Commission should trust the Special Rapporteur, who was in a better position than anyone else to judge whether it was advisable to study the national treatment clause. In any case, the Commission ought to complete its study of the topic of the most-favoured-nation clause at its next session.

22. Both the most-favoured-nation clause and the national treatment clause were connected with the question of non-discrimination, and it was certainly tempting to study them together. The topic of the most-favoured-nation clause had been placed on the Commission's agenda when it had been preparing its draft articles on the law of treaties.<sup>8</sup> Mr. Jiménez de Aréchaga, then a member of the Commission, had said that the most-favoured-nation clause ought to be studied, even though it had no bearing on the effects of treaties with respect to third parties, because it was commonly held to be related to the law of treaties.<sup>9</sup> In fact, the operation of the clause, like that of the national treatment clause, depended on the process of *renvoi*. The two clauses were legal devices which consisted in laying down a rule the

content of which varied according to international law in one case, and according to internal law in the other. If the Commission decided to study them both simultaneously, that would show that it was especially responsive to questions of *renvoi*. That method might take it very far, however, and completely upset the structure of the draft.

23. The problem of *renvoi*, in the broad sense, had been rather neglected in the literature of public international law; all that was known about it came from private international law. If the Special Rapporteur thought there was sufficient time, it would be interesting to study those questions, though some aspects might be left aside if necessary.

24. Mr. USHAKOV pointed out that the Special Rapporteur, having first concentrated on the most-favoured-nation clause, had then found that treaties contained national treatment clauses which were closely connected with most-favoured-nation clauses. He was now proposing to study the national treatment clause also. Members of the Commission should therefore express themselves definitely for or against that proposal. He himself supported it.

25. Mr. SETTE CÂMARA confirmed his support for the approach suggested by the Special Rapporteur. It was difficult to see how the question of national treatment could be disregarded when dealing with most-favoured-nation treatment. It was true that the two types of treatment differed in some ways, but they were nevertheless closely connected. The clauses on both types of treatment were fundamental to the continuing negotiations in GATT. To omit the *subject* of national treatment clauses would leave a serious gap in the draft articles.

26. Sir Francis VALLAT expressed misgivings at the suggestion that the Commission should embark at the present stage on a study of national treatment. As Mr. Ushakov had pointed out, the decision to do so would involve amending the title of the draft articles; but although the Special Rapporteur's fifth report had been submitted to the Commission in 1974 and the Commission's report for that year had mentioned it, no indication had been given to the General Assembly that a study of that report would involve taking up a new subject and altering the title of the topic.

27. He shared Mr. Reuter's concern that if the scope of the topic was widened to include national treatment, the Commission would become involved in the study of problems that went much beyond most-favoured-nation treatment. Reservations would have to be made regarding the implications of national treatment clauses, which were much greater than might be realized at the present stage.

28. Practical considerations also militated in favour of caution. If the Commission had wished to broaden the topic of the most-favoured-nation clause to include national treatment, it should have taken that decision earlier. There was not much time at its disposal, and its duty was to take up the study of articles 6, 6 *bis* and 6 *ter* as drafted by the Special Rapporteur. The Commission was expected to continue its study of the most-favoured-nation clause and should only undertake to

<sup>8</sup> *Yearbook* . . . 1967, vol. II, p. 369, para. 48.

<sup>9</sup> *Yearbook* . . . 1967, vol. I, p. 188, para. 79.



consider national treatment if it proved impossible to carry on its work without examining that question.

29. The CHAIRMAN, speaking as a member of the Commission, said that he was in favour of leaving the question of national treatment aside until the second reading of the draft articles; at the present stage, the Commission should concentrate its attention on the most-favoured-nation clause. It should complete its work on the topic by the end of its 1976 session, and there was also the problem of explaining the proposed change of title to the General Assembly.

30. Mr. AGO said he regretted that at that stage he could not express a final opinion on the Special Rapporteur's proposal. Several members of the Commission had stressed a practical aspect of the matter, namely, the possibility of completing the work on the most-favoured-nation clause at the next session. It was also important to know all the reasons for and against a change in the title of the draft, since such a change would imply that the Commission had taken a position on the relationship between the most-favoured-nation clause and the national treatment clause.

31. Mr. USTOR (Special Rapporteur) said he did not think it was too late to decide to include the subject of national treatment. In his fifth report, submitted in 1974 (A/CN.4/280), he had included articles on national treatment because of the need to take into account not only clauses which promised most-favoured-nation treatment, but also clauses which promised national treatment.

32. It was necessary to bear in mind the case, which had often arisen in practice and had led to much discussion by writers, of a granting State which promised most-favoured-nation treatment to one State and national treatment to another; the State benefiting from the most-favoured-nation clause would claim the benefit of national treatment, and it was necessary to deal with that problem. In order to do so, national treatment would have to be defined, but he did not believe that that task would take up much of the Commission's time.

33. In any case, he wished to make it clear that the subject of national treatment in the present context was entirely different from the question of equality of treatment of nationals and aliens, which arose in connexion with the treatment of aliens. The present topic was a part of the law of treaties, and the rules governing most-favoured-nation clauses overlapped in many respects those governing national treatment clauses. It was therefore desirable to specify in the present draft that many of the rules on most-favoured-nation clauses applied *mutatis mutandis* to national treatment clauses.

34. He appreciated the desire of members to complete the work on the topic at the next session, but he thought that aim could still be achieved, even if the question of national treatment was considered. At the next session, he would only propose some five new articles to the Commission, so that it should be possible to complete consideration of all the pending articles by the end of that session.

35. If the Commission decided to include his proposed articles on national treatment in the draft, his proposals

for the revision of articles 1, 2, 3 and 6 adopted in 1973 (A/CN.4/286) need not be discussed by the Commission itself; they could be examined by the Drafting Committee.

36. Perhaps the Commission could postpone its decision on the change of title of the draft and proceed to consider the articles on the most-favoured-nation clause which followed those adopted in 1973. It would thus deal with articles 6 to 8 before it took up the problem of national treatment in article 9, proposed in his fifth report.

37. He appreciated that there were differences between national treatment and most-favoured-nation treatment, but there was also some similarity. There was an element of fluctuation in both: it resulted from other treaties in the case of the most-favoured-nation clause, and from national legislation in the case of the national treatment clause. The differences between the two were not, in any case, great enough to prevent the Commission from dealing with both of them together.

38. The CHAIRMAN pointed out that the approval of the General Assembly would be needed for a change in the title of the topic. He suggested that the Commission should follow its usual method and continue consideration of the draft articles on the most-favoured-nation clause, beginning with articles 6, 6 *bis* and 6 *ter*.

39. Mr. USHAKOV observed that the Sixth Committee might ask the Chairman of the Commission not only why it had decided to widen the scope of the topic, but also why it had not decided to include the study of the national treatment clause when the Special Rapporteur had put that idea forward in 1974.

40. Mr. USTOR (Special Rapporteur) said that in the light of the discussion he agreed to the Commission's starting consideration of articles 6 and the following articles at the present stage. The Commission could settle the question of extending the study to national treatment when it reached article 9 (National treatment clause).

41. Mr. AGO thanked the Special Rapporteur for taking account of the difficulties encountered by certain members of the Commission in taking an immediate decision on whether the question of the national treatment clause should be taken up. He supported the Special Rapporteur's new suggestion.

42. Nevertheless, he wondered whether those two types of clause should really be treated as parallel subjects, or whether the Commission should confine itself to the effects of national treatment on the most-favoured-nation clause. The substance of the problem seemed to lie in draft article 13 (A/CN.4/280), which dealt specifically with the operation of the most-favoured-nation clause when the State which had granted it granted national treatment to a third State. It might perhaps be preferable for the draft to deal with the question of national treatment only with reference to the most-favoured-nation clause.

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR ARTICLES 6, 6 *bis* AND 6 *ter*

43. The CHAIRMAN invited the Special Rapporteur to introduce draft articles 6, 6 *bis* and 6 *ter* which read:

*Article 6<sup>10</sup>**Presumption of unconditional character  
of the most-favoured-nation clause*

Except when in appropriate cases most-favoured-nation treatment is accorded under the condition of material reciprocity, the most-favoured-nation clause is unconditional.

*Article 6 bis**Effect of an unconditional most-favoured-nation clause*

1. Under an unconditional most-favoured-nation clause the beneficiary State acquires the right to treatment not less favourable than that accorded by the granting State to a third State, without the obligation to reciprocate the same treatment in kind to the granting State.

2. Paragraph 1 applies irrespective of whether the treatment in question has been accorded by the granting State to a third State gratuitously, or subject to material reciprocity or against any other compensation.

*Article 6 ter**Effect of a most-favoured-nation clause conditional  
on material reciprocity*

1. Under a most-favoured-nation clause conditional on material reciprocity the beneficiary State acquires the right to treatment not less favourable than that accorded by the granting State to a third State only against reciprocating the same treatment in kind to the granting State.

2. Paragraph 1 applies irrespective of whether the treatment in question has been accorded by the granting State to a third State gratuitously or subject to material reciprocity or against any other compensation.

44. Mr. USTOR (Special Rapporteur) said that until the early nineteen-twenties there had been three types of most-favoured-nation clause: the unconditional clause, the clause conditional on material reciprocity and the form of the clause employed in United States practice. The latter clause had differed from the other two in that its operation had not been automatic, its essence being the stipulation that the beneficiary State would enjoy the favours accorded by the granting State to a third State if the concession had been freely made, or on allowing the same compensation if the concession had been conditional. It had thus not been a most-favoured-nation clause, but a *pactum de contrahendo*. It was no longer found in treaties and he had not considered it in his reports.

45. The most common form of most-favoured-nation clause was now the unconditional clause, the nature and effect of which were described in articles 6 and 6 bis. The operation of that clause was not dependent on consideration or advantages promised to the granting State by either a third State or the beneficiary State, and its aim was to place the beneficiary State in the same position in relation to the granting State as a third State. The unconditional clause was found in trade agreements and many other types of agreement and, unlike the clause conditional on material reciprocity, which was most often found in consular treaties, it was non-discriminatory.

46. Mr. REUTER said he had the impression that article 13 (A/CN.4/280) followed quite naturally from paragraph 2 of article 6 bis; he would like to know whether that impression was correct.

47. Mr. USTOR (Special Rapporteur) said it was true that there was a close connexion between article 6 and article 13, which really referred to a special case of the operation of the most-favoured-nation clause. Since article 6 stated that the operation of the clause was unconditional, it followed that article 13 would apply in all cases where it was not expressly stated that the beneficiary State would not receive national treatment. It was, however, apparent from both practice and jurisprudence that there was still some confusion on that point, and that was why article 13 had been included.

48. Mr. REUTER said that in principle he was not opposed to articles 6 and 6 bis, but he had a reservation about the principle stated in article 13, which was a very important consequence of the principle stated in article 6 and on which he could not commit himself. In his opinion, if the Commission did not accept article 13, it would be necessary to amend article 6. For he wondered whether a regional union was not, to some extent, founded on the principle of national treatment and whether, consequently, national treatment granted within a regional union might not be claimed on the basis of the most-favoured-nation clause.

49. Mr. KEARNEY said that, while articles 6 and 6 bis caused him no substantive problems, he was concerned at the wording of certain passages.

50. He assumed that the phrase "Except when in appropriate cases", in article 6, modified the condition of material reciprocity rather than the unconditionality of the most-favoured-nation clause, but he was not sure of the intention behind the phrase "in appropriate cases". If it was to place a limitation on what the condition of material reciprocity could be, the nature of the "appropriate cases" must be specified.

51. He also wondered whether the reciprocity referred to in article 6 must be "material" and, if so, whether it should be substantial or equivalent. In that connexion, he drew attention to the quotation from Piot in paragraph (16) of the commentary to article 6 in the Special Rapporteur's fourth report,<sup>11</sup> which suggested that there must be a measure of symmetry between the treatment each State accorded to the other. The way the phrase was used in the revised article 6 seemed to imply that if the condition of reciprocity was not material or equivalent, it might not be a condition at all. That implication was difficult to reconcile with the situation described in paragraph (5) of the commentary to articles 6 bis and 6 ter in the Special Rapporteur's fifth report (A/CN.4/280), in which the condition in question, though not material, was still a condition of reciprocity between the two States concerned and one which would have a specific effect on the advantages accruing to a State entitled to most-favoured-nation treatment. It might be advisable to delete the word "material" from article 6, since the nature of the most-favoured-nation clause was affected by any condition of reciprocity.

52. If, as provided in article 6 bis, the beneficiary State could acquire the right to treatment no less favourable than that granted to a third State irrespective of the conditions under which the grant had been made, it would

<sup>10</sup> Text as revised by the Special Rapporteur; see *Yearbook* ... 1973, vol. II, p. 98.

<sup>11</sup> *Yearbook* ... 1973, vol. II, p. 100.

seem unnecessary to specify that the beneficiary State was not under an obligation to reciprocate. That being so, the article could be reduced to a single paragraph.

53. He was also concerned about the question of exceptions to the scope of the most-favoured-nation clause. For example, it was often stipulated that a beneficiary State would not enjoy the special advantages of the GATT, the object being to prevent it from profiting from that Agreement without assuming the obligations imposed on the signatories. Did that stipulation constitute a requirement of reciprocity and, in its absence, would the GATT apply under a most-favoured-nation clause? Would that clause apply *in toto* and in favour of the beneficiary State? If so, and there was in the most-favoured-nation clause an exception of the type to which he had referred, would that constitute a limitation which made the clause partly conditional and partly unconditional?

54. Mr. CALLE Y CALLE said he approved of the division of article 6, as it had appeared in the Special Rapporteur's fourth report, because the second part of its single paragraph had been an explanation of the rule contained in the first. With regard to what was now article 6 *bis*, and particularly to the implications of the last clause of the first paragraph, it was important to emphasize, and to make clear for the benefit of States, the subtle distinction between formal reciprocity and material reciprocity discussed in paragraph (3) of the commentary to articles 6 *bis* and 6 *ter* in the Special Rapporteur's fifth report.

55. Mr. USTOR (Special Rapporteur) said that the conclusion he had reached in his sixth report concerning the need to imply exceptions, in certain cases, to ostensibly unconditional most-favoured-nation clauses, was diametrically opposed to Mr. Reuter's conclusion. He would discuss that question at length later.

56. In reply to Mr. Kearney, he said that in article 6 the phrase "in appropriate cases" was linked to the words "material reciprocity". As Mr. Calle y Calle had pointed out, there was a promise of formal reciprocity in all agreements. In some cases, however, States might wish to make the granting of most-favoured-nation treatment conditional on the extension to each other of the same treatment in kind; it was to those cases, such as the reciprocal granting of immunity from jurisdiction by two States to each other's consuls, that the phrase "material reciprocity" was intended to refer. So far as the question of exceptions to the most-favoured-nation clause was concerned, it might be necessary to make provision for cases in which a State wished to grant most-favoured-nation treatment to a potential beneficiary to a lesser extent, or in fewer matters, than to another State with which it had traditionally maintained particularly friendly relations.

57. In article 6 *bis*, paragraph 1, the phrase "without the obligation to reciprocate the same treatment in kind", mentioned by Mr. Calle y Calle, referred to the absence of a promise of material reciprocity. Where States did reciprocate the same treatment in kind, one of them might, for example, agree to give special treatment to the consul of the other, if its own consul in the territory of the other State was given the same advantages in kind

as the first State gave to the most favoured of the consuls of any other State in its own territory.

The meeting rose at 5.50 p.m.

### 1331st MEETING

Tuesday, 17 June 1975, at 10.10 a.m.

Chairman : Mr. Abdul Hakim TABIBI

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

#### Most-favoured-nation clause

(A/CN.4/266;<sup>1</sup> A/CN.4/280;<sup>2</sup> A/CN.4/286)

[Item 3 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR  
ARTICLE 6 (Presumption of unconditional character of the most-favoured-nation clause),

ARTICLE 6 *bis* (Effect of an unconditional most-favoured nation clause) and

ARTICLE 6 *ter* (Effect of a most-favoured-nation clause conditional on material reciprocity)<sup>3</sup> (continued)

1. Mr. SETTE CÂMARA expressed his admiration for the extraordinary efforts the Special Rapporteur had made to extract the common elements from the mass of specific treaty provisions in his most difficult field. He had succeeded in producing a few succinct, objective rules, which were likely to gain general acceptance.

2. The division of article 6, as it had appeared in the Special Rapporteur's fourth report,<sup>4</sup> into two separate articles made for clarity and simplicity, and he approved of the substance of articles 6 and 6 *bis* as now proposed. He believed, however, that it would be better to reverse the order of the clauses in article 6, since it began with the exceptions to the presumption it stated, which seemed a little strange. He agreed with Mr. Kearney that the phrase "in appropriate cases" was rather vague. All the members of the Commission knew that the cases in question related to such matters as consular immunities and functions, private international law and establishment treaties, but the Drafting Committee might be able to find a better word than "appropriate" to describe them. Alternatively, the article as a whole could be simplified by the omission of the phrase "in appropriate cases".

3. With regard to article 6 *bis*, the Special Rapporteur had shown, in paragraph (4) of the commentary to articles 6 *bis* and 6 *ter* in his fifth report (A/CN.4/280), that

<sup>1</sup> Yearbook ... 1973, vol. II, pp. 97-116.

<sup>2</sup> Yearbook ... 1974, vol. II, Part One, pp. 117-134.

<sup>3</sup> For texts see previous meeting, para. 43.

<sup>4</sup> Yearbook ... 1973, vol. II, p. 98.

except in the rare instances of unilateral granting of most-favoured-nation treatment, most-favoured-nation clauses would always involve at least two reciprocal promises, even when they were free from conditions. The reciprocity in such cases was purely formal; the risk of confusion with the material reciprocity referred to in article 6 *ter* could be avoided by replacing the words “without obligation to reciprocate”, in article 6 *bis*, paragraph 1, by the words “without any conditions”. The Drafting Committee could be asked to improve the style of the sentence thus amended.

4. Mr. PINTO expressed his appreciation of the Special Rapporteur's very helpful fifth and sixth reports (A/CN.4/280 and 286).

5. As he now understood it, article 6 meant that a most-favoured-nation clause which contained no express reference to a condition to which it was to be subject would be presumed to be unconditional; that when the clause was stated to be subject to a particular condition, that would in fact be the case; and that where material or effective reciprocity was possible or customary, as in the case of agreements on consular relations, private international law and the like, most-favoured-nation treatment would be subject to such reciprocity even if the clause contained no express provision to that effect. If that was so, article 6 involved two presumptions rather than one, and, as it stood, was too condensed. The word “presumption” should be included in the body of the article, to make it easier to understand.

6. Mr. TSURUOKA supported the principle stated in article 6, but proposed that the wording should be amended on the lines indicated by Mr. Sette Câmara and Mr. Pinto, so that it would read: “Unless it is otherwise agreed [Unless the clause provides otherwise], the most-favoured-nation clause is unconditional”. He thought that the words “appropriate cases” were indeed rather vague and that it would be difficult to make a complete list of appropriate cases.

7. The expression “material reciprocity” also seemed difficult to interpret and to apply in practice. For supposing that two States, A and B, had concluded a treaty containing a most-favoured-nation clause and State A had exempted a third State from a tax X—by reason of consular privileges and immunities, for example—State B could, if it had the same system as State A, benefit from the most-favoured-nation clause by exempting State A from tax X. But if State B did not have the same system as State A, it would be difficult for it to demand the immediate application of the most-favoured-nation clause without compensation. He did not think it was necessary to raise such problems, however, since the wording he had just proposed would make it possible to avoid the difficulty.

8. It could also be questioned whether the conditional form of the most-favoured-nation clause was limited material reciprocity. For example, States A and B might conclude a treaty containing a most-favoured-nation clause concerning exemption from an import tax, which provided that State B could claim most-favoured-nation treatment only on condition that it granted economic or technical assistance to State A. In that case

the clause would be conditional, but not on material reciprocity. On the other hand, if it was assumed that the conditional form of the most-favoured-nation clause included cases other than that of material reciprocity, paragraph 1 of article 6 *bis* could be amended to read:

“Under an unconditional most-favoured-nation clause the beneficiary State acquires without compensation the right to treatment not less favourable than that accorded by the granting State to a third State”. Similarly, paragraph 1 of article 6 *ter* could be amended to read:

“Under a conditional most-favoured-nation clause the beneficiary State acquires the right to treatment not less favourable than that accorded by the granting State to a third State, only against the compensation determined by the clause”.

9. He thought the second paragraphs of articles 6 *bis* and 6 *ter* were unnecessary.

10. Mr. KEARNEY said that the similarity of the terms employed in articles 6, 6 *bis* and 6 *ter* showed that those provisions were closely interrelated. For example, article 6 *bis*, paragraph 1, contained, in the phrase “without the obligation to reciprocate the same treatment in kind”, a negative definition of material reciprocity, which was positively defined in the phrase “only against reciprocating the same treatment in kind”, in article 6 *ter*, paragraph 1; the Drafting Committee should consider whether the relationship between those two provisions ought to be made still clearer. In any case, he still thought it would be preferable to delete the reference to “material” reciprocity, and he approved of the suggestion made by Mr. Tsuruoka. He appreciated that the Special Rapporteur's aim had been to reduce the range of conditional most-favoured-nation clauses discussed, and to enlarge the scope of the unconditional clause in accordance with the apparent historical trend; but it should not be forgotten that new types of conditional reciprocity could still arise, as could be seen from section 26 of the United States Foreign Trade Act of 1974.

11. With regard to article 6 *bis*, it would be preferable to maintain the same language where possible, so the word “reciprocate”, in paragraph 1, should be replaced by the word “accord”. In the same paragraph, the phrase “the same treatment in kind”, which he found too restrictive and likely to give rise to difficulties of interpretation, should be replaced by a phrase such as “equivalent treatment”.

12. It was clear from treaties and from the Special Rapporteur's own commentary that the beneficiary State would enjoy its rights under the most-favoured-nation clause from the time of the granting of favourable treatment to a third State, without having to request them. While that was a generally accepted rule, it was desirable to state it expressly in the draft articles and that could be done most appropriately in article 6 *bis*, which dealt with the effect of the most-favoured-nation clause.

13. Mr. USTOR (Special Rapporteur) agreed that the Drafting Committee should consider the amendments to articles 6 and 6 *bis* suggested by Mr. Sette Câmara. The inclusion of the word “presumption” in the text of

article 6, suggested by Mr. Pinto, was also a drafting matter. The first two parts of Mr. Pinto's analysis of the effects of article 6 had been correct; but it would be contrary to practice to assume, even in the cases mentioned by Mr. Pinto, that a State could apply the condition that favours would be granted only in return for what Mr. Kearney had termed "equivalent" treatment, if that condition was not expressly mentioned in the most-favoured-nation clause.

14. He agreed that the version of article 6 proposed by Mr. Tsuruoka was simpler than the present text, the starting point for which had been his own belief that the only types of most-favoured-nation clause still in existence were the unconditional clause and the clause conditional on material reciprocity. As Mr. Tsuruoka had pointed out, it would be necessary to take account, either in the articles themselves or in the commentary, of the types of condition other than the obsolete "American" condition which could still be attached to a most-favoured-nation clause. The drafting amendments proposed by Mr. Tsuruoka should be carefully considered.

15. He agreed that the 1974 United States Foreign Trade Act referred to by Mr. Kearney could lead to the stipulation of various conditions in the most-favoured-nation clause, such as the condition that the operation of the clause would be reviewed after a certain length of time. Mr. Kearney's suggestion concerning the phrase "the same treatment in kind" was valuable and should be studied by the Drafting Committee. The purpose of article 6 *ter*, in which, as in article 6 *bis*, that phrase occurred, was explained in paragraph (14) of the commentary to those two articles in his fifth report.

16. The question of what exactly constituted "material reciprocity" was very complex, owing to the differences in national legislation. That difficulty was, however, inherent in the operation of the most-favoured-nation clause, so that even where the clause stated that reciprocal treatment should be "equivalent", it would be very difficult to determine whether the favours offered actually met that requirement. The matter would have to be dealt with in the commentary, but it was doubtful whether it could be successfully covered in the text of the articles.

17. The question of the arising of the rights of a beneficiary State simultaneously with the granting of favourable treatment to a third State was covered by draft article 15. He had not thought it necessary to mention the fact that such rights would arise without their being requested by the beneficiary State, but would have no objection to doing so.

18. Mr. USHAKOV said he was grateful to the Special Rapporteur for the efforts he had made to widen the scope of the draft articles and include national treatment. He had no difficulty in accepting the principle stated in articles 6 and 6 *bis*. It was a simple principle, though difficult to state. According to that principle, if State A had concluded with State B a treaty containing an unconditional most-favoured-nation clause and had concluded with a third State an agreement containing a conditional most-favoured-nation clause, when State B received the treatment accorded to the third State, it was not obliged to fulfil the conditions imposed on that third State. For

example, if a State tried to use the most-favoured-nation clause to impose on the Soviet Union certain conditions regarding emigration from its territory and the Soviet Union accepted those conditions, a third State, such as Hungary, on receiving the same treatment as the Soviet Union, would not be obliged to fulfil the conditions regarding emigration imposed on the Soviet Union.

19. He was not sure what was meant by the words "treatment in kind" in the English text of article 6 *bis*.

20. Mr. RAMANGASOAVINA said he fully supported the principles stated in article 6, and in articles 6 *bis* and 6 *ter*. With regard to the wording of article 6, he shared the view of several other members of the Commission that the first phrase, "Except when in appropriate cases most-favoured-nation treatment is accorded under the condition of material reciprocity", was rather difficult to understand. It was true that the Special Rapporteur had taken care to indicate, both in his report and in his oral explanations, that in the practice and in various agreements concluded between States, there were specific cases in which a clause with reciprocity was obligatory because the very nature of the case required it. But he (Mr. Ramangasoavina) considered that the words "appropriate cases" were not very clear and that it would be better to use the customary formula "Unless it is agreed otherwise".

21. The essential point in the revised article 6 was the affirmation contained in the words "the most-favoured-nation clause is unconditional". That affirmation followed from the title of the article: "Presumption of unconditional character of the most-favoured-nation clause". But that presumption was a rebuttable presumption which fell away when there was a clause providing that the advantages were granted subject to reciprocity. Article 6 *bis* dealt with the effect of an unconditional most-favoured-nation clause. There was thus a logical connexion between those two articles, which had been combined in the former article 6 submitted by the Special Rapporteur in his fourth report. Article 6 *bis* was, indeed, the necessary complement to article 6, for it explained the principle stated in that article, namely, that in the absence of other clauses the most-favoured-nation clause was presumed to be unconditional. Hence it could be either a paragraph of article 6 or a separate article.

22. He therefore considered that, in the explanatory part of article 6 *bis*, it was unnecessary and even illogical to refer again to the unconditional clause, since the unconditionality was presumed according to article 6. If the unconditional nature of the most-favoured-nation clause was presumed, it was not necessary to include an express provision on that point in a contract. He thought it would accordingly be better to present article 6 *bis* as the logical sequel to article 6 and word it to read: "In these circumstances, the beneficiary State acquires the right to treatment not less favourable than that accorded by the granting State to a third State".

23. Article 6 *ter* could be a separate article, because the subject with which it dealt, namely, the effect of a most-favoured-nation clause conditional on material reciprocity, did not come within the scope of the presumption of

unconditionality, which applied when there was no conditional clause. If the contracting parties wished to include in their contract a most-favoured-nation clause conditional on material reciprocity, they must do so expressly.

24. Mr. KEARNEY said that, while he knew of no decisions on the subject, there was a view, which he shared, that in cases such as those described in article 6 *ter*, paragraph 2, where a granting State accorded favourable treatment to a third State gratuitously, the treatment required of the beneficiary State under the most-favoured-nation clause should be no more favourable than that required of the third State. In those circumstances, the basic triggering mechanism for the operation of the most-favoured-nation clause was absent and the beneficiary State should not be required to give the granting State the same treatment as it received itself.

25. Mr. USTOR (Special Rapporteur) said that to his mind it was obvious that where States A and B had concluded a most-favoured-nation clause in respect of consular privileges and immunities which was not subject to conditions, State A was obliged to grant the consuls of State B all the privileges and immunities it granted to representatives of other States, and *vice versa*. It did not matter whether there was any difference in the levels of treatment accorded by the two States, for the clause aimed only at ensuring that neither would discriminate in favour of any of the representatives in its territory. Where a similar agreement existed which was subject to a condition, State A, for example, would not be able to enjoy the special benefits provided for in the conditional clause unless it granted to the consuls of State B in its own territory privileges as extensive as those accorded by State B to consuls in its own territory. It was absolutely immaterial, however, whether the privileges granted to foreign consuls by State B had been accorded gratuitously or against compensation; the decisive factor was the extent of the privileges, not the way in which they had arisen.

26. Mr. KEARNEY said the situation was clearly one on which his own views and those of the Special Rapporteur were far from identical.

27. The CHAIRMAN suggested that, on the understanding that the question raised by Mr. Kearney would be discussed in the commentary, articles 6, 6 *bis* and 6 *ter* should be referred to the Drafting Committee.

*It was so agreed.*<sup>5</sup>

28. Sir Francis VALLAT said he had a statement to place on record regarding article 6 *ter*. There had been very little discussion on that article which, as he saw it, was likely to cause more difficulty than articles 6 and 6 *bis* at the present stage. As it was drafted, it was very difficult to see what the exact effect of article 6 *ter* would be. That was only natural, because paragraph 1 of the article concentrated the very phrases of the two previous articles on which comments had been made during the discussion.

29. He therefore reserved his position on article 6 *ter* until its language had been clarified.

#### ARTICLE 6 *quater*

30. The CHAIRMAN invited the Special Rapporteur to introduce article 6 *quater* in his fifth report (A/CN.4/280) which read:

##### *Article 6 quater*

##### *Observance of the laws and regulations of the granting State*

Without prejudice to the right to most-favoured-nation treatment acquired by the beneficiary State under a most-favoured-nation clause the persons and things enjoying the favours deriving from that treatment are subject to the laws and regulations of the granting State.

31. Mr. USTOR (Special Rapporteur) said that article 6 *quater* was a simple safeguard clause. Its only purpose was to express the idea that favours granted under a most-favoured-nation clause could not go beyond the stipulation of the clause. Persons enjoying those favours had to observe the laws and regulations of the granting State. There was some similarity between the provisions of article 6 *quater* and those of article 41 of the Vienna Convention on Diplomatic Relations, paragraph 1 of which stated the duty of all persons enjoying privileges and immunities under that Convention was "to respect the laws and regulations of the receiving State".<sup>6</sup> Provisions to the same effect were contained in the Vienna Convention on Consular Relations<sup>7</sup> and the Convention on Special Missions.<sup>8</sup>

32. In the commentary to article 6 *quater* some precedents were cited which showed that the obvious rule stated in the article was generally recognized. He hoped that the article would meet with general support in the Commission.

33. Mr. CALLE Y CALLE said that the rule in article 6 *quater* was self-evident; benefits granted under the most-favoured-nation clause could not go beyond the bounds set by the duty to observe the laws and regulations of the granting State.

34. As the Special Rapporteur had pointed out, there was a similarity between the provisions of article 6 *quater* and the corresponding provisions of the Conventions on Diplomatic Relations, Consular Relations and Special Missions. The most recent convention on diplomatic law, the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,<sup>9</sup> also contained a provision on the subject in article 77 (Respect for the laws and regulations of the host State).

35. The draft articles under consideration dealt with the most-favoured-nation clause in relations between States. Since the question of most-favoured-nation treatment could also arise as between organizations, he suggested that a reference to international organizations should be included.

36. He supported article 6 *quater*, which set out in clear and precise terms a rule that was well grounded in doctrine and in practice.

<sup>6</sup> United Nations, *Treaty Series*, vol. 500, p. 120.

<sup>7</sup> *Op. cit.*, vol. 596, p. 308, article 55.

<sup>8</sup> General Assembly resolution 2530 (XXIV), annex, article 47.

<sup>9</sup> Document A/CONF.67/16.

<sup>5</sup> For resumption of the discussion see 1352nd meeting, para. 1.

37. Mr. TSURUOKA said he had no objection to the retention of draft article 6 *quater*, but wondered whether it was absolutely necessary to deal with the question of observance of the laws of the granting State in draft articles on the most-favoured-nation clause. It was obvious that the granting State's internal law must be respected. Nevertheless, the Special Rapporteur's commentary (A/CN.4/280), and especially his reference to a judgment of the French Court of Cassation in paragraph (2), showed the usefulness, if not the necessity, of dealing with that matter in the draft.

38. Mr. REUTER said that he too was prepared to accept draft article 6 *quater*, which, although it was only a formal provision, nevertheless raised difficulties it would be better not to overlook. Draft article 6 established a presumption of the unconditional character of the most-favoured-nation clause, and in his commentary to article 6 *quater* the Special Rapporteur had rightly pointed out that a State must not withdraw the benefits of an unconditional clause by its legislation; he had added that it was a question of good faith. The judgment of the French Court of Cassation which he had cited was surprising: France had granted a most-favoured-nation clause, but the Court had subsequently invoked French law, and in particular article 11 of the French Civil Code, under which aliens in France enjoyed the rights accorded to French nationals only subject to reciprocity. The Court had thus combined the unconditional clause with article 11 of the French Civil Code, which made the clause conditional.

39. The Commission should therefore recognize either that that judgment was not compatible with the draft articles, or that the wording of article 6 was not sufficiently strict. True, the Special Rapporteur had pointed out that the presumption in article 6 was not irrebuttable, and two conclusions could be drawn from that. To state that evidence to the contrary could be derived only from the treaty containing the most-favoured-nation clause would be opting for a very strict solution; it would exclude any evidence that could be derived from the circumstances of the individual case and, in particular, the circumstances of the conclusion of the agreement. Moreover, it could be maintained that the French Court had been justified in finding that the unconditional clause in question was in fact conditional, by reason of a fundamental principle concerning the treatment of aliens in France laid down in the French Civil Code. States concluding an agreement with France concerning the status of aliens would normally be aware of that provision. Interpreted in that light, article 6 would open the way to sources of evidence other than the text of the treaty.

40. The judgment of the French Court of Cassation cited by the Special Rapporteur faced the Commission with a choice. If it adhered to the rules of interpretation in the Vienna Convention on the Law of Treaties<sup>10</sup> and did not lay a stricter rule, that would mean that it was prepared to admit evidence from sources other than the

treaty in rebuttal of the presumption in article 6; if it considered that the interpretation of most-favoured-nation clauses required a stricter rule, it would have to state that rule expressly, but the rule would have repercussions on article 6.

41. Mr. USHAKOV pointed out that the rule stated in article 6 *quater* might conflict with a most-favoured-nation clause which provided for exceptions to the application of the granting State's internal law. Moreover, it might not be necessary to make a general reference to the granting State's laws and regulations, since only the laws and regulations relating to the application of the clause were involved.

42. The drafting of article 6 *quater* prompted a question which he had not raised in regard to articles 6 *bis* and 6 *ter*, since they might have to be completely recast: in view of the text of article 5, was it really possible to speak of the right to most-favoured-nation treatment "acquired by the beneficiary State"? It was rather a right accorded to the beneficiary State, or to "persons or things in a determined relationship with that State", to quote draft article 5.

43. The reference in article 6 *quater* to persons and things enjoying the favours deriving from most-favoured-nation treatment was also unsatisfactory, as it might be taken to mean persons and things of any State, whereas obviously there must be a determined relationship with the beneficiary State.

44. Mr. AGO noted that the main difficulties raised by the article under discussion had already been mentioned by other members of the Commission. He merely wished to point out that the purpose of the article was to protect, at the international level, the right of the beneficiary State vis-à-vis the granting State. It might therefore be asked what would happen if the granting State kept in force laws or regulations contrary to the most-favoured-nation treatment. How would such a conflict between a rule of international law and provisions of internal law be resolved?

45. Article 6 *quater* also raised some drafting problems. In particular, it was always awkward to speak of persons and things being "subject" to the laws and regulations of a State, as the term "subject" could hardly apply to movable property.

46. Mr. SETTE CÂMARA said he had no objection to the text of article 6 *quater*, but shared the doubts expressed by Mr. Tsuruoka as to whether the article was really necessary in the draft.

47. The practice of most States was that once a treaty containing a most-favoured-nation clause had been ratified, it was enacted as internal law to render it enforceable. It thus became the law of the land, and if it conflicted with existing laws and regulations, the provisions of the treaty would prevail, on the principle *lex posterior derogat priori*.

48. That being said, he was prepared to support the approval of article 6 *quater*, subject to the necessary drafting amendments.

49. Mr. BILGE said he thought article 6 *quater* was acceptable in its present form, not only because it was

<sup>10</sup> 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. 293, section 3.



useful, but also, because it dispelled certain doubts which might arise in practice. The commentary to the article gave the impression that the laws of the granting State concerning the modalities of the exercise of a certain right must be respected. It should therefore be specified that laws concerning the modalities of the acquisition of a right or of the practice of a profession, for example, must be respected. A country's internal law might well impose conditions, as did a Turkish law requiring reciprocity. If the granting State's laws imposed restrictions in a certain sphere—for instance, if the practice of certain professions was restricted to its own nationals—and it accorded the benefits of a most-favoured-nation clause to another State, the clause had to be applied. Such a situation engendered a conflict both between international law and internal law, and between a general rule and a special rule of internal law.

50. Hence it was important to emphasize the first phrase of article 6 *quater*. In the commentary, the Commission could stress the fact that a right acquired by virtue of a most-favoured-nation clause was really acquired, and that the laws and regulations of the granting State could in no way impede its enjoyment.

51. Sir Francis VALLAT said he was prepared to accept the principle underlying article 6 *quater*; he had been greatly assisted in understanding it by the excellent commentary to the article (A/CN.4/280). He had considerable doubts, however, about the wisdom of stating the rule in article 6 *quater* as a single proposition. The problem of the application of local laws and regulations could be an extremely subtle one in individual cases. If a trader was required to have a permit by the local law, it could be said that the treatment consisted in the right to trade and that it was being made conditional on a permit being obtained. Seen in that light, the requirement of a permit could be regarded as a condition within the meaning of articles 6 and 6 *bis*.

52. It was also possible, however, to see the same case in a totally different light. The extension of the right to trade could be considered as being subject to a permit, and the requirement of a permit would then be regarded as part of the treatment. The conclusion would then be the opposite of that reached by the other approach.

53. The provisions of article 6 *quater* gave rise to serious doubts because they dealt with rights at two levels: first, the right of the beneficiary State to most-favoured-nation treatment at the level of international law; second, the right of persons to enjoy the favours deriving from that treatment and from the internal laws and regulations that might be applicable. It was very difficult to clarify the relationship between those two levels of rights in the cases under consideration.

54. The operative part of article 6 *quater* raised serious problems. It was difficult to see in what sense persons, and particularly things, could be said to enjoy the favours deriving from most-favoured-nation treatment. What was probably meant was that the persons concerned were entitled to raise a complaint, through the State to which they belonged, if they did not receive certain benefits.

55. It would seem normal to require those enjoying the favours deriving from most-favoured-nation treatment to comply with the laws and regulations of the granting State. If, under a most-favoured-nation clause, the ships of a State had the right of access to a port, the persons or companies to whom they belonged enjoyed that benefit, but the ships had to observe the local laws and regulations while in port.

56. The application of the rule stated in such concise terms in article 6 *quater*, however, might open the way for enactment by the granting State of legislation which could operate in a discriminatory fashion. And the principle of non-discrimination was fundamental to the whole subject. For example, trade licensing provisions were undoubtedly made in accordance with the laws and regulations of the granting State. They could, however, be applied in a discriminatory manner. In cases of that kind, it was difficult to see how the provisions of article 6 *quater* would apply.

57. As he saw it, the Commission had two alternatives. The first was to go into the whole question more thoroughly and in greater detail; the second was to delete article 6 *quater* from the draft and deal with the matter in a commentary. Certainly, a short article on the lines of the present article 6 *quater* could not cover the great variety of cases that could arise in practice.

58. The situation contemplated in article 6 *quater* was different from that dealt with in article 41 of the Vienna Convention on Diplomatic Relations. The latter provision dealt with two things which were comparable: the privileges and immunities of diplomatic agents under international law and the duty imposed on them by international law to respect the laws and regulations of the receiving State. It had been necessary to lay down in that Convention the general principle of the respect due to those laws and regulations, because diplomatic agents operated in the territory of the receiving State. The same was true of consuls, members of special missions and other representatives who enjoyed privileges under the various conventions mentioned during the discussion. The position was very different, however, in the case of a person enjoying the favours deriving from most-favoured-nation treatment; article 6 *quater* was much too broad a provision to cover the variety of problems which could arise in that context. The language of the article needed to be made more specific, particularly in its last part.

59. Mr. KEARNEY said he shared the concern expressed by the previous speaker. He doubted, however, whether it would be possible to go into more detail regarding the subject-matter of article 6 *quater* with any hope of achieving a solid result. The scope of the subject-matter was so varied and the conditions so contingent that it would not be possible to cover, in that article, the great variety of problems involved.

60. He cited the example of a standard clause contained in most establishment treaties, concerning access to courts of justice by companies of the contracting States on a most-favoured-nation basis. Clauses of that kind raised the problem of the requirement, which existed in

many countries, that a company must register as a domestic company before it was permitted access to the courts. The only practical way to deal with that type of problem was through a suitable provision in the establishment treaty. It would be an intractable task to deal, in the context of the subject-matter of article 6 *quater*, with the enormous number of different problems of that kind.

61. It was very difficult to achieve a proper balance when defining the relationship between internal law and most-favoured-nation treatment required under an international agreement. Under the system embodied in the Vienna Convention on the Law of Treaties, international law prevailed over internal law in the event of a conflict;<sup>11</sup> hence the rights enjoyed under a most-favoured-nation clause should take precedence over the provisions of the law of the granting State. The language of article 6 *quater*, however, seemed to imply that the laws and regulations of the granting State would take precedence over the observance of most-favoured-nation clauses under international law. That impression should be dispelled. It could be done by rewording article 6 *quater* to provide that persons enjoying the favours deriving from most-favoured-nation treatment were "subject to the laws and regulations of the granting State except as otherwise required by the most-favoured-nation clause". He would certainly prefer to drop article 6 *quater* from the draft than to retain it with its present unbalanced wording.

62. Mr. PINTO said he was in favour of including an article such as article 6 *quater*. He believed that the language proposed by the Special Rapporteur adequately balanced the two ideas of the enjoyment of rights under the most-favoured-nation clause and the implementation or exercise of those rights.

63. The right to most-favoured-nation treatment could clearly not be altered by internal law. At the same time, article 6 *quater* placed appropriate emphasis on the exercise of that right, which was subject to due respect for the laws and regulations of the granting State. He cited the example of a country that wished to encourage foreign investment and gave certain facilities to another country for the repatriation of profits by its nationals. Those facilities would be automatically extended to other States benefiting from a most-favoured-nation clause. The beneficiary States would have the right to that treatment notwithstanding any provisions to the contrary in the local legislation, but they would not be exempted from using the normal administrative machinery or from complying with the regulations governing the exercise of the right to repatriate profits made in the granting State.

64. While he appreciated that there were genuine difficulties in adopting a general provision dealing with a variety of different situations, he thought those difficulties in no way justified the omission of article 6 *quater* from the draft.

The meeting rose at 1 p.m.

## 1332nd MEETING

Wednesday, 18 June 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

### Tribute to the memory of Mr. Eisaku Sato, former Prime Minister of Japan

1. The CHAIRMAN, speaking on behalf of the Commission, expressed its condolences to the Government and people of Japan on the death of their former Prime Minister, Mr. Eisaku Sato, a man of peace whose passing was greatly regretted. He felt sure the members would also wish to express their sympathy for Mr. Sato's family.
2. Mr. TSURUOKA thanked the members of the Commission for their expression of sympathy to his country and to the family of a great Japanese statesman.

### Most-favoured-nation clause

(A/CN.4/266;<sup>1</sup> A/CN.4/280;<sup>2</sup> A/CN.4/286)

[Item 3 of the agenda]

(resumed from the previous meeting)

### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR ARTICLES 6 *quater* (continued) AND 6 *quinquies*

3. The CHAIRMAN invited the Special Rapporteur to introduce the redraft of article 6 *quater* and his new article 6 *quinquies*, which read:

#### Article 6 *quater*

##### Observance of the laws and regulations of the granting State

Without prejudice to the treatment to which they are entitled under a most-favoured-nation clause, persons and things in a determined relationship with the beneficiary State are subject to the laws and regulations of the granting State on the territory of the latter to the same extent as are the persons and things in the same relationship with a third State.

#### Article 6 *quinquies*

##### Prohibition of evading obligations arising from a most-favoured-nation clause

The granting State shall not enact laws or regulations which would nullify or jeopardize the right of persons or things in a determined relationship with the beneficiary State to the treatment accorded by it under a most-favoured-nation clause i.e. which would in law or in fact have the effect that the treatment of such persons or things becomes less favourable than that of the persons or things in the same relationship with a third State.

4. Mr. USTOR (Special Rapporteur) said that the new version of article 6 *quater* expressed essentially the same thought as the original text (A/CN.4/280), but brought out more clearly that the right to which the beneficiary

<sup>11</sup> *Ibid.*, p. 293, article 27.

<sup>1</sup> *Yearbook* . . . 1973, vol. II, pp. 97-116.

<sup>2</sup> *Yearbook* . . . 1974, vol. II, Part One, pp. 117-134.

State was entitled was in essence a right to non-discrimination in a certain field. So long as that right was not violated by the granting State, the persons concerned had to comply with the laws and regulations of that State.

5. Under the rules of general international law, all persons and things in the territory of the granting State were subject to the laws and regulations of that State as the territorial State. The granting State could introduce new legislation which would also be applicable to those persons and things, but it could not enact any legislation that contravened treaty obligations into which it had entered. The laws and regulations enacted must not create a discriminatory situation to the detriment of the persons who, or things which, were the ultimate beneficiaries of the most-favoured-nation clause. The crux of the matter was that the most-favoured-nation clause did not purport to grant any special advantages, but to ensure equality of treatment; it was that principle of equality which the territorial State must respect.

6. There had been some discussion on the possibility of a granting State violating its obligations under the most-favoured-nation clause. In order to allay the fears expressed, he had prepared a new article 6 *quinquies*, the purpose of which was to prohibit any acts whereby the granting State might seek to evade its obligations under a most-favoured-nation clause.

7. The problem of such evasion was one which had frequently arisen in State practice. One of the devices used was the adoption of unduly specialized tariffs. In his 1968 working paper he had cited a classic example: in 1904, Germany had conceded to Switzerland a reduced tariff for heifer calves "reared at 300 metres above sea level" with "at least one month of grazing at at least 800 metres above sea level"—calves which obviously could not be produced by other countries entitled to most-favoured-nation treatment.<sup>3</sup> The purpose of the new article 6 *quinquies* was to prohibit the enactment of legislation which would discriminate in fact, but not in name, against the beneficiary State.

8. He would welcome suggestions for drafting improvements to both the new articles.

9. Mr. ŠAHOVIĆ said he found article 6 *quater* quite appropriate in the draft, since it was important to deal with the relationship between the most-favoured-nation clause, which came under international law, and the internal law of the granting State. The first part of the article reserved the right of the beneficiary State to most-favoured-nation treatment, whereas the second part stressed the need to observe the laws and regulations of the granting State.

10. In paragraph (6) of his commentary to article 6 *quater* (A/CN.4/280), the Special Rapporteur had explained that the article was formulated in sufficiently general terms to be applicable not only to unconditional, but also to conditional clauses, including those subject to a condition of reciprocity. It was self-evident that article 6 *quater*, as revised, and the new article 6 *quinquies* would apply both to conditional and to unconditional clauses. Perhaps that should be made clearer in the commentary to

those provisions, since the clauses subject to a condition of reciprocity were probably those most likely to raise problems regarding not only observance of the laws and regulations of the granting State, but also the guarantees to be given to the beneficiary State.

11. It was in response to the comments made during the discussion on article 6 *quater*, as originally drafted, that the Special Rapporteur was proposing article 6 *quinquies*. The new article was not indispensable, but could be justified by the need to provide the beneficiary State with some guarantees. In connexion with possible guarantees to States, he referred to a situation which was very different from that contemplated in article 6 *quinquies*, but was not without interest for the consideration of that article: under a provision of the Yugoslav Constitution of 1974, contracts concluded with foreign persons or enterprises and relating to foreign investments in Yugoslavia could not be affected by any law enacted subsequently in Yugoslavia.

12. Mr. RAMANGASOAVINA said he found it natural to include in the draft a provision stipulating that the laws and regulations of the granting State must be respected without prejudice to the right of the beneficiary State to most-favoured-nation treatment. In view of the concern about article 6 *quater* expressed by some members of the Commission the previous day, the Special Rapporteur had amended that article *inter alia* by adding at the end the words "to the same extent as are the persons and things in the same relationship with a third State". In reality, that addition only shifted the problem. For the discussion at the previous meeting had been concerned with the relationship between the advantages granted to the beneficiary State under a most-favoured-nation clause and the internal law of the granting State, whereas the effect of the additional clause was to equalize the advantages granted to the beneficiary State and those granted to a third State, which seemed to be inherent in the very idea of most-favoured-nation treatment.

13. In its first version, article 6 *quater* had been clearly modelled on article 41 of the Vienna Convention on Diplomatic Relations<sup>4</sup> and on article 55 of the Vienna Convention on Consular Relations.<sup>5</sup> But those two provisions were placed in a very different context from that of the most-favoured-nation clause; they laid down the principle of respect for the laws and regulations of the receiving State or State of residence, as the case might be, by persons enjoying privileges and immunities not enjoyed by nationals of those States. According to the new version of article 6 *quater*, the advantages accorded to the beneficiary State under the most-favoured-nation clause could not be greater than those accorded to a third State. That was a settled principle, recognized by jurisprudence: a beneficiary State could not rely on the existence of a convention between the granting State and a third State to claim advantages greater than those enjoyed by that third State.

14. If a granting State took internal legislative measures concerning the status of aliens—if, for example, it

<sup>3</sup> *Yearbook* . . . 1968, vol. II, p. 170, para. 31.

<sup>4</sup> United Nations, *Treaty Series*, vol. 500, p. 120.

<sup>5</sup> *Op. cit.*, vol. 596, p. 308.

reserved the practice of certain professions or the sale of alcoholic drinks or pharmaceutical products to its own nationals—and if those measures were incompatible with the advantages accorded under a most-favoured-nation clause, there would be a conflict between internal law and international law. Consequently, the new draft of article 6 *quater* merely shifted the problem, since the conflict would not necessarily be confined to the extent of the advantages accorded to the third State. Moreover, the Special Rapporteur had been well aware of that nuance, for he had mentioned that most States, when concluding agreements containing a most-favoured-nation clause, took care to stipulate that the granting of advantages was subject to observance of their internal laws. One example was to be found in the treaty between the Soviet Union and the United Arab Republic cited in paragraph (4) of the commentary to article 6 *quater* (A/CN.4/280).

15. So far as draft article 6 *quinquies* was concerned, he noted that it introduced a salutary restriction, for it meant that the granting State must show good faith in applying the most-favoured-nation clause.

16. Mr. SETTE CÂMARA said that while he was grateful to the Special Rapporteur for his efforts, he preferred the previous text of article 6 *quater* to the new wording, largely for the reasons stated by Mr. Raman-gasavina. Moreover, he did not see how the additional provision at the end of the article would operate. It appeared to suggest that some States were under a greater obligation than others to respect the laws and regulations of the granting State. As he saw it, observance of the laws and regulations of the territorial State was an absolute concept and a provision of that kind would be unworkable. He found the previous wording of article 6 *quater* clearer and simpler; it showed that the conflict arose between internal law and the favours resulting from the most-favoured-nation clause and did not raise the question of the degree of application of internal laws.

17. As to the new article 6 *quinquies*, he agreed with Mr. Šahović that it was unnecessary. States would be reluctant to subscribe to a provision of that kind, which affected their sovereign right to enact laws. The situation envisaged in the new article would normally be settled through the claim that would inevitably be made by a beneficiary State which was injured by discriminatory laws or regulations.

18. Mr. KEARNEY said he was basically in agreement with the previous speakers who had expressed misgivings about the revised text of article 6 *quater*. The reference to “persons and things in the same relationship with a third State” introduced into the article an undesirable fluctuating standard. In addition to confusing the issue, the new wording could have the effect of reducing the rights of persons and things entitled to benefit under a most-favoured-nation clause.

19. That being so, he suggested the following simpler formulation for the article:

“Persons and things enjoying favours under a most-favoured-nation clause are subject to the laws and regulations of the granting State except to the extent that such laws and regulations may be rendered inap-

plicable to such persons or things as a consequence of the application of the most-favoured-nation clause”.

He believed that language on those lines would preserve an adequate balance between the rights of the beneficiary State and those of the granting State.

20. With regard to the new article 6 *quinquies*, he shared the doubts which had been expressed about its desirability. As far as he could see, the content of the article amounted to no more than a reiteration of the principle of *pacta sunt servanda*. He did not think it was either necessary or wise to restate that fundamental principle of the observance of treaties, which was already affirmed in article 26 of the Vienna Convention on the Law of Treaties.<sup>6</sup> No useful purpose would be served, and some harm could be done, by reiterating it in the present context.

21. He understood the Special Rapporteur's concern about such special problems as countervailing duties and “anti-dumping” provisions, which had given rise to complicated technical arguments as to whether they were permissible or not within the reasonable scope of the most-favoured-nation clause. The proper procedure for dealing with problems of that kind was recourse to the competent domestic courts by the injured persons. Of course, if those persons did not obtain what they believed to be their rights from the domestic courts, they would need international machinery to settle the problem at the international level through the beneficiary State. He himself had always taken the position that international arrangements for the impartial adjudication of disputes were essential. Machinery of that kind existed under the GATT for the settlement of disputes arising out of the obligations of the contracting parties; perhaps it could provide guidance in the present context.

22. At the present stage of the work, he thought that article 6 *quinquies* should be dropped.

23. Mr. PINTO said he welcomed the fact that the Commission seemed inclined to retain article 6 *quater*. On the whole, he found the former version of the article more satisfactory than the new one; the rather general nature of the previous wording seemed more suitable.

24. As to article 6 *quinquies*, he agreed with some of the previous speakers that it was perhaps not essential in the draft. Moreover, its wording involved a technical difficulty, in that it clearly referred to laws and regulations that might be enacted in the future; it did not deal with the problem of evasion of the most-favoured-nation clause through the application of pre-existing laws and regulations.

25. Article 6 *quinquies* seemed far too heavy for the intended purpose, and he shared Mr. Sette Câmara's belief that States would not welcome a provision which affected their sovereign right to legislate, or willingly accept the implication that they were trying to evade their international obligations.

26. If the majority of the Commission considered that a provision of that kind should be included in the draft

<sup>6</sup> 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. 292.

articles, he would suggest that it be confined to a proviso to be inserted at the end of article 6 *quater*, which might read: "provided, however, that such laws and regulations shall not have a discriminatory effect against the beneficiary State vis-à-vis third States."

27. Mr. TSURUOKA said that article 6 *quater*, in its revised form, and the new article 6 *quinquies* were not essential, or even useful, from a strictly legal and logical point of view, since they only confirmed well-established rules of international law. They should be retained for practical reasons, however, because the existence of judicial decisions, such as the judgment of the French Court of Cassation cited by the Special Rapporteur, proved that the problems covered by article 6 *quater* did in fact arise.

28. According to the two new draft articles submitted by the Special Rapporteur, persons and things of the beneficiary State must comply with the laws and regulations of the granting State when benefiting from the advantages of the most-favoured-nation clause. Moreover, the granting State must keep the promises it had made in granting the most-favoured-nation clause. Personally, he thought those two ideas could be expressed in a single provision.

29. Mr. USHAKOV said that the two articles under consideration were acceptable in principle. It was quite natural to refer to a third State in article 6 *quater*, since the most-favoured-nation clause could not apply without such a State being involved. It was entirely necessary to specify that when the granting State exempted a third State from the application of part of its internal law, the beneficiary State was also exempt.

30. In the event of a conflict between the international obligation of the granting State deriving from the most-favoured-nation clause and its own internal law, it would be logical that the latter should be amended, otherwise the international responsibility of the granting State would be engaged. The Commission might even opt for a provision specifying that in such a case the granting State had an obligation to amend its internal law so as to respect the principle *pacta sunt servanda*.

31. With regard to the drafting of article 6 *quater*, he did not think that the word "subject" was appropriate.

32. According to article 6 *quinquies*, the granting State could not enact laws or regulations which discriminated against one or more countries, because they would be contrary to the most-favoured-nation treatment. While he approved of the substance of that provision, he hoped that the Drafting Committee would consider amending the phrase "to the treatment accorded by it under a most-favoured-nation clause", since the reference was rather to treatment which was accorded directly to a third State, but which, by the operation of the most-favoured-nation clause, was accorded to the beneficiary State. Perhaps the words "to the treatment due to them under a most-favoured-nation clause" would be more appropriate.

33. Mr. REUTER said he approved of the two articles under consideration because their purpose was to ensure better application of the most-favoured-nation clause.

The only reason for dropping them would be the conclusion that they gave rise to difficulties which it did not seem possible to overcome. But that was not so.

34. Referring to article 6 *quinquies*, he pointed out, first, that that provision referred only to the case in which the granting State took legislative measures after granting the most-favoured-nation clause. To cover the case of prior measures, it might be provided that the clause could not be interpreted by reference to provisions of the internal law of the granting State, even if they had been enacted before the granting of the clause. A rule might also be laid down to the effect that a State which concluded a treaty containing a most-favoured-nation clause and which had laws that could limit the effects of that clause, must mention the relevant legislative provisions in the treaty, failing which it would be debarred from invoking them later. If the Commission decided in favour of that rule, which was certainly severe and far removed from the general principles of the interpretation of treaties, it should be included in draft article 6.

35. Several members of the Commission had stressed that States were hostile to any limitation of their sovereignty. In that connexion, he pointed out that article 6 *quinquies* dealt with a very special situation, namely, abuse of right. Every State had the right to enact laws, but it lost that right when its main object was to violate an international obligation. In the English version of article 6 *quinquies*, the words "nullify or jeopardize" might perhaps be replaced by the word "frustrate", which would be an allusion to the theory of frustration of contract, according to which a measure could not be taken if its main object was to prevent a certain result which others had been led to expect. When the notion of abuse of right had been referred to in connexion with State responsibility, the Special Rapporteur for that topic had not received it very favourably. But where the most-favoured-nation clause was concerned, manifest abuses of right did occur. He was therefore in favour of a provision such as article 6 *quinquies*, though he hoped that the idea of the essential intention would be introduced into it, for the sovereignty of the granting State must be respected when the measures it adopted were justified by considerations of general interest.

36. Sir Francis VALLAT thanked the Special Rapporteur for submitting two articles which would be very helpful to the Drafting Committee. Although the language could be improved, the texts now proposed represented a valuable effort to move forward in the direction of the original article 6 *quater*.

37. The wording added at the end of the new article 6 *quater* might perhaps have the effect of unduly narrowing the scope of the article. The original language, however, was much too broad, and it was necessary to correct that defect. The new text linked the application of the laws and regulations of the granting State to the enjoyment of benefits derived from the most-favoured-nation clause. The idea of subjecting persons and things to the whole body of laws and regulations of the granting State was outside the scope of the present draft articles.

38. The new article 6 *quinquies* introduced a useful balancing element. In a way, article 6 *quater* stated the

obvious and could have been dispensed with. But if the self-evident rule it contained was to be included in the draft, it became necessary also to include a statement of the equally obvious rule set out in the new article 6 *quinquies*. There were many examples in State practice of States relying on their own laws and regulations to evade the application of a most-favoured-nation clause. If a provision was to be included to the effect that the granting State was entitled to apply its laws and regulations, it was essential also to prohibit any acts whereby that State might attempt to frustrate the operation of the most-favoured-nation clause. It was true that the language of article 6 *quinquies* was rather heavy as it stood, but the Drafting Committee could no doubt find an improved form of words to express the idea of avoiding any discrimination which nullified the effect of the most-favoured-nation clause.

39. The CHAIRMAN, speaking as a member of the Commission, said he did not think it was sufficient to have article 6 *quater* standing alone; it should be balanced by article 6 *quinquies*, with which it was organically linked. It would be better, however, to replace the words "are subject to", in article 6 *quater*, by some phrase such as "should accept".

40. Without article 6 *quinquies*, the preceding provisions would serve no purpose. For instance, there were cases in which transit States offered land-locked countries the right of transit only under a most-favoured-nation clause; if those transit States then adopted legislation requiring the presentation of numerous and complex customs documents, the enjoyment by a beneficiary State of its rights under the clause could become extremely difficult.

41. Mr. SETTE CÂMARA expressed concern about the effects of article 6 *quinquies* on developing countries which found themselves faced with an economic crisis. Such countries might be compelled to adopt internal legislation, including protective measures, in the interval before international measures, such as the denunciation of treaties and invoking of the special provisions of the GATT, could take effect. The adoption of an article containing such a categorical prohibition as that in article 6 *quinquies* would deny them that chance to defend themselves. The Commission should bear in mind its own belief in regard to developing nations and the most-favoured-nation clause: that equal treatment of nations whose positions were not equal constituted inequality.

42. Mr. EL-ERIAN commended the Special Rapporteur for the scholarship he had shown in his commentary to article 6 *quater*. He shared the views of the Chairman and the apprehension of Mr. Sette Câmara concerning article 6 *quinquies*, and hoped that the Drafting Committee would be able to make it less categorical.

43. The CHAIRMAN, speaking as a member of the Commission in reply to Mr. Sette Câmara, said that periods of war and other emergencies were special cases in which it was customary for States to suspend international legislation. Nevertheless he still believed that article 6 *quinquies* was necessary. A precedent was provided by a United Nations instrument, the Convention on Transit Trade of Land-locked Countries, which contained both an article on the most-favoured-nation clause

and an article stipulating that the application of the Convention could not be suspended even in time of war.<sup>7</sup>

44. Mr. USTOR (Special Rapporteur) said that the choice between the old and the new versions of article 6 *quater* was largely a matter of drafting. The new version emphasized, in its first phrase, the right to most-favoured-nation treatment, which was a contingent right dependent on the treatment of a third State. Whatever formulation was chosen, the basic idea behind the article was that the nationals and things of a State which was the beneficiary of a most-favoured-nation clause had, within the limits of the *ejusdem generis* rule, a right to the same treatment as was accorded to the nationals and things of a third State. That the nationals and things of a beneficiary State would, without prejudice to that right, be subject to the laws of the granting State within the latter's territory was, admittedly, self-evident, but he thought it was worth stating expressly.

45. Those who considered that both article 6 *quater* and article 6 *quinquies* were self-evident and therefore unnecessary, should bear in mind the comments made by Mr. Reuter and Mr. Tsuruoka in support of his proposals. He fully agreed that the drafting of the articles could be improved and was grateful to Sir Francis Vallat for his suggestions.

46. Referring to the comments by Mr. Sette Câmara and Mr. El-Erian on the special situation of the developing countries, he said that other draft articles still to be introduced took that situation into account. Article 6 *quinquies* could serve to protect developing countries—for example, in situations in which their exports were threatened. In his view it would not be in the interests of the developing countries to set the article aside. He did not believe that any member of the Commission would wish to adopt an article stipulating that developed countries could not, but developing countries could, adopt internal legislation modifying their treaty obligations. The article as it stood was essentially a restatement of article 27 of the Vienna Convention on the Law of Treaties, which was a basic rule applicable to all States.

47. Mr. Sette Câmara said that the Special Rapporteur had partly dispelled his concern over article 6 *quinquies*; but it was only very seldom that developing countries actually benefited from a most-favoured-nation or a national treatment clause. The discussions in GATT and elsewhere showed that developing countries were continually seeking exceptions to such clauses. The protection which the Special Rapporteur had said the article would afford to developing countries was far from being a reality in present-day life.

48. Mr. REUTER said he thought that article 6 *quinquies* could be seen only as referring to an abuse of right which was objectively manifested by the fact that the sole purpose of a measure was to deprive the beneficiary of the advantages of the clause. A State had the right to take general measures, even if they limited the advantages of the clause, provided that those measures were

<sup>7</sup> United Nations, *Treaty Series*, vol. 597, p. 42; see articles 10 and 13.



justified for basic economic, financial or other reasons. But the Commission should not omit to prohibit certain acts which were manifestly wrongful, on the pretext that safeguard clauses were necessary.

49. Under the GATT, developing countries had benefited since 1964 from an exemption from reciprocity, and since 1968 they had also benefited, through UNCTAD, from generalized preferences without reciprocity. Moreover, the system of generalized preferences had been extended very widely and the 1975 Lomé Agreements had granted full equality of treatment without reciprocity to 46 developing countries, including 12 of the poorest. In his opinion, it would be very dangerous to introduce into international law a general principle that no rule of international law must be formulated that might hamper developing countries, which already benefited—very properly—from a quite exceptional régime. It should not be forgotten that every State that wished to place itself in the category of developing countries had the right to do so, which had made it necessary for the Secretary-General of the United Nations himself to define a new category of least-developed countries. It was those countries, whose situation was absolutely tragic, which were entitled to an entirely exceptional régime.

50. Mr. USHAKOV said that article 6 *quinquies* was in no way related to the situation of the developing countries, which were affected by that article in exactly the same way as other countries. The adoption of legislation which discriminated against certain countries was prohibited for all States, including developing countries. The principle that if a State granted preferential treatment to developing countries it was not required to grant the same treatment to other countries, did not come within the scope of article 6 and would be the subject of subsequent articles.

51. Mr. USTOR (Special Rapporteur) said he thought article 6 *quinquies* was really very innocent and could be most useful to developing countries. He agreed with Mr. Sette Câmara that nowadays developing countries were interested in obtaining special preferences from developed countries rather than most-favoured-nation treatment, but the article would apply only where developing countries had granted most-favoured-nation treatment. It merely provided that when a developing country had promised most-favoured-nation treatment to another country, it could not introduce legislation which would discriminate against the beneficiary State contrary to that promise. He did not think that economic difficulties in developing countries would make it necessary for them to introduce discriminatory measures and thus violate their promises under most-favoured-nation clauses; on the other hand, the article would give a developing country which had most-favoured-nation rights in another developing country an assurance that it would not be subjected to discrimination.

52. Mr. SETTE CÂMARA pointed out that developing countries were far more likely to need special legislation to protect their industries than industrial countries, though even some of the most powerful industrial countries had recently taken emergency measures of that type. He was not opposed to the substance of article 6 *quinquies*

and had no intention of suggesting that the Commission should approve an article giving developing countries the right to evade their obligations under a most-favoured-nation clause. His only doubt was whether the Commission should adopt an article that would seem to tie States' hands. If the article was binding, it would, he believed, be the very first provision approved by the Commission which prohibited a State from enacting legislation. If, on the other hand, the article was merely a reaffirmation of the present situation, in which a State having treaty obligations must not enact legislation conflicting with those obligations and if it did so the treaty would prevail, he had objection to it.

53. Mr. CALLE Y CALLE said that exceptions to most-favoured-nation clauses had long existed, and the right to make such exceptions was recognized in contemporary international economic law—for example, in the work of UNCTAD. The discussion had placed article 6 *quinquies* in its true context and shown that it should not be drafted in negative form as a categorical prohibition. The Commission should say that the granting State must not take any action affecting the rights of the beneficiary State which would result in the treatment accorded to that State being less favourable than that accorded to a third State, the basic obligation of the granting State being to ensure that there was no disparity between the treatment it accorded to the beneficiary and to third States. That did not mean, of course, that beneficiary States could escape the effects of article 6 *quater*: changes in the internal laws of the granting State affecting persons and things of a third State would also apply to persons and things of the beneficiary State.

54. The real meaning of article 6 *quater* had been defined by Sir Francis Vallat when he had said that the article did not seek to subject the persons and things of the beneficiary State in the territory of the granting State to all the laws and regulations of that State, but rather to ensure that the benefits of a most-favoured-nation clause would be enjoyed in accordance with the rules of the granting State relating to the field covered by the clause. He was sure that the Drafting Committee would be able to make appropriate amendments to articles 6 *quater* and 6 *quinquies*.

55. Mr. EL-ERIAN assured the Special Rapporteur that he had not meant that article 6 *quinquies* should be set aside. Nor had he intended any adverse reflection on the *pacta sunt servanda* rule or the rule that a State could not invoke its internal law to evade its international obligations. He was grateful to the Special Rapporteur for his intention to introduce draft articles providing for the special problems of the developing countries.

56. The Commission should always bear in mind that its task was to lay down universal rules of international law, but it had been considered appropriate to include in the draft articles on succession of States in respect of treaties, a section dealing separately with newly independent States.<sup>8</sup> The codifier of international law had to allow for the transitional provisions which inevitably appeared in the constitutions of at least some of the

<sup>8</sup> *Yearbook* . . . 1974, vol. II, Part One, document A/9610/Rev.1, chapter II, section D, part III.



many States which had gained independence in recent decades. At the same time, care must naturally be taken to ensure that those provisions did not undermine the universal character of the law of nations.

57. He agreed with Mr. Ushakov that article 6 *quinquies* was not concerned solely with the application of the most-favoured-nation clause to developing countries, but was a general article. In saying that the article was too categorical, he had in mind the possibility that a State which became a member of a regional organization and was subsequently required by that organization to adopt certain legislation, might thereby violate its obligations under a most-favoured-nation clause. He agreed with the substance of the article, but hoped it could be redrafted to take account of the points he had raised.

58. The CHAIRMAN suggested that articles 6 *quater* and 6 *quinquies* should be referred to the Drafting Committee.

*It was so agreed.*<sup>9</sup>

The meeting rose at 12.50 p.m.

<sup>9</sup> For resumption of the discussion see 1352nd meeting, para. 116.

### 1333rd MEETING

*Thursday, 19 June 1975, at 10.10 a.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

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

#### Most-favoured-nation clause

(A/CN.4/266;<sup>1</sup> A/CN.4/280;<sup>2</sup> A/CN.4/286)

[Item 3 of the agenda]

(continued)

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR ARTICLES 7 AND 7 bis

1. The CHAIRMAN invited the Special Rapporteur to introduce draft articles 7 and 7 bis, which read:

##### *Article 7*

##### *The ejusdem generis rule*

Under a most-favoured-nation clause or a national treatment clause the beneficiary State cannot claim any other rights than those relating to the subject-matter of the clause and falling within the scope of the clause.

##### *Article 7 bis*

##### *The scope of the most-favoured-nation clause regarding persons and things*

1. The scope of the persons or things to whose most-favoured-nation treatment the right of the beneficiary State extends under a most-favoured nation clause is confined to the class of persons or things expressly specified in the clause or in the treaty containing

it or implicitly indicated by the agreed sphere of relations where the clause applies.

2. From among the persons or things falling within the scope of paragraph 1 the beneficiary State may claim actual most-favoured-nation treatment for those (a) belonging to the same class of persons or things as the class of persons or things that are accorded favours under the right of a third State by the granting State and (b) being in the same relationship with the beneficiary State as the latter are with a third State.

2. Mr. USTOR (Special Rapporteur) said that the *ejusdem generis* rule was one which had been generalized, but it was not always easy to define and its implementation had caused much controversy. A most-favoured-nation clause consisted in a promise by the granting State to treat the beneficiary State no less favourably than it treated a third State in a certain field of relations. Operation of the clause was governed by the nature of that field of relations; by the fact that, pursuant to the general rules of limitation, the granting State could not be obliged to accord most-favoured-nation treatment in a field other than that to which the promise in the clause related; and by the extent and nature of the favours granted to a third State. Those points were essential to a proper understanding of the operation of the clause; that was why he had drafted articles 7 and 7 bis.

3. The simplest explanation of the substance of article 7 was to be found in paragraph (1) of the commentary to that article in his fourth report.<sup>3</sup> The operation of the most-favoured-nation clause might, however, be limited not only to a certain field of relations, but also to certain persons and things: for instance, if the clause provided that favourable treatment would be extended only to residents of a certain town or members of a certain profession, that treatment could not be claimed for other persons, and the same applied to things. Furthermore, the operation of the clause would always be restricted by the treatment accorded to a third State; even persons or things in a class mentioned in the clause could not enjoy the benefits promised to them unless the granting State accorded preferential treatment to persons or things of a third State in the same class.

4. Mr. TAMMES observed that in formulating the *ejusdem generis* rule the Special Rapporteur had relied heavily on treaty interpretation. He had referred, in the final sentence of paragraph (6) of the commentary to article 7 in his fourth report,<sup>4</sup> to the dilemma which always confronted drafters of a most-favoured-nation clause; but he had met that difficulty satisfactorily by his general drafting of articles 7 and 7 bis.

5. The Special Rapporteur's interpretation of the *ejusdem generis* principle was, as stated in the quotation from McNair in paragraph (1) of the commentary to article 7 in his fourth report, "that the clause can only operate in regard to the subject-matter which the two States had in mind when they inserted the clause in their treaty". Similar statements were to be found in the jurisprudence analysed in his various reports and it was, indeed, a basic principle, linked with the reference to performance by the parties "in good faith" in the Vienna

<sup>1</sup> Yearbook . . . 1973, vol. II, pp. 97-116.

<sup>2</sup> Yearbook . . . 1974, vol. II, Part One, pp. 117-134.

<sup>3</sup> Yearbook . . . 1973, vol. II, p. 102.

<sup>4</sup> Ibid., p. 104.

Convention on the Law of Treaties.<sup>5</sup> The application of that principle, however, was not always simple, since most-favoured-nation clauses were frequently invoked long after their conclusion, when their language had become obsolete or obscure.

6. It seemed clear from the Special Rapporteur's studies that what the parties to a later, or collateral treaty had had in mind in promising certain favours was irrelevant to the interpretation of the clause if those favours only corresponded materially or intrinsically to those which fell within the scope of the clause. The Special Rapporteur was therefore justified in rejecting, in paragraphs (13) to (15) of the commentary to article 7 in his fourth report, the contention that the legal context of the clause and the framework within which the advantage was claimed were necessarily of importance. Of course, that did not mean that there could not be cases in which account should be taken of things other than the clause itself in determining the scope of the clause. For example, a collateral treaty concluded prior to the adoption of a most-favoured-nation clause could be considered to have influenced the attitude of the parties drafting the clause. That consideration was part of the complex problem of the relationship between national and international law mentioned by Mr. Reuter in connexion with article 6 *quater*.

7. Mr. KEARNEY said he thought Mr. Tammes' comment on the relationship between the first and subsequent treaties in a particular field should be considered in the light of the provision in the Vienna Convention on the Law of Treaties that the practice of the parties should be taken into account in the interpretation of a treaty.<sup>6</sup> Hence that aspect was one which should normally be taken into account.

8. The principles stated in articles 7 and 7 *bis* were acceptable and correct, but he thought they had been expressed in too complex a fashion. The two stipulations in article 7 that the rights claimed must be those "relating to the subject-matter of the clause and falling within the scope of the clause" seemed to overlap, but he would not object to the retention of both conditions if the intention was to clarify the situation beyond all possible doubt. He found it difficult to determine the relationship between the two paragraphs of article 7 *bis* and wondered whether the difference between the alternative and the cumulative definitions of the persons and things affected by the clause, in paragraph 1 and paragraph 2 respectively, was deliberate.

9. Mr. USTOR (Special Rapporteur) said that the distinction mentioned by Mr. Kearney was deliberate. The starting point for article 7 *bis* was the promise contained in the most-favoured-nation clause. The first essential for operation of the clause was that the persons or things to benefit from it should be identified, and that could be done either explicitly or implicitly in the clause. The treatment received by the beneficiary State would then depend on the treatment accorded by the granting State

to a third State, in the sense that the beneficiary State could not claim favours accorded to persons or things outside the scope of the clause.

10. Mr. KEARNEY said that, as he understood the commentary to article 7 *bis* (A/CN.4/280), the first paragraph of that article had been drafted in its present form because there were both most-favoured-nation treatment agreements which applied to expressly identified persons or things, and agreements which applied to an entire sphere of relations. That fact having been admitted in the first paragraph, he did not see the logic of limiting the beneficiary State to claiming advantages for persons or things which met both the conditions in the second paragraph.

11. Mr. USTOR (Special Rapporteur) said that the reason for the double requirement mentioned by Mr. Kearney could be illustrated by the example of a general most-favoured-nation clause offering benefits in regard to shipping. If the granting State accorded favourable treatment only to such vessels of a third State as flew the flag of that State, the beneficiary State should be able to claim similar treatment only in respect of vessels which flew its own flag. Condition (b) of paragraph 2 would prevent the beneficiary State from requesting favoured treatment for vessels which it controlled, but which did not fly its flag, since the relationship of such vessels to itself would not be the same as that of the originally favoured vessels to the third State.

12. Mr. KEARNEY said that in the light of the reasons advanced by the Special Rapporteur for having an alternative requirement in paragraph 1 and a cumulative requirement in paragraph 2, he was not certain that condition (b) of paragraph 2 was appropriate. If, as the Special Rapporteur had said, the beneficiary State should not be able to obtain treatment more favourable than that granted to the most favoured nation, condition (b) would seem to require further study. He believed that article 7 *bis* could be simplified and made a more positive rule if its two paragraphs were combined.

13. Mr. ŠAHOVIĆ agreed with the Special Rapporteur that article 7 laid down a fundamental rule, but he thought the rule was rather too general to solve a number of problems that might arise in practice, to which Mr. Kearney had drawn attention. Those problems arose from the interpretation of the *ejusdem generis* rule, which could be differently understood, as the Special Rapporteur had shown in his commentary to article 7, by comparing Pescatore's interpretation with that of Sauvignon, which he supported.<sup>7</sup> In his opinion, the Special Rapporteur should indicate whether any connexion existed between the rule in article 7 and the various types of most-favoured-nation clause he had in mind.

14. It was clear from the commentary that the question dealt with in article 7 *bis*—the scope of the most-favoured-nation clause regarding persons and things—could not be dealt with in article 7, which stated a general rule. The application of that rule raised a number of questions: for example, whether the application of the most-favoured-nation clause must be confined to persons and things.

<sup>5</sup> 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. 292, article 26.

<sup>6</sup> *Ibid.*, p. 293, article 31.

<sup>7</sup> *Yearbook* . . . 1973, vol. II, pp. 106-107, paras. (13) and (14).

He was not opposed to the Special Rapporteur's approach, for he, too, believed that persons and things should be considered first. He thought, however, that it might perhaps be possible to simplify the wording of article 7 *bis* by reducing it to a single paragraph.

15. He gathered that in paragraph 1 the Special Rapporteur had tried to show the general relationship which must exist between the classes of persons and things benefiting from most-favoured-nation treatment and the classes of persons and things expressly covered by the clause; and in paragraph 2 he had tried to define the scope of the clause in regard to the persons and things entitled to benefit. But in doing so the Special Rapporteur seemed to have made a distinction between the persons and things specified in paragraph 1 and those referred to in paragraph 2. It was not quite clear what distinction he had intended to make between those two classes of persons and things.

16. In paragraph (1) of his commentary to article 7 *bis* (A/CN.4/280) the Special Rapporteur said that although it would have been simpler if the title of the article had referred only to the "personal scope" of the clause, for the sake of completeness he had chosen a somewhat more elaborate title. He thought the Special Rapporteur should perhaps explain more clearly why he had thought it necessary to make parallel references to persons and things. He would also like to know what exactly was meant by the words "implicitly indicated" in paragraph 1 of article 7 *bis*. In paragraphs (8), (9) and (10) of his commentary to article 7 *bis* the Special Rapporteur had spoken of problems relating to the controversial notion of "like articles" or "like products", saying that he had intended to define that notion by the rule stated in article 7 *bis*. The Special Rapporteur's intention did not seem very clear, however, and he thought it should be explained.

17. Mr. USHAKOV said that he accepted articles 7 and 7 *bis* in principle, but thought that their interpretation raised a number of questions. Referring to the definition of the most-favoured-nation clause given in article 4,<sup>8</sup> he reiterated his view that the clause should not be defined as a "treaty provision", but as "treaty provisions", since it comprised all the provisions of the treaty concerning most-favoured-nation treatment. If the definition was thus amended, it would not be necessary to include the words "or in the treaty containing it" in paragraph 1 of article 7 *bis*. In addition, he had a reservation about the words "or implicitly indicated": he did not think that an alternative was involved; it would be better to say "and/or implicitly indicated".

18. Paragraph 2 of article 7 *bis* would be justified only where the classes of persons and things benefiting from most-favoured-nation treatment were "implicitly indicated by the agreed sphere of relations where the clause applies", and in that case only. For if the classes of persons and things benefiting from most-favoured-nation treatment were "expressly specified in the clause" it was unnecessary to give further particulars of paragraph 2. If, on the other hand, those classes of persons and things were only "implicitly indicated by the sphere of relations" to which

the clause applied, paragraph 2 would have to specify what they comprised. Thus, if the alternative in paragraph 1 were eliminated by replacing the words "or implicitly" by "and implicitly", paragraph 2 would no longer be necessary.

19. Mr. REUTER said that he, too, accepted articles 7 and 7 *bis*, though he was not sure whether it would really be possible to retain a very precise and satisfactory text, or whether a simpler text should be adopted, with an explanation in the commentary that it needed to be clarified by jurisprudence.

20. The *ejusdem generis* rule was a very simple one. All the members of the Commission agreed that the most-favoured-nation clause had a clearly defined field of application, which was determined by the totality of the rules of the treaty. But difficulties arose as soon as one attempted to describe exactly the classes of persons and things benefiting from most-favoured-nation treatment. For example, if the granting State allowed a third State—Belgium—to export under specially favourable conditions fruit grown in its territory, did it follow that the State claiming the benefit of the most-favoured-nation clause could claim the same advantages for fruit grown in Belgium—such fruit being so designated in the treaty made with the third State—or should it be inferred, as common sense would suggest, that the advantages it claimed under the most-favourable-nation clause applied to fruit grown in its own territory? The problem did not arise in that particular case, for the object described in the initial treaty obviously had to be transposed; but there were cases in which it could arise.

21. The question which did, in fact, arise was that of the relationship between internal law and international law. When the subject-matter to which most-favoured-nation treatment was to apply was defined by international law, there was no problem. For instance, if the most-favoured-nation clause related to shipping matters which were defined by international law, the question would be whether the advantages accorded by the clause came within the scope of the definition of international shipping matters. But some treaties referred to internal law: for example, in regard to the right of establishment of legal persons. The definition of legal persons raised a particularly difficult problem, because they were defined by internal law. The problem arose when a treaty expressly granted a third State favourable treatment for a class of legal persons specified according to the internal law of the third State. For example, if a treaty between Germany and France gave Germany advantages for the establishment of a certain kind of German limited liability company known as a *Gesellschaft mit beschränkter Haftung*, which did not exist in the Anglo-Saxon countries, would the United Kingdom be able to invoke the most-favoured-nation clause to claim the same advantages for the British type of company which most closely resembled the German type referred to in the treaty, or would it be debarred from doing so? Similarly, if a treaty granted some advantage to French companies of the type known as *association en participation*, which corresponded to the "joint venture" of the common law countries, would an Anglo-Saxon country be able to invoke the most-favoured-nation clause to claim the same

<sup>8</sup> *Ibid.*, p. 215.

advantages for those of its companies which were of the "joint venture" type? The Special Rapporteur had well understood the problem that arose when persons or things were defined in terms of internal law: in that case, the most-favoured-nation clause did not permit extension of the advantage granted, or permitted such extension only by transposition.

22. The same problem arose in regard to the nationality of companies, which was not determined by international law. For when a treaty of establishment granted advantages to a foreign State for its national companies, it was the law of that State which determined the nationality of the companies. That being so, could the State which invoked the most-favoured-nation clause claim its advantages for all the companies defined as "national" under its own law? Could not the granting State object that the national companies of a third State to which it had granted an advantage were defined much more restrictively, under the law of that third State, than the national companies of the State invoking the most-favoured-nation clause? Under the law of the latter State, for a company to be regarded as "national", it might suffice for it to have its registered offices or a principal place of business in the territory of the State in question, or for that State to control a substantial part of its registered capital. Hence, the granting State could refuse to extend the benefit of the clause, arguing that it had accorded to the third State a specific kind of advantage which, when transposed into the law of another State, would become much more extensive.

23. The *ejusdem generis* rule might thus have rather far-reaching consequences in regard to multinational companies, so he wondered whether it would not be better to put the rule in modern terms and draw attention, in the commentary, to all the problems it raised.

24. Mr. USTOR (Special Rapporteur) agreed that all the difficulties to which Mr. Reuter had alluded were present in articles 7 and 7 *bis*. It was clear to him, as it was to Mr. Reuter, that the adoption of articles on the most-favoured-nation clause would not prevent discussion at the interpretation stage. The Commission's rules and commentaries could, however, be helpful to those wishing to conclude most-favoured-nation clauses, if the articles adopted were made as precise as possible and the difficulties involved were mentioned in the commentaries.

25. Mr. KEARNEY proposed the following redraft of article 7 *bis*:

Under a most-favoured-nation clause persons or things included in a class of persons or things specified in the clause or the treaty containing it, or coming within an agreed sphere of relations to which the clause applies under the treaty, shall be accorded most-favoured-nation treatment if the granting State is according favours to the same class of persons or things in a third State or (and) they have the same relationship with the beneficiary State as the persons or things being accorded the favours have with the third State.

26. That wording combined in a single paragraph the provisions of both paragraphs of the Special Rapporteur's text. It omitted the adverb "expressly" before the word "specified" and the expression "implicitly indicated",

which appeared in paragraph 1. Adverbs such as "expressly" and "implicitly" raised problems which had been well illustrated by Mr. Reuter.

27. His proposed text brought together two ideas: that of the right of the beneficiary State, at present contained in paragraph 1, and that of the claim of the beneficiary State for most-favoured-nation treatment for particular persons or things, which was contained in paragraph 2. His text not only brought those two balancing factors closer together, but had the advantage of indicating clearly the automaticity of the operation of the most-favoured-nation clause. No request or claim by the beneficiary State was mentioned; the persons or things in the appropriate relationship with the beneficiary State were entitled to the treatment in question merely by reason of the fact that it had been granted to persons or things in the same relationship with the third State. His proposed text simply stated that the persons or things entitled to most-favoured-nation treatment "shall be accorded" that treatment.

28. There was one important point in the redraft, on which his final position would depend on the reaction of the Special Rapporteur: it was indicated by the use of the words "or (and)" in the last part of the text. The difficult problem of the choice between the two conjunctions "or" and "and" arose because article 7 *bis* was concerned with two different types of treatment: treatment based on specification in a class and treatment based on an agreed sphere of relations. By the rule of permutations, four different cases were possible between two States. In three of them, it would seem appropriate to use the conjunction "or", but in the fourth the conjunction "and" would be more suitable.

29. The first case in which the conjunction "or" should be used was that in which the scope of the clause was confined to a specified class and the persons or things of the third State were also in the specified class. The second case was that in which the scope of the clause was confined to an agreed sphere of relations and the grant to the third State was also made on the basis of relationship. The third case was that in which the scope of the most-favoured-nation clause was confined to a specific class, but the grant made to the third State covered the total field of relations, which included that class. The conjunction "and" should be used in the fourth case, where the scope of the most-favoured-nation clause extended to a general field of relations, but the grant made to the third State referred to a specified class of persons or things. In that case, for the clause to operate, the persons or things of the beneficiary State had to fall within the total relationship and also within the specified class.

30. He appreciated that the provision was a complex one, but thought it was necessary in order to cover a complex set of situations.

31. Sir Francis VALLAT said that Mr. Kearney's statement provided one more illustration of the fact that articles 7 and 7 *bis* involved questions of interpretation. That being so, he had misgivings regarding the use of the Latin expression *ejusdem generis*. The Commission had decided many years previously to avoid using Latin

as far as possible; the only traditional Latin phrase which had survived in the Vienna Convention on the Law of Treaties was *pacta sunt servanda*, which was a time-honoured expression. Moreover, in English legal practice, at least, the expression "*ejusdem generis*" was used in a sense different from that in which it was employed in article 7. It served to indicate that, where a series of specific items was enumerated, but was followed by a general expression, that expression should be interpreted by reference to the specific items. For example, a list reading "chicken, ducks, turkeys and other livestock" would be interpreted so that the term "livestock" would cover pheasants, that was to say, livestock of the same kind as the items specifically mentioned. It would not be interpreted so as to cover pigs. Possibly, some such rule might be useful in the present draft, because problems of that nature arose in connexion with the application of the most-favoured-nation clause. The important point, however, was that the words "*ejusdem generis*" were not used in that sense in the title of article 7; hence it was desirable to dispense with them.

32. He was concerned about the relationship between articles 7 and 7 *bis* and the rules of interpretation contained in the Vienna Convention on the Law of Treaties.<sup>9</sup> It was particularly important that nothing should be done to detract from the authority of the rules in articles 31 and 32 of the Vienna Convention; those rules had acquired a very significant standing in the international community. In the recent *Golder case*, in which he had represented the United Kingdom before the European Court of Human Rights, the view had been taken by all those involved in the case—the Court, the European Commission of Human Rights and Counsel for the United Kingdom—that articles 31 and 32 of the Vienna Convention codified pre-existing rules of customary international law.

33. It was essential to make it clear whether there was any intention, in articles 7 and 7 *bis*, to treat the most-favoured-nation clause as a particular kind of treaty and to depart from the system of article 31 of the Vienna Convention, in which the idea of specific rules of interpretation had been deliberately avoided. Possibly the intention was a different one and articles 7 and 7 *bis* came under the heading of "relevant rules of international law applicable in the relations between the parties", referred to in article 31, paragraph 3 (c) of the Vienna Convention. In that case, if the provisions were intended to constitute codification, they would have to be very well founded on doctrine and practice. Possibly, it was intended to lay down only conventional rules applicable exclusively to the parties. The Special Rapporteur should give some indication of his intentions on that point.

34. That being said, he was prepared to accept the basic ideas underlying articles 7 and 7 *bis*, despite the very difficult questions of interpretation and application they raised.

35. Mr. REUTER said that Mr. Kearney's proposal had the advantage of simplifying at least one of the

problems raised by article 7 *bis*. The use of the words "class . . . specified" and "agreed sphere" indicated that the clause applied only to persons or things included in a specific class or sphere. Thus according to the text proposed, the benefit of the most-favoured-nation clause could not be claimed when the favours accorded were entirely individualized. For example, a most-favoured-nation clause relating to shipping would not apply where the granting State concluded an agreement with a third State by which it allowed vessels from a certain port in that State to enter one of its own ports, since such an advantage would not be included in a specified class or an agreed sphere.

### Co-operation with other bodies

[Item 8 of the agenda]

(resumed from the 1321st meeting)

#### STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

36. The CHAIRMAN welcomed Mr. Golsong, the Observer for the European Committee on Legal Co-operation, and invited him to address the Commission.

37. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) said that the Commission's work was always followed with great interest by the European Committee on Legal Co-operation. He regretted that the Commission's heavy programme of work had prevented it from being represented at the last meeting of the Committee, which had been held recently.

38. Among the activities at Strasbourg which might be of interest to the Commission, he wished to mention, first, the arrangements made to enable the European Communities to become contracting parties to the European Convention for the Protection of International Watercourses Against Pollution; for that matter was related to a topic which the Commission was now studying, namely, treaties concluded between States and international organizations or between two or more international organizations. In order that the European Communities might be able to become contracting parties to the Convention, which was not yet open for signature, it was planned to include in the text a signature and ratification clause which would enable them to sign it on the same basis as States and then deposit an instrument by which they would express their consent to be bound. That instrument would not be counted among the number of ratifications necessary for the entry into force of the Convention. Once they had become parties to that multilateral Convention, however, the Communities would nevertheless assume the same obligations and enjoy the same rights as States. Lastly, their participation would not depend on the prior or concomitant ratification of the Convention by all their member States.

39. The formulation of that clause had raised a number of difficulties. Since the relations between the Communities and their member States were evolving, it would be difficult to fix, over a period of time, the scope of the competence of the Communities in regard to water pollution control. It had therefore been decided to submit to the Committee of Ministers of the Council of

<sup>9</sup> 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. 293, section 3.

Europe, which had prepared the Convention, a draft declaration by which the Committee of Ministers would, at the time of the signature of the Convention, take note of the fact that "the necessary competence for implementing the European Convention for the Protection of International Watercourses Against Pollution may be vested, as the case may be, in its member States or in the Community itself, for whom it is to state how such competence is distributed in accordance with its internal procedures".

40. That solution might give rise to some difficulties, because States which were not members of the Communities might be faced with partners who were hard to get at, particularly in the event of a dispute. Consequently, an arbitration procedure had been provided for in an annex, which covered various possible cases. In the event of a dispute between two contracting parties, only one of which was a member of the European Economic Community, which was itself a contracting party, the other party would make an application both to the member State and to the Community, which would jointly notify it, within two months of receipt of the application, whether the member State, the Community, or the member State and the Community jointly, would be a party to the dispute.

41. The European Communities had applied to become parties to three other conventions. Since two of them were already in force, the only possible procedure would be to prepare an additional protocol.

42. Also related to the law of treaties was the work undertaken with a view to adapting the European Convention on Extradition to current needs. That Convention, the preparation of which went back about 20 years, was now in force between many States, both members and non-members of the Council of Europe. Recent efforts had aimed, in particular, at reducing the number of reservations formulated by States. The work had resulted in three instruments: an interpretative declaration, which had been adopted by the representatives of the contracting States members of the Council of Europe within the Committee of Ministers, with the express consent of the contracting States not members of the Council; a recommendation to States designed to ensure the application of the provisions of the Convention in a specific way; and an additional protocol which would add to the Convention provisions relating, in particular, to the scope of the privileges deriving from the notion of a political infrastructure. The latter instrument stipulated that, for the purposes of application of the rule making it possible not to extradite for a political offence, the crimes against humanity specified by the Convention on the Prevention and Punishment of the Crime of Genocide, the offences specified in certain articles of the Geneva humanitarian Conventions in their present form, and all similar violations of the laws of war in force at the time of the entry into force of the protocol and of the customs of war existing at that time which were not already specified in the Geneva Conventions, would not be regarded as political offences. That clause might raise some difficulties because it referred to provisions in force at the time of entry into force of the protocol, without specifying for whom those provisions must be in force.

43. In the field of criminal law, with which the Commission was only incidentally concerned, he wished to mention a Convention which had recently entered into force, namely, the Convention on the International Validity of Criminal Judgments, which related to the recognition and execution of criminal sentences passed by foreign courts, and another that would soon enter into force, the Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, which made it possible to grant privileged treatment, such as a suspended sentence, not only to nationals of the country of the court, but also to nationals of other contracting parties.

44. The European Court of Human Rights had recently referred to the Vienna Convention on the Law of Treaties when hearing the *Golder case*, which concerned the interpretation of a provision of the Convention for the Protection of Human Rights and Fundamental Freedoms that was nearly identical with a provision of the International Covenant on Civil and Political Rights. In order to interpret that provision and determine whether it implied a right of access to the courts, the Court had followed the method of interpretation provided for in articles 31 to 33 of the Vienna Convention on the Law of Treaties:<sup>10</sup> it had examined the disputed provision in its context and in the light of the object and purpose of the treaty; it had taken the preamble to the treaty into consideration; and it had taken into account the relevant rules of international law applicable in the relations between the parties. The Court's interpretation had led it to state that the principle that it must be possible to bring a civil dispute before a judge was one of the fundamental and universally recognized principles of law.

45. The European Committee on Legal Co-operation also had under consideration the drafting of instruments relating to mutual administrative assistance. In addition, work would soon begin on concerted acts of violence.

46. Lastly, he noted that the Commission's work on the most-favoured-nation clause might have some repercussions on the scope of the European Convention on Establishment and, if the Commission dealt with national treatment, on the current drafting of provisions relating to the status of migrant workers.

47. The CHAIRMAN, speaking on behalf of the Commission as a whole, thanked the Observer for his lucid and interesting account of the work of the European Committee on Legal Co-operation. The Commission's relations with that Committee were particularly friendly, and a close personal bond had been established by Mr. Golsong, who had acted as its observer at all the sessions of the Commission held since those relations had been established.

48. He expressed the Commission's thanks for the invitation to send an observer to the Committee's meetings. He himself had enjoyed the hospitality of the European Committee at Strasbourg in 1974, when he had attended its meetings as observer for the Commission.

49. Exchanges of views between the Commission and the regional bodies concerned with the codification of

<sup>10</sup> *Ibid.*



international law were particularly useful. They served to bring home the views, needs and requirements of the regions to the Commission in its task of making universal law. Europe, as a highly developed region which had produced many great jurists in the past and had sent outstanding international lawyers to the International Law Commission, had a special contribution to make to that task. The Commission derived great benefit from the work and the experience of the European Committee for Legal Co-operation.

50. He had been impressed by the Observer's reference to the question of participation by the European Economic Communities in a treaty as parties in their own right. He had also been greatly interested by the description of the new mechanism whereby the Communities could become bound by a treaty as institutions, quite independently of their member States, which might or might not be parties to the treaty. That process, whereby a European institution made itself responsible to the world community for the application of a convention, was particularly important at a time when the discussions on European security appeared to be about to lead to a definite agreement.

51. He had found equally interesting the Observer's description of the work of the European Committee on criminal law. In its early days, the International Law Commission had worked in that field; in 1954 it had adopted a Draft Code of Offences against the Peace and Security of Mankind.<sup>11</sup> The Commission had also worked for a number of years on the question of an international criminal jurisdiction.

52. There was one point relating to co-operation between the two bodies, to which he had referred in 1974 when he had appeared as an observer at Strasbourg, and which he wished to stress again. It was the question of maintaining close contact in regard to the approach to items under consideration by the International Law Commission. The Statute of the Asian-African Legal Consultative Committee specified that one of that Committee's purposes was to study the work of the International Law Commission and possibly to comment on it. Pursuant to that provision of its Statute, the Asian-African Committee had discussed such topics as the law of treaties and international rivers, and its work had been very useful to the Commission. It would be of great benefit to the Commission if the European Committee on Legal Co-operation were likewise to examine topics on the Commission's agenda, in addition to discussing problems of particular interest to Europe.

53. He expressed the Commission's regret at its inability, owing to pressure of work, to send an observer to the meeting of the European Committee held the previous week. He hoped it would be possible for the Commission to send an observer to the meeting to be held in December.

54. In conclusion, he expressed the hope that the close co-operation between the International Law Commission and the European Committee on Legal Co-operation would continue to develop to their mutual benefit.

The meeting rose at 1 p.m.

<sup>11</sup> *Yearbook* . . . 1954, vol. II, pp. 149-152.

## 1334th MEETING

Friday, 20 June 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

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

### Most-favoured-nation clause

(A/CN.4/266;<sup>1</sup> A/CN.4/280;<sup>2</sup> A/CN.4/286)

[Item 3 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 7 (The *ejusdem generis* rule) and

ARTICLE 7 *bis* (The scope of the most-favoured-nation clause regarding persons and things)<sup>3</sup> (continued)

1. The CHAIRMAN invited the Commission to continue consideration of articles 7 and 7 *bis* submitted by the Special Rapporteur.

2. Mr. TSURUOKA said that, in principle, he agreed with the ideas expressed in those two provisions. The Special Rapporteur seemed to have tried to stress three aspects of the problem: the necessary relationship between the persons and things in question and the beneficiary State; the subject-matter of the clause; and the identity of the relationship between the persons and things and the third State, with the relationship between the persons and things and the beneficiary State.

3. Since the only remarks he had to make related to drafting, he would reserve them for the Drafting Committee, but he would like the Special Rapporteur to explain, at the present stage, what was the difference, if any, between the "subject-matter of the clause", the "scope of the clause" and the "agreed sphere of relations".

4. Mr. PINTO said he understood the revised articles 7 and 7 *bis* to mean that, in addition to the requirement that the rights claimed must relate to the subject-matter of the most-favoured-nation clause, those rights must also be of the same essential character as the rights granted to the third State. If that understanding was correct, he agreed with the remark made at the previous meeting that the expression *ejusdem generis*, which was used in the title, did not convey the intended meaning to an English-speaking lawyer.<sup>4</sup>

5. In the text of article 7, the phrase "relating to the subject-matter of the clause" was inappropriate. In one sense it was too wide, because everything relating to that subject-matter would not necessarily be *ejusdem generis*; in another sense it was too narrow, because it was not only rights relating to the same subject-matter, but also rights having the same essential character which

<sup>1</sup> *Yearbook* . . . 1973, vol. II, pp. 97-116.

<sup>2</sup> *Yearbook* . . . 1974, vol. II, Part One, pp. 117-134.

<sup>3</sup> For texts see previous meeting, para. 1.

<sup>4</sup> *Ibid.*, para. 31.



were covered. Article 7 thus required that the rights should fall within some specific definition imported by the most-favoured-nation clause.

6. The provisions of article 7 *bis* constituted a further elaboration of that specific limitation. Paragraph 1 laid down the potential scope by specifying that the operation of the clause was confined to the "class of persons or things expressly specified in the clause" or "implicitly indicated by the agreed sphere of relations" in which the clause applied. Paragraph 2 specified the actual or available scope of the clause by reference to the rights which were accorded by the granting State to a third State.

7. He did not disagree with the substance of paragraph 2, but thought that the wording needed improvement. The use of the adjective "same" before the word "class" was not satisfactory; the adjective "equivalent" would seem closer to the intended meaning. For example, if a third State was given certain fishing facilities, but with the qualification that the fishing vessels must be manned by its own nationals, or that there should be some other clear connexion between those vessels and the third State, the expression "belonging to the same class" would not properly cover the situation. The beneficiary State under the clause might well claim that any fishing vessel flying its flag belonged to "the same class" as the vessels of the third State to which the facilities had been accorded, and ignore the requirement of a direct connexion.

8. With regard to the drafting of article 7 *bis*, he preferred the shorter text proposed by Mr. Kearney,<sup>6</sup> which was clearer and more logical.

9. Mr. SETTE CÂMARA said that the Commission was faced with the dilemma referred to in paragraph (6) of the commentary to article 7:<sup>6</sup> either to draft a general rule, at the risk of its being interpreted too rigidly; or to specify the situations which might arise, at the risk of the enumeration being incomplete. In that situation, he agreed with Sir Francis Vallat in preferring a general statement of the rule. The discussions, which had been proceeding for two meetings, had not clarified the variety of situations that could arise.

10. The rule in article 7 was obviously a provision on interpretation which would operate in the light of articles 31 and 32 of the Vienna Convention on the Law of Treaties.<sup>7</sup> The various means of interpretation set out in those articles would clarify the application of article 7.

11. He strongly supported the suggestion that the Latin expression *ejusdem generis* should be avoided; it was not used by lawyers in a great many countries and would not be readily understood. Moreover, the Commission had in the past consistently avoided the use of Latin expressions wherever possible. Even the universally known doctrine of *rebus sic stantibus* had been described as "fundamental change of circumstances" in article 62 of the Vienna Convention on the Law of Treaties.

12. Mr. USTOR (Special Rapporteur), summing up the discussion on articles 7 and 7 *bis*, noted that there was general agreement on the principles involved; the discussion had centred on the drafting, which was extremely difficult, and he thanked members for all their valuable suggestions.

13. With regard to the use of the word "same" in article 7 *bis*, paragraph 2, which Mr. Pinto had suggested should be replaced by the word "equivalent", he drew attention to the following passage in paragraph (3) of the commentary to article 5, as adopted by the Commission in 1973: "The expression 'same relationship', however, has to be used with caution because, to continue the example, the relationship between State A and its nationals is not necessarily the same as the relationship between State B and its nationals. Nationality laws of States are so diverse that the sum total of the rights and obligations arising from one State's nationality laws might be quite different from that arising from another State's nationality laws".<sup>8</sup> His own suggestion would be to retain the word "same" on the understanding that it was not intended to mean identity, but indicated more than mere similarity.

14. As to the use of Latin, he would be quite prepared to drop the expression *ejusdem generis* if suitable expressions in the working languages could be found to replace it. He himself had so far been unable to find any terse wording which conveyed the intended idea.

15. In reply to the question raised by Mr. Tsuruoka, he explained that the term "subject-matter" was intended to refer to the matter to which the most-favoured-nation clause related, such as international trade or *cautio judicatum solvi*. The word "scope" was used with two rather different meanings in articles 7 and 7 *bis*, which had not been drafted at the same time. In article 7, it was used in a general meaning and could perhaps be dispensed with. In article 7 *bis*, however, the expression "scope of the persons or things" referred to the class of persons or things to which the most-favoured-nation clause related. The problem of a class of products was one which arose very often in connexion with the most-favoured-nation clause. One obvious example was that of treaties relating to customs tariffs.

16. On the question of relationship with the beneficiary State or with the third State, where persons were concerned, nationality and residence were the criteria most commonly applied. For a ship, it was generally the flag that was decisive. In the case of legal entities, the usual criteria were those of headquarters, control, and the laws under which the entity was organized or incorporated. For products, the relationship was generally based on the place of production or manufacture.

17. Reference had been made to the dilemma regarding article 7: whether to draft it in general terms, which might make for excessively generous application, or to make the rule explicit and thus unduly restrictive. A similar dilemma had been faced by the Commission many times in connexion with the other topics on its agenda, such as State responsibility and succession of States. The only

<sup>6</sup> *Ibid.*, para. 25.

<sup>6</sup> *Yearbook* . . . 1973, vol. II, p. 104.

<sup>7</sup> 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. 293.

<sup>8</sup> *Yearbook* . . . 1973, vol. II, p. 219.

way to deal with that difficulty was to try to maintain a balance between the two extremes of abstraction and generality on the one hand, and excessive detail on the other. He believed that articles 7 and 7 *bis* struck the required balance and thanked Mr. Kearney for his valuable suggestion for shortening the wording of the latter article.

18. In reply to Mr. Šahović, he explained that the rule in article 7 applied to all most-favoured-nation clauses, whether conditional or unconditional.

19. Sir Francis Vallat had raised the question of the relationship between the articles under discussion and the articles on interpretation in the Vienna Convention on the Law of Treaties. On that point, his view was that the study of the most-favoured-nation clause was a continuation of the Commission's work on the law of treaties, in the course of which the question of the clause had first arisen. There was no intention to question any of the rules embodied in the Vienna Convention. The Commission was only trying to ascertain whether it could identify any rules of existing international law applying to the most-favoured-nation clause, in order to codify those rules. An effort should be made to frame rules which would be useful to the community of nations and to all those engaged in drafting treaties containing a most-favoured-nation clause. He did not altogether exclude the possibility of some element of progressive development being introduced into the present work, but the task remained essentially one of codification.

20. The distinction between persons or things "expressly specified" in the clause and those "implicitly indicated" by the agreed sphere of relations in which the clause applied, was not always easy to make. He agreed that the wording of paragraph 1 of article 7 *bis* should be improved.

21. He was grateful to Mr. Pinto for his analysis of article 7 *bis* and agreed with him that paragraph 1 of that article referred to the potential scope of the most-favoured-nation clause and paragraph 2 to its actual or available scope. He also agreed with Mr. Pinto that the expression "relating to the subject-matter", in article 7, was not very satisfactory; the Drafting Committee would endeavour to find better language.

22. Mr. KEARNEY said that the discussion had revealed the enormously wide range of problems raised by the provisions of the draft articles under discussion. For the benefit of the Drafting Committee, he had revised the text he had proposed for article 7 *bis* at the previous meeting. The revised text read:

"Persons or things included within a class specified as entitled to most-favoured-nation treatment under a most-favoured-nation clause shall be accorded by the granting State the favours accorded by that State to a comparable class of persons or things in a third State and having substantially the same relationship with the third State as the persons or things in the specified class are required to have with the beneficiary State under the clause."

23. In that revised text, the provisions of the article were framed as a rule having direct legal effect, not as an interpretation. The rule required not only that the class

should be the same, but also that the relationship should be the same. At the previous meeting, he had discussed the possible existence of a case in which compliance with only one of those two requirements would suffice; but on reflection he had come to the conclusion that both requirements should apply in all cases. He had replaced the idea of the "same class" by that of a "comparable class", and had introduced the qualification "substantially" before the words "the same relationship". The second of those changes would cover such questions as the different nationality laws in different countries, to which the Special Rapporteur had referred in his summing up.

24. Sir Francis VALLAT, speaking on a point of order, pointed out that the revised text of article 7, which was before the Commission, began with the words "Under a most-favoured-nation clause or a national treatment clause". Since the Commission had postponed its decision on the inclusion of national treatment clauses,<sup>9</sup> he assumed that article 7 would be referred to the Drafting Committee without the words "or a national treatment clause", which would be reserved for future discussion.

25. The CHAIRMAN said that assumption was correct. If there were no further comments, he would take it that the Commission agreed to refer articles 7 and 7 *bis* to the Drafting Committee for consideration in the light of the discussion.

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

#### ARTICLES 8 AND 8 *bis*

26. The CHAIRMAN invited the Special Rapporteur to introduce articles 8 and 8 *bis*, which read:

##### *Article 8*

##### *The most-favoured-nation clause and benefit-restricting stipulations (clauses réservées)*

The right of the beneficiary State to most-favoured-nation treatment is not affected by an agreement between the granting State and one or more third States confining treatment to their mutual relations.

##### *Article 8 bis*

##### *The most-favoured-nation clause and multilateral agreements*

The right of the beneficiary State to most-favoured-nation treatment is not affected by the fact that treatment by the granting State of a third State or of persons or things in a determined relationship with it has been accorded under a multilateral agreement.

27. Mr. USTOR (Special Rapporteur), introducing his revised article 8 and the new article 8 *bis*, said that very extensive explanations were given in the commentary to those articles in his sixth report (A/CN.4/286).

28. The text of article 8 was very short and the rule it contained was, in a sense, self-evident. It dealt with two possible situations. The first was that in which the granting State, after having granted most-favoured-nation treatment to the beneficiary State, entered into an agreement with a third State; by that agreement it conferred, in matters within the scope of the most-favoured-nation

<sup>9</sup> See 1330th meeting, paras. 7-41.

<sup>10</sup> For resumption of the discussion see 1352nd meeting, para. 32.

clause, a certain advantage upon that third State, but the concession was confined to their mutual relations, so that the advantage would not be extended to any other State. Clearly, the agreement with the third State was in conflict with the promise made to the beneficiary State in the most-favoured-nation clause. As far as the beneficiary State was concerned, the second agreement was *res inter alios acta* and could be disregarded when claiming most-favoured-nation treatment from the granting State.

29. The second possible situation was that in which the granting State granted most-favoured-nation treatment to the beneficiary State after it had made the agreement with the third State. Clearly, the granting State could not evade its obligations under the most-favoured-nation clause by invoking its earlier agreement with the third State, which was also *res inter alios acta* as far as the beneficiary State was concerned.

30. Article 8, which was drafted in simple terms, covered both those cases. It showed that the granting State must not give conflicting promises to the beneficiary State and a third State. Any agreement between the granting State and one or more third States confining treatment to their mutual relations would have no effect on the right of the beneficiary State to most-favoured-nation treatment.

31. Any dispute which arose out of such a conflict would have to be settled by the ordinary means of settlement of disputes. Mr. Kearney had referred to the special machinery which existed in GATT, and international trade agreements often contained arbitration clauses. Questions relating to the settlement of disputes, however, were not the immediate concern of the Commission at that stage.

32. Article 8 *bis* dealt with the question of advantages extended by the granting State under a multilateral agreement. That was a very delicate question, but the Commission had to state the law as it stood. The rule of contemporary international law in the matter was, as he saw it, that if the granting State had, in good faith, promised most-favoured-nation treatment to the beneficiary State without excluding certain advantages given under a multilateral agreement, the most-favoured-nation clause would apply to the advantages extended to any third State, whether by bilateral or by multilateral agreement.

33. There was only one exception to that rule. It related to the situation, described in detail in annex 1 to his second report,<sup>11</sup> in which developing countries wished to reserve certain trade advantages to themselves without extending them to developed countries. That question, however, would be dealt with at a later stage.

34. Mr. USHAKOV said he was prepared to accept articles 8 and 8 *bis*. He proposed that they should be referred to the Drafting Committee.

35. Sir Francis VALLAT said that the articles were obviously sound in principle and delicate in drafting; the real problem was that of the commentary. He believed that to send the articles to the Drafting Committee forthwith would save time, and he could agree

to that course on the understanding that further discussion would be possible when the Committee's versions became available.

36. Mr. PINTO said that, as there were a number of points in the articles to which he wished to give further thought, he hoped the decision to send them to the Drafting Committee could be postponed until the next meeting.

37. Mr. KEARNEY said that, whereas article 8 was very necessary, since it dealt with a precise problem, article 8 *bis* stated something so obvious and indisputable that it might be considered superfluous. The article should be given more substance to justify its retention.

38. Mr. CALLE Y CALLE said he approved of articles 8 and 8 *bis* and was willing for them to be referred to the Drafting Committee at once. They were an expanded version of the original article 8,<sup>12</sup> which had followed from the unconditional, automatic nature of the most-favoured-nation clause and had implied that treatment should be accorded to the beneficiary State in good faith.

39. He would be grateful if the Special Rapporteur would explain why, in revising article 8, he had not retained the notion that a limitation could be placed on the rights of the beneficiary State if it expressly consented thereto. It seemed to him that such a provision would be useful, for while it was generally accepted that the right acquired by the beneficiary State could not be altered by agreements concluded between other States, it was conceivable, in view of the complexity of international life, that exceptional circumstances might arise in which some restriction of that right would be necessary.

40. Mr. AGO said he had no objection to articles 8 and 8 *bis* being referred to the Drafting Committee, provided that did not in any way imply that the Commission accepted the principle stated in those articles. Coming from a country which was a member of the European Economic Community, he was particularly concerned about the wording of those two provisions. He was, of course, in favour of the widest possible use of the most-favoured-nation clause, but on condition that it would not have the effect of preventing certain countries from establishing their own economic communities and thus gradually arriving at some form of federation. In his opinion, it was necessary to find a balance between two different and sometimes contrary needs. There, the Special Rapporteur had touched on an essential and extremely delicate problem.

41. Mr. USTOR (Special Rapporteur) explained that the idea in the original article 8 mentioned by Mr. Calle y Calle was still valid, but he had not thought it necessary to express it in the revised version which, like all the other articles, was in the nature of *jus dispositivum*. He would have no objection to restoring the clause in question.

42. He assured Mr. Ago that he was aware of the repercussions of articles 8 and 8 *bis* for members of the European Economic Community and other associations based on customs unions. He believed in the right of States

<sup>11</sup> *Yearbook* . . . 1970, vol. II, pp. 237-239.

<sup>12</sup> *Op. cit.*, 1973, vol. II, p. 108.

to join such associations, but he also believed that other States, which had concluded treaties with them prior to their joining, had a right to protection. Articles 8 and 8 *bis* were closely linked with article 234 of the Treaty of Rome establishing the European Economic Community,<sup>13</sup> for the idea behind all three articles was that States should exercise their right to associate without causing undue harm to others and that, wherever prior obligations were incompatible with membership of an association, they should be dissolved or amended by agreement between the parties concerned.

43. Mr. PINTO said he was afraid the wording of article 8 might be too simple. It seemed to him that, as it stood, the article could lead to an unfair situation. For example, a State which depended for its survival on the export of low quality copper, which would not be competitive in the open market, might succeed in persuading an importing State to make its product the sole beneficiary of a low tariff. There was nothing in the article to prevent the importing State from subsequently extending most-favoured-nation treatment to another State which exported better quality copper, although the consequences of such action would be disastrous to the low quality exporter.

44. Mr. USTOR (Special Rapporteur) reminded the Commission that in introducing the articles under discussion he had said that they were general rules and that he hoped to introduce later an exception applying to international trade associations of developing countries. As could be seen from Annex I to his second report, he had more or less reached agreement on that point with UNCTAD and discussions were continuing.

45. Mr. PINTO said he was grateful for the clarification provided by the Special Rapporteur, but he would still prefer the Commission to wait until the next meeting before referring articles 8 and 8 *bis* to the Drafting Committee.

46. The CHAIRMAN said it seemed to be the general wish that the articles should be referred to the Drafting Committee forthwith. Members of the Commission would still be free to comment on them after that step had been taken. Since time was short and many matters were still outstanding, the Commission should take every opportunity of speeding up its work.

47. Mr. PINTO said he would agree to immediate reference of the articles to the Drafting Committee, on the understanding that that did not imply acceptance of their substance.

48. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that, while he was most embarrassed at having to oppose the Chairman's efforts to hasten progress, he thought the discussion had shown that it would be advisable to allow more time for comment on the articles. That would not delay the Drafting Committee, which already had a good deal of work on hand.

49. He had much sympathy with what other speakers had said about the articles. It was easy to make and justify comparatively neat rules, but as the Special Rapporteur himself had often pointed out, no rule could

actually solve the problem of applying one situation against another. What had been expressed with regard to article 8 *bis* was not opposition to its restatement of a proposition too basic to be queried, but concern that in some way it might alter the climate in which judgements would be made. It was for those reasons that he thought more time was required.

50. Mr. USHAKOV said that reference of articles 8 and 8 *bis* to the Drafting Committee would not mean that those articles had been adopted by the Commission. Hence the discussion on them would not be closed.

51. Mr. AGO said he was opposed to referring articles 8 and 8 *bis* to the Drafting Committee immediately; they were very important articles which required more thorough discussion.

52. The CHAIRMAN said that the articles would remain open for discussion until the Commission had adopted its report.

The meeting rose at 12.45 p.m.

### 1335th MEETING

Monday, 23 June 1975, at 3.15 p.m.

Chairman: Mr. Abdul Hakim TABIBI

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

#### Most-favoured-nation clause

(A/CN.4/266;<sup>1</sup> A/CN.4/280;<sup>2</sup> A/CN.4/286)

[Item 3 of the agenda]

(continued)

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 8 (The most-favoured-nation clause and benefit-restricting stipulations (*clauses réservées*)) and

ARTICLE 8 *bis* (The most-favoured-nation clause and multilateral agreements)<sup>3</sup> (continued)

1. Mr. SETTE CÂMARA said that he was basically in agreement with the texts of articles 8 and 8 *bis* as proposed by the Special Rapporteur. The sound and thorough examination of the evolution of doctrine and State practice which the Special Rapporteur had made in his fourth and sixth reports (A/CN.4/266 and A/CN.4/286) left no room for doubt as to the validity of the principles underlying the articles.

2. The old ideas concerning *clauses réservées*, such as those of Nolde and the League of Nations Economic Committee,<sup>4</sup> had rightly been discarded by the Special Rapporteur as inconsistent with modern thinking on the

<sup>13</sup> United Nations, *Treaty Series*, vol. 298, p. 91.

<sup>1</sup> *Yearbook* ... 1973, vol. II, pp. 97-116.

<sup>2</sup> *Yearbook* ... 1974, vol. II, Part One, pp. 117-134.

<sup>3</sup> For texts see previous meeting, para. 26.

<sup>4</sup> *Yearbook* ... 1973, vol. II, p. 108, para. (4).

very nature of the most-favoured-nation clause. A *clause réservée* was *res inter alios acta* and could not affect the operation of a most-favoured-nation clause unless the beneficiary State waived its rights after appropriate negotiations. He agreed with the Special Rapporteur's decision to omit the saving clause contained in the original version of article 8,<sup>5</sup> since the express exception it had referred to would in any case represent a new agreement, which would prevail over the previous agreement establishing most-favoured-nation treatment, regardless of any special provision in the general rule the Commission was now trying to draft. He noted that the Special Rapporteur had said that the provisions of article 8 did not constitute *jus cogens* and that, as amply illustrated in the commentary, States could choose another course of action if they wished.

3. The principle stated in article 8 *bis*, that a State benefiting from most-favoured-nation treatment could claim any favours accorded by the granting State under multilateral conventions, whether open or closed, was also beyond dispute. As the Special Rapporteur had pointed out, that principle was supported both by the fact that it had been thought necessary expressly to preclude the extension of certain treaties to States receiving most-favoured-nation treatment, and by the fact that the benefits of such treatment were usually waived on the basis of negotiation and express consent. The conclusion stated by the Special Rapporteur in the second sentence of paragraph (16) of the commentary to articles 8 and 8 *bis* in his sixth report applied also in the case of customs unions and similar associations. The situation would, of course, be different in the event of a uniting of States, since, as the Special Rapporteur had explained, it would no longer be a question of the exchange of treatment between two or more independent States.

4. Mr. PINTO said that, while he had no desire to delay the Commission's work or the reference of the articles to the Drafting Committee, he wished to place on record his apprehension concerning article 8.

5. It seemed to him that if a granting State A concluded a treaty containing a most-favoured-nation clause with a number of States, which might be designated B, B1, B2, and so on, and subsequently concluded a treaty with a State C, under which it accorded that State the exclusive right to favours such as low tariffs, the States in the B group would be able, under the terms of article 8, to claim the same favours. That would be so because it could be assumed that the granting State A, in concluding its agreement with State C, could not have been unaware of the obligations it had already incurred through its agreements with States B, B1 and B2.

6. If that were the only effect of article 8, he could accept it, despite the fact that it seemed to constitute a limitation on the contractual freedom of States. The situation could, however, be disastrous for State C if the first agreement concluded was that with itself; for the subsequent conclusion of most-favoured-nation treatment agreements between State A and the States in the B group would make it obligatory for the supposedly exclusive favours, on which the economy of State C might depend,

to be extended to the B states. Where the agreement between States A and C provided for reciprocal treatment and State A subsequently concluded most-favoured-nation treatment agreements with other States, both A and C would suffer, and their treaty and political relations might be disrupted. State C might suffer damage as a consequence of action it had taken on the basis of its belief in the good faith of State A, for which A could be held responsible.

7. He welcomed the Special Rapporteur's intention to submit articles designed to protect the developing countries from some of the side effects of other articles, and asked whether article 8, in its present form, would preserve the position the developing countries hoped to attain by their request for preferential treatment, rather than equal treatment, under a most-favoured-nation clause. The Commission might wish to consider including an article stipulating that nothing in the draft was to be interpreted as preventing the inclusion in treaties of provisions granting preferential treatment to developing countries in their dealings with developed countries, and that the draft articles did not apply to treaties concluded by developing countries *inter se*. The definition in law of the developing countries to which such a protective clause might extend would, admittedly, be extremely difficult, but the terms of article 8 were absolute and clear.

8. Mr. TAMMES said that article 8 caused him no particular difficulties, though he had found Mr. Pinto's comments very apposite. As it stood, the article seemed to be an application of the general rule that the acquired rights of States could not be negatively affected by agreements concluded between other parties, which constituted *res inter alios acta*.

9. The rule stated in article 8 *bis* seemed almost as obvious, although it was the subject of controversy. The operation of existing most-favoured-nation clauses was threatened not so much by restrictive stipulations as by the restrictive interpretation of agreements with third parties, or of what was a customary rule of international law. As he had said before, he found it inadmissible to rely on the pretext that a treaty was closed and aimed at securing integration, to restrict, retroactively, the operation of a most-favoured-nation clause between parties which had not had the possibility of such integration in mind when concluding their agreement. Where the possibility of such integration, the so-called "regional phenomenon", was recognized in advance, limitations and exceptions designed to protect customs unions and like associations could be included in the most-favoured-nation clause, and that was becoming an increasingly common practice.

10. With regard to the possible formulation of a customary rule excluding customs unions and the like from the operation of most-favoured-nation clauses, he thought the inclusion of article 8 *bis* would have the great merit of showing, through the reactions of States, whether or not there was now in being an *opinio juris* contrary to the provisions of that article. The existence of such an opinion would mean that escape clauses relating to the associations in question, which were now the rule rather than the exception, would come within the scope of

<sup>5</sup> *Ibid.*, p. 108.

article 38 of the Vienna Convention on the Law of Treaties, which laid down that:

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.<sup>6</sup>

11. That was a typical problem of codification, but the Special Rapporteur had also confronted the Commission with two problems relating to the progressive development of international law. With regard to the first, raised in paragraph 58 of the Special Rapporteur's sixth report (A/CN.4/286), he agreed that the Commission should not make what would be a value judgment of an economic, rather than a legal nature. With regard to the second problem, which concerned the possible recognition, in the draft articles, of the special situation of developing countries in regard to the operation of the most-favoured-nation clause, he reminded the Commission of the old principle of equity, according to which it was unjust to treat equals as unequals and even more unjust to treat unequals as equals.

12. Mr. RAMANGASOAVINA said he had the same difficulties with articles 8 and 8 *bis* as Mr. Pinto. In his opinion, it would have been premature to refer those two articles to the Drafting Committee immediately, because they raised a number of problems which could not be solved by the Drafting Committee.

13. The analysis made by the Special Rapporteur in his sixth report showed that the difficulties to which articles 8 and 8 *bis* gave rise were due not only to the wording of the rules contained in those articles, but also to the rules themselves, which were highly controversial. International practice in the matter was very vague and there were considerable differences in international opinion, particularly in regard to the effects of the most-favoured-nation clause on multilateral treaties or agreements. States which belonged to regional groups—customs unions or free-trade areas—did not subscribe to the principles stated in articles 8 and 8 *bis*. It was true, as the Special Rapporteur himself had stressed, that those were optional, not mandatory provisions, since States parties to a multilateral agreement granting most-favoured-nation treatment could make whatever stipulations they considered necessary to protect their interests.

14. He himself thought it was well to state the principles set out in articles 8 and 8 *bis*, and he was grateful to the Special Rapporteur for introducing them. Those articles would be submitted to governments and to the Sixth Committee, and would certainly give rise to differences of opinion. For instance, according to the Executive Secretary of the European Economic Community, the members of that Community maintained that, since it was a customs union, the EEC constituted a legitimate exception to the obligation to apply the most-favoured-nation clause. On the other hand, some writers and certain governments considered that there was not yet any customary rule according to which a multilateral

agreement concluded within the framework of a customs union, free-trade area or other regional group constituted a derogation from a most-favoured-nation clause granted by a State before it had become a party to the multilateral agreement.

15. In its present form, the wording of the principles set out in articles 8 and 8 *bis* was rather sibylline. The mechanism of the most-favoured-nation clause was, indeed, difficult to understand, especially when other treaties conflicted with the application of the clause. The difficulties caused by articles 8 and 8 *bis* were due to the fact that those articles might run counter to the current tendency to form regional groups. It would therefore be necessary to examine the consequences the articles might have and try to determine, through the application of the various regional agreements—particularly those concluded by young countries—whether the granting of most-favoured-nation treatment might hinder the establishment of customs areas designed to facilitate intra-regional or extra-regional trade.

16. He was grateful to the Special Rapporteur for having provided, in the last chapter of his sixth report, for special derogations in favour of developing countries. As the Special Rapporteur had pointed out, the Special Committee on Preferences had formulated a number of principles, which had been accepted by the great majority of Members of the United Nations and were designed to establish a more equitable system of co-operation between industrialized and developing countries (A/CN.4/286, para. 66). The adoption of those principles, which were intended to promote the industrialization of developing countries, to increase their export earnings and to raise their rate of economic growth, was to be welcomed.

17. It was true that, despite the generous principles adopted in UNCTAD, it might be very difficult for developing countries to penetrate the markets of the developed countries, because of their industrial lead. But the intention was there, and the Special Rapporteur had promised to devote several articles to that aspect of relations between developed and developing countries. It would, however, be difficult to state principles having any permanence, because preference agreements were of a temporary nature and liable gradually to disappear over the years, as the developing countries became industrialized in order to diversify their production and thus achieve a faster rate of growth.

18. He was not opposed to the rules stated in articles 8 and 8 *bis*, since it was understood that they could be submitted to governments and to the Sixth Committee. In his opinion, however, the present wording of those rules was rather difficult to understand and should be carefully reviewed.

19. Mr. ŠAHOVIĆ said he thought the Special Rapporteur had been obliged to state the rules in articles 8 and 8 *bis*, because it seemed impossible to conceive of draft articles on the most-favoured-nation clause which did not deal with the relationship between the obligations inherent in the clause and obligations deriving from agreements concluded with third States. In his opinion, the Special Rapporteur had been right to divide the original article 8 into two separate articles, and he had

<sup>6</sup> 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. 294.

explained very clearly why he had done so. He had shown that the new article 8 covered the case in which the granting State had concluded, with one or more third States, an agreement expressly restricting the application of most-favoured-nation treatment to their mutual relations, whereas article 8 *bis* covered the case in which most-favoured-nation treatment had been granted by the granting State to third States by virtue of a multilateral treaty which did not contain any benefit-restricting stipulations. The Special Rapporteur had been fully aware of the problems raised by certain special situations. He had envisaged two types of special situation: in article 8, the situation of developing countries, and in article 8 *bis*, the situation of regional organizations, such as customs unions. It was for the Commission to decide what value should be attached to the rules proposed by the Special Rapporteur in articles 8 and 8 *bis*.

20. He noted that, in the revised text of article 8, the Special Rapporteur had omitted the benefit-restricting stipulation "unless the beneficiary State expressly consents to the restriction of its right in writing", which had appeared in the original text of article 8.<sup>7</sup> He understood why the Special Rapporteur had dropped that clause, but, taking certain exceptional situations into account, he wondered whether it would not be possible to introduce a safeguard clause into articles 8 and 8 *bis*, in order to define the conditions for their application more precisely. It was, indeed, necessary to take account of the situation of developing countries and of certain regional organizations of a special nature, whose existence raised certain problems in regard to the application of the most-favoured-nation clause in its unconditional and general form.

21. In the title of the revised article 8, it might not be necessary to include the expression "*clauses réservées*", which the Special Rapporteur had found difficult to translate into English. If that expression was used, it would be necessary to define its meaning.

22. Mr. AGO said that the simplicity of the texts of articles 8 and 8 *bis* did not match the complexity of the international reality. There was no end to the variety of situations which a multilateral treaty could create. It might let normal international relations subsist between the States parties to it; in that case, the rule stated in article 8 *bis* was perfectly acceptable. But it was also possible for a multilateral treaty to create a federation of States; and in that case a plurality of subjects of international law would be replaced by a single subject of international law. Then the relations between the member States of the federation would no longer be international relations, but constitutional relations. Between those two extremes lay an infinite range of intermediate cases, for multilateral treaties could bring about the formation of international unions of States of very diverse forms. Was the rule laid down in article 8 *bis* acceptable in such cases? Could it be affirmed that States forming an international union of States must accord to third States, under a most-favoured-nation clause, the same treatment as they accorded to States

members of the union? In his opinion any such rule would be absolutely inadmissible.

23. If the principle stated in article 8 *bis* was retained in its present inflexible form, it would be liable either to obstruct the formation of international unions of States or to make States extremely cautious about granting a most-favoured-nation clause to another State, knowing that their hands would be tied if they wished to form a union of States in the future.

24. What he had said about multilateral treaties might apply in some cases to bilateral treaties, for a bilateral treaty could also establish a union of States. For example, in the case of the Belgo-Luxembourg Union, which had been established by a bilateral agreement, would the privileges accorded to Luxembourg by Belgium also have had to be accorded to France under the most-favoured-nation clause, if such clause had been in effect between Belgium and France? He did not think so. Consequently, it seemed obvious that the rule stated in articles 8 and 8 *bis* could not hold good for all types of treaty, especially multilateral treaties.

25. Mr. TSURUOKA observed that articles 8 and 8 *bis* attempted to settle a very difficult and highly controversial question: that of the implicit exceptions to the most-favoured-nation clause. He agreed, in theory, with the idea expressed by the Special Rapporteur, for it was consistent with the principles stated in articles 26 and 34 of the Vienna Convention on the Law of Treaties—*pacta sunt servanda* and *res inter alios acta* which were the very foundations of international law.

26. The idea underlying articles 8 and 8 *bis* was confirmed by the practice of a number of States, but an unduly strict application of those two articles, as they stood, might create difficulties for States which intended to conclude international agreements for regional integration—especially as it was difficult, when concluding a treaty containing a most-favoured-nation clause, to foresee what kind of international arrangements one or other of the contracting parties might conclude with third States in the future. Hence the question dealt with in articles 8 and 8 *bis* called for very thorough study. In his opinion the rules formulated by the Special Rapporteur in those two articles should be kept in the draft.

27. He agreed with those who would prefer the implicit exceptions to the most-favoured-nation clause not to be expressly mentioned in the body of the draft articles, for the very existence of those exceptions was controversial, and jurists who recognized their existence differed as to what kind of advantages the exceptions should cover. He feared that exceptions of that kind, badly formulated and ill-defined, would lead to abuses. Moreover, in international practice the problem was solved in most cases by explicit exceptions; and in the absence of explicit exceptions, the interested parties could agree on a settlement by negotiation. For instance, the EEC countries had come to an agreement with other interested States that the latter would not claim the advantages of the most-favoured-nation clause. He thought the Commission should be guided by the wise practice of settling the question in accordance with the two great rules of international law: *pacta sunt servanda* and *res inter alios acta*.

<sup>7</sup> *Yearbook* . . . 1973, vol. II, p. 108.



28. He noted that the Special Rapporteur intended to submit some draft articles on general preferences for developing countries.

29. Mr. KEARNEY said that the discussion was an excellent example of the way in which the Commission operated, with gradual development of a position through the interplay of ideas. He had at first thought that article 8 was very simple, but the comments of Mr. Pinto, Mr. Tammes and Mr. Ago had made him realize the complexity of the underlying problems. He was quite willing to have the articles referred to the Drafting Committee, but he wondered whether the Commission was yet sure to which of the various obligations involved it wished to give precedence.

30. With regard to the case mentioned by Mr. Pinto, of a State being accorded exclusive preferences which were subsequently extended to other States under most-favoured-nation clauses, he thought that according to the general principles of international law it would be the first commitment of the granting State that should prevail. Thus if the Commission was seeking to lay down a general principle of treaty law, article 8 should say that the right of a beneficiary State to most-favoured-nation treatment would be subject to limitations undertaken by the granting State in a prior agreement with a third State. It seemed to him that, according to basic treaty law, the granting State might incur a responsibility to make recompense if it took action which violated the rights accorded exclusively, and that it would not have the legal right subsequently to accord to other States most-favoured-nation treatment in a field in which it had given a pledge in a treaty not to accord such treatment.

31. On the other hand, and again as a matter of general law, he believed that where most favoured-nation-clauses had been granted first, they would prevail over any subsequent agreement. The determining element seemed to be the time when the various agreements were concluded, for he doubted whether there was yet sufficient evidence to prove the existence of a customary rule which would prevail over the treaty principle, as Mr. Tammes had suggested might be the case.

32. As he had said before, he did not see much difference between article 8 and article 8 *bis*, and doubted whether the latter article really threw much light on the problems at issue. Article 8 *bis* might be given point if special articles on the problems of economic union, preferential treatment for developing countries and the like were included. As a general principle, he believed that the application of article 8 *bis* should be subject to the same temporal conditions as that of article 8—a belief which necessitated consideration of what was meant by the vague term “multilateral agreement”.

33. Mr. USHAKOV said that the revised article 8 was confined to stipulating that a granting State, when concluding an agreement with another State, could not decide that that other State would not be considered as a third State for the purposes of the application of the most-favoured-nation clause. Thus the States parties to that agreement could not agree to restrict the enjoyment of certain advantages to the sphere of their mutual relations alone. In itself, that rule was not subject to any kind of

exception—for example, an exception in favour of developing countries. In addition, the rule did not apply to customs unions and similar associations of States, such as the Common Market.

34. With regard to the drafting of the revised article 8, which provided that the right of the beneficiary State to most-favoured-nation treatment “is not affected” by an agreement between the granting State and one or more third States confining treatment to their mutual relations, he found that negative formulation rather unsatisfactory. It would be better to stress the fact that the beneficiary State could claim most-favoured-nation treatment regardless of such an agreement, and draft article 8 on the following lines:

“The beneficiary State enjoys treatment not less favourable than the treatment accorded by the granting State to a third State, irrespective of the fact that the latter treatment is accorded under an agreement confining its application to the relations between the granting State and the third State.”

Exceptions to that principle, such as that recognized in favour of developing countries, were rules of general international law which governed the whole of the draft. For the purposes of article 8 it mattered little whether the agreement in question was a bilateral or a multilateral agreement.

35. Article 8 *bis* provided that the beneficiary State must receive all the advantages accorded to a third State, whether they derived from a bilateral, a multilateral or a universal agreement applicable to the relations between the granting State and the third State. If there were exceptions to that principle—for example, in the case of economic associations—they applied not only to article 8 *bis*, but to the whole of the draft.

36. The members of the Commission who had dwelt on what they considered to be exceptions to the two articles under consideration had thus been wrong in doing so. Later on, the Special Rapporteur should try to establish general rules to facilitate the development of non-industrialized countries. For instance, a State benefiting from a most-favoured-nation clause could not claim the preferential part of the treatment which the granting State might accord to a developing country. As exceptions of that kind came under general international law and States could not change them by agreement, it would be useless to continue the discussion on articles 8 and 8 *bis* mainly with reference to the exceptions to those provisions. It would be better to refer the two articles to the Drafting Committee.

37. Sir Francis VALLAT said that the further discussion on articles 8 and 8 *bis* at the present meeting had revealed the existence of problems which had not at first been apparent. It had confirmed his serious doubts about the inclusion of those articles in the draft. The rigid form in which they were cast could distort the application of rules of international law which, as all members agreed, there was no intention to alter.

38. Where a treaty containing benefit-restricting stipulations had been concluded before a treaty containing a most-favoured-nation clause, the relationship between the two treaties must clearly be governed by the general

rules of international law, including the rules of interpretation. The later treaty might be completely silent regarding the earlier treaty, but it might nevertheless be the true intention of the parties not to cut across pre-existing benefit-restricting stipulations. Other examples could no doubt be given. Article 8, as proposed, was drafted in completely absolute terms and it was therefore essential to amend its wording so as to permit the application of the relevant rules of international law in the proper cases.

39. Those remarks applied even more forcefully to article 8 *bis*. It was significant that in his fourth report, the Special Rapporteur had discussed at length the question of reliance on multilateral agreements to avoid obligations under a most favoured nation clause,<sup>8</sup> but had not proposed any provision on the lines of the present article 8 *bis*. That approach had been wiser than that adopted in his sixth report (A/CN.4/286), in which article 8 *bis* was proposed.

40. The proposed article 8 *bis* established an unnecessary and undesirable distinction between multilateral agreements, covered in that article, and bilateral agreements covered in article 8. No such distinction was made in the earlier articles of the draft. Thus the term "treaty" was defined in article 2 (a) without any distinction between bilateral and multilateral treaties. On that basis, article 4 defined the most-favoured-nation clause as a "treaty provision" granting most-favoured-nation treatment, without making any distinction between multilateral and bilateral treaties.

41. The inclusion of an article providing that multilateral agreements did not affect the right of the beneficiary State to most-favoured-nation treatment could lead to difficulties of interpretation. It might be argued that legislation or administrative practice were outside the rule laid down in article 8 *bis*, and that the granting State was therefore free to adopt legislative or administrative measures which affected the right of the beneficiary State.

42. Article 8 *bis* was framed in such general terms that it seemed to suggest that in no circumstances could a multilateral treaty of any kind affect most-favoured-nation treatment. A federation of States could be formed by a multilateral treaty, however, and it could certainly not be argued that the rule in article 8 *bis* ought to be applied in that case. He suggested that article 8 *bis* should be dropped.

43. Mr. HAMBRO said that as a result of the present discussion he had reached the same conclusion as Sir Francis Vallat. He hoped that the Drafting Committee would be able to produce a more satisfactory solution, but he would be relieved if article 8 *bis* were eliminated.

44. Mr. ELIAS said he agreed with the underlying intention of articles 8 and 8 *bis*, but thought that perhaps they did not express the Special Rapporteur's ideas fully and satisfactorily.

45. He agreed that it was difficult to draw the line between the two situations contemplated in articles 8 and 8 *bis* respectively, and to distinguish between bilateral

and multilateral agreements in so far as they might affect the operation of the most-favoured-nation clause. Little would be gained by attempting to deal separately with the two cases, and a careful reformation of article 8 should make it possible to dispense with article 8 *bis*.

46. Many of the points discussed, especially those raised by Mr. Pinto and Mr. Ramangasoavina, were probably covered by the provisions on interpretation in the Vienna Convention on the Law of Treaties.

47. He suggested that the Drafting Committee should be asked to draft a single article stating the rule that the right of the beneficiary State to most-favoured-nation treatment was not affected by any agreement between the granting State and one or more third States, whether the agreement was bilateral or multilateral. The Drafting Committee would be greatly assisted in that task by the oral suggestion made by Mr. Ushakov.

48. Mr. BILGE said that he regarded articles 8 and 8 *bis* from the same point of view as Sir Francis Vallat. He believed, however, that those provisions were acceptable only in regard to a right of a beneficiary State which had come into being before the agreement between the granting State and the third State. Where the right of the beneficiary State had arisen after conclusion of that agreement, it seemed that a distinction should be made between the different kinds of multilateral treaty referred to in the Vienna Convention on the Law of Treaties.

49. Mr. PINTO said that as a result of informal consultations he gathered that there was no intention in article 8 to ignore any possible right of the third State. He suggested that that point should be explicitly covered by introducing into the article a second sentence reading: "The right of a third State under a treaty with the granting State confining treatment accorded thereunder to their mutual relations is not affected by a right conferred on a beneficiary under a most-favoured-nation clause".

50. Mr. USTOR (Special Rapporteur) confirmed that article 8 simply restated the relevant rule of the law of treaties. Clearly, if a State made a promise to another State, the validity of that promise was not affected in any way by any conflicting promise which the first State might make to a third State. His drafting of article 8, however, had naturally been centred on that rule in so far as it related to most-favoured-nation treatment.

51. The basic idea of article 8 was that the granting State could not be relieved of its undertaking to grant most-favoured-nation treatment to the beneficiary State simply by making an agreement with a third State whereby certain advantages granted to that State were excepted from the operation of the clause. If those advantages fell within the scope of the clause, the agreement with the third State would be a breach of the granting State's commitments.

52. He welcomed the suggestion by Mr. Ushakov for drafting improvements.

53. As to the special situations mentioned by a number of speakers, they did not affect the validity of the rule stated in article 8. There had been some discussion on the question of exceptions granted to developing countries, and it had been suggested that the concept of a developing country was not clear. He would not

<sup>8</sup> *Ibid.*, p. 111, paras. (14) *et seq.*

attempt to solve the problem of defining a developing country, which was under consideration by several United Nations bodies. He saw no obstacle, however, to making provision for developing countries in the present draft, without actually defining them. The International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly in 1966 and annexed to resolution 2200 (XXI), contained a provision on developing countries which made no attempt to define them, namely, article 2, paragraph 3, which read: "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee economic rights recognized in the present Covenant to non-nationals". On the basis of that precedent, set by the General Assembly itself, the Commission was undoubtedly free to refer to developing countries in the present draft for the purposes of one of the rules included in it.

54. In reply to Sir Francis Vallat, he explained that article 8 *bis* had been included, although its provisions could be said to be covered by those of article 4 defining the most favoured nation clause, because of the enormous volume of writings on the subject it dealt with. In view of the tendencies which had become apparent and of the great interests at stake, it was desirable that a specific rule on that subject should be included in the draft.

55. The idea suggested by Mr. Šahović and Mr. Tsuruoka, of a saving clause concerning express consent to restrict the operation of the most-favoured-nation clause, should be referred to the Drafting Committee.

56. It was true, as Mr. Ago had pointed out, that the facts of international life were complex, but the Commission should nevertheless try to draft a rule which was as clear and simple as possible. Mr. Ago had said that he could accept article 8 *bis* for a simple multilateral agreement, but not for a multilateral agreement which set up a regional economic community. The rule stated in that article applied to all kinds of multilateral agreement with a single exception, namely, agreements whereby the contracting States relinquished part of their sovereignty and became a union of States. In that particular case, the third State disappeared as an international entity and there was no basis for the application of the rule in article 8 *bis*. But if a multilateral agreement established a regional economic community such as the European Economic Community, which did not involve any loss of sovereignty, the rule in article 8 *bis* clearly applied. If a State which became a member of such an economic union decided that it could not continue to grant most-favoured-nation treatment to other countries, it would have to take the necessary arrangements with its partners to terminate the agreements under which it had granted them most-favoured-nation treatment. There could be no question of the actual validity of the most-favoured-nation clause being in any way affected merely because the granting State had signed a multilateral agreement purporting to establish an economic union.

57. He suggested that, in accordance with the Commission's usual practice where opinion was divided, the different views should be covered at length in the commentary.

58. The CHAIRMAN suggested that articles 8 and 8 *bis* should be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>9</sup>

The meeting rose at 6 p.m.

<sup>9</sup> For resumption of the discussion see 1352nd meeting, para. 49.

### 1336th MEETING

*Tuesday, 24 June 1975, at 10.10 a.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

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

#### Most-favoured-nation clause

(A/CN.4/266;<sup>1</sup> A/CN.4/280;<sup>2</sup> A/CN.4/286)

[Item 3 of the agenda]

(continued)

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR ARTICLES 9 AND 10

1. The CHAIRMAN invited the Special Rapporteur to introduce articles 9 and 10 in his fifth report (A/CN.4/280) which read:

##### Article 9

##### National treatment clause

"National treatment clause" means a treaty provision whereby a State undertakes to accord national treatment to another State in an agreed sphere of relations.

##### Article 10

##### National treatment

"National treatment" means treatment by the granting State of persons or things in a determined relationship with the beneficiary State, not less favourable than treatment of persons or things in the same relationship with itself.

2. Mr. USTOR (Special Rapporteur) said that the purpose of articles 9 and 10 was to define the national treatment clause and national treatment; the texts were modelled on articles 4 and 5, which defined the most-favoured-nation clause and most-favoured-nation treatment.<sup>3</sup>

3. There were two reasons why it was necessary to include articles 9 and 10 in the draft. The first was that many most-favoured-nation clauses were really cumulative clauses whereby the granting State promised the beneficiary State either most-favoured-nation treatment or national treatment. Occasionally, a cumulative clause

<sup>1</sup> Yearbook . . . 1973, vol. II, pp. 97-116.

<sup>2</sup> Yearbook . . . 1974, vol. II, Part One, pp. 117-134.

<sup>3</sup> Yearbook . . . 1973, vol. II, pp. 215 and 218.

specified that the beneficiary State could claim the benefit of whichever of the two types of treatment it found more favourable.

4. The second reason for including the articles was that they were a necessary complement to article 13, which dealt with the right of the beneficiary State, under a most-favoured-nation clause, to claim national treatment on the grounds that such treatment had been extended to a third State.

5. The definitions of the national treatment clause and national treatment, given in articles 9 and 10 respectively, conformed with generally accepted notions. They were briefly explained in the joint commentary to the two articles.

6. There was a great similarity between national treatment clauses and most-favoured-nation clauses, in that both were of a contingent character. The operation of the most-favoured-nation clause depended on the treatment accorded to a third State by the granting State; the operation of the national treatment clause depended on the treatment accorded by the granting State to its nationals or to things within its jurisdiction. Both types of clause contained an element of *renvoi*: in one case, the reference was to the treatment accorded to a third State; in the other, to the internal law of the granting State.

7. The question of national treatment, which was the subject-matter of articles 9 and 10, was entirely different from the question of equality of treatment with nationals, which arose in connexion with the treatment of aliens and had given rise to much discussion in the past.

8. Mr. SETTE CÂMARA said that of the four possible ways of dealing with provisions on national treatment clauses described by the Special Rapporteur in his sixth report (A/CN.4/286, para. 3), the best was to mention both the most-favoured-nation clause and the national treatment clause explicitly in the articles applicable to both; that method would entail fewer changes in the structure of the articles already adopted.

9. The inclusion of articles on the national treatment clause was fully justified, because throughout the century-long practice of States there had always been a relationship between the most-favoured-nation clause and the national treatment clause; those clauses were often combined in treaties or included side by side. Both clauses purported to achieve equality of treatment, but the pattern of reference was different.

10. In the most-favoured-nation clause, the standard of reference was the treatment of persons and things belonging to other States; in the national treatment clause, it was the treatment of persons and things belonging to the national legal order of the granting States. In paragraph (6) of the commentary to articles 9 and 10 (A/CN.4/280), the Special Rapporteur had aptly called those two standards of treatment "foreign parity" and "inland parity".

11. Traditionally, national treatment clauses had dealt with the treatment of aliens in the national territory, but more recently they had found wide application in trade. The national treatment clause and the most-favoured-nation clause had become the two central pillars of the

GATT system, and the former was embodied in article III, paragraph 4 of the General Agreement. Like the most-favoured-nation clause, the national treatment clause, as applied to trade, was treated with reserve by developing countries. Those countries always preferred to negotiate within the context of Part IV of the GATT. Internal parity could only work to the detriment of economically weak national individuals and enterprises; only preferential treatment would enable the poorer developing countries to achieve their economic independence.

12. There were certainly some human rights and fundamental freedoms that were granted to nationals and aliens on an equal footing by every internal legal order. But those rights were outside the scope of the negotiations by which national treatment clauses were adopted, since parity of treatment in regard to them was obligatory under general international law. In practice, while equality before the law was the general constitutional rule, ordinary legislation gave preference to nationals in a number of specific situations, and those advantages could be the subject of negotiations for the granting of national treatment to foreigners. Some rights, however, such as political rights, were constitutionally reserved to nationals and sometimes to nationals by birth; as a general rule, those rights were outside the realm of concessions of national treatment.

13. In article 10, he suggested that the concluding word "itself", which was ambiguous, should be eliminated by redrafting the text to read: "'National treatment' means treatment granted by a State to persons or things in a determined relationship with a beneficiary State not less favourable than treatment of persons or things in the same relationship with the granting State".

14. Sir Francis VALLAT said that when the Commission had first discussed the question of national treatment,<sup>4</sup> it had been his understanding that it had not taken any final decision to deal with that question in the context of the most-favoured-nation clause. It had then been suggested that the Commission should continue consideration of the articles on the most-favoured-nation clause and see whether the need to deal with national treatment emerged from its discussions.

15. The Commission had since discussed a number of articles on the most-favoured-nation clause, but there had been no indication, during the debates, of any need to deal with the national treatment clause at the present stage. He favoured as broad an approach as possible to all subjects dealt with by the Commission, but thought that in the present instance to embark on what amounted to a new topic would adversely affect the Commission's work. If it did so, the Commission would have to adopt the dubious course of altering the title of the draft under consideration.

16. The topics of national treatment and most-favoured-nation treatment were fundamentally different. The standard of national treatment was defined by reference to the internal law and practice of the State concerned. Most-favoured-nation treatment, on the other hand, was

<sup>4</sup> See 1330th meeting, paras. 7-41.

defined by reference to the treatment accorded to third States.

17. Article 10 *bis* provided a good illustration of the kind of difficulty that would arise if the Commission took up the study of national treatment clauses. That article dealt with the question of national treatment in federal States, and all those who had had experience of negotiating treaties in recent years knew the difficult problems that arose regarding the special position in federal States. It was a completely new field which had nothing to do with the most-favoured-nation clause as such; but the subject-matter of that article would inevitably have to be dealt with if the Commission decided to cover the question of national treatment and national treatment clauses in the present draft.

18. The first article in the draft which established a link between national treatment and the most-favoured-nation clause was article 13 (A/CN.4/280) which dealt with the right of the beneficiary State, under a most-favoured-nation clause, to claim national treatment if it was accorded to a third State. He did not believe, however, that there was any need for a specific provision on the lines of article 13, since the result stated in it would necessarily follow from the provisions of articles 5 and 7.<sup>5</sup> Indeed, the inclusion of article 13 would only create doubts. If any emphasis on that particular application of articles 5 and 7 was needed, it could be supplied in the commentary.

19. He was also concerned about the procedural issue involved in the proposed study of national treatment clauses. Under article 18, paragraph 2 of its Statute, when the Commission considered that the codification of a particular topic was necessary or desirable, it was required to "submit its recommendations to the General Assembly"; but the Commission had not made any recommendation to the General Assembly on the study of national treatment clauses. In the Commission's 1974 report, the Special Rapporteur's fifth report had been referred to as a report "on the most-favoured-nation clause";<sup>6</sup> and in the section entitled "Organization of future work",<sup>7</sup> the Commission had declared its intention of continuing, at the present session, its study of a number of topics, including the most-favoured-nation clause. If the Commission had intended to deal with national treatment clauses at the present session, it should have stated that intention in its 1974 report.

20. In operative paragraph 4 (c) of General Assembly resolution 3315 (XXIX), dealing with the Commission's 1974 report, the Assembly had recommended that the Commission should "proceed with the preparation of draft articles on the most-favoured-nation clause". And in the Sixth Committee's debates, from which that recommendation had emerged, no delegation had thought that the reference to the most-favoured-nation clause might conceal the possibility of a study of national treatment clauses.

21. Practical considerations relating to lack of time strengthened those procedural and constitutional arguments, and he therefore suggested that articles 9 and 10 should be left aside, while the Commission continued to examine the articles dealing with most-favoured-nation treatment. Later, with the possible backing of the General Assembly, it might be also to take up the question of national treatment.

22. Mr. USTOR (Special Rapporteur) reminded the Commission that when it had started consideration of the most-favoured-nation clause at the present session, he had proposed that it should begin with articles 9 and 10 because of the very close links between national treatment and the most-favoured-nation clause.<sup>8</sup>

23. The study of the most-favoured-nation clause necessarily involved consideration of the question dealt with in article 13—the right of the beneficiary State under a most-favoured-nation clause to national treatment. Sir Francis Vallat had argued that, on the basis of earlier articles of the draft, no other solution was possible than that adopted in article 13. That position was certainly tenable, but the fact remained that there had been considerable controversy on the point. Contrary views had been expressed, and for his part, he thought it was absolutely necessary to include an article stating the rule that, under a most-favoured-nation clause, the beneficiary State could claim national treatment if the granting State had accorded that treatment to a third State.

24. There was also the important question of cumulative clauses, dealt with in article 14. The rule stated in that article was a simple one, namely, that a beneficiary State to which both most-favoured-nation treatment and national treatment had been promised, could claim the treatment which it considered the more favourable.

25. He did not believe that the Commission could possibly be criticized for dealing with all aspects of the most-favoured-nation clause, including those covered in articles 13 and 14. The inclusion of those articles, which made specific reference to national treatment, made it necessary also to include articles defining national treatment clauses and national treatment. The question whether the Commission should retain articles 9 and 10 in the draft was entirely different from the question whether the earlier articles, and the title of the whole draft, should be amended so as to include references to national treatment.

26. One further consideration should be borne in mind. For a number of years the Secretariat had been carrying on the formidable task of analysing the most-favoured-nation clauses contained in treaties registered with the United Nations. That work was still under way, but he had seen some of it and had noted that there were a vast number of clauses which promised most-favoured-nation treatment and national treatment side by side. The most-favoured-nation clause and the national treatment clause were similar, because they both contained promises of a contingent nature. Each of the two clauses, however, had its own peculiar character. The content of the promise in the most-favoured-nation clause varied according

<sup>5</sup> *Yearbook* . . . 1973, vol. II, pp. 218 and 221.

<sup>6</sup> *Op. cit.*, 1974, vol. II, Part One, document A/9610/Rev.1, para. 161.

<sup>7</sup> *Ibid.*, para. 164.

<sup>8</sup> See 1330th meeting, para. 8.

to the treatment given to the third State; the content of the promise in the national treatment clause depended on the treatment accorded to nationals.

27. He suggested that the Commission should consider forthwith the question whether articles 9 and 10 should be included in the draft. To his mind, those articles were indispensable complements of articles 13 and 14. The Commission would not be performing its task adequately if it did not extend its work to national treatment.

28. The CHAIRMAN invited the Commission to discuss the procedure to be followed.

29. Mr. CALLE Y CALLE said that, as he understood it, the Commission's decision to study the topic of the most-favoured-nation clause carried with it the intention of dealing with all aspects of the practical application of that clause. That point had been made clear in the very first report on the most-favoured-nation clause submitted by the Special Rapporteur.<sup>9</sup> The question of national treatment was part and parcel of the topic, since one of the commonest forms of most-favoured-nation treatment within the meaning of article 5 of the draft was, precisely, national treatment.

30. In view of the close connexion between national treatment and the most-favoured-nation clause, it was clearly both useful and necessary to explain the meaning and scope of national treatment in the draft. That was the purpose of article 9 and the following articles proposed by the Special Rapporteur. In article 13, the question of national treatment arose for the first time in direct connexion with the most-favoured-nation clause. At the present stage of its work, the Commission should not readily engage in the process of eliminating or merging draft articles. There would be ample opportunity for doing that during the second reading, on the basis of government comments. Moreover, in many of its other drafts, the Commission had gone into very considerable detail and he saw no reason why a different approach should be adopted for the present topic. It should be borne in mind that reasonably detailed provisions on a topic in process of codification were of great assistance to States.

31. The question of national treatment was of great interest to Latin America. It was particularly important that national treatment in the context of the most-favoured-nation clause should be carefully differentiated from the doctrine of equality of treatment between nationals and aliens. That doctrine had been put forward by Calvo and other authoritative Latin American writers in the nineteenth century, in order to combat the abuses involved in exaggerated claims arising out of alleged injuries to aliens.

32. The national treatment referred to in articles 9 and 10 was treatment accorded to the persons and things of a third State by the granting State, which placed them on a par with its own nationals or things under its jurisdiction. Many examples could be given of situations in which it would be out of the question to grant

national treatment to foreign persons or companies. A powerful transnational company, for instance, was able to obtain credit facilities from the local banks as soon as it started business in a country. It could thus absorb a huge proportion of the local financial resources and enrich itself by making use of the scanty savings painfully accumulated by the local population. The only remedy for that type of situation was to debar such a company from local credit facilities and to reserve national savings for investment in national undertakings.

33. The arrangements for integration among the countries of the Andean region provided another interesting example. Multinational companies set up by the Andean countries were granted national treatment under those arrangements. Clearly, the same treatment could not be accorded to companies foreign to the region.

34. For those reasons, he considered it important that the draft should include suitable provisions on the question of national treatment, and he did not believe that by studying that question the Commission would be in any way exceeding the mandate it had received from the General Assembly.

35. Mr. KEARNEY said that the example given by the previous speaker illustrated the difficulty of dealing with the question of national treatment at the present stage. If a State in the Andean region had promised most-favoured-nation treatment to a non-Andean State with respect to the establishment of companies, it was debatable whether it could refuse that beneficiary State the benefit of national treatment accorded to a national company of the Andean region. Many other equally intractable problems would arise if the Commission tried to deal with the question of national treatment at the present stage. Consequently, he thought it should leave aside article 9 and the following articles, and continue its work on the articles dealing with the most-favoured-nation clause.

36. Article 14, on cumulation of national treatment and most-favoured-nation treatment, did not present any major difficulty. As he understood its provisions, the article merely meant that if, in the same sphere, a beneficiary State was granted both most-favoured-nation treatment and national treatment, it was entitled to choose whichever treatment it considered the more favourable. There seemed hardly any need to state such an obvious rule, because the beneficiary State clearly had two rights and there could be no doubt about its being entitled to claim whichever it preferred.

37. Article 13, on the right of the beneficiary State, under a most-favoured-nation clause, to claim national treatment on the ground that it had been granted to a third State, would need more careful study. As indicated in the commentary (A/CN.4/280), the rule which it stated was not unanimously endorsed.

38. Another reason for not taking up the question of national treatment at present was that the Secretariat was carrying out a study on most-favoured-nation clauses contained in treaties, and the connexion between these clauses and national treatment clauses. It would certainly be most helpful to the Commission if it could

<sup>9</sup> *Yearbook* . . . 1969, vol. II, p. 158, para. 3.

examine the results of that study before it took up the question of national treatment.

39. He had himself examined a number of treaties of friendship, navigation and establishment concluded by the United States, and that study had shown that there was great variety in the way in which most-favoured-nation clauses and national treatment clauses were presented. In one and the same treaty—for example, the treaty of 1961 between the United States and Belgium—a series of articles specifying national treatment was followed by an article which contained a most-favoured-nation clause, and by an article containing a cumulative clause for the benefit of the vessels of either country using the ports and waters of the other. Problems of reciprocity also arose, which differed according to whether national treatment or most-favoured-nation treatment was concerned.

40. For all those reasons, and in view of the division of opinion on the effects of national treatment clauses, the Commission would only be acting with due caution if it postponed consideration of the question of national treatment until its next session.

41. Mr. USHAKOV said that, under cover of comments on procedure, Sir Francis Vallat had spoken on substance when he had said that articles 13 and 14 were self-evident, and that the definition of “national treatment” was not at issue. The Chairman himself had considered that it was a question of procedure. On the contrary, however, draft articles 13 and 14 followed from the definitions already adopted by the Commission and were within the scope of the topic of the most-favoured-nation clause. It was not when examining the Special Rapporteur’s fifth report (A/CN.280), but when examining his sixth report (A/CN.4/286) that the Commission would have to consider enlarging the topic and possibly amending articles previously adopted, in order to take account of the problems raised by national treatment. The question which would then arise might be one of procedure, but at the moment the Commission was dealing with essential provisions that were fully within the scope of the topic of the most-favoured-nation clause.

42. He therefore formally proposed that the Commission should first consider articles 13 and 14, and then examine the definitions proposed in articles 9 and 10. In the report on the work of its twenty-fifth session the Commission had expressly stated that it would later consider the interaction between most-favoured-nation clauses and national treatment clauses.<sup>10</sup> Thus the Commission had already proposed the method of work he recommended.

43. Sir Francis VALLAT said he could agree to consideration of articles 13 and 14 at the present stage. In examining those articles the Commission could consider whether it needed definitions of the national treatment clause and national treatment. That procedure would be more in accordance with the Commission’s normal practice.

44. Mr. TSURUOKA agreed with the Special Rapporteur that articles 13 and 14, if not absolutely indispensable,

were at least useful for defining the operation of the most-favoured-nation clause and its relationship with national treatment.

45. Mr. ELIAS said he thought it was possible to find a mean between the conflicting views of Sir Francis Vallat and the Special Rapporteur. In his opinion, articles 9 to 12 could not engage the Commission’s attention at the present stage, since, like most definition articles, they would probably take up too much time, and it had never been the Commission’s practice to concern itself to an inordinate extent with the precise details of definitions. The articles were useful, however, in that they gave an idea of how the terms they contained should be employed for the purposes of articles 13 and 14. Articles 10 *bis* to 12 went further into detail than was necessary to enable the Commission to decide which portions of articles 13 and 14 it might wish to retain.

46. He had serious reservations concerning article 13: while its wording appeared simple, the problem it raised was so fundamental that the Commission might be unable to find an acceptable solution at the present session. That problem had been well illustrated by the Special Rapporteur, particularly in the first paragraph of the quotation from Pescatore, in paragraph (8) of the commentary (A/CN.4/280). In addition, the first two sentences of the third paragraph of that quotation drew attention to two major difficulties. The Special Rapporteur himself had hinted at some of the problems involved, and the Commission would have to give them further detailed consideration if it was to draft an effective article taking them into account.

47. The problem raised by article 14 did not seem so difficult. He would have thought that the ordinary rules of interpretation would provide sufficient guidance for the beneficiary State, but it might be necessary, for the sake of clarity, to say that it had the right of election. If the most-favoured-nation clause and the national treatment clause were contained in the same instrument, or had been established in closely similar circumstances, the choice between them should not be too difficult. The question remained, however, whether the Commission could agree on the final form of article 14, in view of the Special Rapporteur’s contention that, if article 14 was adopted, it would also be necessary to adopt at least the definition clauses in articles 9 and 10.

48. If the Commission wished briefly to consider articles 9 and 10, solely with a view to the use of the terms they defined in articles 13 and 14, he would not object. In his opinion, however, articles 13 and 14 went to the heart of the matter under discussion, so that there was merit in the suggestion that the Commission should do no more than approve provisional versions of those articles at the present session, leaving the formulation of the final texts until the following year, when members would have had more time for reflection, the study being prepared by the Secretariat would be available, and the Sixth Committee of the General Assembly would have had a chance to state its opinion on whether provisions relating to national treatment should be included. At present, it did not seem to him that the provisions of articles 1 to 8 necessarily led to the provisions of articles 13 and 14,

<sup>10</sup> *Yearbook* . . . 1973, vol. II, p. 211, para. 110.



which were perhaps important residuary rules to be fitted in at some other point.

49. Mr. QUENTIN-BAXTER said that the Commission appeared to be approaching agreement to concentrate its attention on draft articles 13 and 14, making reference to the definition articles as necessary—a decision with which he would not disagree. But whether the Commission took up the broad question of the relationship between most-favoured-nation treatment and national treatment or the narrower question of the way in which the two types of treatment came together in article 13, there were certain considerations that should be borne in mind.

50. For him, the major concern was not constitutional: he was sure that if the Commission thought it necessary to consider national treatment, an arrangement could be reached with the General Assembly. The problem was rather, as other speakers had said, that there was a considerable difference between the ways in which the two principles were applied, and little time to complete consideration of an important set of draft articles.

51. He agreed with the Special Rapporteur that both the most-favoured-nation clause and the national treatment clause involved *renvoi*, and it was certainly true that they were often found in juxtaposition in the same instrument. The Special Rapporteur had acted entirely within his terms of reference in drawing attention to those points and recommending a course of action. For his part, however, he believed that the difference between the two types of clause—the existence of a triangular relationship under the most-favoured-nation clause and a bilateral relationship under the national treatment clause—was not merely formal, but lay at the heart of the matter.

52. An essential fact relating to the most-favoured-nation clause had been mentioned by several speakers, namely, that it was impossible to formulate principles which were capable of automatic application. Questions of judgement arose in two different contexts: Mr. Reuter had mentioned the very real difficulty of measuring the most-favoured-nation clause against the facts and obtaining the proper basis of comparison,<sup>11</sup> and it was equally difficult to make allowance for the fact that, in concluding most-favoured-nation treatment agreements, States intended neither to avoid their obligations thereunder nor to permit any restriction of their sovereignty in respect of matters outside the agreed sphere of application. In situation after situation, therefore, the need arose for discussions on what it was reasonable and proper to do in the circumstances, and the solution often had little to do with formal responsibility.

53. In following the discussion on the articles up to 8 and 8 *bis*, he had become increasingly convinced that the Commission's aims must be to produce a set of draft articles which would be both flexible and coherent. He feared that if restrictive drafting had to be balanced by broad exceptions, the draft articles would not attain the place which the Commission hoped would be theirs in international law and which the efforts and scholarship of the Special Rapporteur so greatly deserved.

54. The national treatment clause did not give rise to the same problems. There was not, for example, the problem of applying a set of obligations to a complicated factual situation involving a relationship with a third State, and it was seldom necessary to strike a balance between the unfettered sovereignty of the granting State and its obligation to accord national treatment. But as Mr. Sette Câmara and Mr. Calle y Calle had pointed out, there were difficulties closely associated with the responsibility of a State for the treatment of aliens within its territory. As matters stood, he could see no reason to believe that the Commission could go into such complex questions and still complete on time, and to a standard acceptable to the international community, the set of draft articles on the most-favoured-nation clause which now seemed within its grasp.

55. Consequently, while he recognized that the questions raised in articles 13 and 14 were entirely relevant to the Commission's work, he approached even those articles with caution. The first priority was to deal with the subject, which had now been before the Commission for a number of years and the work on which must be completed soon.

56. Mr. HAMBRO said he thought it would be going too far to say that the Commission could not discuss the question of national treatment because it had not mentioned the matter in its report to the General Assembly. The Commission should be free to discuss even peripheral subjects if it found that necessary for the consideration of its main topic.

57. None the less, he hoped that the Commission would not take up the national treatment clause, for that would require far more than the small amount of thought which it had been suggested the matter should receive. It should not be forgotten that the conflict between national treatment and a minimum standard was one which had hitherto bedevilled all discussions on the treatment of aliens. The same difficulties would be encountered in discussing the relationship between national treatment and most-favoured-nation treatment, and he agreed with Sir Francis Vallat that there was as yet no evidence that it was necessary to discuss national treatment in that connexion.

58. He supported the suggestion that the Commission should take up articles 13 and 14 and, if the need arose, revert to the question of national treatment at some later stage.

59. Mr. RAMANGASOAVINA said that with articles 13 and 14 the Commission was entering an entirely new field, despite the close connexion between those articles and the preceding ones. While he had no difficulty with articles 9 to 12, since they contained definitions and were intended to explain the difference between the most-favoured-nation clause and the national treatment clause, articles 13 and 14 caused him grave concern, as they did other members of the Commission. If those articles were concerned only with bilateral relations between two States and with relations with the State benefiting under the most-favoured-nation clause, the problem could be approached without too much anxiety. But articles 13 and 14 opened up prospects the full extent of which could not

<sup>11</sup> See 1333rd meeting, paras. 19-23.

yet be assessed. For there was now a tendency among States—particularly young States—to form customs unions in order to increase their prosperity and hasten their development. And if one of the States members of an economic community had, before joining it, granted most-favoured-nation treatment to another State not a member of the community, that extraneous element, introduced through the operation of the most-favoured-nation clause, would suffice to destroy the whole system of preferences laboriously built up in the interests of the community.

60. In his opinion, it was not yet possible to gauge all the consequences of the rules stated in articles 13 and 14. The Special Rapporteur had been rather laconic on that point, for practice did not yet offer sufficient precedents to illustrate the possible consequences of those articles. He therefore shared the opinion of some members of the Commission who would prefer to defer a decision on articles 13 and 14 until a more thorough study had been made to determine the possible consequences of the cumulation of national treatment and most-favoured-nation treatment. He was impatiently awaiting the articles on non-reciprocal preferences to be granted to developing countries, which might perhaps throw some light on the possible consequences of the principles stated in articles 13 and 14. He appreciated that those articles were of definite interest, but he had some fears—possibly unjustified—about their consequences.

61. The CHAIRMAN observed that there seemed to be general agreement that the Commission should proceed to consider articles 13 and 14 and revert to articles 9 to 12 at some later stage.

62. Mr. USTOR (Special Rapporteur) said that, while he regretted that the Commission had not adopted that course at the beginning of the meeting, the discussion had been useful in throwing light on the difficulties of the subject. Since the study of most-favoured-nation clauses and of the cumulation of national treatment and most-favoured-nation treatment being prepared by the Secretariat would be essentially statistical, it would not be possible to use it in connexion with the discussion of national treatment in the way some members of the Commission hoped. He had been rather puzzled by the calls for further time to study articles 13 and 14, which had been available for more than a year, and he trusted that the Commission would be able to deal with them quickly at its next meeting.

The meeting rose at 1 p.m.

### 1337th MEETING

Wednesday, 25 June 1975, at 10.20 a.m.

Chairman: Mr. Abdul Hakim TABIBI

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

### Most-favoured-nation clause

(A/CN.4/266;<sup>1</sup> A/CN.4/280;<sup>2</sup> A/CN.4/286)

[Item 3 of the agenda]

(continued)

#### STATEMENT BY THE SPECIAL RAPPORTEUR ON THE QUESTION OF THE NATIONAL TREATMENT CLAUSE

1. Mr. USTOR (Special Rapporteur) said that he hoped he had not offended members of the Commission by his remarks at the end of the previous meeting. While he naturally accepted the view of the majority that the question of the national treatment clause should not be brought within the scope of his study at the present stage, he remained unconvinced by the arguments adduced in support of that view.

2. Those arguments related to procedure and to the merits of his proposal. As the procedure, the Commission had always tried to maintain a certain intellectual freedom in relation to the General Assembly. Indeed, it had been the Commission, not the Sixth Committee, which had first decided that a study of the most-favoured-nation clause should be undertaken. That being so, he thought the Commission could take the liberty of extending the study to some degree.

3. While much had been said about the need for caution and for making haste slowly, little had been said about the actual merits of his proposal. For example, no one had said, in regard to any particular article, that extension of that article to national treatment would be very difficult, and he did not think there was any instance in which that would, in fact, be the case. Had it considered the national treatment clause, the Commission would have remained within the sphere of the law of treaties; just as it had not discussed the merits of the most-favoured-nation clause, but had merely adopted rules for its application, so the Commission would have had no need to go into questions of national treatment and minimum standards of international law.

4. He believed that when explaining the Commission's decision to the General Assembly, he would be justified in saying that the Commission might extend its study to national treatment clauses at its next session.

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

##### ARTICLE 13

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

##### Article 13

*The right of the beneficiary State under a most-favoured-nation clause to national treatment*

1. The beneficiary State acquires under a most-favoured-nation clause the right to national treatment if the granting State has accorded national treatment to a third State.

2. Paragraph 1 applies irrespective of whether national treatment has been accorded by the granting State to a third State unconditionally or subject to material reciprocity or against any other compensation.

<sup>1</sup> Yearbook . . . 1973, vol. II, pp. 77-116.

<sup>2</sup> Yearbook . . . 1974, vol. II, Part One, pp. 117-134.

6. Mr. USTOR (Special Rapporteur) said that the rule proposed in article 13 seemed obvious, at least from a simple reading of the most-favoured-nation clause. By that clause, the granting State promised the beneficiary State treatment no less favourable than it accorded to a third State; the beneficiary State was thus able to claim any advantages enjoyed by third States which exceeded the advantages granted to itself under the most-favoured-nation clause, irrespective of the way in which those advantages had arisen. For example, State A might levy harbour dues of one penny per ton on its own ships and three pence per ton on all other ships. If State A subsequently granted national treatment to State B and most-favoured nation treatment to State C, the dues levied on B's ships would be lowered to equal those levied on the ships of the territorial State, and State C, relying on the promise given to it by that State, could claim the same reduction. Since State A would be unable to dispute the contention that national treatment was the more favourable, it would have to satisfy C's claim. He had included some examples of State practice in his commentary (A/CN.4/280), and they showed that the unanimous opinion was that most-favoured-nation treatment also embraced national treatment.

7. For the sake of objectivity, he had also included in his commentary examples of opposing views. But however seductive they might be, those views did not rely on State practice, but on conjecture, and should not be entertained by the Commission. The suggestion was that national treatment was not of the same nature as most-favoured-nation treatment, and that the most-favoured-nation clause itself precluded claims for benefits of any kind other than those to which it related. The example he had given, of ships and harbour dues, showed that the two types of treatment were not different in nature. It was clear to him that in situations where the most favourable treatment was that accorded to a third State, the same treatment would have to be accorded to the beneficiary State, irrespective of whether the favours given to the third State derived from a bilateral treaty, national legislation of the granting State, or a national treatment clause. It was because that idea was inherent in the most-favoured-nation clause that Sir Francis Vallat had said that article 13 was unnecessary; while he sympathized with that view, he thought it would be useful to lay down a formal rule, because of the controversy to which the question had given rise.

8. It had been said that most-favoured-nation treatment could not encompass national treatment, because the former was often granted unconditionally and the latter subject to reciprocity. However, as provided in the new version of the second paragraph of articles 6 *bis* and 6 *ter* adopted by the Drafting Committee,<sup>3</sup> the rights of a beneficiary State under a most-favoured-nation clause must be upheld independently of whether the granting State had accorded favours to a third State gratuitously or against compensation. That provision was based on the *pacta sunt servanda* rule and on general State practice, which was to invoke the condition of reciprocal treatment by a third State as a reason for withholding certain favours

from a beneficiary State only where appropriate exceptions had been provided for in the most-favoured-nation clause. Article 13 meant that, in the absence of such exceptions, the beneficiary State must receive all the advantages the granting State accorded to any third State, even if those advantages had been accorded under a national treatment clause.

9. He was well aware that there was an increasing tendency for States which were members of economic unions to conclude multilateral agreements under which they accorded national treatment to each other. In his objective opinion as Special Rapporteur, the most-favoured-nation clause would operate in the presence of such agreements, as provided in article 8 (A/CN.4/286). In other words, he did not believe that the rules of international law had developed beyond the point of allowing no exceptions to the clause other than those expressly stipulated in it. The present situation, which was recognized in such important international instruments as the 1957 Treaty of Rome,<sup>4</sup> was that States which found that their obligations under a most-favoured-nation clause were incompatible with their obligations under a subsequent multilateral agreement, could release themselves from their earlier commitments, which would otherwise remain valid, only by negotiation with the beneficiary State or by means for which provision was made in the earlier agreement. He did not think it would be desirable to introduce into international law institutions which, of themselves, would free States from their treaty obligations.

10. Mr. ŠAHOVIĆ said that the discussion at the previous meeting had been very useful because it had enabled the Commission to clarify a number of points. The Special Rapporteur had said that he had wished to deal with a number of questions which were directly connected with the most-favoured-nation clause and had reached the conclusion that it was impossible to leave national treatment aside. He (Mr. Šahović) agreed with the Special Rapporteur on that point and thought that articles 13 and 14 were necessary. He did, however, have certain difficulties with the relationship between most-favoured-nation treatment and national treatment, which were two different notions. In his opinion, it would be necessary to define the notion of national treatment and to study its legal nature more thoroughly, particularly from the point of view of international law.

11. With regard to article 13, he thought the Special Rapporteur had been much stricter in the wording of the article than in his commentary. He had said that the rule in that article was self-evident, but had described the situation in much more flexible terms when he had affirmed, in paragraph (9) of his commentary (A/CN.4/280), that "If a State wishes to exclude previous or future national treatment grants from its most-favoured-nation pledge, it is free to do so". He seemed thus to have contemplated the possibility of an exception to the rule in article 13. Hence it seemed that the rule could be made more flexible by adding a saving clause such as "unless

<sup>3</sup> See 1352nd meeting, para. 45.

<sup>4</sup> United Nations, *Treaty Series*, vol. 298, p. 11; see article 234.

the parties agree otherwise", as had been suggested in the case of other draft articles.

12. While he did not wish to discuss the pertinence of Pescatore's arguments, he thought that some of them were important and warranted consideration. In particular, it would be necessary to study more thoroughly the problem of reciprocity and the problem of the time element. The practice of States, on which the Special Rapporteur's commentary was based, was certainly convincing, but all aspects of the question should be taken into account.

13. He doubted whether paragraph 2 was really necessary, since the Commission had formulated other rules that were valid for all forms of most-favoured-nation clause without saying so expressly in the articles.

14. Mr. AGO said he thought article 13 had a place in the draft. For if a State had granted most-favoured-nation treatment to another State and later granted national treatment to a third State, it was evident that, through the operation of the most-favoured-nation clause, national treatment must be accorded to the State benefiting under the clause. Hence he was only concerned about the possible consequences of paragraph 2.

15. He recognized that the Special Rapporteur had been perfectly consistent, because paragraph 2 was simply the counterpart of paragraph 2 of article 6 *bis*. But the consequences of paragraph 2 of article 13 led him, in retrospect, to have some doubts about the consequences of article 6 *bis*. For if the State which granted most-favoured-nation treatment to another State had not yet granted national treatment to a third State, it was quite obvious that the State benefiting under the most-favoured-nation clause was not entitled to national treatment for its nationals and things. If the same State subsequently granted national treatment to a third State, but on condition of reciprocity, was the beneficiary State under the most-favoured-nation clause entitled to claim from the granting State, without reciprocity, the national treatment which it had granted to the third State? In his opinion such a solution would be unacceptable, since it would go beyond the operation of the most-favoured-nation clause by introducing into the relations between State A and State B, through the operation of that clause, the national treatment provided for between State A and State C—and that not within the limits to which the national treatment was subject in the relations between State A and State C, but without any limitation. It was the most-favoured-nation clause as such—that was to say as a formal instrument granting a specific treatment to a State—which was unconditional, whereas the treatment was specifically determined by the content of the treaties which State A had concluded with other States. If State A had accorded national treatment to State C only on condition of reciprocity, State B could not claim that treatment unless it agreed to accord national treatment to State A. Thus a strict and correct interpretation of the most-favoured-nation clause could not lead to the conclusion stated in article 13, because State B would obtain from State A more favourable treatment than that accorded to State C, in other words, treatment more favourable than most-favoured-nation treatment.

16. Those considerations were prompted by respect for the *pacta sunt servanda* principle, which the Special Rapporteur had so rightly stressed.

17. Mr. USHAKOV said that, in principle, he supported articles 13 and 14, subject to a few drafting changes. States were not children; the Commission must have confidence in them and assume that they did not act without due consideration, but were fully aware of all the possible consequences of an agreement when they concluded it.

18. Article 13 did not concern standards for the status of aliens; those standards related to civil and political rights, whereas the most-favoured-nation clause applied mainly to commercial and consular relations affecting property and goods. The question of standards relating to the status of aliens was a very broad one, whereas national treatment accorded under a most-favoured-nation clause was limited to the agreed sphere of relations to which the clause applied.

19. In article 13, the Commission had to settle the question whether the beneficiary State acquired the right to national treatment under a most-favoured-nation clause when the granting State had accorded national treatment to a third State. It must answer that question categorically—in the affirmative or in the negative—without reservations. Thus in article 13 it must state an absolute rule, without trying to make it more flexible by means of a saving clause, as Mr. Šahović had suggested. For if the granting State had accorded national treatment to a third State, it was obliged to grant that same treatment to the State benefiting under the most-favoured-nation clause. Whatever the conditions under which the granting State had granted national treatment to a third State, the beneficiary State was entitled to the same treatment unconditionally. It was free to choose between national treatment and most-favoured-nation treatment. When the Special Rapporteur had said, in paragraph (9) of his commentary to article 13, that "If a State wishes to exclude previous or future national treatment grants from its most-favoured-nation pledge, it is free to do so", he had not intended to make an exception to the rule in article 13, as Mr. Šahović believed. He had simply meant that the granting State and the beneficiary State could agree, when concluding the most-favoured-nation clause, to exclude from that clause the benefit of national treatment granted to a third State. That was not a general rule of international law, but an exception mutually agreed by the two States.

20. He agreed with the Special Rapporteur that the rule in article 13 was self-evident. But that was not the opinion of some members of the Commission, who believed that, on the contrary, the beneficiary State did not automatically acquire the right to national treatment under the most-favoured-nation clause when the granting State had accorded national treatment to a third State. It would therefore be possible to formulate a contrary rule excluding the benefit of national treatment from the most-favoured-nation clause; but current State practice seemed to confirm the position taken by the Special Rapporteur, as he had shown in his commentary.

21. He therefore supported articles 13 and 14, subject to certain improvements in drafting.

22. Mr. TAMMES said it was perhaps because the rule in article 13 was self-evident that, even taking into account the relevant sections of the commentary to article 14, the space devoted to it in the Special Rapporteur's fifth report (A/CN.4/280) was small. From what the Special Rapporteur had said, particularly at the previous meeting, it appeared that no new material had been added in the year the article had been before the Commission, and that no more could be expected from the Secretariat study.

23. The two court decisions quoted by the Special Rapporteur in his commentary proved once again that most-favoured-nation and national treatment clauses were invoked direct by the persons for whose benefit they were drafted, and that their application need not give rise to laborious negotiations. Of the two writers quoted, Pescatore offered a sort of *ejusdem generis* rule, which was applied not to the persons and things covered by a most-favoured-nation clause, but to the corresponding clauses and instruments as such, independently of what they contained in the way of a promise. As he had said earlier, the impression created by such theories was that they were rather artificial. At all events, they differed widely from the Commission's understanding of the *ejusdem generis* rule.

24. The third paragraph of the quotation from Pescatore, in paragraph (8) of the commentary to article 13, contained the statement that "national treatment is normally granted only on the basis of reciprocity". Perhaps that was now true enough for the statement to be added to article 13 as a rebuttable presumption, thus placing before the Commission a clear alternative on which it, and subsequently the General Assembly, could pronounce.

25. Mr. TSURUOKA congratulated the Special Rapporteur on his oral introduction of the article under consideration and assured him that he fully shared his views on the freedom of action which the Commission should retain.

26. The rule stated in article 13 appeared to be subject to four conditions. First, when the clause was unconditional, it was in accordance with the provisions of article 6 *bis* that the beneficiary State acquired the right to national treatment. If, on the other hand, the clause was conditional, it was article 6 *ter* that applied. Thus if it was stipulated in the clause that the beneficiary State could only enjoy most-favoured-nation treatment on the same conditions as the third State concerned, and if the third State obtained national treatment subject to reciprocity or against compensation, the beneficiary State could only claim national treatment subject to reciprocity or against the same compensation. While it was true that national treatment was normally accorded on condition of reciprocity, as Mr. Tammes had pointed out, the practice of Japan nevertheless appeared to show that that country quite often accorded national treatment without that condition. Secondly, the national treatment accorded to the third State must relate to the subject-matter of the most-favoured-nation clause. Thirdly, the principles concerning the exceptions to be specified in the revised article 8 and article 8 *bis* must also apply to the national treatment. Fourthly, when national

treatment was accorded to the third State subject to the limitations which might be required, for instance, for the security of the granting State, and those limitations took effect for the third State, the beneficiary State could only claim national treatment under the most-favoured-nation clause subject to the same limitations.

27. If those were in fact the conditions of application of article 13, he could only approve of the content of that provision. According to draft article 14, however, the beneficiary State had the choice between national treatment and most-favoured-nation treatment, and it should also have that choice in the situation referred to in article 13. For most-favoured-nation treatment was not always less favourable than national treatment; hence it should be explained in the commentary to article 13 that the beneficiary State was free to confine its claim to most-favoured-nation treatment, without requesting national treatment.

28. For those reasons, he thought paragraph 2 of article 13 was unnecessary. The article could accordingly be drafted to read: "Subject to the provisions of the present articles, the beneficiary State may claim the right to national treatment under a most-favoured-nation clause if the granting State has accorded national treatment to a third State". The phrase "Subject to the provisions of the present articles" was intended to show that article 13 applied under the conditions already specified in other provisions of the draft. The phrase "the beneficiary State may claim" was intended to show that the beneficiary State had the choice between national treatment and most-favoured-nation treatment, which did not appear from the present wording of article 13.

29. Mr. KEARNEY said that Mr. Ushakov's reminder of the late Gilberto Amado's favourite dictum, "*les Etats ne sont pas des enfants*", was certainly appropriate. It could indeed be said that if a State granted a most-favoured-nation clause, it should do so in full knowledge of the consequences. Viewed in that light, the rule stated in paragraph 1 of article 13 was quite logical: the granting State should be aware that if it granted national treatment to a third State, that treatment must be extended to the beneficiary State under the most-favoured-nation clause. At the same time, he could not help feeling some concern at the possible ramifications of that logical process, partly because he was not sure of the consequences of the rule in every sphere of relations.

30. The provisions of paragraph 2 of the article involved even greater complications, mainly because of the uncertainty surrounding State practice in the matter. An example was provided by the case of *Kolovrat et al., v. Oregon*, heard in the United States Supreme Court in 1961, which was discussed in paragraph (6) of the commentary to article 13. In that case, the most-favoured-nation clause granted by the United States to Serbia, the predecessor State to Yugoslavia, had been successfully invoked by Yugoslav citizens to claim the benefit of national treatment, which had been granted to Argentinians under the 1853 Treaty of Friendship between the United States and Argentina. From his own knowledge of that case, he could supplement the information given in the commentary by drawing attention to the fact that

the United States Supreme Court had mentioned, in its reasoning, the treaties between Yugoslavia, on the one hand, and Czechoslovakia and Poland on the other, whereby national treatment was granted on a reciprocal basis to their respective nationals in each other's territory. It was his feeling that if that element of reciprocity had been absent, the official position of the United States Government would probably not have been different, but could anyone be certain that the United States Supreme Court would have given the same ruling?

31. An examination of existing treaties did not indicate that the most-favoured-nation clause was always clear and unconditional. When a State granted the benefit of national treatment, it was doubtful that it always had in mind that the grant would attract the operation of the most-favoured-nation clause and thus be extended to the nationals of other States. On the other hand, he had examined a number of treaties containing national treatment clauses, and had found that almost invariably the grant was made on a reciprocal basis.

32. There were also cases in which a most-favoured-nation clause was granted in a context in which national treatment would be impossible. For instance, the Convention of Establishment concluded by the United States with France<sup>6</sup> provided, in article V, that national treatment would be accorded to the nationals and companies of the two countries in the territory of each other, with respect to commercial, industrial and financial activities. The provision added that the nationals of the two countries were permitted to form companies in each other's territory under the general company laws of the State concerned. Clearly, national treatment of that type could not possibly apply in a State which had no company law and in which private companies could not be formed. In some States there was no legal structure to permit certain commercial, financial or industrial activities by private persons, and it would not be possible to import into the relations with a State of that kind the concept of national treatment to which article V of the Convention on Establishment referred.

33. There was not enough knowledge of State practice regarding cases of that kind. It would be easier for him to accept article 13, particularly paragraph 2, if a study of the practice showed that when States subscribed to a most-favoured-nation clause, they intended it to include national treatment regardless of the circumstances in which that treatment was granted to nationals of a third State.

34. For those reasons, he supported the suggestion made by Mr. Tammes, which could be put into effect by inserting, at the beginning of paragraph 2 of article 13, some such opening proviso as "Unless otherwise established". It was difficult to accept the flat rule stated in paragraph 2 of the article as it stood.

35. Mr. PINTO said that his views on article 13 were similar to those he had expressed on article 8.<sup>6</sup> While he could find no fault with the admirable logic and precision of the article, he was concerned at its implications

for the life of States, and thought it necessary to study its provisions in a particular perspective. The whole concept of the most-favoured-nation clause was valid and important for an equal striving with equals for equality. He, for one, hoped that the day would come when all countries had reached the stage at which the struggle for non-discrimination had a meaning. In the meantime, however, it was necessary to see the problem in the setting of present conditions.

36. A hypothetical example was provided by the 200-mile economic zone many countries would like to see established under the law of the sea, which was in process of formulation under United Nations auspices. If such a zone came to be established in the future, the coastal State would have exclusive fishing rights in it, and in appropriate cases might agree to grant national treatment to the fishing vessels of a neighbouring land-locked developing country. In that case, the rule laid down in paragraph 1 of article 13 might have the effect of extending the national treatment in question to the fishing fleet of a major fishing State which happened to have been granted a most-favoured-nation clause in a commercial treaty with the coastal State. A result of that kind would defeat the whole purpose for which the 200-mile economic zone had been proposed.

37. It was no answer to say that a State which granted the most-favoured-nation clause should be aware of the consequences of that clause. The State was an abstraction: treaties concluded on its behalf were in fact negotiated by statesmen and officials, who sometimes acted under great pressure of time. A most-favoured-nation clause might well be included somewhat hastily in a treaty of friendship concluded on the occasion of the visit of a foreign Head of Government. He was seriously concerned that a most-favoured-nation clause accepted under those circumstances might lead to the far-reaching results stated in article 13.

38. A remedy had been suggested in the form of a saving clause to be inserted at the beginning of paragraph 2; a similar proposal had been made with regard to article 8. He did not favour that approach, which would tend to destroy the logic of the Special Rapporteur's admirable draft. He would prefer to place States on notice by introducing, at the beginning of the draft articles, a provision to the effect that, when granting most-favoured-nation treatment, States could make that treatment subject to certain conditions; specific reference would be made to such conditions as material reciprocity and the exclusion of national treatment. A provision of that kind would help States to protect themselves against their own mistakes. In form, it would be rather like article 19 (Formulation of reservations) of the Vienna Convention on the Law of Treaties.<sup>7</sup>

The meeting rose at 1 p.m.

<sup>6</sup> United Nations, *Treaty Series*, vol. 401, p. 76.

<sup>6</sup> See 1335th meeting, paras. 4-7 and 49.

<sup>7</sup> 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. 291.

## 1338th MEETING

Thursday, 26 June 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

## Most-favoured-nation clause

(A/CN.4/266;<sup>1</sup> A/CN.4/280;<sup>2</sup> A/CN.4/286)

[Item 3 of the agenda]

(continued)

## DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 13 (The right of the beneficiary State under a most-favoured-nation clause to national treatment)<sup>3</sup>  
(continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 13 in the Special Rapporteur's fifth report (A/CN.4/280).

2. Mr. ELIAS said that the doubts he had previously expressed about article 13 had not been dispelled.<sup>4</sup> The idea behind the article was a logical corollary of earlier provisions of the draft, but the text was framed in too absolute terms.

3. There was much to be said for Mr. Šahović's suggestion that an element of flexibility should be introduced into article 13. It should state explicitly the idea, which Mr. Ushakov appeared to regard as implicit in the present text, that national treatment could be claimed only if the most-favoured-nation clause was agreed by both parties to be unconditional. Unless that point was made clear, the article would be open to the criticism made by Mr. Ago.

4. Another point was that the national treatment to which article 13 referred must relate to the same subject-matter as the most-favoured-nation clause. Unless that limitation was accepted, the most-favoured-nation clause would give the beneficiary State benefits which had never been contemplated at the time of making the agreement.

5. He suggested that the Drafting Committee should reword the article so as to cover those two important points. The text as it stood, and particularly paragraph 2, might deter many States from accepting the draft.

6. The scholarly commentary prepared by the Special Rapporteur showed that there was not much precedent for drafting article 13 in such absolute terms. A qualifying phrase on the lines suggested by Mr. Kearney was essential.<sup>5</sup> The same considerations had led Mr. Tsuruoka to suggest the inclusion in paragraph 1 of

the proviso "Subject to the provisions of the present articles".<sup>6</sup> His own view was that the changes would have to go much further.

7. The interesting suggestion by Mr. Pinto, that the first part of the draft should include a provision placing States on notice,<sup>7</sup> deserved careful consideration. In view of the importance of article 13, however, it was not possible to solve the problem entirely in that way; the text of the article would have to be amended.

8. Mr. SETTE CÂMARA said that he had already expressed his support for the idea underlying articles 13 and 14. The question of national treatment could not be ignored; the most-favoured-nation clause and the national treatment clause were the two legs of the same body, as exemplified by the GATT. If the Commission were to omit one of those elements, it would be submitting a lame draft to the General Assembly. The Commission was not concerned with the respective merits of most-favoured-nation clauses and national treatment clauses; its task was to frame rules that conformed with the reality of contemporary international relations.

9. The rule set out in article 13 proceeded from the inexorable logic of the whole draft. If national treatment was granted to a third State, the beneficiary State was certainly entitled to claim that treatment as being most-favoured-nation treatment. That result could not be escaped, unless the Commission were to introduce a contrary rule into the draft—a course no one had proposed.

10. States knew how to protect their interests. It was open to them to exclude national treatment from the operation of the most-favoured-nation clause, but they must do so when negotiating the clause. The same result could not be achieved through the treaty according national treatment to a third State, because for the beneficiary State that treaty was *res inter alios acta*. The whole subject was governed by the law of treaties, in which the will of States was paramount.

11. The same method could be followed in dealing with the case, mentioned by Mr. Pinto, of national treatment accorded by a coastal State to a landlocked State. Beneficiary States would have to waive their right to claim that treatment under the most-favoured-nation clause. A procedure of that kind existed under the GATT.

12. The discussion had shown the need to include article 13 in the draft. Some members had maintained that the rule it contained was self-evident, but others had expressed doubts about its validity. He himself believed that articles 13 and 14 accurately reflected present world conditions. Paragraph 2 of article 13, and possibly also article 14, was already covered by the contents of earlier articles, however, and might perhaps be dropped.

13. As to the doubts expressed by Mr. Elias, it should be remembered that the articles were being discussed on first reading; the Commission would take the reactions of governments into account when it came to the second reading.

<sup>1</sup> Yearbook . . . 1973, vol. II, pp. 97-116.

<sup>2</sup> Yearbook . . . 1974, vol. II, Part One, pp. 117-134.

<sup>3</sup> For text see previous meeting, para. 5.

<sup>4</sup> See 1336th meeting, para. 46.

<sup>5</sup> See previous meeting, para. 34.

<sup>6</sup> *Ibid.*, para. 28.

<sup>7</sup> *Ibid.*, para. 38.



14. Sir Francis VALLAT observed that paragraph (2) of the commentary to article 13 (A/CN.4/280), referred to the British practice regarding the relation between national treatment and treatment accorded under a most-favoured-nation clause. In a broad sense, it was indeed the British practice that the mere description of a certain treatment as "national treatment" did not exclude it from the operation of the most-favoured-nation clause. That idea, however, was much less absolute than the one expressed in article 13 as it now stood.

15. Because of its excessive rigidity, article 13 would be difficult for many countries, probably including the United Kingdom, to accept. It dealt with national treatment in much too general, isolated and rigid a manner, and States would probably be reluctant to accept the risk of its possible consequences.

16. In the Special Rapporteur's excellent commentary, he thought that undue weight was perhaps given to the views of Mr. Pescatore. He had attended the meeting of the Institute of International Law to which paragraph (8) of the commentary referred, and could vouch for the fact that Mr. Pescatore's general views on *ejusdem generis* had had little appeal for the membership of the Institute as a whole. The discussion had proved that the question was a controversial one. Otherwise, the commentary showed that there was only a very limited amount of national judicial precedent to justify a provision as pointed and as rigid as article 13 in its present form.

17. He believed that the problem underlying article 13, and other similar articles, was that its provisions had emerged from a need for co-operative action in the economic field. Two factors had to be taken into account: the wish of developing countries to get the benefit of economic co-operation, and the fear of States that they might find themselves obliged to grant certain benefits without receiving anything in return. At some stage in its work on the most-favoured-nation clause the Commission would have to face that problem. In any case, governments were bound to raise it in their comments.

18. Governments would undoubtedly wish to know why the absolute rule on national treatment contained in article 13 did not take the question of economic unions into account. The members of such unions were sure to stress that they had established a system under which certain mutual benefits relating to customs, trade or employment, were extended by the members to each other within the context of the institutions they had set up. It was unthinkable that the member States should have to extend those same benefits to any outside State with which they happened to have a most-favoured-nation clause. If an inflexible approach was maintained, something was bound to break, and it would not be the economic unions, but the most-favoured-nation clause. The countries concerned would repudiate the most-favoured-nation clauses by which they were bound and would not enter into any more agreements including such clauses. It had to be recognized that there was a direct link between the treatment accorded by the members of an economic union to each other and the obligations they assumed.

19. There was another reason for caution. Other articles of the draft covered the same ground as article 13, but in another way. In particular, articles 6 *bis* and 6 *ter* clearly differentiated between unconditional and conditional most-favoured-nation clauses. That distinction disappeared in article 13, paragraph 2 of which actually reproduced the terms of paragraph 2 of articles 6 *bis* and 6 *ter*.

20. Since the subject-matter of article 13 was covered by the general articles in the earlier part of the draft, it could safely be relegated to the commentary. Dealing with that subject-matter in a separate article gave it an exaggerated importance against the background of the earlier articles. In addition, that treatment had the even greater drawback of implying that there might be other exceptions to articles 6 and 6 *bis*, apart from the one referred to in article 13.

21. The general trend of the discussion had led him to change views to some extent, and he was now prepared to accept the inclusion in the draft of some provision on national treatment, provided that it did not impose an absolute obligation. That provision should be placed immediately after articles 5, 6, 6 *bis* and 6 *ter* and might be drafted to read: "Unless otherwise provided, national treatment accorded by a State cannot be relied upon by it as such to exclude the application of a most-favoured-nation obligation." Wording of that kind would be less dangerous and less rigid than the present text of article 13, especially paragraph 2.

22. Mr. BILGE said that he had not taken part in the procedural discussion occasioned by article 13, because he had already intimated that he was not opposed to studying national treatment, though only from the point of view of its relationship with the most-favoured-nation clause.<sup>8</sup>

23. He thought the principle stated in paragraph 1 of article 13 was acceptable, provided that the reference to national treatment was regarded as a rule of *renvoi* and that the beneficiary State could benefit from national treatment only under conditions similar to those which would be applicable to most-favoured-nation treatment. In that respect, paragraph 2 of the article was far from satisfactory.

24. If the national treatment clause did fulfil a function of *renvoi*, he saw no objection to mentioning it in article 13; and State practice indicated that that was so. States had shown a desire to obtain favourable treatment for their nationals through the process of *renvoi*. The cumulation of national treatment and most-favoured-nation treatment was evidence of the same desire. In the past, the national treatment clause had performed only two functions; a function of *renvoi*, and a safeguard function where the most-favoured-nation clause did not enable the beneficiary State to obtain treatment as favourable as that which it could obtain through the operation of the national treatment clause. After the Second World War, however, States had shown a tendency to form groups at the continental level, because they wished to obtain sufficiently large markets for their

<sup>8</sup> See 1330th meeting, para. 12.

products. That grouping phenomenon met a modern need which had been felt by both developed and developing countries. Under those conditions, the national treatment clause had to perform a function of unification. It would thus be wrong to place on an equal footing national treatment clauses in agreements establishing economic groups and the national treatment clauses in other treaties, which performed a function of *renvoi*. It would accordingly be advisable to explain in the commentary that article 13 applied to the national treatment clause only in so far as that clause performed a function of *renvoi* only.

25. The conditions for the enjoyment of national treatment should certainly be the same as those for the enjoyment of most-favoured-nation treatment, though subject to a reservation for economic associations of States. For if the promise of most-favoured-nation treatment had been made before the establishment of an association of States, it would naturally cover the benefit of national treatment, where applicable. But that result was contrary to the purpose of such an association. Since it was inconceivable that the granting State could unilaterally amend the most-favoured-nation clause, the fate of that clause must be governed by general international law, which provided either for negotiations between the States concerned or for denunciation of the clause. On that point, he shared the view of the Special Rapporteur. Unlike the Special Rapporteur, however, he considered it necessary to deal separately with the case in which a most-favoured-nation clause was granted after the formation of an association of States, since such a clause was contrary to the purpose of the national treatment which the members of the association granted to each other. It was important to take that case into consideration, because it reflected a phenomenon which was not transitory and was of increasing concern to the developing countries.

26. Mr. RAMANGASOAVINA observed that article 13 was perfectly logical and was the outcome of the reasoning followed by the Special Rapporteur. It was natural for a beneficiary State under a most-favoured-nation clause to receive national treatment when the granting State accorded national treatment to a third State. The discussion which had taken place did not relate to the statement of that principle; it had arisen from the existence of associations of States, which had already been referred to during the consideration of article 8 *bis*.<sup>9</sup> On that occasion, reservations had been made concerning the difficulties in applying the most-favoured-nation clause that might be encountered by granting States which were bound by multilateral agreements providing for the mutual granting of advantages between the parties.

27. His examination of State practice had led the Special Rapporteur to affirm that there were no implicit exceptions for economic unions. It would, indeed, be difficult to provide, in a universally applicable provision, for exceptions in favour of such unions. There was no denying, however, that in its present form article 13 might inconvenience both States that had already formed

economic or customs unions and new States that wished to form such unions. For instance, a number of countries in East Africa, which had nothing in common but their youth and the desire to find the economic system most advantageous for their development, might decide to form an economic union and to accord each other national treatment. Far from facilitating trade within the region, that arrangement might complicate it, since each country might be linked to a different State by a most-favoured-nation clause; Mozambique might be linked to Portugal, Tanzania to the Commonwealth and China, Somalia to the Soviet Union, and Madagascar to France.

28. A provision could be logical, like article 13, without necessarily being equitable. Even if countries had, of their own accord, promised most-favoured-nation treatment before entering into a union favourable to their economic development, they should be able to relax their commitments. It was true that in view of the *pacta sunt servanda* principle they could not break their promises, but the maxim *rebus sic stantibus* should, in certain cases, allow them to adapt their commitments to new circumstances. The most-favoured-nation clause, which was an old institution, should not restrain the modern tendency to establish regional economic unions. It was certainly not out of childishness that certain new States had acceded to the GATT, article XXIV of which dealt with questions of most-favoured-nation treatment and even of national treatment. Nevertheless, when they formed a regional union, those States might be hampered by the promises of most-favoured-nation treatment made in accordance with that Agreement.

29. It was certainly difficult to provide for exceptions in favour of unions of that kind, because their status was not well-defined; they might be economic zones, customs unions or free-trade areas. Sir Francis Vallat's suggestion would undoubtedly enable the Commission to relax the rule in article 13 and to allay the fears some States might feel. The draft conventions prepared by the Commission should be accepted by as many members of the international community as possible; and many States might hesitate to accept a convention one provision of which would limit their freedom to form economic unions by not allowing them to review their commitments. Article XXI of the GATT provided a procedure for derogation in favour of economic areas and customs unions which, although it was not applicable *mutatis mutandis* to article 13, could be taken into consideration to make that provision more flexible.

30. With regard to paragraph 2 of article 13, he thought that, like article 14, it contained only principles implicit in other articles of the draft. He would have no objection to retaining those provisions, however, if the Special Rapporteur could show that they provided some clarification.

31. Mr. USHAKOV said that most of the problems raised during the discussion were not genuine problems. In stating the rules in articles 13 and 14, the Commission was carrying out codification, not progressive development of international law. If it affirmed that the national treatment which a granting State could promise to a

<sup>9</sup> See 1334th meeting, paras. 26 *et seq.* and 1335th meeting.

third State did not come within the scope of the most-favoured-nation clause, it would be engaging in regressive development.

32. The rule in article 13 was an absolute rule. The question whether the granting State must accord national treatment through the operation of the most-favoured-nation clause could only be answered affirmatively or negatively; it was inconceivable that the granting State could accord national treatment only in part, or accord it to one beneficiary State under the most-favoured-nation clause and not to another. Since the answer to that question was to be found in contemporary international law, the members of the Commission could not cast doubt on it.

33. Nevertheless, that absolute rule should be distinguished from the practice of States. States which did not wish to grant national treatment to a certain country with which they were linked by a most-favoured-nation clause need only refrain from concluding an agreement with a third State providing for national treatment. They could also, when granting most-favoured-nation treatment, exclude national treatment from their promise to the beneficiary State. In any case, the national treatment promise could not present any great danger, because it was limited, in practice, to a particular sphere, such as shipping. States could be expected not to act like children and to grant only the advantages they really wished to grant.

34. With regard to the example of the economic zone, given by Mr. Pinto, if an exception was made for landlocked countries only, coastal countries would not be able to claim the same treatment by invoking a most-favoured-nation clause. Moreover, the Special Rapporteur intended to draft a special rule in favour of developing countries, which would be applicable to the whole draft.

35. Referring to the comments made by Mr. Ago, who considered that the rules of general international law were not applicable to the member countries of the Common Market, he asked what was the basis of that alleged exception. Before such an exception could be invoked, its existence must be proved.

36. Mr. QUENTIN-BAXTER said he believed that both the discussion on article 13 itself and the procedural discussion on the articles immediately preceding it had been extremely useful and that they were perhaps vital to the place the draft articles would finally attain in codified international law. The Commission should remember that its task was not to advocate or to discourage the use of the most-favoured-nation clause, which was a matter for political judgement, but to review and describe the reality of international practice. It should bear in mind, however, what the international community was likely to do when confronted with a particular rule. It would seem, for example, that if the Commission were merely codifying law, without introducing any progressive element, States would have no difficulty at all in agreeing that the rules proposed should apply to the whole range of existing most-favoured-nation agreements. The belief he shared with other speakers, that States would not so agree, suggested that the rules now proposed did not

reflect all the aspects of the complex international heritage the Commission was studying.

37. The members of the Commission should take great care, in discussing the rigidity or flexibility of the rules to be enunciated, not to become mere legal historians rather than contributors to living law. While it was true that they could temper the rigidity of certain rules, for example, by adding special provisions in favour of developing countries, too great a reliance on such exceptions would, again, suggest some defect in the basic rules and militate against their application.

38. In his view, the main problem with rules which, like that in article 13, seemed logical in themselves but had none the less caused concern, was that, as Mr. Ago had said, the facts of international life were far more complex than the rules proposed. In particular, he had the impression that most-favoured-nation treatment agreements had been drawn up, in the past, within a specific sphere of expectation. That was to say that, while States had understood well enough that they must see how the proposed agreement would affect them in other contexts, must be prepared to concede to other States what they conceded to one State, and must weigh up the advantages to themselves, they had not made allowance for the fact that, in its absolute logic, the most-favoured-nation clause had almost infinite repercussions.

39. Agreements had been concluded in a certain climate, so that, as Mr. Ago had also pointed out, there were circumstances in which a distinction could be drawn between national treatment granted conditionally and that granted unconditionally. While it had not always been adequately reflected in the texts of agreements, there had sometimes been a common assumption that there were definite limits to the parallels which could be drawn. It was that fact, more than any other, which would make States reluctant to apply to existing most-favoured-nation treatment agreements rules designed as a simple, logical whole; and if the Commission did not make allowance for that fact, its work would be akin to that of the taxidermist who preserved for display an example of an extinct species. Mr. Pinto had referred to the cigarette packet which carried a warning against the use of its contents; in the same way, codification of the most-favoured-nation clause as an institution might easily serve as a warning to the international community that the clause should not be used, or at least that the first paragraph in the agreement should set aside the Commission's rule.

40. He was far from believing that article 13 had no value, but the Commission should be extremely careful not to draft rules which, as abstract propositions, were of compelling logic, but which a government would not wish to apply to all the relevant agreements in which its country was involved.

41. While he could see merit in the kind of formulation suggested by Mr. Pinto,<sup>10</sup> he hoped that the article would be drafted not as a warning, but in a way which indicated recognition that the rule had its place in a series of obligations and should not be of excessive finality. States

<sup>10</sup> See previous meeting, para. 38.

entering into a most-favoured-nation treatment agreement did so on the basis not only of careful consideration of its foreseeable effects, but also of a belief that the clause would not be turned against them and applied to a situation wholly different from that which they had in mind. They undoubtedly recognized that there would be many situations in which automatic application of the clause would be impossible and it would be necessary to discuss on which of several possible bases the parallel could be drawn; but it was certainly not their intention to forgo, in important matters of State policy, their sovereign right to change their institutions.

42. The articles adopted by the Commission should not encourage States to look to the situation of State succession or to invoke a doctrine as undisciplined as that of *rebus sic stantibus* to escape their obligations. Balance was to be found in existing law, such as the Vienna Convention on the Law of Treaties and the doctrine of national sovereignty over natural resources, and he was very much drawn to Sir Francis Vallat's suggestion concerning the institution of a proper balance in the present context also.

43. Mr. HAMBRO said that, although article 13 might appear harmless on the surface, the discussion had shown that it could be dangerous to the special kind of treaty relations with which the Commission was concerned. He had found Mr. Kearney's remarks and the very wise words of Mr. Pinto particularly pertinent in that respect. At the 1214th meeting of the Commission he had expressed views which were entirely in accordance with those just stated by Mr. Quentin-Baxter. He had said that the whole way in which the question of the most-favoured-nation clause had been approached looked too much to the past, and that for the future it was important to bear in mind both the relationship between the clause and the treatment to be accorded to developing countries and that between the clause and the new forms of customs and economic unions.<sup>11</sup> He had thought that discussion of the clause would otherwise be entirely unrealistic and was therefore very grateful for the Special Rapporteur's announced intention to take those points into account.

44. Mr. Ushakov had said that the Commission should adopt the principle stated in draft article 13 before considering the possible need for exceptions. His own view, however, was that if a large number of the members of the Commission believed that important exceptions would be required, consideration should be given to accommodating them before the rule was approved. Alternatively, the general rule could be adopted subject to the introduction of exceptions at a later stage.

45. He could agree to the article as it stood, on the express understanding that the Commission would revert to it when it came to discuss the problems of the developing countries and economic unions.

46. Mr. USTOR (Special Rapporteur) said that the discussion on article 13 and on the general problems connected with the most-favoured-nation clause had shown how great was the desire of members of the Commission to include in their report to the General Assembly articles and commentaries which would be both valid

and in keeping with the requirements of contemporary international life. The articles he had drafted were intended as a supplement to the Vienna Convention on the Law of Treaties and, in dealing with the most-favoured-nation clause, the Commission found itself in a world of legal rules relating to a special kind of treaty. Much had been said during the discussion which somehow went beyond purely legal considerations.

47. It was natural for States contemplating the conclusion of a most-favoured-nation clause, or, indeed, of any treaty, to approach the matter with caution, since whatever the nature of the agreement, they would be held to it. Other features common to all types of treaty were the possibility that later generations would find them too imprecise or too burdensome to apply, and the safeguards provided by the general law of treaties, which could be invoked in the event of a fundamental change of circumstances on the basis of *rebus sic stantibus*.

48. He accordingly believed that there was no difference between treaties which contained most-favoured-nation clauses and those which did not, and that that was a basic point to be borne in mind. It was, of course, true that the operation of the most-favoured-nation clause, which was contingent on the treatment given to a third State, was dependent on things outside the treaty containing the clause, but such a treaty was not basically different from any other undertaking. The danger which Mr. Pinto saw as inherent in the most-favoured-nation clause was inherent in any treaty by reason of the changing pattern of international life. Moreover, some of the rules embodied in the Vienna Convention on the Law of Treaties were quite rigid, but that did not mean that, when circumstances arose which made their application difficult, States could not find a solution through negotiation, arbitration, or the like.

49. He noted that many speakers had agreed that draft article 13 was logical. He accepted Mr. Tammes' criticism that the commentary might be considered somewhat meagre, but he thought it provided adequate proof that the article was in conformity with State practice. No member of the Commission had pointed to an instance of practice contrary to the thesis he defended in the article. It was, of course, possible that a court had given a contrary judgement, but it was his considered opinion that article 13 corresponded to the underlying principles of the most-favoured-nation clause.

50. However incompletely expressed, the rule stated in the first paragraph of article 13 was a rule, and one whose existence the Commission must admit. To submit an alternative version was always a very constructive way of expressing the problems raised by a text and he was grateful for the proposal by Sir Francis Vallat. He agreed with Mr. Tsuruoka that points covered in other articles, such as the *ejusdem generis* rule and the unconditional or conditional nature of the most-favoured-nation clause, would apply to the situation contemplated in article 13.

51. He thought that Mr. Ago, who had been strongly critical of the second paragraph of the article,<sup>12</sup> had

<sup>11</sup> *Yearbook* . . . 1973, vol. I, p. 64, paras. 62-64.

<sup>12</sup> See previous meeting, paras. 14-16.

approached the matter from the standpoint of the now outmoded "American" conditional most-favoured-national clause. Modern thinking held that, unless otherwise specified in the agreement, the operation of the clause depended on the kind of treatment accorded to the third State, not on the conditions under which that treatment arose, and that was what he had had in mind in drafting the paragraph.

52. He believed that the Commission would be doing its duty in regard to the problems raised for economic unions by provisions such as articles 8 and 13 if it described those problems in detail in the commentaries. He did not think the exceptions referred to by Mr. Hambro yet formed part of the body of international law. On the contrary, he believed the present situation was that all economic associations advised their members to make individual arrangements to bring their prior commitments into harmony with their obligations as members of the group. He undertook to reflect both the supporting and the opposing views as fully as possible in the commentary to article 13.

53. The CHAIRMAN suggested that article 13 should be referred to the Drafting Committee.

*It was so agreed.*<sup>13</sup>

The meeting rose at 1.05 p.m.

<sup>13</sup> For resumption of the discussion see 1352nd meeting, para. 56.

### 1339th MEETING

*Friday, 27 June 1975, at 10.10 a.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

*Members present:* Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

#### Most-favoured-nation clause

(A/CN.4/266;<sup>1</sup> A/CN.4/280;<sup>2</sup> A/CN.4/286)

[Item 3 of the agenda]

(continued)

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR ARTICLE 14

1. The CHAIRMAN invited the Special Rapporteur to introduce article 14 in his fifth report (A/CN.4/280), which read:

##### *Article 14*

##### *Cumulation of national treatment and most-favoured-nation treatment*

If in an agreed sphere of relations both most-favoured-nation treatment and national treatment are stipulated by the granting State, the beneficiary State has the right to claim that treatment which it deems more favourable.

<sup>1</sup> Yearbook ... 1973, vol. II, pp. 97-116.

<sup>2</sup> Yearbook ... 1974, vol. II, Part One, pp. 117-134.

2. Mr. USTOR (Special Rapporteur) said that it seemed appropriate to have an article dealing with the not uncommon situation in which the beneficiary State was promised both most-favoured-nation treatment and national treatment in a particular field. The rule in article 14 was in conformity with the generally accepted principle that the beneficiary State could choose between the two standards of treatment. He knew of nothing in legal theory to invalidate the idea underlying article 14. National treatment was usually more favourable than most-favoured-nation treatment, since in most spheres nationals had wider rights than the best-treated foreigners, but there were instances of States granting to foreigners or foreign products special advantages not enjoyed by their nationals.

3. Mr. PINTO said that, since the phrase "agreed sphere of relations" had been used elsewhere, care should be taken to ensure that it was used with the same meaning in all cases. He took it to mean the relations created by treaties between the granting State and third States, on which the effect of the most-favoured-nation clause was in a sense superimposed.

4. There appeared to be some ambiguity about the choice before the beneficiary State. The use of the word "cumulation" in the title seemed to imply that the benefits of most-favoured-nation treatment were added to those of national treatment and that the beneficiary State could pick and choose among the whole range of benefits available under the two clauses, since the article stated that the beneficiary State had the right to claim "that treatment", not "that category of treatment", which it deemed more favourable. If the intended meaning was that the beneficiary State was required to choose between the two categories of treatment—most-favoured-nation treatment and national treatment—the wording should be made more specific.

5. Mr. ELIAS said he shared some of Mr. PINTO's concern about the wording. The underlying principle of article 14 was not as difficult to accept as that of article 13, but it needed to be formulated more clearly. The expression "agreed sphere of relations" had been found too imprecise in another context and an alternative had been found. The drafting Committee might do the same for the present article.

6. He was not sure why the treatment referred to in article 14 was expected to be "stipulated" by the granting State; if the intention of the article was to establish the concept of the co-existence of two types of treatment, it would be better to do so without introducing the notion of stipulation.

7. He assumed that the reference to the beneficiary State's "right to claim" meant that it was entitled to the treatment in question. Although the title spoke of "cumulation", the article itself did not seem to entitle the beneficiary State to claim both types of treatment, but only to choose one or the other. It should be made clear which was intended.

8. Subject to drafting improvements, the article appeared to be acceptable and could be referred to the Drafting Committee.

9. Mr. AGO said he was fully convinced of the validity of the principle stated in article 14, which was merely a

concrete application of a general rule of the law of treaties. When a State was a party to two different agreements, it was entitled to take advantage of the more favourable agreement. He doubted, however, whether the term "cumulation" was the most appropriate, and thought it might perhaps be necessary to define its meaning more precisely, either in the text of the article or in the commentary. In point of fact, when a State benefited from two different agreements, one granting it national treatment and the other most-favoured-nation treatment, its freedom of choice was not freedom to choose one agreement or the other, but freedom to choose under each agreement the treatment most favourable to it. Thus, if national treatment was more favourable for persons, but most-favoured-nation treatment was more favourable for certain goods, the beneficiary State was entitled to choose, under each clause, the treatment it considered the more favourable. And the choice need not be made once and for all. If the beneficiary State had first been granted most-favoured-nation treatment and then national treatment, it could choose national treatment if it considered that more favourable than the other treatment. But if the granting State subsequently accorded more favourable treatment to a third State, the beneficiary State was entitled to change its initial decision and renounce national treatment in order to claim, under the most-favoured-nation clause, the more favourable treatment granted to the third State. The choice must thus be open to review at any time, so that the beneficiary State could always choose the treatment best suited to its interests.

10. Subject to those explanations, article 14 was in full conformity with the general principles of the law of treaties and should be approved.

11. Mr. KEARNEY said that article 14 stated the obvious, since its provisions operated automatically, on the basis of the actual most-favoured-nation treatment and national treatment clauses in effect in each case. For example, the relevant national treatment clauses in certain United States agreements with France and Iraq specified, additionally, that the treatment should be not less favourable than that accorded to any third country in similar situations. It was not a question of choice, but of a legal obligation on the part of the granting State to accord whichever treatment was the more favourable to the beneficiary State. There was no other possible interpretation of such a clause.

12. Sir Francis VALLAT said that the draft articles were leading further and further into the field of interpretation. Article 14 would have to be very carefully drafted to ensure that it was in harmony with the clauses used in practice. He agreed that the term "cumulation", which conveyed the notion of addition, did not accord with the substance of the article, which was concerned with alternatives and therefore a choice. The relevant provision in the 1642 Anglo-Portuguese treaty, cited in paragraph (1) of the Special Rapporteur's commentary (A/CN.4/280), was cumulative in that the granting State had to observe both the standard of most-favoured-nation treatment and the standard of national treatment. On the other hand, the multilateral convention cited in the same paragraph appeared to offer a choice between most-favoured-nation treatment and national treatment.

13. Article 14 should not have implications which might cut across the actual effect of clauses used in practice. If it specified choice, it would tend to limit the freedom of the beneficiary State in particular cases. Some cases were complicated: for example, if there was an obligation to accord national treatment or some specific right under a bilateral treaty, and an obligation to grant most-favoured-nation treatment under a multilateral treaty, it would be very difficult to interpret the relationship between the two obligations.

14. It might therefore be better to draft the article in the form of a saving clause rather than to establish a specified right of choice, which would require circumstances to be defined and could not cover all cases. He agreed with the general idea underlying article 14, however, and thought the text should be referred to the Drafting Committee for improvement in the light of the comments made by other speakers.

15. Mr. TSURUOKA said that, in principle, he supported the idea expressed in article 14. The article would be very useful to foreign ministries, because the cases it covered were often encountered in the practice of the international community. It was obvious that it was the beneficiary State that chose the treatment it deemed the more favourable and not the granting State that decided. But he was prepared to go further than Mr. Ago in that respect, for he considered that two shipping companies belonging to a country entitled to both national treatment and most-favoured-nation treatment could, if they wished, choose different treatments—one national treatment and the other most-favoured-nation treatment.

16. Mr. ŠAHOVIĆ said that in the light of State practice he too supported article 14. He had some doubts about the use of the word "cumulation", however, and thought that the wording of the article should be made clearer. It was necessary to decide whether the Commission wished to stress the right to the most favourable treatment or the right to freedom of choice.

17. Mr. RAMANGASOAVINA said he did not think that article 14 raised any problems, because it was quite normal for a granting State which granted both most-favoured-nation treatment and national treatment to allow the beneficiary State to choose between the two. It might, of course, be asked how a most-favoured-nation clause could contain provisions that were more favourable than provision for national treatment. Cases of that kind were rare, but it did sometimes happen that most-favoured-nation treatment gave the beneficiary State greater advantages than national treatment. In such a case, he saw no reason why the beneficiary State should not benefit from the cumulation of national treatment and most-favoured-nation treatment, provided that such cumulation did not make the nationals of the granting State feel frustrated because they thought they were being less well treated than the nationals of the beneficiary State.

18. He had no difficulty with the apparent contradiction between the title and the body of the article; for although one got the impression that the beneficiary State chose between national treatment and most-favoured-nation treatment, the choice was theoretical in most cases, for in reality most of the advantages of national treatment



and most-favoured-nation treatment were generally the same. It was only in borderline cases that it was really possible to choose between the two treatments. Thus article 14 was perfectly acceptable, subject to minor improvements by the Drafting Committee.

19. Mr. QUENTIN-BAXTER said that, in its present form, article 14 appeared to deal equally with most-favoured-nation treatment and national treatment in enunciating a positive rule which applied to both. While it was appropriate to lay down a rule for most-favoured-nation treatment in the present context, he doubted the wisdom of doing so for national treatment. The proper function of article 14 seemed to be to indicate that a most-favoured-nation clause could not be interpreted restrictively to deprive the beneficiary State of any more favourable treatment to which it might be entitled by virtue of some other kind of grant.

20. Mr. SETTE CÂMARA said he agreed with Mr. Elias and Mr. Pinto that the Drafting Committee should reconsider the wording of article 14, especially the use of such terms as "cumulation" and "stipulated".

21. Referring to Mr. Šahović's doubts about whether the emphasis should be on freedom of choice or the most favourable treatment, he said that the virtue of the present text was that it did not refer to freedom of choice. It would be in conformity with the logic of the draft articles to place the emphasis on the most favourable treatment the beneficiary State was entitled to claim. A reference to freedom of choice might confuse States negotiating agreements; the question of the right of a State to choose the treatment it deemed the more favourable should be left open.

22. Mr. AGO said that, following the statement by Sir Francis Vallat, he wished to stress that national treatment was only one of the ways in which a State could grant to another State certain treatment for its nationals or its goods and grant such treatment direct, without reference to the treatment accorded to another State—which reference was characteristic of the most-favoured-nation clause. It was clear, however, that in the context of the draft articles it was necessary to cover the case of the choice between treatment accorded indirectly through the operation of the most-favoured-nation clause and treatment accorded direct under another agreement, which was not necessarily national treatment and could be either more or less favourable than national treatment. Article 14 should therefore be completed by another provision dealing with that case.

23. The Commission should remember that the interpretation of the agreements to which it was referring could lead to a different conclusion from that which followed from article 14. It should also make allowance, in each specific case, for the possible effect of the reciprocity clause.

24. Mr. BILGE said that he accepted article 14 with the same reservations as he had made in regard to article 13.

25. Mr. USTOR (Special Rapporteur) said that the concern expressed by members appeared to arise from the need to avoid any conflict between the draft articles on the most-favoured-nation clause and the relevant

provisions of the Vienna Convention on the Law of Treaties.<sup>3</sup> Since that Convention covered all treaty situations, it could be argued that there was no need for articles on the most-favoured-nation clause, especially those which appeared to lay down rules of interpretation, as they might be a source of confusion. As Mr. Tsuruoka had rightly pointed out, however, even a banal article which appeared to state the obvious, and the commentary to it, would help foreign ministries to draft most-favoured-nation clauses and to interpret them. In view of the wide diversity of most-favoured-nation clauses, however, the articles would have to be drafted very carefully.

26. Mr. Pinto's remarks about the term "agreed sphere of relations" were entirely justified and the point would be taken up in the Drafting Committee.

27. The reference to "cumulation" was perhaps incorrect in the present context, as it was intended to convey the notion of the co-existence of most-favoured-nation and national treatment clauses in certain cases, not of their combined application. Mr. Pinto had rightly interpreted it to mean that the beneficiary State should be entitled to choose between two different categories of treatment.

28. He agreed with Mr. Elias that the article should be made clearer; the word "entitled" had been used in previous drafts in preference to "the right" to claim.

29. The point made by Mr. Ago was quite valid, but would not be easy to express in the article; it could perhaps be dealt with in the commentary. For example, under the Convention on Co-operation in Maritime Commercial Navigation, cited in paragraph (1) of the commentary to article 14 (A/CN.4/280), the beneficiary State, in his opinion, could choose national treatment for port entry and most-favoured-nation treatment for loading and unloading operations. If the situation changed, the beneficiary State could always choose the best standard of treatment.

30. Mr. Tsuruoka's idea that different companies of the beneficiary State might be able to choose different standards of treatment seemed rather dubious.

31. He agreed with the remarks made by Mr. Šahović.

32. Mr. Sette Câmara appeared to interpret the term "cumulation" rather restrictively. If the beneficiary State had the right to claim the treatment it considered the more favourable, would it be entitled to claim less favourable treatment? The matter should be left to the beneficiary State's judgement unless otherwise agreed.

33. The CHAIRMAN suggested that article 14 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>4</sup>

#### ARTICLE 15 AND 16

34. The CHAIRMAN invited the Special Rapporteur to introduce articles 15 and 16 of his fifth report (A/CN.4/280), which read:

<sup>3</sup> 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.

<sup>4</sup> For resumption of the discussion see 1352nd meeting, para. 62.



### Article 15

#### *The commencement of the functioning of a most-favoured-nation clause*

1. An unconditional most-favoured-nation clause commences to function at the time of its entry into force provided that at that time the treatment specified in the clause has been accorded by the granting State to a third State. If that treatment is accorded later, the clause commences to function at the time of the according of that treatment.

2. A most-favoured-nation clause subject to material reciprocity commences to function at the time defined in paragraph 1 provided that at that time material reciprocity has been established between the granting State and the beneficiary State in respect of the treatment specified in the clause. If that reciprocity is established later, the clause commences to function at the time of the establishment of that reciprocity.

### Article 16

#### *Termination or suspension of the functioning of a most-favoured-nation clause*

1. The functioning of an unconditional most-favoured-nation clause shall be considered as terminated or suspended at the time of the termination or suspension of the operation of the clause—or at the time of the termination or suspension of the according of the favoured treatment by the granting State to a third State—whichever is earlier.

2. The functioning of a most-favoured-nation clause subject to reciprocity shall be considered as terminated or suspended at the time defined in paragraph 1 or at the time of the termination or suspension of the material reciprocity between the granting State and the beneficiary State in respect of the treatment specified in the clause—whichever is earlier.

35. Mr. USTOR (Special Rapporteur) said that articles 15 and 16 were technical articles, dealing respectively with the commencement of the functioning of a most-favoured-nation clause and the termination or suspension of that functioning. The content of the two articles was largely based on the relevant rules of the Vienna Convention on the Law of Treaties.

36. The articles referred to the “functioning” of the most-favoured-nation clause and not to its operation, because the expression “operation of the treaty” was used in the Vienna Convention in a different sense. A treaty provision was “in operation” within the meaning of the Vienna Convention when it had entered into force and had not been terminated or suspended. In draft articles 15 and 16, however, the reference was to the most-favoured-nation clause being brought into play by the granting of certain benefits to a third State. A most-favoured-nation clause could be in force and “in operation”, in the sense of the Vienna Convention, without actually functioning, if no grant had been made to a third State.

37. Paragraph 1 of article 15 dealt with the unconditional most-favoured-nation clause and specified that it commenced to function on two conditions: first, that the clause itself should be in force; secondly, that the treatment specified in the clause should have been accorded by the granting State to a third State. Paragraph 2 of the article dealt with a most-favoured-nation clause subject to material reciprocity; for such a clause to be brought into play, a third condition was neces-

sary, namely, that material reciprocity should be established.

38. Apart from the commencement of the functioning of the clause and the termination or suspension of that functioning, which was the subject of article 16, there was another point on which it would be desirable to include an article in the draft. The most-favoured-nation clause was a floating device: its functioning changed according to the treatment extended in the course of time to the third State or States by the granting State. He had attempted to draft an article to deal with that particular characteristic of the most-favoured-nation clause, but had not so far succeeded in producing a satisfactory text. He would welcome comments by members on that question.

39. Mr. KEARNEY said that the principles stated in article 15 were irreproachable, but the expressions used caused him some misgivings. In the first place, the reference in paragraph 1 to the “treatment specified in the clause” was ambiguous. It would raise the problem of the extent of the treatment extended by the granting State to a third State. Moreover, the use of the word “specified” made the provision unduly restrictive. He suggested that the first sentence of paragraph 1 be redrafted to read: “An unconditional most-favoured-nation clause commences to function at the time of its entry into force with respect to any favours within the scope of the clause that have been accorded by the granting State to a third State”.

40. He noted that, in both sentences of paragraph 1, the verb “to accord” was used in a sense somewhat different from that in which it had been used elsewhere in the draft. It would be necessary to define the meaning of that term, so as to explain whether it was intended to refer to the physical activity of extending a favour or to the contractual commitment to grant it.

41. A similar problem arose with regard to the interpretation of paragraph 2 of article 15, which referred to material reciprocity being “established” between the granting State and the beneficiary State. That passage could be construed as referring to either of two different things: the contractual commitment to grant material reciprocity, and the actual putting into effect of material reciprocity. The same problem arose with regard to the second sentence of paragraph 2, dealing with the case in which reciprocity was “established later”. There again, the provision could be interpreted as referring to a subsequent treaty arrangement or to the mere fact of reciprocal treatment.

42. Mr. USHAKOV said that article 15 was acceptable in principle, though he doubted whether it was necessary to specify that the most-favoured-nation clause commenced to function at the time of its entry into force, since the draft articles obviously referred only to most-favoured-nation clauses that were in force. Of course, a distinction could be made between the *de facto* situation and the *de jure* situation; hence it might be advisable to indicate that as soon as the granting State had granted to a third State the treatment specified in the clause, the clause began to function not only legally, but also in practice.

43. He hoped the Special Rapporteur would try to improve the drafting of article 15 in order to clarify the legal rules deriving from the situations it described.

44. Mr. AGO said that he would confine his comments to paragraph 1 of article 15. The Special Rapporteur had distinguished, in that paragraph, between the validity of the most-favoured-nation clause and its effectiveness. Like any treaty rule, the clause entered into force at a certain time, but it might be at another time that it produced its practical effects, that was to say, that it brought into the relations between the granting State and the beneficiary State the treatment provided for in the agreement between the granting State and the third State.

45. Those distinctions raised some terminological problems. For instance, the words "commences to function" well expressed the fact that the functioning of the clause began at a certain moment, but it was open to question whether the French expression "*prend effet*" was equally clear. Similarly, it was not appropriate to speak of the treatment "specified" in the clause, because a most-favoured-nation clause was characterized precisely by the fact that it did not itself specify a particular treatment, but merely referred to treatment which would be "specified" in an agreement between the granting State and a third State.

46. The rule set out in paragraph 1 of article 15 was well founded, but the drafting could be improved.

47. Mr. USTOR (Special Rapporteur) said he wished to thank Mr. Kearney for his valuable drafting suggestions; they would be duly taken into consideration by the Drafting Committee.

48. The verb "to accord" had been used in article 15 in the sense of the legal commitment to grant a right, not of actual or physical performance. The relevant point in time was the point at which the entitlement to the right arose.

49. Similar considerations applied to the use of the word "established", in paragraph 2 of article 15. The reference was to an agreement between the granting State and the beneficiary State; it was that agreement which "established" a clear situation and fulfilled the condition of material reciprocity specified in paragraph 2 for the entitlement to most-favoured-nation treatment.

#### THE CASE OF CUSTOMS UNIONS AND SIMILAR ASSOCIATIONS OF STATES

50. The CHAIRMAN said that a member wished to raise a point arising out of the discussion at an earlier meeting.

51. Mr. HAMBRO said that during the discussion on articles 8 and 8 *bis*, the Special Rapporteur had said that he hoped to introduce, later, an exception applying to international trade associations of developing countries.<sup>5</sup> That was an outcome of the interesting study in chapter IV (The most-favoured-nation clause and the different levels

of States' economic development) of his sixth report (A/CN.4/286).

52. The Special Rapporteur's sixth report also contained a chapter III entitled "The case of customs unions and similar associations of States", which contained much valuable material. He had read that chapter carefully, but thought that matters were perhaps not as simple as was suggested in its concluding paragraphs. He thought that the subject of customs unions and similar associations of States should be discussed by the Commission at some stage.

53. Mr. USTOR (Special Rapporteur) said that the ideas which he had put forward at some length in chapter III of his sixth report were connected with his proposed article 8 *bis*, dealing with the relationship between the most-favoured-nation clause and multilateral agreements. During the debates on articles 8 and 8 *bis*, that subject had not been discussed very thoroughly. His own view on the matter, following his study of State practice, was that there was no basis for drafting a rule of international law on the relationship between the most-favoured-nation clause and customs unions, either as codification or as progressive development. The fact that the granting State had entered into a customs or economic union could not have the effect of terminating the validity of that State's pledge to grant most-favoured-nation treatment.

54. Of course, problems arose in regard to the impact of economic groups on the most-favoured-nation clause; but any conflicts that arose had to be settled by negotiation or other means of peaceful settlement. In practice, such matters were dealt with in the agreements relating to existing economic unions, which contained provisions requiring their members to take steps lawfully to terminate their most-favoured-nation obligations.

55. He had thus reached the conclusion that it was not desirable to draft an article on the subject. A State which was faced with conflicting obligations arising out of a most-favoured-nation clause and membership of an economic union should take steps to terminate one or the other set of obligations in the proper manner.

The meeting rose at 12.50 p.m.

#### 1340th MEETING

Monday, 30 June 1975, at 3.10 p.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

<sup>5</sup> See 1334th meeting, para. 44.

**Most-favoured-nation clause**  
(A/CN.4/266;<sup>1</sup> A/CN.4/280;<sup>2</sup> A/CN.4/286)  
[Item 3 of the agenda]  
(continued)

**DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR**

**ARTICLE 15** (The commencement of the functioning of a most-favoured-nation clause) and

**ARTICLE 16** (Termination or suspension of the functioning of a most-favoured-nation clause) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of articles 15 and 16 in the Special Rapporteur's fifth report (A/CN.4/280).

2. Mr. USTOR (Special Rapporteur) said that in the light of the discussion at the previous meeting, he had redrafted the two articles to read as follows:

*Article 15*

*The commencement of the functioning of a most-favoured-nation clause*

1. An unconditional most-favoured-nation clause commences to function at the time of its entry into force provided that at that time a favourable [favoured] treatment has been accorded by the granting State to a third State. If that treatment is accorded later, the clause commences to function at the time of the according of that treatment.

2. A most-favoured-nation clause subject to material reciprocity commences to function at the time defined in paragraph 1 provided that at that time material reciprocity has been established between the granting State and the beneficiary State. If that reciprocity is established later, the clause commences to function at the time of the establishment of that reciprocity.

*Article 16*

*Termination or suspension of the functioning of a most-favoured-nation clause*

1. The functioning of an unconditional most-favoured-nation clause terminates or is suspended [even if the clause or the treaty containing it remains in force] at the time when a favourable [favoured] treatment accorded by the granting State to the third State terminates or is suspended.

2. The functioning of a most-favoured-nation clause subject to material reciprocity terminates or is suspended also at the time when that reciprocity is terminated or suspended between the granting State and the beneficiary State.

3. In both articles he had replaced the phrase "the treatment specified in the clause", which had attracted some criticism during the discussion, by the alternative expressions "a favourable treatment" and "a favoured treatment", leaving the choice between them to subsequent discussion. The use of one of those two expressions would indicate more adequately the treatment which was extended to the third State and to which the beneficiary State laid claim under the most-favoured-nation clause.

4. In paragraph 1 of article 16, he had placed the words "even if the clause or the treaty containing it remains in force" in square brackets, because Mr. Ushakov had pointed out, in connexion with article 15, that it was not necessary to refer to the entry into force of the most-

favoured-nation clause, since the draft articles could only apply to clauses that were in force.<sup>3</sup> If the words in square brackets were dropped, there would be no reference to entry into force in article 16. He had not found it possible, however, to avoid such a reference in article 15.

5. There had been some discussion about the meaning of the word "accorded". The commentary to article 15 explained that, in the case of an unconditional most-favoured-nation clause, the right of the beneficiary State accrued, without any request on its part, immediately upon the third State becoming entitled to favoured treatment. The question arose, however, whether the application of the most-favoured-nation clause would begin automatically as soon as favoured treatment was extended, irrespective of whether any commitment was subscribed by the granting State. His own view on that point was that favoured treatment should be deemed to be "accorded" whenever the third State received favoured treatment in law or in fact; the entitlement of the beneficiary State would then follow automatically. That point would be explained in the commentary.

6. The question of material reciprocity did not arise in connexion with such matters as customs duties; the beneficiary State was simply concerned to have equal treatment with its competitors in the granting State's market, and the question of reciprocity was irrelevant. Material reciprocity was of significance, however, in such matters as consular privileges: a State was interested in securing for its consuls in another country the same advantages as it was prepared to grant to that country's consuls.

7. The functioning of a most-favoured-nation clause subject to material reciprocity was not automatic. The beneficiary State had to establish that reciprocity existed; that process could require an exchange of letters or some other formality in the relations between the two States concerned. Paragraph 2 of article 15 accordingly referred to material reciprocity having been "established between the granting State and the beneficiary State".

8. The text of article 16 had been shortened. Paragraph 1 referred to the case of an unconditional most-favoured-nation clause which was valid and in effect, but which did not function because the favoured treatment accorded by the granting State to the third State had terminated or had been suspended. Paragraph 2 stated that the functioning of a most-favoured-nation clause which was subject to material reciprocity terminated or was suspended whenever that reciprocity itself terminated or was suspended between the granting State and the beneficiary State.

9. Mr. ELIAS said the Special Rapporteur deserved the Commission's thanks for having simplified the wording of articles 15 and 16. After the present discussion, those articles would have to be carefully examined to see whether the essential ideas embodied in them could be presented even more clearly.

10. In drafting article 15, five essential elements had to be borne in mind. The first was that the rule stated in

<sup>1</sup> Yearbook ... 1973, vol. II, pp. 97-116.

<sup>2</sup> Yearbook ... 1974, vol. II, Part One, pp. 117-134.

<sup>3</sup> See previous meeting, para. 42.

it was intended to provide guidance where the wording of a most-favoured-nation clause did not give sufficient details about the "functioning" of the clause—to use the terminology of articles 15 and 16. He himself was not persuaded of the wisdom of departing from the language used in the Vienna Convention on the Law of Treaties, which referred to the "operation" of a treaty or of a treaty provision.<sup>4</sup> The Drafting Committee should consider that point.

11. The second element was the statement of the three conditions for the operation of the most-favoured-nation clause: the entry into force of the treaty containing the clause; the extension to a third State of favoured treatment by the granting State; and, in the case of a clause subject to material reciprocity, the existence of such reciprocity.

12. The third element was the right of the beneficiary State to invoke the clause as soon as the agreement between the granting State and the third State came into force; it was not necessary for the third State to claim the favoured treatment and begin to enjoy it. In paragraph (6) of the commentary to article 15 that view was mentioned as being the one upheld in State practice by, among others, the United Kingdom and by the United States. Special attention should be paid to that point in connexion with the reference to favoured treatment being "accorded" by the granting State. Care should be taken to choose the right wording to express that central idea.

13. The fourth element was that the rights to which the beneficiary State would be entitled covered all benefits granted to the third State, both before and after the entry into force of the most-favoured-nation clause.

14. The fifth element was that the most-favoured-nation clause came into operation regardless of the manner in which the favoured treatment was accorded to the third State. It did not matter whether the treatment in question was granted under a treaty or by means of internal legislation in the granting State.

15. In both articles 15 and 16, he preferred the expression "favoured treatment" to "favourable treatment".

16. Article 16 should embody two essential ideas. The first was that whether the treaty containing the most-favoured-nation clause was in force or not, the clause itself terminated or was suspended as soon as the treatment extended by the granting State to the third State terminated or was suspended. The second idea was that where the clause was subject to material reciprocity, its operation would terminate or be suspended if reciprocity terminated or was suspended. The rule embodied in article 16 was a simple one and operated regardless of the causes that brought about the termination or suspension; that point should perhaps be stressed.

17. In conclusion, he urged that an effort should be made to formulate the rules in articles 15 and 16 even more briefly and simply, by focussing attention on the essential elements rather than on the great variety of particular situations that could arise.

18. Mr. PINTO said he noted the Special Rapporteur's explanation that the reference in articles 15 and 16 to favoured treatment having been "accorded by the granting State" meant accorded in law or in fact. If the intention was to cover cases in which the third State had been granted a favour in law, even if not implemented, that point should be made clear. The term "accorded" could be taken to mean either of two things: an undertaking by the granting State to extend a certain favour, regardless of implementation; or favoured treatment of the third State in fact.

19. In paragraph 2 of article 15, the words "material reciprocity has been established" needed clarification. As he saw it, some express understanding between the granting State and the beneficiary State would be necessary, or some action between the two parties would have to take place, to establish the mutuality of obligations.

20. Paragraph (1) of the commentary to article 15 explained the reasons for applying the word "functioning" to the most-favoured-nation clause, instead of the word "operation". He found, however, that the idea of the entry into force of the clause was presented in articles 15 and 16 in a somewhat isolated fashion. The whole subject was approached as though it might be possible for the clause to survive the treaty which contained it; but the most-favoured-nation clause could not exist without the treaty of which it formed part, and the Drafting Committee would have to consider including some reference to that treaty in the articles. There were two levels of operation: that of the treaty itself, which could terminate or be suspended; and that of the most-favoured-nation clause, which entered into force apart from the treaty, and could also terminate or be suspended.

21. Article 16 gave the impression that the functioning of the most-favoured-nation clause was entirely dependent on the existence of the rights granted to the third State. There was no doubt a logical connexion between the operation of the clause and the rights of the third State, but paragraph (10) of the commentary to article 16 gave examples of the continuation of most-favoured-nation treatment after the expiry of the grant of benefits to the third State. In those cases, the most-favoured-nation clause took on a life of its own.

22. Another point which required careful consideration was the position of innocent parties who had acted on the strength of the most-favoured-nation treatment granted to the beneficiary State; the rights of those parties would have to be protected in the event of termination or suspension of the operation of the clause.

23. Lastly, since the operation of the clause went hand in hand with the rights granted to the third State in regard to termination and suspension, it would seem appropriate to make provision for the resurrection of most-favoured-nation treatment if and when those rights of the third State reappeared.

24. Mr. THIAM thanked the Special Rapporteur for having redrafted articles 15 and 16 in the light of the discussion at the previous meeting. Referring to a comment by Mr. Kearney, he said that the word "accorded", as used in those two provisions, could apply both to a right granted to a third State by a treaty and to the imple-

<sup>4</sup> 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. 295, part V.

mentation of that right; hence it referred both to the legal and to the practical aspect of the problem. To overcome the difficulty it would probably be advisable, as the Special Rapporteur had suggested, to explain in the commentary how the word “accorded” was to be understood. It was, indeed, quite possible for a most-favoured-nation clause to enter into force solely by reason of the fact that a State had received a certain advantage, without its being stipulated in a treaty.

25. With regard more particularly to article 16, he thought the drafting had been improved, and that the expression “favoured treatment” was preferable to “favourable treatment”.

26. Mr. AGO said the Special Rapporteur was to be commended for his efforts to draft a clearer and more comprehensible text for the two articles, but they could still be improved in some respects. For instance, the expression “commences to function” might be translated into French simply by “*commence à fonctionner*”, rather than by “*prend effet*”. Again, the phrase “provided that ... a favourable [favoured] treatment has been accorded by the granting State to a third State” raised the question of the meaning of the qualification “favourable”. There were, in fact, two possible cases. In the first, the granting State had not yet granted to any third State a treatment which could bring the most-favoured-nation clause into effect; it was only at the moment when it did grant such treatment to a third State that the clause would begin to function. That case was covered by the second sentence of paragraph 1 of article 15. In the second case, the granting State had already accorded the treatment in question to a third State and the clause began to function immediately. If the granting State had accorded several different treatments to third States, it was naturally the most favourable treatment that must be applied.

27. In practice, it not infrequently happened that the purpose of a treaty was to accord a certain treatment to a State and that, by means of a most-favoured-nation clause, the granting State undertook to improve that treatment as soon as it accorded more favourable treatment to a third State. Consequently, for the most-favoured-nation clause to begin to function, it was not sufficient for the granting State to accord favourable treatment to a third State; the treatment must be more favourable than that accorded to the beneficiary State. The complexity of such a situation could give rise to difficulties in applying article 15 if it was worded as proposed.

28. The phrase “A most-favoured-nation clause subject to material reciprocity”, at the beginning of paragraph 2 of article 15, was more precise in the French version than in English. The rest of that provision was less happily worded; it provided that material reciprocity must have been “established” between the granting State and the beneficiary State at the time when the clause commenced to function. But material reciprocity was established at the time when the granting State concluded the most-favoured-nation clause. In fact, the rule stated in paragraph 2 of article 15 was subject to the condition that the beneficiary State must actually accord material reciprocity

to the granting State. He therefore suggested that the relevant part of the first sentence of paragraph 2 be amended to read: “provided that at that time material reciprocity has been [is] accorded by the beneficiary State to the granting State”.

29. With regard to article 16, he suggested that the word “functioning” be translated by the word “*fonctionnement*”, rather than the word “*effet*”. He drew attention to the fact that in the French translation the phrase “at the time when a favourable treatment” had been rendered by “*à la date à laquelle le traitement favorable*”.

30. In paragraph 2 of article 16, the reference to suspension of “reciprocity ... between the granting State and the beneficiary State” might not be clear to anyone who was not perfectly familiar with the subject. In fact, it was the reciprocal advantages the beneficiary State should accord which were suspended.

31. Mr. TSURUOKA said that he approved of the substance of articles 15 and 16. In view of the content of article 15, paragraph 2, however, he felt bound to repeat an observation he had made before concerning the general structure of the draft. Every time the Drafting Committee had dealt with the conditional most-favoured-nation clause, it had considered only the condition of material reciprocity. He doubted that attitude was right, particularly as article 6, as provisionally adopted by the Drafting Committee, read: “A most-favoured-nation clause in a treaty is unconditional unless that treaty otherwise provides or the parties otherwise agree.”<sup>5</sup> It should be made clear, either in an article or in the commentary, that a most-favoured-nation clause could be conditional on something other than material reciprocity if the treaty so provided or the parties so agreed.

32. Mr. KEARNEY said it was highly desirable to define more clearly the meaning attached to the term “accorded” in paragraph 1 of article 15 and paragraph 1 of article 16. The same was true of the term “established” in paragraph 2 of article 15. In view of the uncertainty of the meaning of those words in the context in which they were used, their definition could not be relegated to a commentary, which was by its very nature ephemeral. For the first of those two terms, an explanation on the following lines might be appropriate: “Most-favoured-nation treatment is accorded to a State when the granting State is obliged under a treaty to provide that treatment or in any other fashion does provide that treatment”.

33. With regard to the use of the term “establish” in connexion with the functioning of a most-favoured-nation clause subject to material reciprocity, he would welcome an explanation by the Special Rapporteur of the respective rights of the granting State and the beneficiary State.

34. Mr. USTOR (Special Rapporteur) said that in the case of a clause subject to material reciprocity, if the granting State gave favoured treatment to a third State, the beneficiary State could, in principle, claim the same treatment; the granting State, however, could retort that it wished to have from the beneficiary State the same reciprocal favours as it had received from the third

<sup>5</sup> See 1352nd meeting, para. 1.

State. It would thus be for the beneficiary State to decide whether it was prepared to give that undertaking of reciprocal treatment. Situations of that kind never occurred with regard to customs agreements, but were very common in the operation of consular agreements and establishment treaties.

35. Mr. KEARNEY said he understood from that explanation that the beneficiary State under a clause subject to material reciprocity had, in effect, a veto over the operation of the most-favoured-nation clause. That subtle point was not made clear merely by the use of the word "establish".

36. An interesting point had been raised by Mr. Pinto when he had pointed out that articles 15 and 16 seemed to deal with the most-favoured-nation clause in a vacuum. The question of the legality of the action taken by the granting State in relation to the third State could not be ignored. If, for example, the granting State illegally terminated, after three years, a five-year treaty with the third State, it would not seem unreasonable to conclude that the rights of the beneficiary State under the most-favoured-nation clause, if terminated, were also illegally terminated. There would seem to be room for a saving clause such as "Without prejudice to the legal rights of the parties".

37. He suggested that the Drafting Committee should make an effort to clarify the effects of the provisions of paragraphs 1 and 2 of article 16. Taken in conjunction, those two sets of provisions appeared to suggest two possibilities. The first was that the granting State, under paragraph 1, might terminate the effect of the grant of most-favoured-nation treatment by terminating or suspending the operation of the favoured treatment extended by it to the third State; the second was that the beneficiary State, under paragraph 2, might terminate the effect of the most-favoured-nation clause by terminating reciprocity, without the granting State having terminated the favour it extended to the third State.

38. Mr. SETTE CÂMARA said that the new versions of articles 15 and 16 submitted by the Special Rapporteur were a considerable improvement. Mr. Elias had made an accurate analysis of the five principles underlying those articles, with the substance of which he was in complete agreement.

39. He agreed with Mr. Ago's comment on the use of the word "favourable" in paragraph 1 of article 15. There were, of course, different degrees of favoured treatment, but since the article was intended to refer to most-favoured-nation treatment, that must be clearly stated, even if it entailed repetition. On the other hand, the wording of paragraph 1 of article 16 was too categorical, for it excluded the possibility, admitted in the Vienna Convention on the Law of Treaties, that the functioning of a most-favoured-nation clause could be terminated by consent of the parties.<sup>6</sup>

40. Sir Francis VALLAT said he merely wished to comment on a few points that had arisen as a result of the illuminating discussion on articles 15 and 16. He

found the new versions of those articles an improvement, and the supporting explanations given by the Special Rapporteur excellent. He hoped that the material in the commentary, especially that concerning article 15, would be included in the Commission's report. His remarks related to two specific questions: the meaning of the word "accorded" and the scope of articles 15 and 16.

41. First, he agreed that it would be desirable to clarify, in the commentary, the meaning of the word "accorded" as used in the articles; but that word was of such crucial importance, particularly in article 15, that he thought a definition should be included in the body of the draft. The same verb had been used in other draft articles, including articles 3, 4 and 6, possibly with slightly different meanings, and if it proved impossible to find a single definition which would cover all those cases, it might be advisable to replace the word in some of the earlier articles.

42. Secondly, articles 15 and 16 dealt with the functioning of the most-favoured-nation clause as a whole. It was a fact that in many, and possibly in most cases, at the moment when a treaty containing a most-favoured-nation clause was concluded, there was some treatment on the basis of which the clause would operate. For example, in the case of a clause concerning the treatment of consuls, there was bound to be some existing treatment which would entail the immediate functioning of the clause. Article 15 did not, however, indicate what would happen if the scope of the treatment accorded by the granting State to the third State was extended. It was clear from the article that, if the consuls of all States enjoyed limited immunity from criminal proceedings and the consuls of some States were subsequently granted full immunity from such proceedings, the clause would come into operation. It was not clear, however, what would be the situation if a new right then arose, as it would if certain consuls were granted immunity from civil proceedings. The Special Rapporteur should therefore include in the draft articles some provision concerning the commencement and suspension of the right to favoured treatment under the clause.

43. Mr. HAMBRO said the Commission should bear in mind that a detailed discussion of definitions at the present stage would delay its progress. The articles should be referred to the Drafting Committee, which already had an enormous amount of material to work on. He agreed with Sir Francis Vallat on the need to clarify the meaning of the word "accorded", but if the word was used in a different sense in earlier articles, it would be inappropriate for the Drafting Committee to introduce a definition applying only to articles 15 and 16. He hoped the word would be changed in the earlier articles.

44. Mr. QUENTIN-BAXTER said he could not help feeling that the articles might have been drafted in a way too closely analogous to the provisions usually found in treaties concerning their entry into force and termination. There were, of course, many situations in which a most-favoured-nation agreement was thought of in the same way as agreements between the granting State and third States, and it was in that rather formal context that most of the problems he had in mind arose.

<sup>6</sup> See article 54 of the Vienna Convention.

45. Like Sir Francis Vallat, he wondered whether it was generally true to say that a clause concerning most-favoured-nation treatment did not begin to function until it could be brought within the scope of a particular agreement between the granting State and a third State. The earliest and simplest forms of most-favoured-nation agreement had been quite unrelated to any knowledge or expectation of the granting of a particular type of treatment to any third State; they had been no more than an assurance that the beneficiary State would not receive treatment worse than that accorded to any other State. For example, an early form of most-favoured-nation clause concerning the treatment of aliens had stated that nationals of the beneficiary State would not be treated any worse within the territory of the granting State than any other foreigners. Since a granting State inevitably had dealings of some kind with nationals of a third State, the condition for the operation of such a clause was fulfilled from the outset. The idea that a most-favoured-nation clause came into operation later than the treaty containing it was therefore somewhat artificial.

46. Furthermore, the analogy to which he had referred hardly provided for the variety of situations that might arise. For example, the thing relied on might change, the rights granted to the third State might become more liberal, or, more simply, the practice of the granting State might change to the point where new norms were established. To refer simply to the termination or suspension of the clause, as in article 16, was to refer only to two extremes.

47. Judging from the material provided by the Special Rapporteur and from State practice, the criterion for the treatment of the beneficiary State was both the treatment which a third State actually received and that which it was entitled to receive. If that was indeed the case, the right of the beneficiary State to a particular kind of treatment would not be affected by the situation to which Mr. Kearney and others had referred, namely, that in which the granting State unwarrantedly withheld the same treatment from a third State. Might it not be said that a most-favoured-nation clause never began to function at any time other than that of the entry into force of the treaty containing it and never terminated at any time other than that of the termination of that treaty?

48. Mr. USHAKOV said that, as he understood it, the word "accorded" meant "accorded in law", not "accorded in fact", since it was only if the granting State had legally accorded certain treatment to a third State that the beneficiary State was entitled to the same treatment.

49. Mr. AGO, referring to article 16, paragraph 1, said that where the termination or suspension of the favourable treatment accorded by the granting State to a third State occurred before the termination or suspension of the application of the most-favoured-nation clause, it was only the particular treatment accorded to that particular third State which terminated or was suspended: the clause itself was in no way terminated or suspended in its effects, since other favourable treatment might be accorded to another third State.

50. Mr. USTOR (Special Rapporteur) said he was grateful to members for their constructive comments,

which had shown that articles 15 and 16 could be further improved. Perhaps the articles should speak, not of the beginning or ending of the operation of the most-favoured-nation clause, but of the beginning of the rights of the beneficiary State and of the way in which those rights would change with a change in the situation between the granting State and a third State.

51. It was evident that, where some form of the verb "to accord" appeared in conjunction with the phrase "most-favoured-nation treatment", the reference was to the conclusion of a treaty containing a most-favoured-nation clause, whereas the "according" of benefits by the granting State to a third State was not necessarily tied to the conclusion of a treaty. It was also quite obvious that, if the granting State incurred a legal obligation in favour of a third State, that was equivalent to the "according" of benefits to that State, but whether the expression included anything else was a question which required very careful thought.

52. Mr. Pinto had raised the problem of a beneficiary State which, being dependent on the operation of the clause, found itself in a serious situation when the granting State ceased to accord favoured treatment to a third State. His own view was that the risk that such a situation might arise was inherent in the operation of the most-favoured-nation clause. A State requiring a firm commitment would be advised to avoid the clause and to enter into a direct agreement with its potential benefactor.

53. Referring to a comment by Mr. Ago, he said that the meaning of the English phrase "material reciprocity" in article 15, paragraph 2, was not accurately conveyed by the French words "*avantages réciproques*"; the Drafting Committee preferred the terms "*réciprocité matérielle*" or "*réciprocité trait pour trait*", the latter being an expression used in private international law. The requirement of "material reciprocity" was never found in agreements on customs duties, but was often included in most-favoured-nation clauses and, whatever the difficulties of interpretation involved, it must be taken into account.

54. With regard to Mr. Tsuruoka's comments, he observed that all the draft articles on the most-favoured-nation clause were dispositive rules and could therefore begin with a phrase such as "Unless otherwise agreed". The Commission could make provision for the possibility that States would resume the use of the type of conditional most-favoured-nation clause no longer found, by indicating clearly in the commentary that while it did not dispute the right of States to conclude such agreements as they wished, it had based its draft on current practice.

55. With regard to the operation of the most-favoured-nation clause, if one believed that the beneficiary State acquired the same rights as the third State, it was hard to dispute Mr. Quentin-Baxter's contention that the right of the beneficiary State would not be affected if the granting State illegally terminated its favoured treatment of the third State. While he agreed with Mr. Quentin-Baxter that it was generally the case that a granting State already accorded to a third State the type of treatment to be covered by a given most-favoured-nation clause, that was



not always the case. For example, two States might conclude an agreement concerning favoured treatment of each other's consuls before the granting State had established consular relations with any third State.

56. Mr. Sette Câmara's objection that article 16 did not at present allow for termination of a most-favoured-nation clause by negotiation would be covered by the redrafting of articles 15 and 16 on the lines suggested by Sir Francis Vallat.

57. The CHAIRMAN suggested that articles 15 and 16 be referred to the Drafting Committee.

*It was so agreed.*<sup>7</sup>

The meeting rose at 6 p.m.

<sup>7</sup> For resumption of the discussion see 1352nd meeting, para. 89.

### 1341st MEETING

*Tuesday, 1 July 1975, at 10.15 a.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

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

#### Most-favoured-nation clause

(A/CN.4/266;<sup>1</sup> A/CN.4/280;<sup>2</sup> A/CN.4/286; A/CN.4/L.228)

[Item 3 of the agenda]

(continued)

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPOREUR

##### ARTICLE 0

1. The CHAIRMAN invited the Special Rapporteur to introduce article 0 (A/CN.4/L.228), which read:

##### *Article 0*

Treatment consisting of trade advantages accorded to developing States on a non-reciprocal basis by a developed State within a generalized system of preferences established by the latter cannot be claimed by another developed State as beneficiary of a most-favoured-nation clause.

2. Mr. USTOR (Special Rapporteur) said that the apparent contradiction between the two earlier decisions of the Commission, to the effect that in studying the most-favoured-nation clause it would confine itself to matters within its own sphere of competence, and that it would devote special attention to the manner in which the need of developing countries for preferences in the form of exceptions to the clause in international trade could be given expression in legal rules,<sup>3</sup> could be resolved if it were borne in mind that the most important task now

facing the international community was to change the present situation by helping the developing countries to reach the standard of living of the developed countries. While rapid progress towards that goal could be achieved only through direct measures such as disarmament, which would have world-wide economic effects and allow attention to be focussed on the central task, much could be done in the field of international trade. As a result of developments relating to that field in various United Nations bodies, including UNCTAD and the General Assembly, he believed that certain rules of international law were already discernible.

3. In its work on the most-favoured-nation clause, the Commission had so far been concerned with codifying, for the guidance of States, rules which had developed by custom over a long period of time. In discussing preferential treatment for developing countries, it was dealing with a kind of international law which had developed over a relatively short period in specialized United Nations organs. The Commission was not equipped to continue the discussions which had taken place in those organs, but it should take cognizance of the rules they had developed and incorporate them in the draft articles as a progressive element of international law. The direction in which the Commission should seek to move was, he thought, clearly defined by the quotation from General Principle Eight of annex A.I.I. of the recommendations adopted by UNCTAD at its first session, given in the Commission's report on the work of its twenty-fifth session.<sup>4</sup>

4. He was aware that he had perhaps not proceeded in a very orderly fashion in taking up the question of exceptions for developing countries in his sixth report (A/CN.4/286, chapter IV) before the Commission had completed its study of the general articles, but he had considered that it would be helpful to make a beginning in the vast field of international trade.

5. Article 0 was a modest beginning; it put forward a rule which had been accepted by practically all the members of UNCTAD, and thus by the great majority of States Members of the United Nations. The background to the emergence of that rule was traced in paragraphs 65 to 75 of his sixth report. The most important factor had been the agreement reached by the UNCTAD Special Committee on Preferences on a generalized system of preferences, to which he referred in paragraph 66 of the report. Under that system, States had the right, and perhaps the duty, to establish régimes under which they would grant the greatest possible preferences to the greatest possible preferences to the greatest possible number of developing countries. Preferences granted under the system were non-reciprocal, but the preference-giving countries were able to invoke certain safeguard mechanisms and to apply the principle of self-election in the choice of beneficiaries, due attention being given to the special situation of the least developed among the developing countries. The system, scheduled to apply for an initial period of ten years, also contained provisions relating to rules of origin and institutional arrangements.

<sup>1</sup> *Yearbook* ... 1973, vol. II, pp. 97-116.

<sup>2</sup> *Yearbook* ... 1974, vol. II, Part One, pp. 117-134.

<sup>3</sup> *Yearbook* ... 1973, vol. II, p. 211, para. 114.

<sup>4</sup> *Ibid.*, p. 212, para. 121.

6. Last, but for the purposes of the Commission not least, the Special Committee on Preferences had given the system legal status, recognizing that "no country intends to invoke its rights to most-favoured-nation treatment with a view to obtaining, in whole or in part, the preferential treatment granted to developing countries in accordance with Conference resolution 21 (II)." The granting of legal status to the generalized system of preferences represented an important innovation, since it introduced into the law of treaties an exception to certain commitments under the most-favoured-nation clause. The importance of the objective behind that exception had been recognized by the contracting parties to the GATT, which had agreed to waive the provisions of article I of the General Agreement for the duration of the generalized system of preferences.

7. It could thus be seen that, while the generalized system of preferences might not fully meet the wishes of the developing countries, it was widely accepted. It seemed reasonable, therefore, to say that it was generally recognized that States applying that system would be exempted from their obligations under the most-favoured-nation clause. Such a rule fell within the scope of the draft articles being prepared by the Commission, and that was why he had drafted article 0.

8. The article concerned only "Treatment consisting of trade advantages", because of the close link between it and the generalized system of preferences, which related only to trade. It would, of course, be possible to delete the words "consisting of trade advantages", since the article included the phrase "within the generalized system of preference".

9. The idea behind the article was that the purpose of granting preferences to developing countries was to help them to compete in international markets, to promote their own nascent industries and to overcome their dependence on agricultural products; if the preference-granting State was not freed from its commitments under most-favoured-nation clauses, the beneficiaries of those clauses would be able to claim the privileges accorded to developing countries and the whole purpose of the preferences would be nullified. The article differed from the generalized system of preferences in one respect, by providing that an exception to the most-favoured-nation clause would apply if most-favoured-nation treatment were claimed by another developed State. Under the generalized system of preferences, such an exception would apply whatever the nature of the State claiming the treatment. It would be for the Commission to decide whether it wished to restrict its own rule in that way.

10. The CHAIRMAN thanked the Special Rapporteur for his lucid explanation of a subject which was of great importance and interest not only to members of the United Nations, but also to the international community as a whole.

11. Mr. HAMBRO said it seemed to him that the Commission was now entering into the very heart of the matter. Quite a number of the articles considered so far had been of a technical nature and, while it was good to clarify them as guide to States, it was obvious that the questions

discussed in the last two chapters of the Special Rapporteur's sixth report were the most important with which the Commission had to deal. Unless they were tackled, the Commission's work would be nothing more than a historical foot-note to technical rules which avoided the essential issue.

12. The Special Rapporteur had shown how customary international law was being formed in the very important field of preferences for developing countries, and it was correct to say that new rules in that field were on the point of crystallization. He differed from the Special Rapporteur, however, in believing that the question could not be considered separately from that of exceptions to most-favoured-nation clauses for associations of States such as customs unions and free trade areas. Some of the reasons advanced by the Special Rapporteur for granting special preferences to developing countries were, from the strictly legal point of view, not very different from those adduced in the international community for granting exceptions to most-favoured-nation clauses to associations of States; much of the material the Special Rapporteur had used had been taken from discussions of the latter question in GATT and other bodies. International law was on the point of crystallizing in regard to customs unions and free trade areas, just as it was in regard to developing countries.

13. If the Commission included in its draft a rule relating solely to developing countries, readers might deduce *a contrario* that it had accepted as international law the right to grant special preferences to developing countries, but not the right to grant them to customs unions and free trade areas. It would not be sufficient to refer to associations of States in the commentary, as some might propose, since, as he could not repeat too often, it was the text of the article alone which would stand. Again, some might propose that, since the articles would not be retroactive, the Commission should include in the draft an article concerning new rules of international law, similar to article 4 of the Vienna Convention on the Law of Treaties.<sup>5</sup> But while it was quite right to say that States could include in future treaties a clause pertaining to associations, it should not be forgotten that they could take the same action in regard to the special needs of developing countries.

14. He could accept an article providing for preferences for developing countries as something which, for political and ideological reasons, was advisable and even necessary. All members of the Commission would agree that the struggle to close the gap between developed and developing countries was so important for the United Nations that it would be wrong to ignore it in rules such as those the Commission was drafting. With regard to the text before the Commission, however, much work remained to be done and he was grateful to the Special Rapporteur for having, with typical modesty, expressed his willingness to accept changes.

15. The resolution adopted by the Institute of International Law at its 1969 session at Edinburgh, quoted

<sup>5</sup> 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. 290.

in the annex to the Special Rapporteur's fourth report,<sup>6</sup> showed that the Institute had considered the question of the most-favoured-nation clause in international trade to be a complex and unresolved matter on which it had preferred to take no final decision. It also showed that the Institute had considered that there was a link between the two aspects of the problem he had been discussing, as could be seen from sub-paragraphs 2 (a) and 2 (b) of the operative part of the resolution.

16. The Commission should not commit the error of thinking that customs unions and free trade areas should be seen in a different political light from preferences for developing countries, on the grounds that they involved only the richer States; such associations of States existed in the third world also and they too required protection.

17. Mr. SETTE CÂMARA said that privileged treatment for developing countries, intended to ensure that the operation of the most-favoured-nation clause would not result in unequal and unfair competition, was now a general feature of relations between States. The contemporary situation was eloquently described in the quotation from Flory in paragraph 64 of the Special Rapporteur's sixth report (A/CN.4/286).

18. The Special Rapporteur had examined in detail the efforts of UNCTAD to establish a system of generalized, non-reciprocal and non-discriminatory preferences with, as stated in UNCTAD resolution 21 (II), the objectives of increasing the export earnings of developing countries, promoting their industrialization and accelerating their rates of economic growth. The system applied at present was far from achieving those objectives: it did not cover agricultural products, which constituted the main exports of the developing countries, but it did contain safeguard mechanisms and temporal restrictions which limited its value. Although discussion of such defects was outside its province, the Commission must ensure that its draft articles preserved the limited progress so far achieved; it must not impair the effectiveness of the steps already taken to ensure that developing countries received just treatment in their struggle for economic development.

19. For that reason, he found article 0 satisfactory. While it was cast in general terms and did not purport to treat the question of preferences for developing countries in detail, through its prohibition of the invocation of most-favoured-nation clauses by developed beneficiary States to claim benefits granted to developing countries, it fully preserved the principle of a privileged exception to the rule of equality.

20. He wished, to propose some amendments to the article, which were consistent with the trends already mentioned by the Special Rapporteur. The text, as amended, would read:

"Preferences and advantages accorded to developing States on a non-reciprocal basis by a developed State within a generalized system established by the latter or within multilateral arrangements cannot be claimed by another developed State as beneficiary of a most-favoured-nation clause."

21. The article should not be confined to trade alone, since even the problem of tariffs did not fall within the domain of trade *stricto sensu*, and there were other advantages relating, for example, to shipping and port facilities and the subject-matter of establishment treaties, which might be extended to developing countries at some later stage. The Commission should not bar the way to progress in the treatment of developing nations and the development of international law in that area.

22. He welcomed Mr. Hambro's expression of support for an article on the lines proposed by the Special Rapporteur. With regard to customs unions, free trade areas and similar associations, however, when the problem had been discussed earlier, the Commission had seemed to agree with the Special Rapporteur's conclusion that exceptions to the most-favoured-nation rule in favour of such groups could only be achieved by negotiation of a system of waivers, as was the case under the GATT, even as it applied to developing countries. The Special Rapporteur had further concluded that such associations of States could not claim an automatic exception to the rule unless they had become unions of States.<sup>7</sup>

23. The problem raised by Mr. Hambro did not concern the rich countries only; in Latin America, for example, there was a free trade association which its members valued highly. His difficulty was that he found it hard to envisage an exception for customs unions and the like at the same level as an exception for developing countries.

24. Mr. CALLE Y CALLE said that the delicate subject now under consideration had been thoroughly studied by the Special Rapporteur in his early reports. Questionnaires had been sent to international organizations concerned with the operation of the most-favoured-nation clause and with the problems of developing countries, and the replies received have been carefully examined. Those studies had clearly shown the existence of a duality of rules, applicable to industrialized States and to developing States.

25. The Special Rapporteur had noted that rules of international law on the preferential treatment of the weaker countries were in process of crystallization. His conviction on that point had now been confirmed and his proposed article 0 set out the appropriate new rule of international law. Up to the present, the Commission had been engaged in considering the traditional rules governing the most-favoured-nation clause, some of which derived from treaties signed as far back as the sixteenth century. The new proposal brought the Commission closer to the reality of the contemporary world, in which treaty provisions were being adopted to remedy existing inequalities, not merely to facilitate competition.

26. A new concept of the third States was emerging: it was connected with the customs unions and free trade areas being formed by the weaker States, which had found new strength in united action. Though it was a difficult point, he did not think that a uniform rule should be drafted to cover all such groups. One aspect of the matter

<sup>6</sup> Yearbook . . . 1973, vol. II, p. 116.

<sup>7</sup> See 1335th meeting, para. 56.

was the efforts being made in UNCTAD and other bodies to prevent discrimination against developing countries resulting from the operation of economic groups.

27. He agreed with Mr. Sette Câmara that the Commission should not enter into the question how the system of preferences operated. The language of article 0 should be broadened to cover more than the generalized system of preferences, which had its own institutional machinery. The article should state that all types of preferential treatment extended to developing States should be non-discriminatory and non-reciprocal. It should aim at eliminating the vertical preferences permitted under the GATT and granted by the European Economic Community; those advantages should be replaced, with appropriate compensation to their beneficiaries, by a generalized system of preferences.

28. The subject of customs unions and other groups had already been discussed in connexion with articles 8 and 8 *bis* and he believed that there was no State practice on which any exception could be based.

29. He supported article 0, subject to the changes of language proposed by Mr. Sette Câmara.

30. Mr. TSURUOKA said that article 0 remained within the framework of a draft on the most-favoured-nation clause, since it dealt not so much with generalized systems of preferences as such, as with the legal relationship between the clause and the treatment which a developed State might accord to developing countries under a generalized system of preferences.

31. For the article to be applicable, its scope must be clearly defined: it applied to trade advantages granted by a developed country to a developing country on a non-reciprocal basis.

32. The idea expressed in the article seemed faithfully to reflect State practice, in particular that of Japan. The matter was of great importance for present and future international relations, because of the role of the generalized system of preferences in promoting the economies of the developing countries and its consequences for the world. It was important to embody it in a provision permitting of lasting and universal application. In that connexion, it should be remembered that the generalized system of preferences adopted by GATT in 1971 had been considered at the time as a non-binding and temporary arrangement. Moreover, the category of countries not entitled to invoke the most-favoured-nation clause had not been specified—at least not formally. He therefore considered that the rule stated in article 0 would have more chance of universal acceptance if it were in harmony with the practice of GATT.

33. The better to take account of that practice, and for drafting reasons, he suggested that the article be amended to read:

“Without prejudice to international arrangements of a universal character, the most-favoured-nation clause may not be invoked to claim the right to treatment accorded by a developed State within a generalized system of preferences established by that State and which consists in trade advantages granted to developing countries on a non-reciprocal basis.”

He reserved the right to amend the opening phrase

“Without prejudice to international arrangements of universal character,”.

34. As GATT had not specified that it was the developed countries which must not invoke the most-favoured-nation clause, it might perhaps be better not to mention them separately as a category of countries which must not do so. Moreover, it was clear that developing countries were the natural beneficiaries of generalized systems of preferences and had no need to invoke a most-favoured-nation clause in order to benefit from such a system.

35. He would also suggest to the Drafting Committee that article 0 should, if possible, begin with the words “The most-favoured-nation clause”, since that clause was its subject.

36. With regard to the definition of the terms “developed State” and “developing country”, it should be noted that States granting tariff preferences usually designated the developing countries to which they were granted. Consequently, for the purposes of the application of article 0, States would naturally respect the designation by the granting State.

37. Mr. PINTO said he welcomed the Special Rapporteur’s draft article 0 because it met certain clearly discerned political needs. It was the first of a series of articles that should go some way towards safeguarding the interests of the developing countries, with which the Special Rapporteur was very much in sympathy.

38. The burning need to raise the level of development of the developing countries was not purely a matter of trade, but the problems of international trade themselves covered a wide field. They embraced not only tariff barriers, but also non-tariff barriers and legal barriers, with which UNCITRAL was dealing. Above all, the developing countries needed more favourable terms of trade.

39. The topic of the most-favoured-nation clause was mainly of interest to developed countries and to countries which were approaching a certain stage of development and wished to participate in existing markets. The Commission should be attentive to the needs and interests of all countries and should recognize that the present topic had a greater impact on some countries than on others. Some provisions were obviously needed in the draft articles to safeguard the position of the developing countries; the problem of framing such provisions was a difficult one, but was not beyond the capacity of the Commission. There was no need to deal with the general problem of development; it was simply a question of protecting the developing countries from the harsher effects of the general application of the rather rigid rules the Commission had so far adopted on the most-favoured-nation clause. Every effort should be made to ensure that the application of those rules did not hinder efforts to promote development.

40. He drew attention to the Declaration of Ministers approved at the GATT Ministerial Meeting on trade negotiations held at Tokyo on 14 September 1973.<sup>8</sup>

<sup>8</sup> GATT document MIN (73) 1.

Paragraph 5 of that Declaration stated that the comprehensive multilateral trade negotiations which it had been agreed to hold in the framework of GATT "shall be conducted on the basis of the principles of mutual advantage, mutual commitment and overall reciprocity, while observing the most-favoured-nation clause, and consistently with the provisions of the General Agreement relating to such negotiations". It added, however, that "The developed countries do not expect reciprocity for commitments made by them in the negotiations to reduce or remove tariff and other barriers to the trade of developing countries", and recognized "the need for special measures to be taken in the negotiations to assist the developing countries in their efforts to increase their export earnings and promote their economic development".

41. That paragraph of the Declaration concluded with the recognition by the Ministers of "the importance of the application of differential measures to developing countries in ways which will provide special and more favourable treatment for them in areas of the negotiation where this is feasible and appropriate". It was no exaggeration to say that the concluding phrase "where this is feasible and appropriate" virtually destroyed all the concessions promised in the whole of the well-intentioned paragraph which preceded it. It was easy to imagine the impatience of the developing countries when faced with such a situation.

42. The Special Rapporteur's article 0 and the articles to follow it would be a response to the legitimate concern of the developing countries. Article 0 as it stood was perfectly acceptable, but would not suffice by itself to attenuate the consequences for the developing countries of the strict application of the precise rules embodied in the articles so far adopted by the Commission.

43. With regard to the text of the article, he thought some definition of the terms "developing State" and "developed State" should be given, at least in the commentary. The term "developing State", in particular, was rather misleading. He himself preferred the term "underdeveloped State", which had been abandoned because of its alleged pejorative connotation. Unless some definition of those terms was provided, there was a danger that a country in need of assistance might be told that it must be a developed country because it had a big gross national product.

44. The growing impatience of the developing countries had become apparent at recent United Nations meetings on economic projects. It was clear that those countries would not be attracted by any future conference on the lines of the Tokyo meeting to which he had referred. The Commission should make every effort to prepare a draft for general application, which could attract the support of all countries and not merely of a few important trading nations.

45. Mr. ELIAS said that article 0 was one of the most crucial provisions in the whole draft. He believed that it would be generally welcomed not only by developing countries, but also by developed countries. It achieved the necessary balance between those two groups of States in the international community.

46. The subject under discussion was not just a matter of sentiment; it related to the principle of the duality of the rules applicable to the industrialized countries and to the developing countries, which was a new principle of international economic and trade law. He had been particularly impressed by the Special Rapporteur's statement that the most urgent task on hand was to come to the aid of the developing countries and that in the final analysis that was "a question of human rights, of the right to life, and often of the right to life alone, of several hundreds of millions of people" (A/CN.4/286, para. 64).

47. Some five articles would, he thought, be needed to deal effectively with the problems of the developing countries and of economic unions. Those articles should be framed in a spirit of universality, as urged by the Special Rapporteur in paragraph 65 of his sixth report.

48. States did not undertake commitments from purely altruistic motives. Both the developed and the developing countries had to come to some kind of terms in order to face contemporary developments in international trade relations. It was interesting that a new spirit of accommodation had been shown by the USSR in 1965, when it had introduced a unilateral system of duty-free imports from developing countries. Its example had been followed by Australia in 1966, and Hungary in 1968. The system of preferences for developing countries had been greatly extended since then, although the benefits granted varied from one developed country to another.

49. When discussing customs unions and similar associations of States, the Special Rapporteur had rightly referred to article XXIV of the GATT, which more or less settled the matter in the relations between the contracting parties to that Agreement. He had decided not to propose the creation of exceptions to the general rule for customs and other unions, but he had promised that the matter would be reviewed in the course of the further study of the functioning of the clause in relation to the developing countries (A/CN.4/286, para. 63). The point was worth stressing because it was becoming increasingly common for developing countries to organize groups of their own. The recent Lomé Convention, whereby 42 developing countries had entered into a special relationship with the European Economic Community, indicated the need for further thought on the matter. He considered that, out of a maximum of five articles to be included in the section that would begin with article 0, one or two should deal with the question of customs and other economic unions; the matter should not be left simply to the operation of article XXIV of the GATT.

50. With regard to the text of article 0, the Special Rapporteur himself had suggested certain changes which were obviously needed in order to make it acceptable. He himself would suggest a rewording of the article on the following lines:

"A developed State which is the beneficiary of a most-favoured-nation clause cannot claim any treatment accorded to a developing State within a generalized system of preferences established by another developed State."

He believed that wording of that kind would serve to lay down the essential principle.

51. It would also be necessary to introduce a provision to prevent a developed country from benefiting from a system of preferences indirectly, by invoking its most-favoured-nation clause with a developing country which had itself secured the benefit of the system of preferences by invoking a most-favoured-nation clause.

52. With regard to the suggestion that the term "developed State" should be defined, he did not think it was at all desirable to introduce a formal definition of either a "developed State" or a "developing State" into the draft articles themselves. Those terms were in common use in GATT, in UNCTAD and throughout the United Nations family and were well understood by all who participated in the work of international organizations. Some explanation in the commentary was necessary, however, because a State which was a developing State at the present time might well become a developed State by the time the draft became a convention.

53. Article 0 was a necessary provision, which reflected a realistic and sympathetic approach to the promotion of equality and justice in international trade relations, and it had his support.

54. Mr. THIAM said that article 0 was in conformity with the Commission's mandate, which was not only to codify international law, but also to develop it progressively. The substance of the article was acceptable, for it confirmed the now widely accepted need to promote the economic development of developing countries. As to the desirability of defining the expression "developing State", he agreed with Mr. Elias that it would be enough to include an explanation in the commentary without going into too much detail. In itself, the expression "developing State" was not very satisfactory, since all States were developing in so far as they made development plans every year. It would not be advisable to refer to the Group of 77, because the level of development of the States members of that Group varied widely.

55. The expression "generalized system of preferences" was in use in GATT, but it had been criticized by some members of the Group of 77. The developing countries which were associate members of the Common Market, and which considered that the former colonial Powers should grant them certain advantages, were afraid of losing those advantages if they became parties to a generalized system of preferences. Consequently, it would be better to use the expression "any system of preferences", which would apply both to the GATT system and to other systems.

56. The expression "trade advantages" seemed too restrictive. The development of the developing countries should not be considered only from the point of view of trade. Besides, an agreement such as the GATT applied not only to trade, but also to customs tariffs.

57. Unlike Mr. Hambro, who thought the question of customs unions should be dealt with in article 0, he himself considered that it was only after it had studied the substance of that article that the Commission should examine the possible effects of the most-favoured-nation clause on customs unions and free-trade areas.

58. Other articles relating to developing countries were needed to supplement article 0. In particular, there

should be a provision stating the rule that a developed State could not claim the treatment accorded by a developing State to another developing State.

The meeting rose at 1.5 p.m.

## 1342nd MEETING

Wednesday, 2 July 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

### Most-favoured-nation clause

(A/CN.4/266;<sup>1</sup> A/CN.4/280;<sup>2</sup> A/CN.4/286;  
A/CN.4/L.228/Rev.1)

[Item 3 of the agenda]

(continued)

### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR ARTICLE 0 (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 0 and drew attention to the revised text submitted by the Special Rapporteur (A/CN.4/L.228/Rev.1), which read:

"A developed beneficiary State is not entitled under a most-favoured-nation clause to the right to trade advantages accorded on a non-reciprocal basis by a developed granting State within its generalized system of preferences to a developing third State."

2. Mr. TAMMES said that the principle underlying article 0 had been known to the Commission from the beginning of its work on the most-favoured-nation cause in 1968. The Special Rapporteur's initial working paper on the topic had mentioned the interests of developing countries as an exception to the operation of the most-favoured-nation clause, and quoted a very significant passage from the proceedings of the Second Session of UNCTAD, which read: "The traditional most-favoured-nation principle is designed to establish equality of treatment . . . but it does not take account of the fact that there are in the world inequalities in economic structure and levels of development; to treat equally countries that are economically unequal, constitutes equality of treatment only from a formal point of view but amounts actually to inequality of treatment".<sup>3</sup>

3. The need for exceptions and preferences which followed from that recognition of the existing situation had been frequently restated since then, most recently in

<sup>1</sup> Yearbook . . . 1973, vol. II, pp. 97-116.

<sup>2</sup> Yearbook . . . 1974, vol. II, Part One, pp. 117-134.

<sup>3</sup> Yearbook . . . 1968, vol. II, p. 169, para. 28 and foot-note 35.

the Charter of Economic Rights and Duties of States adopted by the General Assembly in 1974.<sup>4</sup> It was therefore only natural that the Commission should now be considering an exception which appeared to have entered the general legal conviction of peoples—a conviction that was the only basis on which the Commission could present a rule of progressive development of international law.

4. At that point, two worlds met: the familiar world of the law of treaties, from which the present draft articles were derived, and the more dynamic world of international economic law, which had a different language and philosophy. That encounter had produced a proposal which gave grounds for some concern as to how such an expression as “generalized system of preferences” would be interpreted by national courts unfamiliar with the concept. He had been reassured on that point, however, when he had noted that that expression had found its way into the internal law of his own country through the incorporation of certain EEC regulations.

5. A serious difficulty was that article 0 dealt with a class of subjects of international law which was by definition ephemeral, since the very purpose of the article was to help eradicate under-development so that the category of developing States would disappear.

6. A more serious difficulty was that individual developing States might leave that category within a relatively short time, as a consequence of some unexpected change such as the discovery of new resources. Awkward problems of interpretation relating to time and substance would then arise. Should the interpreter go to the United Nations to ascertain whether, in a particular case, a claim based on the most-favoured-nation clause could still be sustained? Development was a gradual process which did not lend itself readily to the application of an objective criterion, such as *per capita* income, which could be applied by a court of law.

7. The Special Rapporteur had drawn attention to a comparable exception for the benefit of developing countries to be found in article 2, paragraph 3 of the International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly in 1966.<sup>5</sup> That provision permitted developing countries to determine to what extent they would guarantee to non-nationals the economic rights recognized in the Covenant. The Covenant, however, was not yet in force, so that there was no experience showing how national courts had handled that exception, which was comparable to the one provided for in article 0.

8. He shared Mr. Sette Câmara's concern over the question whether the effect of article 0 should be limited entirely to trade. As he saw it, the draft articles as a whole were intended to have general application to all sorts of benefits. Moreover, the idea behind article 0 was general: it was designed to remove or eradicate intolerable inequalities, and should apply to other things than trade—for instance, scientific and technical information. Article 13, paragraph 1, of the Charter of

Economic Rights and Duties of States<sup>6</sup> provided that “Every State has the right to benefit from the advances and developments in science and technology for the acceleration of its economic and social development”. In the light of that provision, access to information on science and technology appeared to be another matter that should be protected from the automatic operation of the most-favoured-nation clause.

9. He agreed with those members who thought that article 0 should be only the first of a series of special articles which he hoped would be submitted to the Commission at its next session.

10. Mr. RAMANGASOAVINA observed that for some time, and particularly since articles 8 and 13 had been considered, several members of the Commission had been urging the need to provide for greater flexibility in, or exceptions to, certain rules which they considered to be correct, but too strict for developing countries. The problems of those countries had caused concern to international bodies such as GATT and UNCTAD, and they had not been evaded by the Special Rapporteur, who had dealt with them in his sixth report (A/CN.4/286). Draft article 0, which would be followed by other articles relating to developing countries, seemed to meet that concern. Several members of the Commission had already stressed the merits of the article and observed that the international community had become aware of the need for solidarity between developed and developing countries, as a means of speeding up the development of the latter.

11. Article 0 should have a special place in the draft because it was a transitional provision. Studies by GATT and UNCTAD showed that the generalized system of preferences would be limited in duration, so that even if under-development continued for a long time yet, the only purpose of article 0 would be to deal with a temporary situation.

12. As he understood it, the expression “generalized system of preferences” meant all the trade arrangements—including arrangements relating to customs tariffs—designed to facilitate marketing of the products of the developing countries. The purpose of article 0 was to provide some protection for the developing countries on the world market. It was obvious that the prohibition contained in the provision applied only to developed countries; it could not prevent a developing country linked to a developed country by a most-favoured-nation clause from invoking that clause, merely because the developed country had special ties with other developed countries, within the Common Market, for example.

13. Article 0 was the outcome of the Special Rapporteur's study of the work of international bodies. In paragraph 74 of his sixth report, he had referred to the Charter of Economic Rights and Duties of States, article 18 of which provided that “Developed countries should extend, improve and enlarge the system of generalized non-reciprocal and non-discriminatory tariff preferences to the developing countries consistent with the relevant agreed conclusions and relevant decisions as adopted on

<sup>4</sup> General Assembly resolution 3281 (XXIX).

<sup>5</sup> See 1335th meeting, para. 53.

<sup>6</sup> See General Assembly resolution 3281 (XXIX).



this subject . . .". Article 0 was perfectly in keeping with that provision.

14. However, another provision of that Charter, article 21, stipulated that "Developing countries should endeavour to promote the expansion of their mutual trade and to this end may, in accordance with the existing and evolving provisions and procedures of international agreements where applicable, grant trade preferences to other developing countries without being obliged to extend such preferences to developed countries . . .". That provision, which applied to relations between developing countries, should be covered by another rule, whereby a developed State could not, as the beneficiary of a most-favoured-nation clause, claim the treatment accorded by a developing country to another developing country under a generalized system of preferences, within a regional organization or a customs union. The establishment of regional organizations, which were a form of co-operation supported by GATT and UNCTAD, should be encouraged.

15. Mr. USHAKOV said that article 0 was acceptable, but it seemed strange to be considering an exception to the general rules before they had been definitely established.

16. The term "developing countries" was difficult to define, either in the present context or in the context of international relations in general.

17. With regard to the exceptions which some members of the Commission would like to make in favour of customs unions and free-trade areas, he did not think they followed from any rule of international law. If the existence of such exceptions could be proved, the Commission should try to clarify the concepts of a customs union and a free-trade area, though in view of their great variety it would be extremely difficult to do so. He would therefore prefer that any questions raised by the existence of customs unions or free-trade areas should continue to be governed by practice.

18. Mr. ŠAHOVIĆ said that article 0 gave the Commission an opportunity to take up a basic question on which the success of its work on the most-favoured-nation clause depended. That question had some non-legal aspects and made it necessary to consider the historical role of the most-favoured-nation clause in the development of international economic and political relations. Since the discussions on the most-favoured-nation clause had begun, some members of the Commission had urged that the modalities of its application should be adapted to economic and political realities, particularly in regard to developing countries. The clause was one of the principal instruments of international trade, but it was characteristic of an international market based on a capitalist economy. Of course, that did not mean that it was going to disappear in the relatively near future, but it was undeniable that, in the interests of most of the members of the international community, the conditions for application of the clause should be changed in order to improve the situation of the developing countries. And to ensure the success of the Commission's work on the subject, the largest possible number of States should be able to support it.

19. Article 0 and the articles which would supplement it could either provide for exceptions to the general rules, or confirm the duality of the rules applicable in trade and economic matters. As a first step, the Commission should decide what those articles were to contain, so that the Special Rapporteur would know what direction to follow in his future work. In his sixth report, he had proposed drafting several provisions concerning developing countries, but he had finally confined himself to only one. It should now be decided which aspects of the situation of developing countries were to be taken into consideration and whether article 0 was sufficient to meet their needs. There were three problems: the relationship between the clause and developing countries, the relationship between the clause and organizations of developed countries, and the system of preferences, which might or might not be generalized. On that last point, it was essential to emphasize the non-discriminatory nature of generalized systems of preferences.

20. The question of customs unions and free-trade areas had been gone into very thoroughly by the Special Rapporteur in his sixth report. He had reached the conclusion that there was no customary rule of international law which allowed exceptions to the application of the most-favoured-nation clause in favour of customs unions or free-trade areas. There might be further development, however, and the Commission should not lose sight of that question. He agreed with the Special Rapporteur's conclusion. The question of customs unions and free-trade areas should be dealt with in the commentary or in the Commission's report to the General Assembly, so that the General Assembly might have a discussion on it, which would probably be very helpful to the Commission.

21. Mr. BILGE said that all the members of the Commission seemed to agree that article 0 met a need—the need to correct the inequality between developed and developing countries; their differences of opinion related only to the scope of the exception provided for in the article. In the commentary, the inequality between developed and developing countries was presented as a temporary phenomenon, but in fact it was impossible to say how long it would last. Moreover, if the measures taken to cure under-development proved ineffective, they would probably become permanent. For about 20 years, the international community had been trying to discover the causes of under-development, but its efforts had not yet been successful. The diversity of the measures successively recommended seemed to suggest that the phenomenon would continue for a long time to come. After confining itself to financial assistance, the international community had decided to provide the developing countries with technical assistance, then to improve their economic infrastructure and, finally, to improve their social infrastructure.

22. The rule stated in article 0 would have the effect of transforming into a legal obligation an intention of the developed States, namely, the intention not to claim the benefit of a most-favoured-nation clause in a specific case. The purpose of the provision was thus to establish confidence between developed and developing countries. That exception in favour of developing countries was

clearly only one measure, among others, calculated to remedy under-development.

23. With regard to the definition of developing countries, which were to be the beneficiaries of article 0, the Commission should content itself with the terminology employed in the United Nations and the specialized agencies. For about ten years groups of experts had been trying to draw up a functional definition of the concept, but that was not a task for the Commission.

24. The main difficulty with article 0 lay in its very limited field of application, which did not match the objectives listed by the Special Rapporteur in his sixth report, namely, to increase the export earnings of the developing countries, to promote their industrialization and to accelerate their rates of economic growth (A/CN.4/286, para. 66, I, 2). The exception in article 0 was limited strictly to trade. Moreover, it should be noted that reduction of customs tariffs was becoming less important, since the international community was moving towards the elimination of customs duties. It was therefore to be feared that a provision of such limited scope as article 0 would disappoint the developing countries. Without going to the other extreme, the Commission should perhaps consider making the provision rather broader. Like the other articles relating to the most-favoured-nation clause, article 0 might apply to matters other than trade. It would, however, be necessary to ensure that such an enlargement of its scope did not discourage developed States from granting benefits to developing countries within a generalized system of preferences.

25. Mr. USTOR (Special Rapporteur) said that after the discussion which had taken place, he thought it desirable to clarify the nature of the provision under study.

26. It was not the Commission's task to deal with the whole question of developing countries. All it could do was to discern the kind of rules that were being evolved in regard to those countries in United Nations bodies and elsewhere. It should examine the special benefits which were being granted to developing countries and determine on what types of benefit there was general agreement among States. If the Commission found that there was general agreement to grant certain special rights to developing countries, it should formulate a legal rule establishing the entitlement to those rights.

27. He believed there was general agreement among States that every developed State should accord the benefits of a generalized system of preferences to the developing countries. As he saw it, that right existed only in trade and customs matters; there was no basis in State practice for admitting any other exception to the operation of the most-favoured-nation clause. Though personally in full sympathy with the cause of the developing countries, he could not propose rules which went beyond what had been accepted by the appropriate economic bodies.

28. Mr. QUENTIN-BAXTER said he admired the careful preparatory work done by the Special Rapporteur in his sixth report on the questions both of developing countries and of economic unions, and his presentation of an article which, whatever its ultimate destiny, was the perfect vehicle for an essential discussion on those subjects.

He was particularly grateful to the Special Rapporteur for having emphasized the modesty of the role the Commission could play in relation to the needs of poor countries. Any suggestion that the Commission's drafts could redress the balance, or change the character of the old rules relating to the most-favoured-nation clause, was bound to lead to regrettable false expectations and misunderstandings.

29. Since other speakers had drawn attention to the limited character of the article, he would only point out that the system it proposed was in the hands of the developed States. Being familiar with the economic problems of small Pacific islands, which needed special rules to ensure that their limited output found a market, he had the objectives of the article very much at heart; it was clear, however, that the discretion left to the developed countries might lead them to apply the proposed system principally for their own benefit. Thus the article was merely an instrument which could be of use.

30. Again as other speakers had said, the concept of what was a developing country and what was a developed country changed as rapidly as the world situation. Consequently, the forward-looking part of the draft articles might soon seem out of date than those rules relating to the clause which had been derived from centuries of practice.

31. He also wondered about the place of the proposed rule in the draft. It had been said that the rule did not come within the sphere of *jus cogens*, that the Commission was not seeking to override the right of States to contract with others as they wished or challenging the *pacta sunt servanda* rule, but it would be unacceptable for the final version of the article to begin "Unless otherwise agreed . . .". The value of the article was, he supposed, that it would be accepted as a rule from which States would not wish to derogate. If the Commission saw the article merely as another aid to interpretation, its inclusion might contribute to the promotion of a benevolent principle, or merely draw attention to the weakness of the Commission's position. He was reminded of the example mentioned by Mr. Pinto of provisions which were ultimately governed by words such as "appropriate" and "necessary".<sup>7</sup>

32. He was sure of one thing, namely, that if the Commission's draft was to become part of codified law, it must have integrity. That was to say, it must be honestly founded on State practice and on the Commission's perceptions of organized world opinion, and it must be of one piece, rather than a set of rules and a set of exceptions. He was very chary of making sharp distinctions between the codification and development aspects of the draft—between the elements which had their origins in treaty law and development law respectively. The Commission should submit to the General Assembly a set of articles with a single, consistent, well-founded theme, not a set of tight rules counterbalanced by broad exceptions. He would be very nervous about the ultimate success of the Commission's efforts if consideration of the problems of developing countries led to the conclusion of special

<sup>7</sup> See previous meeting, para. 41.

exceptions for economic unions. In his view, the splendid work done by the Special Rapporteur provided a basis broad enough for the Commission to suggest to the General Assembly, and particularly to the representatives of developing States, basic propositions which should command their attention and perhaps their approval.

33. The Commission's findings on the most-favoured-nation clause were consistent with the conclusions it had reached on the relationship between the sovereignty and the international obligations of States when discussing other subjects. Time and time again, and most recently in connexion with State succession in respect of matters other than treaties, the Commission had had to ensure that obligations were placed in their proper context and did not constitute infringements of State sovereignty. In the case of a most-favoured-nation clause, the agreement was always drafted in a certain climate of expectation and within definite limits, so that when a change occurred so profound that it went beyond the scope of the matters agreed upon, it was generally understood that most-favoured-nation treatment agreements would not constitute a restraint on the ordinary freedom of States to develop in various ways. That being so, it seemed to him that both practice and sense of what was reasonable suggested that, when a State entered an economic union, obligations more limited than those it incurred thereby must yield to negotiation and amendment. It also seemed that understandings between parties to arrangements such as the GATT would normally be incorporated in any arrangements made by those States under the kind of generalized system of preferences referred to in draft article 0.

34. Consequently, the first step to be taken in submitting the venerable institution of the most-favoured-nation clause to the General Assembly was to say that the ideas on which it was based and which it contained were fully in harmony with modern thinking on the relative positions of State sovereignty and the obligations States assumed towards each other in everyday life.

35. The second step was to point out that, whatever its limitations and whatever the extent to which it had been overtaken by other economic rules and formalized multilateral negotiations, there were still fields in which the most-favoured-nation clause offered the less developed nations a chance to achieve a certain status. While that often implied no more than the right to participate in negotiations, the fact that under the clause developing countries always had a certain claim to have their views taken into account was extremely important. If it was clear that commitments under a most-favoured-nation clause must be amended if an economic union was formed—a fact which should be stated as a consequence of, not as an exception to, the Commission's rules—it was also beyond doubt that the beneficiary States had a right to be heard on such an occasion and to seek to preserve their own interests as far as possible.

36. If, as a third step, the Commission could point out the main difficulties and choices to which the extensive ramifications of the most-favoured-nation clause gave rise, the draft articles would be useful to small States which lacked the resources to engage in elaborate research

and which might need a reminder that the clause faced them with primary choices likely to have important consequences.

37. By following such a course, the Commission would place the most-favoured-nation clause, which by and large had served the world well, in a modern context. He was particularly wary of attempts to gain favour for the draft articles by stating principles which in themselves must be popular. While the principle stated in article 0 was in itself harmless, danger could arise if States were allowed to believe that it, or anything else the Commission adopted by way of exceptions, could radically alter the balance of the whole draft. Members of the Commission should bear in mind the difficulty of attracting parties to multilateral conventions. There were situations in which there would be overwhelming approval of the inclusion of a certain principle in a treaty, simply because it was of the kind which commanded general international support, but in which, when it came to ratification of the instrument, States would seriously reconsider their positions, finding a provision which had been of value as a demonstration of international solidarity to be empty as an international obligation.

38. For those reasons, he reserved his position on the value of article 0 as currently proposed, and on the inclusion of further exceptions in the draft.

39. Sir Francis VALLAT said he wished to make it quite clear at the outset that he was fully in favour of the idea underlying article 0. Nonetheless, he was filled with doubt and concern at the thought that the Commission had left an area of work in which it had dealt with legal principles and entered a new field where it was surrounded by economic and political problems and was on unstable ground. He had feeling that, under the guise of working towards the codification and progressive development of international law, members of the Commission were vying with each other to gain or preserve economic and political advantages, and he very much doubted whether that was the Commission's true function.

40. There was no general agreement, no practice or *opinio juris* on the basis of which the principle in article 0 could be seen as a general rule. What the Commission was proposing pertained to the progressive development of international law, but he had grave doubts as to whether the bases for the proposal were solid enough for the purposes of codification. The document on which the Special Rapporteur had relied most heavily, the Agreed Conclusions of the UNCTAD Special Committee on preferences (A/CN.4/286, para. 66), referred to a system that was to be reviewed after ten years. Since that system had been instituted in 1970, the review would take place at the very moment when the Commission could first hope that its draft articles would enter into force. Moreover, in section IX, paragraph 2, of the agreed conclusions, UNCTAD itself had emphasized the mobile, transitional character of the very concept on which the Commission had based its draft article. If the Commission did wish to make a rule based on something the economic and political world was likely to replace in five years' time, in order to avoid confusion it might be wise to use the language employed by UNCTAD.

41. There could be no absolute answer to the question whether a particular country was a developing country or not; everything depended on the relations between States, since a country might be considered developed by comparison with one country and still developing by comparison with another. That view was confirmed by the reference in paragraph 70 of the Special Rapporteur's sixth report to a preferential tariff scheme operated by Hungary, under which the test applied for the granting of preferences not only discriminated on a geographical basis, but relied on the relationship between the *per capita* national income of a developing country and that of Hungary itself. While he was delighted that Hungary should feel able to consider itself a developed country, he wondered whether it would wish to do so in all circumstances. Similarly, it was possible that certain States in Africa, for example, might be happy to accord preferences to other countries, but would themselves feel entitled to claim similar treatment from, for example, States in Europe.

42. He had called attention to the difficulty of defining the concept of a "developing country" for two reasons. The first was that the Commission should be careful lest, by using the term in a loose sense, it opened the back door to another kind of discrimination, as was entirely possible. While he agreed that there was no need for a formal definition of the term, the Commission must describe what it meant. It must employ in the commentary a common standard which would be objective, not a kind of sliding scale; and if the criterion was to be the comparison of some elements of the systems of the beneficiary and granting States, that should be stated in the article.

43. The second reason concerned the scope of the article. Given its historical background, the phrase "generalized system of preferences" clearly referred to a system under which one State would be granted lower customs tariffs than another. That, however, was very different from the concept of "trade advantages", which could take widely differing forms. It was more a matter of drafting than anything else, but as it stood, article 0 did seem to subject the broader concept of trade advantages to the limitations of the generalized system of preferences. If the Commission wished to refer to "trade advantages" as such, it would have to consider further just what the phrase meant and what standards would be applied.

44. In the light of the discussion, he feared that he would be misunderstood if he did not refer to the question of customs unions and free trade areas. He agreed with Mr. Hambro that that question was, in a sense, linked with the question of developing countries, as indeed it had been in the 1969 resolution of the Institute of International Law reproduced in the annex to the Special Rapporteur's fourth report.<sup>8</sup> At the same time, it fell into a different category; for the Commission was trying to find, within the context of the most-favoured-nation clause, generally agreed means of guaranteeing certain kinds of advantages to developing countries, and that, it must be admitted, was a quasi-political objective. The question of economic unions, on the other hand, was

essentially a legal matter, involving the relationship between the members of an association and their respective obligations under most-favoured-nation clauses. Hence it was not a matter to be covered by an exception, but a basic legal question which must be dealt with in the draft articles.

45. If the Commission made its draft articles so inflexible that there was no room for economic unions to exist side by side with the most-favoured-nation clause, it would have to rethink the entire project; for there was little doubt that, since the majority of States now found economic unions necessary to ensure their economic viability, the most-favoured-nation clause would disappear. The problem, then, was to draft the articles in such a way that when benefits were so closely integrated with an institution that they really ceased to be separate benefits, they would not fall within the scope of the ordinary most-favoured-nation clause.

46. Mr. AGO said that he was very much aware of the increasingly urgent need for a more effective solidarity among the members of the international community. He was becoming more and more convinced that it was imperative for the rich countries to make a genuine effort to narrow the growing gap between them and the poor countries. Like the Special Rapporteur, he was also convinced that something could be done in that direction even in the specific context of the most-favoured-nation clause; for if a more developed State decide to grant benefits to less developed countries with a view to achieving the general objective he had mentioned, it would be wrong for another rich State to profit thereby indirectly merely because, in its relations with the State in question, it happened to be the beneficiary of a most-favoured-nation clause.

47. Nevertheless, he could not help feeling somewhat troubled by the rule stated in article 0. First, the article made use of a number of notions and institutions which were not precisely defined, and which had implications in fields where lawyers were not always competent to express an opinion. Secondly, the actual notions of a "developed country" and a "developing country" were vague and the meaning of those expressions varied with the angle from which they were viewed, the context and the time. The distinction formerly made between rich countries and poor countries no longer corresponded to present conditions; developed countries were not necessarily rich, nor were under-developed countries necessarily poor. The Special Rapporteur had understood that if the expression "developing country" was given too broad a meaning, the system of the most-favoured-nation clause and its development possibilities might be very seriously impaired.

48. The Special Rapporteur had therefore himself adopted what he considered a more specific criterion: that of generalized systems of preferences. Those systems varied, however, and might even cease to exist. They were primarily "national" preference schemes which might have results that did not really meet the historical need article 0 was intended to satisfy. Consequently, he wondered whether, by referring to generalized systems of preferences, the Commission would achieve its objective, or whether it would only be codifying systems of

<sup>8</sup> Yearbook . . . 1973, vol. II, p. 116.

preferences based on certain national interests, rather than on the general interest of the international community and its least privileged members.

49. Mr. REUTER proposed a new article which read:

“None of the provisions of these articles prejudices:

“(1) the special régimes which may prevail in the relations among developing countries and in the relations between developing and developed countries;

“(2) the construction to be placed on a most-favoured-nation clause in the case of regional régimes limited to certain countries forming part of a particular economic or political union.”

The meeting rose at 1 p.m.

### 1343rd MEETING

Thursday, 3 July 1975, at 10.20 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

#### Most-favoured-nation clause

(A/CN.4/266;<sup>1</sup> A/CN.4/280;<sup>2</sup> A/CN.4/286;  
A/CN.4/L.228/Rev.1, L.229 and Corr.1)

[Item 3 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPporteur

ARTICLE 0<sup>3</sup> (continued) AND

NEW ARTICLE PROPOSED BY MR. REUTER<sup>4</sup>

1. The CHAIRMAN invited Mr. Reuter to introduce the new article he had proposed at the previous meeting (A/CN.4/L.229/Corr.1).

2. Mr. REUTER said that the new article he had proposed was intended to deal with two different questions: that of development and that of the relationship between the most-favoured-nation clause and certain special regional agreements. There were two separate matters and they were dealt with in two independent paragraphs, so that the Commission could very well drop one and keep the other. The two questions had certain aspects in common, but the mere fact that paragraph 1 dealt with the special régimes which might prevail in relations between developing countries made paragraph 2 superfluous so far as those countries were concerned.

3. In submitting a fairly general and quite brief provision he had had two kinds of consideration in mind, the first of which seemed imperative, since a question of time was

involved. For even if the Commission decided to devote the remaining three weeks of the session to questions concerning the most-favoured-nation clause and developing countries, he did not think it would be able to work out a satisfactory text. If it wished to show the General Assembly how much it had that question at heart, it should recognize the existence of certain problems, but adopt a waiting attitude and express a sort of general reservation, leaving open the possibility of reverting to the question later if the General Assembly requested it to do so.

4. That reserved attitude was also justified by considerations of a different kind. For while he appreciated that the bitterness of the developing countries was perfectly legitimate, particularly after 1974, which had been a very disappointing year for them, he hoped the Commission would not have to deal with the legal aspect of the problems of developing countries, regarding which the situation was extremely confused.

5. The law relating to development was still in its infancy, as Mr. Bilge had very rightly said. But if the Commission wished to deal with development problems from the legal point of view, it would have to take a position on the law of development and inquire into its sources. Were those sources to be found in conventions or in a nascent international authority possessed by certain international organizations? Those questions were being hotly contested at the very time when the General Assembly had decided to undertake a review of the Charter. In his opinion, it was the body responsible for studying the review of the Charter which should pronounce on certain questions concerning the sources of the law of development.

6. The definition of the term “developing countries” was also controversial. Some members of the Commission had spoken on that question in other bodies and in other contexts, and had shown that it was absurd to multiply definitions and categories of developing countries. One definition had been proposed for the generalized system of preferences, but it was not necessarily adopted in individual agreements; the agreements with Hungary had been mentioned, but it would be equally appropriate to cite the agreements of the European Communities, which had refused to apply generalized preferences to European developing countries. The United Nations had drawn up a list of the 25 poorest countries, but when it had come to establishing a relief fund for victims of the drought in the Sahel, the number had been increased to 29. Again, when deciding the apportionment of the expenses of the emergency force set up by the Security Council in 1973, the General Assembly had classified developing countries in another way. Thus the definition of the expression “developing country” was a very difficult problem which the Commission was hardly in a position to solve; and it was only one problem among many.

7. He was, of course, only expressing his personal opinion, but he was sure that the text he had submitted would at present be unacceptable to most of the developed countries, for it was based on the premise that the problem of development was not confined to specific economic

<sup>1</sup> Yearbook . . . 1973, vol. II, pp. 97-116.

<sup>2</sup> Yearbook . . . 1974, vol. II, Part One, pp. 117-134.

<sup>3</sup> For text see 1341st meeting, para. 1 and 1342nd meeting, para. 1.

<sup>4</sup> For text see previous meeting, para. 49.

questions. It must be borne in mind that in the current practice of the United Nations, treaties signed by developing countries were not, for those countries, subject to the same strict rules of performance as they were for developed countries. Hence he was convinced that some day it would be necessary to consider development in a broader setting than that of economic questions.

8. The text he had submitted was accordingly very broad, and dealt both with relations between developing countries and with relations between developing and developed countries. In that respect, it reflected the two main relationships defined in UNCTAD, where it had been considered desirable that developing countries should carry on preferential trade among themselves, so that a first treaty, subsequently enlarged, had been concluded between Yugoslavia, Egypt, India and some other countries.

9. The Special Rapporteur had adopted a very wise approach. The reason why he himself was proposing a much more general formula than that proposed by the Special Rapporteur was that he hoped the Commission would go beyond the question of generalized preferences, which were of very limited application and which had so far benefited only the nine most developed of the developing countries. In his opinion, the Commission should show the General Assembly that it had no wish whatever to obstruct, either in the matter of preferences or in any other way, any measures which could improve the lot of developing countries.

10. He agreed with Mr. Ushakov that, even if the Commission devoted the remaining three weeks of the session to those questions, it would not be able to find acceptable definitions which, despite the existence of the most-favoured-nation clause, would reserve for certain States constituting an embryo of regional life, the faculty of progressing towards unification. The unification of States could take place in two ways; either in a single operation in which case a new State was formed and the problem of succession of States arose; or gradually, in which case there were a number of intermediate solutions that could not be clearly defined at present.

11. He further agreed with Mr. Ushakov that a regional union could be most damaging to the most-favoured-nation clause or to a régime of non-discrimination. For example, when the six European founder members of the European Communities had attempted to set up the European Coal and Steel Community, they had come up against the GATT commitments, but since the law of GATT was fairly elastic, they had been able to gain acceptance for their economic agreements. On the other hand, when the Treaty of Rome had been concluded, the view had prevailed in GATT that that customs union so greatly changed the general conditions of operation of the General Agreement that it was unacceptable; and the United Kingdom and the Commonwealth countries had formulated objections which had never been formally withdrawn. The situation had been even more dramatic in the case of OEEC; when the United Kingdom had asked for a waiver of the quantitative restrictions which the "Six" had agreed upon among themselves, they had

refused, and the tension in OEEC had become so acute that that organization had not survived.

12. It was a very difficult problem, but States could not be refused the right to develop a centre of intensive regional life. The Commission should not adopt too rigid a position on such a political question. From a strictly legal viewpoint, it was a matter of the interpretation of treaties and of the relations between treaties; but treaties could be interpreted in ways that were valid in some cases and not in others. It was a question which could not be settled in the abstract, in advance, by an absolute rule; he hoped, therefore, that it would remain open. In his opinion, it was a matter which was crucial for the Commission's future; consequently, the Commission could not deal with it in the abstract, by appearing to ignore what was the fundamental concern of the majority of the States Members of the United Nations. Nor did he think that, technically or even legally, the Commission was in a position to substitute itself for organs established by GATT, which was in disagreement with UNCTAD, which in turn was not always in agreement with the General Assembly.

13. With reference to the Charter of Economic Rights and Duties of States, quoted by Mr. Tammes,<sup>5</sup> he pointed out that according to the *Official Journal of the European Communities*, the States members of those Communities considered that that Charter had no legal consequences so far as they were concerned. In his opinion, the Commission was not called upon to settle questions of that kind.

14. Mr. USHAKOV said that, before considering whether it could provide for restrictions or exceptions in the case of economic unions, the Commission should define the meaning of an "economic union" on the basis of concrete examples, such as the Common Market or CMEA, and then work out general rules. The text proposed by Mr. Reuter was very vague and did not, in his opinion, contain either a specific proposal or a general rule. What was meant by such expressions as "special régimes" and "relations"? Was the reference to economic or social or cultural relations? By whom was the "construction" to be placed on the most-favoured-nation clause? What was meant by "regional régimes" and "particular economic or political unions"? Could political unions like NATO or the Warsaw Pact have any effect on the interpretation of the most-favoured-nation clause?

15. Mr. KEARNEY said that article 0 stood out strongly from the preceding draft articles. The Commission, which had been considering general articles on the most-favoured-nation clause, now had before it an article dealing specifically with trade advantages and couched in the specialized language of commercial treaties; it seemed as if the Commission had moved into the domain of GATT or even UNCITRAL. It could, of course, do so if it wished, and he had no basic objection to the proposal.

16. The problems of definition raised by the article were, however, considerable. For example, if trade

<sup>5</sup> See previous meeting, para. 8.



advantages were granted to developing countries on the basis of some countervailing favours, as commonly happened, it was hard to tell whether the most-favoured-nation clause would not apply. It certainly seemed that the clause would not apply if treatment was accorded under a "specialized" system of preferences, and it might be asked why that should be so. Lastly, there was the very basic problem of determining what was a "developing" or a "developed" country.

17. There could be no doubt that the article sought to establish an exception to the *pacta sunt servanda* rule. That was, of course, permissible, but he was concerned that the commentary in chapter IV of the Special Rapporteur's sixth report (A/CN.4/286) tended to imply that the exception for developing countries was an accepted international principle, even though the historical evidence adduced in support of that view was scanty. The situation could be contrasted with that in regard to economic unions, considered later in the same chapter, where the Special Rapporteur had taken the view that there was no basis in law for an exception. There could be no objection to the Commission's engaging in the progressive development of international law provided that it furnished sound and basic reasons for its proposals. It should, therefore, be made clear that the Commission was proposing an exception in respect of developing countries for reasons which, though valid, were not necessarily legal.

18. In that context, he had a great deal of sympathy for the new article submitted at the previous meeting by Mr. Reuter, which had the advantages of not saying that one form of economic development should be saved and another damned, and of constituting a holding proposal designed to allow more time for identification and consideration of the underlying issues. If the proposal was seen in that light, the objections to it raised by Mr. Ushakov became less important.

19. For his part, he did not feel competent to judge the precise consequences of the inclusion in an article of a phrase such as "generalized system of preferences" and he would appreciate time to seek an expert opinion on such matters. He had assumed from what the Special Rapporteur himself had said in paragraph 75 of his sixth report, that article 0 and the related articles would not be discussed until the next session. But if the Commission wished to produce an article such as article 0 at the present session—perhaps in a somewhat clearer form—he would be prepared to accept it on a provisional basis, subject to review and reconsideration at the 1976 session.

20. The CHAIRMAN, speaking as a member of the Commission, commended the Special Rapporteur for his excellent commentary and for his formulation, in article 0, of a very important and timely rule. The Special Rapporteur had given expression to the common will of the international community, which had developed since the foundation of the United Nations. The founders of the Organization, in discussing how to save the world from another holocaust, had recognized that that could not be done without considering economic and political questions; thus the decisions taken at Dumbarton Oaks

had been reflected in the Charter of the United Nations, and had been followed by the Havana Conference and the formation of GATT and UNCTAD.

21. At the first session of UNCTAD, the most important meeting of the present era, rules had been laid down which specifically provided for exceptions to the most-favoured-nation clause for land-locked countries. Those who believed that trade questions did not come within the purview of the International Law Commission should reflect on the fact that, as long ago as the time of Vitoria, trade had been described as a natural part of relations between States. To suggest that the Commission should not take up the matter dealt with in article 0 because the UNCTAD generalized system of preferences was to be reviewed in five years' time was no argument; nearly 30 years' discussion of economic questions in the United Nations had brought little change in the basic pattern of the world economy, so it was unlikely that there would be any radical change in the near future. Indeed, the gap between developed and developing countries might grow still wider. The Commission's concern should be for the half of the world's population which was faced with starvation. Even if generalized systems of preferences as envisaged in article 0 were put into effect, the problem of the developing countries would not be entirely solved. Developed countries would still be protected by safeguard mechanisms and the developing countries could not hope to make much progress so long as they had no manufactures to export.

22. The problems of developing countries would be discussed during the current year in numerous international forums, including the seventh special session and the thirtieth regular session of the General Assembly. He felt it his duty as Chairman to point out that the Commission would lay itself open to criticism from the Sixth Committee of the General Assembly, which had always considered it to be Western-oriented, if, after three days of discussion, it produced nothing and merely said that it required more time to seek expert advice. If the Commission adopted article 0, however, its work would win both the close attention and the appreciation of the Sixth Committee.

23. Mr. PINTO said that Mr. Reuter's admirable statement was of significance not only in regard to his proposal and the question of the most-favoured-nation clause, but also in regard to the work, and perhaps the very life of the Commission. It had been like a flash of light in the darkness, throwing into sharp relief problems which had remained hidden too long, and revealing conflicting and unspoken hesitations and desires which had underlain the Commission's discussions in recent weeks.

24. Mr. Reuter seemed to wish his new article to be seen as a holding operation rather than a concrete proposal. Personally, he fully appreciated that wish in the spirit in which it had been meant, for if the proposal were indeed concrete, it could so restrict the operation of the remaining draft articles as virtually to destroy their significance.

25. Where he did not agree with Mr. Reuter was in his suggestion that it would be unwise for the Commission to deal at the present stage with matters affecting the



developing countries, because they were of a political nature. The Commission differed from its predecessors in the field of codification in that it had been instructed to take account of the views of governments.<sup>6</sup> It dealt not with the abstract science of international law, but with the life of States; the law it created had no coercive force, but must be acceptable to States. For the sake of its own survival the Commission should admit that it was politicized and not balk at discussing problems, such as those relating to developing countries, which were of political import, particularly since, in view of its small size and the vocation of its members, it could do so in a disciplined and objective manner. The validity of that thesis was proved by the very fact that Mr. Reuter, who came from a developed State, had felt able to speak as he had.

26. Mr. THIAM said that the problem under consideration was essentially political, but the Commission could not disregard it. And it could not escape from its predicament by purely legal speculations, for law was only a tool; law must serve reality, not vice versa.

27. All the members of the Commission seemed to be in favour of providing for an exception to the application of the most-favoured-nation clause for the benefit of developing countries, but the questions raised during the discussion might impair the value of that exception.

28. The draft article proposed by Mr. Reuter had the advantage of covering two situations that were not dealt with in draft article 0. As it stood, article 0 was insufficient; it ought to be supplemented by articles which, first, would deal with customs and economic unions and, secondly, would lay down the principle that a developed State could not, as the beneficiary of a most-favoured-nation clause, claim the treatment accorded by one developing State to another developing State. Both those questions were covered by Mr. Reuter's draft article.

29. So far as customs or economic unions were concerned, he considered that the formation of such unions was essential to the development of any country. Because the colonized territories had been split up arbitrarily by the colonizers, most of the developing countries did not enjoy sufficient economic living room. Consequently, the formation of customs or economic unions was a necessity, and it was important to relax the conditions of application of the most-favoured-nation clause for the benefit of developing countries.

30. If it approved Mr. Reuter's draft article, the Commission would not need to draft articles supplementing article 0; the wording could no doubt be improved, though the expressions "special régimes" and "regional régimes limited to certain countries forming part of a particular economic or political union" were quite satisfactory.

31. The distinction between developed and developing countries was in current use; but what was important in the fight against under-development was not to spend time on terminological questions, but to establish institutions and machinery which would bring justice and

equity into international economic relations. The fact that the situation of the developing countries would necessarily change during the next few years and that articles drafted in 1975 might no longer correspond to reality in the year 2000, could not be invoked by the Commission as a reason for not taking the special situation of those countries into consideration.

32. He suggested that the draft article proposed by Mr. Reuter should be adopted provisionally or, if that could not be agreed on, that article 0 should be supplemented by other provisions.

33. Mr. TSURUOKA said that he was still in favour of referring article 0 to the Drafting Committee.

34. The principal purpose of Mr. Reuter's draft article seemed to be to inform the General Assembly that a number of special situations were being considered by the Commission. Personally, he thought it would suffice to mention in the commentary to article 0 that the Commission had studied those situations, but that such delicate problems had come up that a more thorough inquiry had proved necessary, and that in the short time available article 0 was the only article concerning developing countries that the Commission had been able to consider. In any case it should be indicated in the commentary that any exception in favour of developing countries should be soundly based in law and should not be contrary to fundamental rules of international law, such as the principles of *pacta sunt servanda* and *res inter alios acta*, or the principle of the sovereign equality of States.

35. Some members seemed to have exaggerated the importance of the problem. It should not be forgotten that the draft would be applicable only to treaties concluded after its entry into force, and would in no way debar developed and developing countries from agreeing on exceptions to the application of the most-favoured-nation clause in the case of economic unions or where advantages were to be granted subject to any special conditions. Besides, countries would still be free not to accept a most-favoured-nation clause. Hence, the draft would in no way hinder the formation of customs, political or economic unions at the regional level. The commentary to article 0 should therefore indicate that in including that article in the draft the Commission's only concern had been to allow for exceptions to the system of the most-favoured-nation clause in favour of developing countries.

36. Mr. CALLE Y CALLE said that sub-paragraph (1) of the text proposed by Mr. Reuter, which related to the developing countries, was consistent with the Commission's views on the subject, but he would prefer the Special Rapporteur's text of article 0, provided it was not confined to trade advantages, but broadened in the manner suggested by Mr. Sette Câmara.<sup>7</sup>

37. Mr. Reuter's proposal covered by the special situation of the developing countries by means of an exception stated in very brief and general terms. The form in which it was drafted was intended to show that the Commission was not unaware of those areas in which the most-favoured-nation clause did not operate, because

<sup>6</sup> See article 16 of the Statute of the International Law Commission (A/CN.4/4/Rev.1).

<sup>7</sup> See 1341st meeting, paras. 20 and 21.

certain realities stood in its way. In addition to the case of the developing countries, the text dealt, in sub-paragraph (2), with economic and political unions. Under that sub-paragraph the regional régimes established by such unions would constitute another exception to the operation of the most-favoured-nation clause.

38. It had been claimed that it would be premature for the Commission to draft a rule of international law to the effect that the most-favoured-nation clause must not hinder the granting of benefits by developed countries to developing countries. He thought the time had come to recognize the existence of such a rule, as suggested by the Special Rapporteur in his remarkable statement in 1969 to the Institute of International Law, quoted in his sixth report (A/CN.4/286, para. 64).

39. It had been rightly pointed out that the generalized system of preferences was not a panacea, that it was limited in scope and that it had yielded only modest results. The fact remained, however, that its adoption constituted a very important international precedent, in that it represented the recognition by the appropriate international bodies of the principle that, where the generalized system of preferences was concerned, the most-favoured-nation clause did not operate automatically.

40. The same applied to any other advantages that might be extended to developing countries by developed countries. The reference to "the importance of the application of differential measures to developing countries", in paragraph 5 of the Declaration of Ministers approved at the GATT Ministerial Meeting at Tokyo on 14 September 1973, had already been mentioned by Mr. Pinto.<sup>8</sup>

41. He was in favour of separate formulation of the various exceptions to the operation of the most-favoured-nation clause. The first would be that relating to the generalized system of preferences; the second that relating to regional systems.

42. Mr. ELIAS said that Mr. Reuter's proposal brought together two very disparate ideas. Its author himself recognized that it would be better to deal separately with the two issues involved.

43. As far as developing countries were concerned, when submitting his own proposed redraft of article 0, he had mentioned the desirability of including a provision to prevent a developed country from benefiting from a system of preferences indirectly, by invoking its most-favoured-nation clause with a developing country which had itself secured the benefit of that system by invoking a most-favoured-nation clause.<sup>9</sup> In order to cover that point, he wished to revise the concluding words of his redraft so that it would now read:

"A developed State which is a beneficiary of a most-favoured-nation clause cannot claim any treatment accorded to a developing State within a generalized system of preferences established by another State, whether developed or developing."

44. The whole purpose of the Commission's work on article 0 was to bring developed States to make some

concessions to developing States in the interests of fair play and justice. He need only remind members once again of the impressive statement made by the Special Rapporteur to the Institute of International Law in 1969, in which he had stressed that what was at stake was, in the final analysis, a question of human rights and of the right to life of several hundred million people.

45. Clearly, the rule the Commission was framing was not so much a matter of codification as of progressive development. In the process of progressive development, the representation on the Commission of the "main forms of civilization and of the principal legal systems of the world", under article 8 of its Statute, acquired a very special significance. It was only by considering the different ways in which human beings reacted in different parts of the world that the Commission could recognize the facts of contemporary international life and help to remove some of the injustices of the past. The adoption of such a responsible attitude by the Commission would enhance its standing with the General Assembly and increase the confidence of States in its work.

46. He was in favour of adopting article 0 on the lines proposed by the Special Rapporteur, subject to the reservation that it did not represent the Commission's final position; that would show the Commission's willingness to deal with the problem. It had admittedly received the revised text of the article only a very short time ago,<sup>10</sup> but the exception relating to the developing countries had been mentioned by the Special Rapporteur in his earliest reports; and in any case, he had submitted his draft article only as a tentative proposal.

47. The Commission should take note of the fact that additional articles would be included in the draft to cover other exceptions, and invite the Special Rapporteur to revise his position in regard to economic and other unions. The situation had altered, in that unions of that kind were being formed by developing States, both in Africa and elsewhere. The Commission should make it clear that it intended to study the question of such unions.

48. He hoped that a reference to the very useful elements in sub-paragraph (1) of Mr. Reuter's proposal would be included in the commentary.

49. Mr. USHAKOV said he was curious to know what rule of international law members had in mind when they supported exceptions in favour of developing countries. Were they thinking of an exception in favour of all the developing countries or of only some of them? Was there a rule under which a developing country, when granting advantages to another developing country, could withhold the benefit of the most-favoured-nation clause not only from developed, but also from developing countries? And in the case of an economic or political union of developing countries, could a State member of such a union deny the advantages granted within the union both to developed and to developing countries which were not members of the union?

50. Mr. SETTE CÂMARA said he was a little surprised at the degree of concern shown by some speakers

<sup>8</sup> *Ibid.*, para. 41.

<sup>9</sup> *Ibid.*, paras. 50 and 51.

<sup>10</sup> See previous meeting, para. 1.

during the discussion. As he saw it, the Commission was not invading the realm of GATT or UNCTAD. It was not writing rules on the subject of trade and developing countries. It was simply framing rules on the most-favoured-nation clause, and in doing so it could not ignore realities.

51. It had been pointed out by some members that the generalized system of preferences could be short-lived. In fact that system fell far short of what the developing countries had been striving for and they had accepted the nominal ten-year period for the system as part of the price to be paid for obtaining some concessions from the developed countries. He was sure that all the many people engaged in UNCTAD work would be most surprised at any suggestion that their efforts to improve the trade position of the developing countries were a purely temporary venture.

52. The proposal put forward by Mr. Reuter had the merit of not being confined to trade concessions. It used the much more general formula "special régimes", which, unfortunately, was far too vague, and detracted from the force of the rule proposed by the Special Rapporteur. Moreover, Mr. Reuter's text did not avoid the problem of definitions, since it used the terms "developing countries" and "developed countries". Consequently, although he would not oppose sub-paragraph (1) of that proposal, he preferred the Special Rapporteur's text with the amendment he had suggested at a previous meeting.<sup>11</sup>

53. With regard to sub-paragraph (2) of Mr. Reuter's text, the very thorough study which the Special Rapporteur had made of customs unions in chapter III of his sixth report (A/CN.4/286) had led him to a different conclusion from that which he had reached in regard to the developing countries. State practice did not yet indicate that it was possible for the Commission to adopt a rule providing for exceptions in the case of economic and other unions. Further studies were called for and more backing by State practice would be necessary before any such rule could be adopted. Nevertheless, if the majority of the Commission favoured the adoption of a provision on the lines of sub-paragraph (2) of Mr. Reuter's text, he would not oppose it; but he would urge that it be kept quite separate from the exception for developing countries, for that had substantial material behind it.

54. Mr. USTOR (Special Rapporteur) drew attention to the statement in the Commission's 1973 report that "while it is not the Commission's intention to deal with matters not included in its functions, it wishes to take into consideration all modern developments which may have a bearing upon the codification or progressive development of rules pertaining to the operation of the clause". The Commission had gone on to say that it wished "to devote special attention to the question of the manner in which the need of developing countries for preferences in the form of exceptions to the most-favoured-nation clause in the field of international trade, can be given expression in legal rules".<sup>12</sup>

55. The problem now facing the Commission was that of drafting, as a matter of progressive development, an exception to the most-favoured-nation clause for developing countries. He had tried to draft a text that would be generally acceptable, and the criticisms put forward by Sir Francis Vallat<sup>13</sup> applied not so much to that text as to the general system of preferences as such. It was true that that system was rather limited and that it did not fully meet the expectations of the developing countries; but it did represent a compromise reached within the framework of UNCTAD. He believed it was valuable to translate the results of that compromise into a legal rule which could gain the approval of all the countries of the world.

56. He fully realized that the generalized system of preferences had been created for an initial period of ten years, but the very fact that that period had been described as "initial" showed the intention to continue the system. With all its limitations, moreover, the generalized system of preferences was an achievement for the benefit of the developing countries, and it was highly desirable to raise the principle embodied in it to the level of a rule of international law.

57. He was not in favour of framing a wider rule that would state the exception as applying to all benefits granted by developed countries to developing countries. The Commission should stay on the firm ground of the generalized system of preferences, on which wide agreement had been reached and which provided valuable safeguards for the developed countries.

58. With regard to the text of article 0, he suggested that the opening words "A developed beneficiary State" be replaced by the words "A beneficiary State" and that the expression "trade advantages" be replaced by "advantages". Those changes would bring the text into line with UNCTAD practice. Moreover, the generalized system of preferences was limited to customs.

59. He did not share the concern expressed by certain members because article 0 dealt with a somewhat technical subject: it was the common fate of lawyers to have to deal with specialized subjects. Those engaged in fashioning the rules on the law of the sea, for example, were facing a great variety of technical problems, but that did not deter them from continuing their work on the formulation of appropriate rules of international law.

60. The Commission's present task should be to examine carefully the work being done in such bodies as UNCTAD and to try to discern any rules which it could raise to the status of norms of international law. The problems of the developing countries were at the forefront of the General Assembly's attention and the Commission could not avoid dealing with them.

61. The question of economic or political unions, dealt with in sub-paragraph (2) of Mr. Reuter's proposal, was not comparable with that of developing countries. In formulating the rule in article 0, he had relied on the substantial background material in chapter IV of his sixth report, which showed that there was agreement on that rule between developed and developing States.

<sup>11</sup> See 1341st meeting, para. 20.

<sup>12</sup> *Yearbook* . . . 1973, vol. II, p. 211, para. 114.

<sup>13</sup> See previous meeting, paras. 39-45.

There was no such agreement between States in regard to economic or other unions.

62. The problem of the impact of economic unions on most-favoured-nation clauses was not one of framing any special rule on the subject; it was simply a problem of conflicting treaty obligations. A conflict of that kind had to be settled in accordance with the appropriate rules of the general law of treaties. The interesting idea had been put forward by Mr. Tsuruoka that the draft would probably contain a non-retroactivity provision and would apply only to future economic unions, not to existing ones, so that States would have time to provide for the necessary exceptions in their treaties. For the present, he did not see how it was possible to claim that the mutual obligations of members of such economic groups should have absolute priority over the ordinary rules of the law of treaties, and that the members of those groups were relieved from their most-favoured-nation commitments.

63. The CHAIRMAN declared the discussion on article 0 closed. He suggested that the article be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>14</sup>

The meeting rose at 1.10 p.m.

<sup>14</sup> For resumption of the discussion see 1352nd meeting, para. 126.

## 1344th MEETING

*Friday, 4 July 1975, at 10.10 a.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

*Members present:* Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

### Most-favoured-nation clause

[Item 3 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR  
ARTICLE 0 (continued)

1. Sir Francis VALLAT said he wished to place on record that the discussion on article 0 had not been completed. He and other members who still had some comments to make on that article had only agreed to its being referred to the Drafting Committee at that stage in order not to delay the work of the Commission, which was now due to take up the next item on its agenda.

2. The CHAIRMAN said that members who wished to comment on draft article 0 would be able to do so when it came back from the Drafting Committee.

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

(A/CN.4/281; A/CN.4/285)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 7 AND

ARTICLE 2, PARAGRAPH 1 (c)

3. The CHAIRMAN reminded the Commission that at its previous session it had begun the first reading of the draft articles on treaties concluded between States and international organizations or between international organizations, and had provisionally adopted article 1, most of article 2, and articles 3, 4 and 6, together with the commentaries thereto.<sup>1</sup> He invited the Special Rapporteur to report on the progress of his work and to introduce his fourth report (A/CN.4/285), with particular reference to article 7 and paragraph 1 (c) of article 2, which read:

#### Article 7

##### Full powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(a) he produces appropriate full powers; or

(b) it appears from the practice of the States and international organizations concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

(b) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ or of a treaty with that organization.

3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the organization to be bound by a treaty if:

(a) he produces appropriate full powers; or

(b) it appears from the practice of the States and international organizations concerned or from other circumstances that their intention was to consider that person as representing the organization for such purposes and to dispense with full powers.

#### Article 2

##### Use of terms

1.  
...

(c) "full powers" means a document emanating from the competent authority of a State or international organization and designating a person or persons to represent the State or organization for negotiating, adopting or authenticating the text of a

<sup>1</sup> Yearbook . . . 1974, vol. II, Part One, document A/9610/Rev.1, chapter IV, section B.

treaty, for expressing the consent of the State or organization to be bound by a treaty, or for accomplishing any other act with respect to a treaty;

4. Mr. REUTER (Special Rapporteur) said that the articles provisionally adopted by the Commission were very closely modelled on the corresponding articles of the 1969 Vienna Convention on the Law of Treaties.<sup>2</sup> His fourth report contained about 30 articles, which corresponded to those in the first part of the Vienna Convention. The new articles proposed could be divided into the following groups: five articles were identical with the corresponding articles of the 1969 Vienna Convention, namely, the articles relating to the *pacta sunt servanda* principle, to the non-retroactivity of treaties and to the interpretation of treaties; nine articles differed only in minor points of drafting from the corresponding articles of the 1969 Vienna Convention and should not present any difficulty; three others also differed only in drafting, but might present some difficulties; and thirteen raised problems of substance. To begin with, he thought the Commission should deal at some length with six questions, namely, full powers to bind an international organization (article 7), the adoption and authentication of the text of a treaty (articles 9 and 10), means of expressing consent to be bound by a treaty (article 11 and article 2, paragraph 1 (b)), reservations to treaties (articles 19 to 23), the territorial scope of treaties (article 29) and the application of successive treaties relating to the same subject-matter (article 30). He might have overlooked some problems which would come up during the discussion; but generally speaking, it should be possible to deal quickly with the proposed new articles, since they were based on a Convention which the Commission had worked on for a long time.

5. He was glad that the excellent study prepared by the Secretariat on "Possibilities of participation by the United Nations in international agreements on behalf of a territory" (A/CN.4/281) had been issued in final form. The conclusion, on 14 March 1975, of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character had settled an awkward question: that of the participation of international organizations in general multilateral treaties and, in particular, in treaties relating to matters directly affecting international organizations. The solution adopted showed that governments were not always in favour of the participation of international organizations in international conventions as parties assimilated to States.

6. Draft article 7 corresponded to article 7 of the 1969 Vienna Convention, on the full powers of representatives of States. Since the Commission had decided that the draft convention in course of preparation should form an independent whole, which could enter into force independently of the entry into force of the Vienna Convention, it was important to include provisions on the full powers of the representatives of States. Those provisions formed paragraphs 1 and 2 of draft article 7,

which were nearly identical with the corresponding provisions of the Vienna Convention. Paragraph 3 dealt with the full powers of the representatives of international organizations.

7. The innovations introduced in paragraphs 1 and 2 were the following: paragraph 1 (b) referred not only to the practice of States, but also to that of international organizations, since it applied to representatives of States in their dealings with international organizations; article 7, paragraph 2 (b) of the Vienna Convention was not reproduced in draft article 7, since the future convention would never apply to treaties concluded between two States; as compared with article 7, paragraph 2 (c) of the Vienna Convention, paragraph 2 (b) of draft article 7 contained an additional reference to treaties concluded between a State and an organization. With regard to the expression "accredited representatives", which was used in the 1969 Vienna Convention on the Law of Treaties, he had reached the conclusion that, for the purposes of the present draft, it was equivalent to the expression "head of mission", used in the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.<sup>3</sup>

8. Representatives of international organizations were not usually required to have full powers. So far, no international organization had become a party to any general multilateral treaty. Hence, the need for full powers could only have been felt during the negotiation of bilateral treaties; but such negotiations normally took place in a climate of confidence and began with an exchange of correspondence which enabled those concerned to know who would represent the international organization. Moreover, in the case of all international organizations having a structure similar to that of the United Nations and a secretariat directed by a head, the latter would have both to issue the full powers and to represent the organization. In fact, the accepted practice was that not only the head of the secretariat, but also his immediate colleagues, could commit the organization without full powers, for acts relating to the conclusion of treaties. Powers were nevertheless issued in certain cases. He had found hardly any examples in the practice of the United Nations, but the European Communities frequently issued full powers for the conclusion of important agreements involving a complicated procedure.

9. In that *de facto* situation, two attitudes were possible. He believed that there was a basic legal rule that representatives of international organizations must produce full powers, but that it was necessary to take practice into account and provide for a broad exception to that rule. On the basis of practice, the Institute of International Law considered that it was not necessary to produce full powers, but that they must be produced if the other party demanded them. In sum, the Institute of International Law accepted the rule that full powers were necessary, but introduced an exception based on practice or function. On the latter point the Commission had maintained, with regard to representatives of States, that certain persons who represented the State in virtue of their functions

<sup>2</sup> 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.

<sup>3</sup> Document A/CONF.67/16.

could be dispensed from producing powers and they were listed in article 7, paragraph 2, of the 1969 Vienna Convention. In his opinion, it was hardly possible to assimilate certain high officials of international organizations to such persons and dispense them from producing powers; for it was a characteristic of international organizations that they had very different structures. Article 85 of the 1975 Vienna Convention contained special provisions regarding high officials of international organizations. That article applied only to international organizations of a universal character, however, and the notion of high officials could not be applied to organizations whose secretariats were divided into departments so independent that each organ had its own secretariat. Moreover, the notion was so broad that, in the case of officials of organizations in the United Nations system, the practice was that several high officials could be at the head of an organization: in the United Nations, for example, Under-Secretaries-General had the same status as the Secretary-General so far as full powers were concerned. In those circumstances, he had preferred not to rely on the notion of high officials.

10. With regard to the term "full powers", during the preparation of the draft which had led to the 1969 Vienna Convention, the Commission had questioned whether or not that term implied an act in solemn form. It had finally decided to retain the term, which was hallowed by usage, although of the opinion that it did not imply any solemn form.

11. Article 2, paragraph 1 (c), differed only in minor points of drafting from the corresponding provision of the 1969 Vienna Convention.

12. Mr. USHAKOV said that the draft articles should not be modelled too closely on the 1969 Vienna Convention. With regard to the definition of the term "full powers" in draft article 2, paragraph 1 (c), he doubted whether it was really advisable to adopt the definition used in the 1969 Vienna Convention, where "full powers" meant a document which emanated from the competent authority of a State and was thus issued in the exercise of its governmental authority. That definition could not apply to full powers issued by an international organization, for there was no authority in an international organization which was competent to issue them. If an organ of an international organization issued full powers, it was because it was empowered to do so by the constituent instrument of the organization. In any case, full powers emanating from the competent authority of a State could not be equated with full powers issued by an international organization. In an international organization, distinctions might be made between full powers for negotiating, for adopting and even for authenticating the text. Negotiating powers were sometimes issued pursuant to a decision of an organ of the organization, taken by a simple majority, whereas full powers to express consent to be bound by a treaty were conferred by another procedure. Consequently, it was not enough merely to make drafting changes in the definition of the term "full powers" given in the 1969 Vienna Convention.

13. In draft article 7, he had no difficulties with paragraph 1 or with paragraph 2 (a). With regard to para-

graph 2 (b), however, he was not sure whether all the persons referred to in that provision could really be considered as representing their State or whether, in the light of the 1975 Vienna Convention, only heads of mission should be included. As to the reference to treaties concluded with an international organization, which the Special Rapporteur had added at the end of paragraph 2 (b), he would like to know whether or not it applied to all kinds of treaties, whether bilateral or multilateral. That provision would enable not only heads of mission, but all accredited representatives to bind an international organization. Consequently, it was important to know what treaties and what representatives were covered by article 7, paragraph 2 (b).

14. As to the expression "appropriate full powers" in paragraph 3 (a), it was doubtful whether it meant anything more than "full powers", as defined in article 2, paragraph 1 (c). For the purposes of paragraph 3 (b), although there was practice of States, there was no practice of international organizations. In view of the diversity of international organizations and their practice, it was impossible to speak of the practice of international organizations with respect to full powers, so there was no justification for paragraph 3 (b).

15. Mr. KEARNEY said he found the text of the Special Rapporteur's article 7 completely satisfactory. The same applied to the proposed adaptations in paragraph 1 (c) of article 2. Those provisions could therefore be referred to the Drafting Committee without much discussion.

16. The problems which had been raised by Mr. Ushakov were not basically connected with article 7 as such. They revolved mainly round the theory that international organizations had the authority to issue full powers for the purposes of negotiating or concluding a treaty. Mr. Ushakov doubted whether the practice of international organizations was sufficiently advanced to permit the adoption of the principle regarding full powers embodied in article 7. It was true that, as pointed out by the Special Rapporteur himself, there was no standard practice relating to the use of the institution of full powers by international organizations; but that was not a sufficient reason for not including article 7 in the draft. The article had a very modest purpose: it said no more than that, if an organization wished to avail itself of the method of full powers, it could not be prevented from doing so.

17. He also found it appropriate to adopt, as was done for States in the Vienna Convention on the Law of Treaties, a broad approach to the question of what constituted full powers. The Vienna Convention did not specify by whom, or in what manner, full powers should be issued. The reason was that it would be dangerous and futile to do so, because of the great variety of State practice. Similar considerations applied to draft article 7. There was no reason to place any restrictions on an international organization in a matter that was governed by its own statute and practice. It would serve no useful purpose to go any further than to recognize the existing position, as stated in draft article 7, paragraph 3 (b).

18. Mr. HAMBRO said he shared the Special Rapporteur's view that the Commission should be able to deal

with the set of draft articles in the fourth report without much delay. He had therefore heard Mr. Ushakov's remarks with some concern. It was his impression, however, that Mr. Ushakov's point of view was based essentially on his position regarding the nature of international organizations and their capacity to conclude treaties. That position was, of course, founded on a certain philosophical conception.

19. His own views differed altogether from those of Mr. Ushakov. His feeling was that the Commission should adopt practical and pragmatic solutions which would facilitate the work of the international organizations and enable them to take their natural place and fulfil their necessary role in the life of the international community. Bearing in mind the increasingly important role which international organizations were bound to play in the future, he fully shared the views of Mr. Kearney and had no difficulty in accepting the ideas embodied in article 7. He agreed that it should be referred to the Drafting Committee for consideration in the light of the discussion.

20. Mr. CALLE Y CALLE said that article 7, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties dispensed certain classes of persons from the requirement of producing full powers; that provision was based on the assumption that, in virtue of their functions, those persons could be considered as representing their States, at least for the purpose of adopting the text of a treaty. Paragraph 2 (c) of that article made specific reference to "representatives accredited by States to an international conference or to an international organization or one of its organs", in other words, to the class of persons covered by paragraph 2 (b) of draft article 7. In March 1975, however, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character had been adopted, and that Convention dealt extensively with permanent representatives who headed missions to international organizations.

21. He therefore suggested that an additional sub-paragraph should be introduced into paragraph 2 of draft article 7 to deal with those permanent representatives separately from the representatives mentioned in paragraph 2 (b). There were obvious reasons for adopting two sets of provisions to deal with those two separate classes of representatives. Paragraph 2 (b) covered the question of accreditation of representatives of States to an international conference or to a meeting at which the text of a multilateral treaty was to be discussed and adopted. The additional sub-paragraph he proposed would cover the question of the full powers of a permanent representative for the purpose of concluding a bilateral agreement with an organization. Such bilateral agreements were commonly adopted for the recruitment and payment of experts; they were usually concluded with the organization by the head of the permanent mission concerned. It was all the more necessary to amend paragraph 2 in that manner because the 1975 Vienna Convention did not define the notion of "representatives accredited by States to an international conference or to an international organization or one of its organs", whereas it did define the terms "head of mission" and

"permanent representative". Moreover, article 10 of that Convention dealt with the credentials of the head of mission, and article 11 with the accreditation of permanent representatives to organs of an international organization.

22. In all other respects, he found draft article 7 fully satisfactory. The point raised by Mr. Ushakov, that the practice of one organization might not be valid for another, seemed to him amply covered by the fact that paragraph 1 (b), specifically referred to the practice of the "international organizations concerned". The reference was thus clearly to the particular practice of individual organizations.

23. Mr. ELIAS said that draft articles 7 to 33 in the Special Rapporteur's fourth report, and the consequential paragraphs on the use of terms to be incorporated in article 2, should prove readily acceptable; the Commission ought to be able to refer them to the Drafting Committee without unduly long discussion.

24. After studying the articles, he had arrived at a classification similar to that made by the Special Rapporteur in his introduction: five articles of the draft were identical, and nine almost identical, with the corresponding articles of the 1969 Vienna Convention on the Law of Treaties. The remaining articles raised questions of substance, especially articles 7, 9, 11, 29 and 30.

25. He appreciated the logic of the points raised by Mr. Ushakov, but he saw no other way of dealing with the problems before the Commission than by adopting the solutions put forward by the Special Rapporteur. For example, Mr. Ushakov was not satisfied with the contents of paragraph 2 (b) of draft article 7, but it was difficult to see what other approach could have been adopted. For his part, he was fully convinced by the reasons given by the Special Rapporteur in his commentary for drafting article 7 as he had done.

26. As to the provisions of paragraph 3 (a) on the production of "appropriate full powers", the difficulty mentioned by Mr. Ushakov was connected with his approach to the fundamental issues involved. In its advisory opinion on *Reparation for Injuries suffered in the Service of the United Nations*, the International Court of Justice had found that the United Nations had international personality.<sup>4</sup> Recognition that international organizations had such personality, and hence could conclude treaties, made it possible for the Commission to refer in draft article 7 to full powers issued by an international organization. That did not mean, however, that an international organization had the same life as a State in international law. He was satisfied with the Special Rapporteur's approach, which seemed the most realistic way of dealing with the representation of international organizations in the conclusion of treaties. As to terminology, he saw no alternative to using the time-honoured expression "full powers".

27. He supported the suggestion that article 7 should be referred to the Drafting Committee and hoped that, when that Committee had revised it in the light of the discussion, the text would prove acceptable to Mr. Ushakov.

<sup>4</sup> See *I.C.J. Reports* 1949, p. 187.



28. Mr. SETTE CÂMARA said that he had no difficulties with draft article 7 as submitted by the Special Rapporteur. All the members of the Commission knew that international organizations had juridical personality, since that had been affirmed by the International Court of Justice. It was, however, a personality *sui generis*, so it could not be expected that all rules pertaining to States could automatically be extended to international organizations. In that respect, the Special Rapporteur had shown great skill in making his rules sufficiently flexible.

29. It was very important to bear in mind what the Special Rapporteur had said about full powers. The contemporary practice of States, and especially of international organizations, no longer required the presentation of an elaborately formal *lettre de cabinet*. The general rule was now that full powers took the form of a simple letter or even, as in the case of no less a body than the Security Council, a telegram. In making the necessary amendments and additions to his model, article 7 of the Vienna Convention on the Law of Treaties, the Special Rapporteur had wisely recognized that, while it was not yet a matter of practice for representatives of international organizations to present full powers for the purpose of adopting or authenticating the text of a treaty, such cases could arise. That was why he had included paragraph 3 (a), followed immediately by the flexible rule in paragraph 3 (b), which recognized that the presentation of full powers was not always necessary. He found that rule objective and practical.

30. The situation of international organizations was in many ways different from that of States. As the Special Rapporteur had said, international organizations often did not have a single chief executive; it would therefore be impossible to provide in the article that full powers must be issued on behalf of an organization by such a person. On the other hand, where such a person did exist, his situation was similar to that of a Head of State in that, since they both held supreme administrative authority, no one could confer full powers on them. That difficulty could easily be resolved by accepting that full powers would be dispensed with in such a case.

31. Mr. Ushakov's question as to the identity of the "competent authority" mentioned in draft article 2, paragraph 1 (c) merited attention. His own understanding was that the Special Rapporteur had used the term to indicate that the document must be issued "according to the relevant rules of the organization concerned". Perhaps some such wording could be included in the article in place of the expression "competent authority". Consideration should also be given to the suggestion by Mr. Calle y Calle that heads of mission should be entitled to represent their State and sign a treaty on its behalf without presenting full powers, especially as that proposal was consistent with the terms of article 12, paragraph 1, of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

32. Mr. PINTO said that the Special Rapporteur was to be complimented on the high quality of the texts and the extensive commentary he had presented in his fourth

report. He had no objection to the principles stated in draft article 7, though he thought the Drafting Committee might be able to make the text clearer. That was particularly true of paragraph 1 (b) and paragraph 3 (b), which seemed to indicate that, where a representative did not produce the appropriate full powers, it must be possible to deduce from the practice of the States and the international organizations concerned a common intention that full powers could be dispensed with. That might not be easy, since international organizations often had little practice in the matter, or only practice marked by internal contrasts. He supposed that, if no such common intention could be found, the representative would be asked to produce full powers.

33. He saw no difficulty in applying the concept of full powers, so he had no problem with article 2, paragraph 1 (c), which referred to full powers as "emanating from the competent authority of a State or international organization". While he quite understood the difficulties occasioned to Mr. Ushakov by the lack, or varied nature, of practice in regard to the determination of the "competent authority" of an international organization, it was clear to him that the words referred to the competent executive organ as defined by the charter of the organization. In his view, the full powers accorded by such an organ would, to the extent that they were accorded pursuant to the rules laid down in the charter of the organization, be on a par with those accorded by the competent authority of a State. In the case of an organization, the situation was really a contractual one, since the member States would have agreed that full powers granted in accordance with the charter could be accepted as such, at least by the membership of the organization. He could accept either the retention of the expression "competent authority", or its replacement by a reference to a decision taken in accordance with the relevant rules of the organization.

34. Referring to the draft articles as a whole, he explained that he took a particular interest in the Special Rapporteur's topic because he had himself advised both States and international organizations on their relations with each other. His experience had shown him that the statement that a State was not an international organization and an international organization not a State, although a truism, could not be disregarded. The Special Rapporteur had submitted a set of draft articles which could be applied to any State entering into an agreement with any international organization, and that was as it should be. The organizations with which States most often concluded agreements, however, were those of which they were members; that fact, and the differences between States and international organizations, coloured their relations before and after the conclusion of the treaty.

35. Being sovereign, which organizations were not, States had experience of living within their own borders in juxtaposition with other Powers. As members of an organization, States knew within what framework of rules the organization could act, and were able to change those rules; they knew that the organization had to devote its attention to achieving a specific objective, rather than to the multifarious problems which they themselves had to consider; and they could be confident

that the organization would be free from the local political pressures that might influence the way they discharged their own obligations. Consequently, States were likely to be more confident in their dealings with international organizations than vice versa. That seemed to be the consideration underlying paragraph (4) (a) of the commentary to draft article 7. While it was desirable that the articles should be flexible, texts which were generally applicable were likely to raise problems; that applied to draft article 9, paragraph 3, which referred to organizations possessing the same rights as States at a conference. He could think of no instance in which that had been the case. As the Special Rapporteur had said, the point would require further study.

36. Mr. TSURUOKA said that he had no difficulty in accepting article 7 as proposed by the Special Rapporteur. The notion of full powers raised no particular problems as far as he was concerned. He would, however, like to have some clarification of paragraph 3 (b). For it was possible to imagine a situation in which some States recognized from the practice that a certain person represented the organization concerned, while other States did not. In such a case, would the person in question have to be accepted as the organization's representative by all States, or only by those which recognized him as such, or would he be refused that status by all States? He would like to know the Special Rapporteur's intention in that respect.

37. Mr. RAMANGASOAVINA said that draft article 7 carried a double guarantee: first, that of the Vienna Convention on the Law of Treaties, on which it was based—the Special Rapporteur had well brought out the similarities and differences between draft article 7 and the corresponding article of the Vienna Convention and had taken the special nature of international organizations into account; and secondly, the guarantee provided by the Special Rapporteur's special knowledge of the subject. That double guarantee explained why the new draft articles submitted at the present session enjoyed the favour of the Sixth Committee of the General Assembly, which had underwritten the rest of the draft after examining the articles the Commission had submitted to it in the report on its previous session.

38. The term "full powers", used by the Special Rapporteur in paragraph 1 (a) of draft article 7, was defined in paragraph 1 (c) of draft article 2 (Use of terms), which reproduced the definition in article 2, paragraph 1 (c), of the Vienna Convention on the Law of Treaties. The Special Rapporteur referred, as did article 7 of the Vienna Convention, to "appropriate" full powers, since they were special powers relating to the treaty in question, which must, of course, be issued by the competent authorities of each State in accordance with its practice. The Special Rapporteur had relaxed that condition in paragraph 1 (b), as did the Vienna Convention, by invoking State practice, which was extremely diverse.

39. Paragraph 2 of draft article 7, like the corresponding paragraph of the Vienna Convention, dealt with persons who, by virtue of their functions, were empowered to take all decisions in international relations on behalf of their country.

40. The wording proposed by the Special Rapporteur in paragraph 3, concerning the representatives of international organizations, was entirely appropriate. There, too, he had introduced, in sub-paragraph (a), the notion of "appropriate full powers", which he had softened, in sub-paragraph (b), by allowing for the practice of States and international organizations.

41. Subject to a few minor changes, which could be made by the Drafting Committee, he thought article 7 was entirely satisfactory.

42. Mr. AGO said that the Special Rapporteur's experience and competence in what was a most delicate and complex subject were extremely valuable. It would be a mistake to believe that the rules of the Vienna Convention concerning treaties concluded between States could be very easily adapted, by a few minor changes, to the situations contemplated in the draft articles under consideration. For the subject-matter of treaties between States had been consolidated by centuries of practice, whereas that of treaties with international organizations was still new and in process of formation. That was evident merely from the fact that draft article 7 dealt with two separate questions: that of treaties concluded between a State and an international organization, and that of treaties concluded between two or more international organizations. Those were two entirely different subjects which might need different rules. Besides, a reference to treaties concluded between a State and an international organization also covered very different situations. In some cases, the international organization acted as an entity quite separate from its member States: for example, when the United Nations concluded a headquarters agreement with Switzerland or the United States, or when the European Communities concluded such an agreement with Belgium. On the other hand, when the European Communities concluded a treaty on behalf of their member States with other States, granting the latter certain treatment in regard to customs or trade, the situation was entirely different, since the Communities then appeared more as an instrument by which the member States could conclude a single treaty with other States than as an entity entirely separate from the member States. Consequently, it was necessary to proceed with great caution when taking a rule from the Vienna Convention on the Law of Treaties and trying to adapt it to the needs of the present draft. In taking the Vienna Convention as a model, the Special Rapporteur had followed an excellent guide, but at every point the Commission would have to consider whether the rule taken from the Vienna Convention did not need further modification to adapt it to the situations under study.

43. The wording of paragraph 1 of draft article 7 was identical with that of paragraph 1 of article 7 of the Vienna Convention on the Law of Treaties, but it might be useful to clarify the purpose of the draft by referring to the consent of the State to be bound by a treaty "concluded with one or more international organizations".

44. There might be some doubt about the precise significance of the rule in paragraph 1 (b): was it a residuary rule? In his opinion, the rule really acquired its full force when considered in conjunction with paragraph 2,

which set out all the classes of persons who did not have to produce full powers. The rule in paragraph 1 (b) was thus intended to cover only certain more or less marginal cases. In the Vienna Convention on the Law of Treaties, that rule covered, for example, the case in which the commander-in-chief of a State's armed forces could conclude a cease-fire agreement or an armistice without having to produce full powers. The situation might obviously be different in the case of a treaty between a State and an international organization, although the possibility could not be excluded that, for example, the commander-in-chief of United Nations forces might conclude an agreement for the cessation of operations in a certain country. There might also be technical agreements—a more common case—concluded, for example, between the representative of a national treasury and an international organization.

45. He approved of the wording used in paragraph 1 (b). But since only bilateral agreements were involved so far, it might perhaps be better to speak of "the practice of the State and the international organization concerned". It seemed difficult to refer to "the practice of the States and international organizations concerned", as it was not known whether there was any generalized practice of States and international organizations in the matter.

46. He had reservations about paragraph 2 (b), which seemed to him to mix up two very different situations. For instance, Italy's representative to the International Labour Conference was empowered to adopt an international labour convention at that Conference without having to produce full powers, because that was a treaty between States, and such a case came within the scope of article 7, paragraph 2 (c) of the Vienna Convention. But Italy's representative to the International Labour Conference was not empowered to conclude a treaty between Italy and the International Labour Organisation, if he did not produce full powers. So perhaps paragraph 2 (b) should be drafted differently, to cover only the case of a treaty concluded between a State and an international organization.

47. Article 7 of the Vienna Convention was a simple article, as it related only to treaties between States. The article under consideration, on the other hand, related both to the representative of a State who had to negotiate with an international organization, and to the representative of an international organization. And whereas in the first case the situation was a simple one, since it concerned a treaty between a State and an international organization, in the second case there were two possibilities, since the representative of an international organization could negotiate either with the representative of a State or with the representative of another international organization, so that the situation would not always be the same. Paragraph 3 should therefore specify that the treaty could be one concluded with a State or with another international organization, to show that the rule stated was applicable to both cases.

48. He would be interested to hear the Special Rapporteur's reply to Mr. Ushakov's comments before expressing an opinion on paragraph 3 (b). He doubted whether it was appropriate to speak of the practice of

the States and international organizations concerned in that context.

49. With regard to paragraph 1 (c) of article 2 (Use of terms), he was not sure that Mr. Ushakov's criticism of the phrase "a document emanating from the competent authority" was justified. He would like to know whether there were any cases in which a written document could really be dispensed with? The Special Rapporteur, with his great experience of the subject, would certainly be able to answer that question. It also seemed necessary to indicate, at the end of paragraph 1 (c), that the treaty in question was one concluded between an international organization and a State or between two or more international organizations.

50. He would also like the Special Rapporteur to say whether treaties concluded between international organizations were real treaties concluded by representatives who had produced full powers, or mere agreements. For example, could the Andean Altiplano co-operation agreements concluded between international organizations such as the United Nations, the ILO, WHO and UNESCO really be called treaties, or were they simply working agreements? That point should be clarified, for the subject under consideration was very complicated and still evolving; it had not yet been crystallized by centuries of practice like the law of treaties between States.

51. Mr. USHAKOV said that, in his opinion, the assumption that a treaty concluded with an international organization could, in practice, bind anyone at all, was absolutely inadmissible.

The meeting rose at 1.10 p.m.

## 1345th MEETING

*Monday, 7 July 1975, at 3.50 p.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

*Members present:* Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

### Welcome to Mr. Rossides

1. The CHAIRMAN, speaking on behalf of all the members of the Commission, welcomed Mr. Rossides, and said he hoped he would be able to take part in the work of the Commission until the end of the session.

2. Mr. ROSSIDES said he wished to express to members of the Commission his apologies and regret for his absence, which had been occasioned by the grave circumstances in which his country had found itself after two consecutive attacks against it, and the tragic developments that had followed its invasion together with the continuing foreign military occupation of almost half its territory. The implications of the neglect of fundamental principles of law in those and other circumstances

were of import for the entire world. The signs pointed clearly to the advent of total anarchy and he believed, therefore, that the time had come to give consideration to the duty of the Commission to restore the basic concepts of the international legal order.

3. Mr. BILGE said he reserved his right to comment on the statement by the previous speaker.

#### State responsibility

(A/CN.4/264 and Add.1; A/CN.4/L.230 and Corr.1)

[Item 1 of the agenda]

(resumed from the 1317th meeting)

#### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

4. The CHAIRMAN invited the Commission to consider draft articles 10, 11, 12, 12 *bis*, 12 *ter* and 13 as proposed by the Drafting Committee (A/CN.4/L.230 and Corr.1).

#### ARTICLE 10<sup>1</sup>

5. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 10:

##### Article 10

*Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity*

The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.

6. The Committee had based its deliberations on the revised draft of article 10 submitted by the Special Rapporteur.<sup>2</sup>

7. Paragraph 1 of the Special Rapporteur's revised text had begun with the phrase "The conduct of an organ of the State or of another entity empowered to exercise elements of the governmental authority . . .", a phrase which the Drafting Committee had decided to expand by referring more explicitly to the two types of entity mentioned in article 7. In order to bring out the meaning of the phrase "provided that it acted as an organ", at the end of the first paragraph of the Special Rapporteur's revised text, the Drafting Committee had amended it and had placed it nearer the beginning of the paragraph, with the result that there now appeared after the enumeration of the types of organs the words "such organ having acted in that capacity".

8. The Special Rapporteur had placed the second paragraph of his revised version of the article within square brackets. The Committee, taking into account a view which had seemed to predominate in the Commission and which was acceptable to the Special Rapporteur, had decided that the paragraph was not essential and could be omitted from its own version of the article.

9. The CHAIRMAN said that, if there were no comments, he would take it that the Commission agreed to approve article 10 as proposed by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 11<sup>3</sup>

10. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 11:

##### Article 11

*Conduct of persons not acting on behalf of the State*

1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10.

11. The Committee had based its deliberations on the revised draft of article 11 submitted by the Special Rapporteur.<sup>4</sup>

12. Paragraph 1 of the Special Rapporteur's revised article had provided that "The conduct of a person, group of persons or entity acting in a purely private capacity shall not be considered as an act of the State under international law". The Committee had decided, after some consideration, to omit the reference to an "entity", so that the paragraph as now proposed followed the language of article 8 in speaking of "a person or a group of persons", a phrase which, as indicated in the commentary to article 8, was intended to cover not only physical persons, but also juridical persons. The Committee had preferred, for the sake of precision, and in order to employ the language already used in article 8, to replace the phrase "acting in a purely private capacity" by the phrase "not acting on behalf of the State".

13. With regard to paragraph 2, the Committee had endeavoured to take into account the comments made in the Commission concerning the problems which would arise if its provisions trespassed into the field of primary rules, and had accordingly made a number of changes to the Special Rapporteur's revised version, designed to stress the link between the conduct of the person or group of persons referred to in paragraph 1 and other conduct which was related to that of the person or group of persons, but which was to be considered as an act of the State by virtue of articles 5 to 10. Consequently, the reference in paragraph 2 to "other conduct" which might be attributable to the State meant all the forms of conduct dealt with in articles 5 to 10.

14. Mr. KEARNEY suggested that paragraph 2 could be deleted and its sense retained by the insertion at the beginning of paragraph 1 of a phrase such as "Without prejudice to the content of articles 5 to 10 . . .".

15. Mr. AGO (Special Rapporteur) said that he would be reluctant to adopt Mr. Kearney's suggestion because

<sup>1</sup> For previous discussion see 1303rd meeting, para. 1.

<sup>2</sup> See 1307th meeting, para. 1.

<sup>3</sup> For previous discussion see 1308th meeting, para. 1.

<sup>4</sup> See 1311th meeting, paras. 21 and 23.

the essence of the rule relating to responsibility for the actions of private individuals was, precisely, that it did not provide for the attribution of such actions to the State, but for the attribution to the State of any other conduct connected with such actions and which was an act of the State. The rule stated in article 11 would thus lose a great deal of its value if paragraph 2 were deleted.

16. Mr. KEARNEY said he did not find the explanation given by Mr. Ago entirely satisfactory, but he would not press his amendment at the present stage. In his opinion, paragraph 2 did not add anything to what had been said in articles 5 to 10.

17. The CHAIRMAN said that if there were no further comments he would take it that the Commission approved article 11, as proposed by the Drafting Committee.

*It was so agreed.*

#### ARTICLES 12, 12 *bis* AND 12 *ter*<sup>5</sup>

18. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that a number of members had expressed the view that the original article 12 should be divided into three elements, dealing with the conduct of an organ of another State, of an international organization and of an insurrectional movement, respectively. The Special Rapporteur had agreed to draft separate articles on each subject. As a result, the Committee was now submitting articles 12, 12 *bis* and 12 *ter*.

#### ARTICLE 12

19. For article 12, the Drafting Committee proposed the following text:

##### *Article 12*

##### *Conduct of organs of another State*

1. The conduct of an organ of a State acting in that capacity, which takes place in the territory of another State or in any other territory under its jurisdiction, shall not be considered as an act of the latter State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10.

20. With regard to paragraph 1, the Drafting Committee thought that the phrase "in the territory" of a State might leave some doubt as to the attribution of conduct occurring outside the territory of a State as strictly understood, but nonetheless in a place under its jurisdiction. Various cases had been contemplated, such as that of conduct occurring on a vessel on the high seas. The Committee had thought it desirable that the article should be framed in such a way as to cover all possible cases and that that could best be achieved through the use of the phrase "or in any other territory under its jurisdiction".

21. Paragraph 2 provided a safeguard, in line with the general idea of article 11, paragraph 2. A State, including the State in whose territory another State had acted, might still have attributed to it any other conduct related to the conduct referred to in paragraph 1, which was attributable to it by virtue of articles 5 to 10.

22. Mr. TSURUOKA proposed that, in paragraph 1, the words "in any other territory under its jurisdiction" be replaced by the words "in any other place under its jurisdiction".

23. Mr. AGO (Special Rapporteur) said that the Drafting Committee had in fact had some difficulty in choosing between the words "any other territory" and the words "any other place". He himself had no preference. The word "territory" was perhaps less specific, but it might be less likely to give rise to misunderstanding.

24. Mr. KEARNEY said, with regard to paragraph 1, that if the Commission wished to make the criterion for attribution the territory in which conduct occurred, the simplest solution would be to replace the phrase "which takes place in the territory of another State or in any other territory under its jurisdiction" by the phrase "which takes place in any territory under the jurisdiction of another State". If the Commission accepted the amendment proposed by Mr. Tsuruoka, it would have to retain a bifurcated definition.

25. Sir Francis VALLAT said that the point was one which had preoccupied him in both the Commission and the Drafting Committee. He still preferred the solution proposed by Mr. Tsuruoka, but he would not press his views, provided it was made absolutely clear in the commentary that, in adopting the wording proposed by the Drafting Committee, the Commission was not implying that conduct of an organ of a State which occurred elsewhere than in the "territory" of another State would be attributable to that other State.

26. Mr. AGO (Special Rapporteur) said that the wording proposed by Mr. Kearney, "in any territory under the jurisdiction of another State" was exactly what he himself had proposed in the Drafting Committee. The Drafting Committee had, however, preferred a more detailed wording, "in the territory of another State or in any other territory under its jurisdiction", so that it would also cover a number of different special cases, such as acts committed on board a ship, in maritime waters subject to the jurisdiction of a State, in a dependent territory and so on. Like Sir Francis Vallat, he was of the opinion that the wording should be explained in the commentary, but he was prepared to accept the phrase "any other place" if the Commission so wished.

27. Mr. CALLE Y CALLE said that he favoured the retention of the wording proposed by the Drafting Committee, particularly since the same language also appeared in article 12 *bis*. While it might be possible to speak of the "place" or "locality" in which the internationally wrongful act was committed, it seemed preferable, since the reference was to States, which were often extensive in area, to employ the word "territory".

28. Mr. AGO (Special Rapporteur) pointed out that in article 13 the expression "territory under its administration" meant a dependent territory in which a new State was formed.

29. Mr. REUTER said that if, for the reason given by Mr. Ago, the use of the word "territory" in the expression "territory under its administration" was justified in article 13, it could be concluded, by reasoning *a contrario*, that its use in article 12 in the expression "territory under

<sup>5</sup> For previous discussion of article 12 see 1312th meeting, para. 1.

its jurisdiction" was not justified, for in article 12 it had two meanings: first, a legal meaning and, secondly, a spatial or geographical meaning. It would therefore be better to say: "in its territory or in any other place under its jurisdiction".

30. Mr. USHAKOV said that, in his opinion, there was always a territory involved even if it was not under any jurisdiction.

31. Mr. REUTER said he wondered whether Mr. Ushakov would therefore agree to the use of the word "territory" in relation to international organizations—because the problem could arise in connexion with the draft articles on treaties concluded between States and international organizations.

32. Mr. USHAKOV said that there was no territory under the jurisdiction of an international organization.

33. Mr. AGO (Special Rapporteur) said he was in favour of using the expression "territory under its administration" in article 12 *ter* and article 13. In the case of article 12, he would not object to the wording suggested by Mr. Reuter, namely, "in its territory or in any other place under its jurisdiction".

34. Mr. ELIAS said that the Commission should not reopen the discussion on paragraph 1. The present wording had been decided on after several meetings and members had had ample time for reflection.

35. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 12 as proposed by the Drafting Committee, subject to the inclusion in the commentary of the explanation requested by Sir Francis Vallat.

*It was so agreed.*

#### ARTICLE 12 *bis*

36. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 12 *bis*:

##### *Article 12 bis*

##### *Conduct of organs of an international organization*

The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.

37. In considering the article, the Committee had had in mind the fact that a number of members of the Commission had been anxious that its provisions should not go beyond the boundaries of the topic and impinge on the subject of international organizations. Hence the apparent lack of symmetry between article 12 and 12 *bis*.

38. Article 12 *bis* had been drafted in a way designed to emphasize its rather limited purpose, which was to state that the conduct of an organ of an international organization acting in that capacity in the territory of a State or in territory under the jurisdiction of that State should not be attributed to that State "by reason only of the fact that . . .". By the use of that phrase, the article clearly stated the intended rule and also left open the possibility that other facts or factors might be relevant in ascertaining whether, in a given case, the conduct of an organ of an

international organization might be attributed to the State in whose territory the organ had acted.

39. Mr. TSURUOKA said that, in addition to what was provided in article 12 *bis*, reference should also be made to the case in which an act of an organ of an international organization must not be considered to be an act of the State by reason only of the fact that the organ in question was a national of that State. That point should at least be made clear in the commentary.

40. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 12 *bis*, as proposed by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 12 *ter*

41. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 12 *ter*:

##### *Article 12 ter*

##### *Conduct of organs of an insurrectional movement*

1. The conduct of an organ of an insurrectional movement, which is established in the territory of a State or in any other territory under its jurisdiction, while acting as an organ of that movement shall not be considered as an act of that State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that State by virtue of articles 5 to 10.

3. Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law.

42. The drafting of article 12 *ter* reflected some of the considerations he had mentioned in connexion with article 12. In particular, paragraph 2 contained the same sort of safeguard clause as was found in paragraph 2 of article 12.

43. Paragraph 3 dealt with the possible attribution to an insurrectional movement of conduct of an organ of that movement. The Drafting Committee, in the phrase "in any case in which such attribution may be made under international law", had avoided speaking of the possession by an insurrectional movement of international personality or status, since that was a question outside the scope of the article. The paragraph was merely intended to show that the article left the way open to and did not prejudice any such attribution, in any case where that might be possible.

44. Mr. AGO (Special Rapporteur) said he thought that, in order to establish a parallel with article 13, it would be necessary, in paragraph 1 of article 12 *ter*, to replace the phrase "in any other territory under its jurisdiction, while acting as an organ of that movement" by the phrase "in a territory under its administration".

45. Mr. KEARNEY said that it was not clear from the present form of paragraph 1 whether the word "established" referred to the insurrectional movement itself or its organ. It was important to remove that ambiguity,

since it was entirely possible that a movement and its organ could be based in different States.

46. In order to avoid giving the impression that the Commission had given up in the face of a problem it could not solve, he suggested that paragraph 3 of the article be deleted and the reasoning behind its initial inclusion set out in the commentary.

47. Mr. AGO (Special Rapporteur) said that the apparent ambiguity in paragraph 1 to which Mr. Kearney had referred was useful, since it made it possible to cover all the possible cases which could arise. For example, the provisional Government of the Republic of Algeria had had its headquarters at Cairo and at Tunis and, in both cases, that organ could have committed wrongful acts.

48. With regard to Mr. Kearney's second suggestion, it would be remembered that the text of paragraph 5 of the original article 12 was much more precise because its intention was to provide for attribution of conduct to the insurrectional movement as a subject of international law. In the case of the nationalist insurrection in Spain, for instance, responsibility for certain acts had been attributed to General Franco's Government by several States. In order to meet Mr. Kearney's wishes, he would suggest that paragraph 3 be explained in the commentary.

49. Sir Francis VALLAT said that, when the Commission had discussed the topic of State succession in respect of treaties, some Governments had had difficulty in understanding the phrase "territory under the administration of a State", and the Commission had accordingly decided to replace it by the phrase "territory for the international relations of which a State is responsible". While he was not proposing such a change in the present instance, he hoped that the reason why the Commission had approved the shorter phrase proposed by Mr. Ago would be explained in the commentary.

50. Mr. AGO (Special Rapporteur) said that Sir Francis Vallat had been right to refer to the difficulties to which the words "territory under its administration" gave rise, but he (the Special Rapporteur) would urge the Commission not to amend the present text in order not to introduce even worse confusion than that it was trying to avoid, by using an expression which implied giving the word "responsibility" a meaning different from that in which it was used in the draft. It was enough to indicate, in the commentary, the reasons why the Commission had preferred the words "territory under its administration".

51. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 12 *ter*, as proposed by the Drafting Committee and amended by the Special Rapporteur, subject to the inclusion in the commentary of the explanation requested by Sir Francis Vallat.

*It was so agreed.*

#### ARTICLE 13<sup>6</sup>

52. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 13:

#### Article 13

*Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State*

1. The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.

2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State.

53. The new text represented an attempt to reformulate the article in order to meet certain criticisms which had been made. The original title of the article had read "Retroactive attribution to a State of the acts of organs of a successful insurrectional movement". The words "retroactive" and "successful" had now been omitted from both the title and the text, since questions concerning the legitimacy of an insurrectional movement were outside the scope of the article. Other changes had been made in the text to clarify the content of the article and limit its scope. Paragraphs 1 and 2 corresponded to paragraphs 2 and 1 respectively of the original version.

54. Paragraph 1 of the new version dealt with the attribution to the State of the act of an insurrectional movement which became the new government of the State. In that case there was a change of government and continuity of the State. The second sentence of paragraph 1 reserved the possibility of attribution to the State of conduct which would previously have been considered as an act of the State by virtue of articles 5 to 10.

55. Paragraph 2 dealt with the attribution to the State of the act of an insurrectional movement which resulted in the formation of a new State, whether in part of the territory of a pre-existing State or in a territory under a pre-existing State's administration. The Drafting Committee considered that reference should be made in the commentary to the possibility that a new State would be established in the whole of the territory of a pre-existing State, but it did not think that such a case need be dealt with in the articles themselves.

56. Mr. KEARNEY said he found it strange that paragraph 1 should refer to the "act" of an insurrectional movement, whereas article 12 *ter* had spoken of the "conduct" of such a movement. The change seemed to suggest that there was some difference between an "act" and "conduct". He assumed that the phrase "which would have been previously considered as an act of the State", which was unduly vague, referred to conduct of organs or persons on behalf of the government which had been replaced and occurring prior to the installation of the new government. With regard to paragraph 2, it would seem better to speak of the "insurrection" rather than the "action" of an insurrectional movement.

57. Mr. HAMBRO said he was still not convinced of the need for or even the usefulness of articles 12 *ter* and 13.

58. Mr. AGO (Special Rapporteur) said that the problem raised in those two articles was nonetheless a very important one. It had frequently caused concern to

<sup>6</sup> For previous discussion see 1316th meeting, para. 2.



Governments and tribunals and had played a prominent role in the practice. It could therefore not be ignored.

59. Replying to the comments by Mr. Kearney, he said that article 13 did not deal with the attribution of conduct to a specific subject of international law other than a State, but rather with the attribution to the State resulting from the insurrection of an act previously attributed to an insurrectional movement because it had been committed by an organ of that movement. The expression "act of an insurrectional movement" was an elliptical rendering of that idea. He realized that the wording of the second sentence of paragraph 1 was very succinct, but was convinced that more elaborate wording would not be any clearer.

60. With regard to the words "whose action results" in paragraph 2, which Mr. Kearney had criticized, it had to be remembered that the aims of an insurrection could change as the insurrectional movement gained momentum.

61. The CHARIMAN said that if there were no further comments he would take it that the Commission agreed to approve article 13, as proposed by the Drafting Committee.

*It was so agreed.*

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

(A/CN.4/285)

[Item 4 of the agenda]

*(resumed from the previous meeting)*

**DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR**  
**ARTICLE 7 (Full powers) AND**

**ARTICLE 2 (Use of terms), paragraph 1 (c) (continued)**

62. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 7 and the related provision in paragraph 1 (c) of article 2.

63. Mr. REUTER (Special Rapporteur) said he was glad to note that neither the meaning of, nor the need for, those two provisions had been questioned. Nevertheless, a number of comments had been made and some clarification was called for. To begin with, many members had felt that article 7, paragraph 2 (b), did not take sufficient account of article 12 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.<sup>7</sup> To meet that criticism, he was prepared to subdivide the paragraph in order to introduce the concept of the head of mission, and model it on article 12 of that Convention. There would then no longer be any reference to treaties concluded with the organization, which must obviously be bilateral treaties.

64. Mr. Ago thought it would be desirable to specify in several places in the body of article 7 that it related to treaties between States and one or more international

organizations. But the Commission had already approved a definition of the word "treaty", in article 2, paragraph 1 (a). It would be necessary to wait until the draft as a whole had been considered before making any changes in that definition, which must necessarily be different from the definition contained in the Vienna Convention on the Law of Treaties.

65. As Mr. Ushakov, Mr. Pinto and Mr. Tsuruoka had pointed out, there was no general practice of international organizations. It was possible to speak of the practice of two international organizations in their mutual relations, but otherwise each organization had its own practice. In his opinion, the words "the practice of the States and international organizations concerned" should refer to the practice of each organization. In order to clear up any misunderstanding, either the phrase "the practice of the States and international organizations in question" or the more specific phrase "the practice of the States and the organization or organizations in question" might be used. The definition of the term "rules of the Organization" contained in article 1, paragraph 1 (34) of the 1975 Vienna Convention spoke of the "established practice of the Organization". That did not necessarily mean that all international organizations had a practice. Nor were they all empowered, by virtue of their constituent instruments, to create a practice. The reference in draft article 7 to the practice of the organizations in question could therefore not prejudge the question of the constitutional limits to the creation of a practice in each organization. But, in the light of the reference to the "practice of the Organization" in the 1975 Vienna Convention, it was difficult to start from the assumption that organizations had no practice at all. When such practice did exist, it bound only the organization and its member States. Under draft article 7, third States would always be in a position to demand that the representative of the organization should have full powers. If States had seldom required full powers, it was because the need to do so had not been felt. The Commission should be careful not to complicate matters.

66. Mr. Ushakov had said that it was debatable whether the term "full powers" could be used both for organizations and for States. He (the Special Rapporteur) suggested that that term might be reserved for States and the term "credentials" used for international organizations. The term "credentials" was, however, used in connexion with delegates of States in article 44 of the 1975 Vienna Convention. It was therefore important to use the appropriate wording. If applied to an international organization, the term "full powers" could be ambiguous because, according to the definition proposed, it meant a document appointing one or more persons to represent the organization not only for the purpose of negotiating, adopting or authenticating the text of a treaty, but also for the purpose of expressing the consent of the organization to be bound by the treaty. It would, however, be inadmissible for a person who had received full powers from the secretary-general of an organization to be able, on his own initiative, to express the consent of that organization. The representative of an organization who had powers to represent it must not be entitled to define the content of the consent of the organization;

<sup>7</sup> See document A/CONF.67/16.

that must be defined by the organization itself in accordance with its own rules. Since representatives of organizations were, in sum, only channels of communication, he proposed to reserve the word "express" for the consent of the State and to use the word "communicate" for the consent of the organization.

67. To take account of a comment by Mr. Ushakov concerning the term "competent authority", in article 2, paragraph 1 (c), he suggested that the use of that term be reserved for States and that the term "competent organ" be used for international organizations. With regard to the term "appropriate full powers", in article 7, paragraph 3 (a), which had also been the subject of a comment by Mr. Ushakov, he proposed that it be replaced by the term "full powers for that purpose". They were in fact, powers for the purpose of adopting or authenticating the text of a treaty or communicating the consent of the organization to be bound by the treaty.

68. The CHAIRMAN said that, if there were no comments, he would take it that the Commission agreed to refer article 7 and paragraph 1 (c) of article 2 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>8</sup>

#### ARTICLE 8

69. The CHAIRMAN invited the Special Rapporteur to introduce article 8, which read:

##### *Article 8*

##### *Subsequent confirmation of an act performed without authorization*

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State or international organization for that purpose is without legal effect unless afterwards confirmed by that State or organization.

70. Mr. REUTER (Special Rapporteur) said that the provision was intended only to extend the application of the rule of the Vienna Convention on the Law of Treaties to the case envisaged in the draft.

71. The CHAIRMAN said that, if there were no comments, he would take it that the Commission agreed to refer article 8 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>9</sup>

#### ARTICLE 9

#### ARTICLE 2, PARAGRAPH 1 (g) AND

#### ARTICLE 10

72. The CHAIRMAN invited the Special Rapporteur to introduce article 9, article 2, paragraph 1 (g), and article 10, which read:

##### *Article 9*

##### *Adoption of the text*

1. The adoption of the text of a treaty concluded between one or more States and one or more international organizations takes

place by the consent of the State or States and the organization or organizations participating as potential parties in its drawing up.

2. The adoption of the text of a treaty between several international organizations takes place by the consent of the organizations participating as potential parties in its drawing up.

3. The adoption of the text of a treaty at an international conference admitting, in addition to States, one or more international organizations possessing the same rights as States at that conference, takes place by the vote of two thirds of the States and organizations present and voting, unless by the same majority the States and organizations shall decide to apply a different rule.

##### *Article 2*

##### *Use of terms*

1. (g) "party" means a State which has consented to be bound by the treaty and for which the treaty is in force; in the same conditions it means an international organization when its position with regard to the treaty is identical to that of a State party;

##### *Article 10*

##### *Authentication of the text*

The text of a treaty is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the States and international organizations participating as potential parties in its drawing up; or

(b) failing such procedure, by the signature, a signature *ad referendum* or initialling by the representatives of those States and organizations of the text of the treaty or of the Final Act of a conference incorporating the text.

73. Mr. REUTER (Special Rapporteur) drew attention to a very important problem raised by those three provisions. It could happen that an international organization took part in the preparation and adoption of the text of a treaty between States or even that it signed such a treaty, without becoming a party to it. That was the position of the World Bank in connexion with the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.<sup>10</sup> It could also happen that the text of a treaty was authenticated by an act emanating from a representative of an international organization, or from the president of the assembly of an international organization, acting as an organ of that organization. For the purposes of the present draft, therefore, it was important to take into consideration only those international organizations which took part in the preparation, adoption and authentication of the text of a treaty as future parties to the treaty.

74. In view of the principle of the sovereign equality of States, no such distinction had been necessary in the case of the Vienna Convention on the Law of Treaties. It was only in the cases to which the present draft applied that an entity could receive only a proportion of the rights to which a party to a treaty was entitled. As the Observer for the European Committee on Legal Co-operation had pointed out,<sup>11</sup> there was a convention of the Council of Europe to which the European Communities could become parties on the same basis as States. The European Communities would, however, be deprived of a right, because no account would be taken of the instrument in which they expressed their consent to be

<sup>8</sup> For resumption of the discussion see 1353rd meeting, paras. 9 and 23.

<sup>9</sup> *Ibid.*, para. 29.

<sup>10</sup> United Nations, *Treaty Series*, vol. 575, p. 160.

<sup>11</sup> See 1333rd meeting, para. 38.

bound by that Convention in calculating the number of instruments of ratification necessary for its entry into force.

75. Referring to a difficulty regarding article 9 pointed out to him by Mr. Ushakov, he said that the equivalent of the words "all the States", used in article 9, paragraph 1, of the Vienna Convention which gave that provision its legal force, should be included in article 9, paragraph 1, of the present draft. It was only because he had not been able to find a satisfactory wording that he had left the text he was proposing somewhat imprecise.

The meeting rose at 6.10 p.m.

### 1346th MEETING

Tuesday, 8 July 1975, at 10.10 a.m.

*Chairman:* Mr. Abdul Hakim TABIBI

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

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

(A/CN.4/285)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR  
ARTICLE 9 (Adoption of the text),

ARTICLE 2 (Use of terms), PARAGRAPH 1 (g), AND

ARTICLE 10 (Authentication of the text) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of articles 9 and 10 and the related provision in paragraph 1 (g) of article 2 (Use of terms).
2. Mr. ŠAHOVIĆ said that although he recognized the need to keep the law of treaties as consistent as possible, the study of treaties concluded between States and international organizations or between several international organizations required a thorough analysis of the practice because there were wide differences in that respect between States and international organizations. The Commission had so far adopted a realistic method. Article 6, on the capacity of international organizations to conclude treaties, was a compromise which was perfectly acceptable in the present circumstances. In considering the draft articles, the Commission should try both to promote the progressive development of international law and to reaffirm the principles already codified in the Vienna Convention on the Law of Treaties.
3. He agreed with the way in which the Special Rapporteur had framed article 9. In particular, two separate

paragraphs were needed, one dealing with treaties concluded between States and international organizations, and the other with treaties concluded between several international organizations. The phrase "as potential parties", which was intended to eliminate any difficulties which might arise as a result of the particular situation of certain organizations taking part in the drawing up of the text of a treaty, did not seem to him indispensable. It would be sufficient to use the word "parties" and to provide the necessary clarification in the commentary.

4. Although international organizations could not be fully assimilated to States as subjects of international law, it was important, particularly in article 9, paragraph 3, not to make too great a distinction between the status of States and that of international organizations. The definitions already adopted by the Commission were applicable to the draft as a whole and would not allow it to treat States and international organizations very differently.

5. Mr. ELIAS said he found both articles 9 and 10 acceptable for the reasons given in paragraphs 3 and 4 of the commentary to article 9, especially in paragraph 3, to which there was a reference in the commentary to article 10. A satisfactory explanation was given of the way in which the corresponding provisions of the Vienna Convention on the Law of Treaties had been adapted.

6. Article 10 did not involve any difficulty, but article 9 raised the problem of the position of an international organization as a party to a treaty. For obvious reasons, there were instances where a conference was held under the auspices of an international organization and the participants did not all have the same status. It was thus possible for an organization to participate in the drawing up of a convention without necessarily becoming a full party to it subsequently. The Special Rapporteur had therefore been well advised to frame article 9 so as to confine the requirement of consent to those organizations which had participated in the drawing up of the text as "potential parties". In paragraph 3 of the commentary to article 9, the Special Rapporteur mentioned the possibility of using instead the form of words "which participated in that drawing up during the negotiation". He himself did not favour that alternative and much preferred the wording used in the text submitted by the Special Rapporteur.

7. In paragraph 3 of article 9, the Special Rapporteur had taken the position that, in computing the required two-thirds majority, only international organizations possessing the same rights as States at the conference should be counted. Clearly, the matter would depend entirely on whether, in that situation, an organization was regarded as broadly comparable to a State.

8. He suggested that articles 9 and 10, together with the definition of "party" contained in paragraph 1 (g) of article 2, be accepted and referred to the Drafting Committee, with instructions to examine the possibility of improving the wording, particularly that of article 9, paragraph 3.

9. Mr. PINTO said that the provisions under discussion involved for him problems both of substance and of drafting.

10. From the point of view of substance, he had a fundamental difficulty with the terms of paragraph 3 of article 9. The idea that an international organization could become a party to a treaty was established by practice and there could be no question of reversing that practice. Nevertheless, as he had pointed out at the 1344th meeting,<sup>1</sup> an international organization was not a State and could not possibly be treated on the same footing as a State. In the first place, an organization was not sovereign. It did not possess the full range of powers or the same political potentialities as a State. An international organization was bound by its constituent instrument and had no powers beyond those conferred upon it either explicitly or by implication in that instrument.

11. Another consideration was that the political forces which operated within an organization were not the same as those which operated within a State. The position in an organization depended on the resolution of forces exercised by individual sovereign States, each pursuing its national policy. Every State had the possibility of initiating action in an international organization, but a single State had very little control over an organization. It would not be possible for any particular State to determine the position that would be taken by an organization at a conference to draw up the text of a treaty. The only way in which States could exercise their influence in an organization was through their right of association. That right, however, was very complex to operate. Even in a very cohesive group of States, each individual State had to sacrifice its own immediate requirements to the interests of the group. The immediate political gains resulting for a particular State from following the action agreed by the group were usually small and sometimes even non-existent. Certain States having considerable power, on the other hand, were faced with a different problem by what some regarded as the tyranny of the majority. The difficulties resulting from the contrast between the position of those States and that of certain groups had led to the practice at international meetings of taking decisions by consensus. That was the situation in the international community and it had to be taken into account as a reality. In that situation, most States were extremely reluctant to allow international organizations to have a status comparable to that of States. By adopting that attitude, the Governments of States believed that they were upholding their sovereign rights and thereby protecting the legitimate interests of their people.

12. Another important consideration was that international organizations varied considerably in character. Some were of a universal character, others were more limited. Some had a wide range of activities and interests, others were restricted to a specific topic. It was therefore extremely hazardous to try to lay down rules applicable to all organizations at all conferences in which they might participate.

13. For those reasons, and bearing in mind particularly the wariness of States when dealing with international organizations, he could not accept the idea embodied in paragraph 3 of article 9 that an international organization

could have the right to vote at a conference. The Commission should recognize the present position, namely, that an international organization was allowed to speak at a conference and wield whatever influence its chief executive officer could exercise, but without participating in votes.

14. He had a few comments to make on the drafting of article 9. In paragraph 2, the Drafting Committee should consider the possibility of replacing the word "between" by the word "among", before the words "several international organizations". In paragraph 3, the phrase "two thirds of the States and organizations present and voting" stood in need of explanation, possibly in the commentary. Under no circumstances should those words be taken to mean that it was necessary for the majority to include both two-thirds of the States present and voting and two-thirds of the organizations present and voting. That drafting comment was of course subject to his objection of substance to the idea of an international organization voting at all.

15. Mr. KEARNEY said that, although he understood Mr. Pinto's position, he was not at all opposed to the provision contained in paragraph 3 of article 9. It should be remembered that the provision in question had the character of enabling legislation. It simply supplied a framework in which it was possible for States and international organizations to agree among themselves on the role which those States and organizations would have in relation to a particular treaty. The Commission should not attempt to draw any conclusions or impose any requirements as to the necessary role of an international organization. It should draft rules which would permit international organizations to participate in the formulation of a treaty to the fullest extent, if such was the wish of the participating States and international organizations concerned. Concern regarding the present situation in the international community should not block future developments. The Commission should take the long view and consider that the draft articles which it was preparing were intended to serve as rules of international law valid for the next half-century.

16. It seemed undesirable, however, to include in paragraph 3 of article 9 the requirement that organizations should have the same rights as States at a conference to adopt the text of a treaty. There was no need for an international organization to have all the rights of a State for it to be allowed to vote at a conference. For example, the rules of procedure of a conference might require that the officers of the conference should all be representatives of States. The fact, however, that the representatives of participating international organizations were not eligible for such office was no reason to deprive those organizations of the right to vote if the participants in the conference wished them to have that right.

17. The real test should be whether the rules of procedure of the conference conferred upon an international organization the right to vote. For that reason, he proposed that, in paragraph 3 of article 9, the words "possessing the same rights as States at that conference" be replaced by the words "participating with the right to vote". In that manner, any international organization having the

<sup>1</sup> Para. 34.

right to vote under the conference's rules of procedure would be covered by the provisions of paragraph 3.

18. There were similar reasons for amending paragraph 1 (g) of article 2, which stated that, for the purposes of the draft articles, "party", apart from a State party, meant an international organization, when its position with regard to the treaty was "identical to that of a State party". The requirement of identity made the provision excessively restrictive and very difficult to apply when it was considered that States and international organizations were fundamentally two very different types of entity. It was significant that, in the commentary to that paragraph, a much weaker expression was used, since it referred to international organizations whose relations with the treaty were in every respect "comparable to those of the States parties". It was also worth noting that even States parties might not all be in an identical position in relation to a treaty. For example, in the case of the Antarctic Treaty of 1959,<sup>2</sup> there were two types of party, depending upon their activities in the region.

19. For those reasons, he proposed the deletion of the second sentence of paragraph 1 (g) of article 2, beginning with the words "in the same conditions", and the insertion, after the word "State", of the words "or international organization". The provision would then read: "'party' means a State or international organization which has consented to be bound by the treaty and for which the treaty is in force".

20. He had no problem with the provisions of article 10.

21. Mr. HAMBRO, referring to Mr. Pinto's comments, said that while it was true that international organizations were not sovereign, it was equally true that the sovereignty of States was not unlimited; like that of international organizations, it was limited by international law.

22. International organizations were extremely diverse and their interests and competence could vary considerably. The same diversity was to be found among States; they could be either large or small and their interests could be very wide or very narrow. The principle of the sovereign equality of States could not hide the fact that States were really no more equal than international organizations were. Some organizations had many members, but others had only three or four. In the latter case, the vote of each member State had much more weight. The majority of two-thirds of the States and organizations present and voting, referred to in article 9, paragraph 3, should be understood as the majority of two-thirds of all the States and organizations present and voting, provided the organizations were entitled to vote. If that was indeed the meaning of that provision, it would be necessary to provide the required clarification in the commentary.

23. According to Mr. Pinto, international organizations were so different from one another that it was very difficult to state a general rule, but although that might be true in fact, it was not true in law, because it was precisely the task of the Commission to try to formulate

general legal rules. Moreover, article 9, paragraph 3, reserved to States and organizations the right to decide to apply a rule which was different from the general rule.

24. He could accept articles 9 and 10 and article 2, paragraph 1 (g), in the form proposed by the Special Rapporteur.

25. Mr. USHAKOV said that he would deal only with the substance, not with the terminology or the drafting. First, it was essential to formulate different provisions for the different categories of treaties. Article 9, paragraph 3, and article 10 clearly showed that it was impossible to formulate rules applicable to treaties without specifying whether such treaties were treaties between States and international organizations, or treaties between several international organizations. Thus, in the case of treaties concluded between international organizations, there was no need to mention the participation of States.

26. With regard to article 9, paragraph 3, the principle it stated should merely refer back to the rules established by the international conference at which the text of the treaty was adopted. If a conference was attended by ten States and one international organization, the organization's vote would have as much weight as that of the States; it would even be decisive because, without the organization, the treaty could not be concluded. If two international organizations took part in a conference with ten States, their votes also might be decisive. The proportion of States and organizations taking part in the adoption of the text of a treaty could vary enormously and it was impossible to formulate rules applicable to every case without making very complicated mathematical calculations. Consequently, he suggested that article 9, paragraph 3, be divided into two provisions, one relating to treaties concluded between States and organizations, and the other to treaties concluded between organizations, and that it be stipulated that only the procedure established by the conference was decisive for the adoption of the text of a treaty. Moreover, both sub-paragraph (a) and sub-paragraph (b) of article 10 implied the need to formulate separate rules for those two categories of treaties.

27. He agreed that the text of a treaty could be established as authentic and definitive by the signature *ad referendum* or initialling of the representative of an international organization, as provided in article 10, sub-paragraph (b), but he wondered whether those two means of authentication were really appropriate for international organizations.

28. Mr. RAMANGASOAVINA said that article 9, paragraph 1, dealt with the very special case in which States and international organizations were called upon, as subjects of international law, to co-operate in adopting a treaty which would be mutually binding upon them. According to that provision, the States and organizations concerned must have taken part in the drawing up of the text of the treaty in order to be able to give their consent to its adoption. In accordance with draft article 11, however, consent could also be expressed by approval, accession or any other means, if so agreed. Consent could therefore be expressed either by participation in the drawing up of the text of the treaty or,

<sup>2</sup> United Nations, *Treaty Series*, vol. 402, p. 72.

subsequently, by approval, accession or any other means, if so agreed. Article 9, paragraph 1, should therefore be amended so as not to give the impression that the adoption of the text of a treaty was limited to the parties which had taken part in its drawing up, to the exclusion of those which had not done so but subsequently expressed their consent to be bound by it.

29. The difficulties to which article 9, paragraph 3, might give rise seemed to be due to the fact that international organizations were not subjects of international law fully on a par with States. In principle, States were all equally sovereign and enjoyed the same right to express their consent to be bound by a treaty. But the capacity of international organizations to be bound by a treaty was derived from the relevant rules of each organization, as stated in draft article 6. There was a kind of hierarchy of international organizations and it was obvious that the General Assembly of the United Nations was at the top of it, while other principal and subsidiary organs came much lower down. Furthermore, although closely related, each organ or organization was also characterized by its particular field of activity. When several persons representing different organizations with similar fields of activity took part at the same time in the adoption of the text of a treaty, it was important to determine which were to be considered as representing the organizations present and voting. The two-thirds majority rule laid down by the Special Rapporteur could then give rise to serious difficulties. There could, for example, be a conflict between the competence conferred upon an organization by its constitution and the competence of certain States.

30. He had no major objection to article 9, but thought the Special Rapporteur should try to improve the wording and make the position clearer because it was difficult to place on the same level subjects of international law as different as States and international organizations.

31. Mr. TSURUOKA said he would leave aside drafting questions, and consider only the substance of the articles. In connexion with paragraph 3 of article 9, the Special Rapporteur had stated in paragraph (4) of his commentary that "it would probably be for the States concerned to define in the case of each treaty, should they so desire, the particular conditions to be extended to organizations which were to become 'parties' to the treaty under a special régime". In the same paragraph he had expressed the view that the time had not yet come to propose a general framework for that topic, but that in the case of a rule as important as that of the two-thirds majority at international conferences, the vote of international organizations should not be placed on the same footing as the vote of States unless the organizations had the same rights as States. He (Mr. Tsuruoka) shared that view, which seemed to reflect the current state of international law. Most international organizations, however, did not have the right to vote at international conferences, simply because, in accordance with the Special Rapporteur's argument, organizations did not have the same rights as States at those conferences. That being so, he wondered what was the Special Rapporteur's real intention on that point.

32. With regard to the two-thirds majority rule, the Commission could either codify existing law, or contribute to the progressive development of international law with a view to promoting international co-operation. Since the purpose of an international conference was to promote international co-operation in a particular field, the two-thirds majority rule or even the simple majority rule, as opposed to unanimity, could only facilitate such co-operation. Since the decisions taken at such conferences usually had far-reaching consequences, the two-thirds majority rule seemed preferable to the simple majority rule.

33. Sir Francis VALLAT said that he had great sympathy with the comments by Mr. Pinto and still greater sympathy with the suggestions made by Mr. Kearney. The fact that the legal situation in the field covered by the articles was still developing and that the factual situations which could arise were extremely complex should not deter the Commission from attempting to draft rules which would provide the best possible solutions for the foreseeable future. The difficulties were, after all, the same as those with which the Commission and the Vienna Conference had been faced in drafting the Convention on the Law of Treaties. Similarly, while he sympathized with much of what had been said by Mr. Ushakov, he did not feel that the use of the word "treaty" in articles 9 and 10 of the present draft would give rise to any greater problems of adoption or interpretation than had been occasioned by the use of the same word in, for example, articles 9, 10, 31 and 32 of the Vienna Convention. Like that Convention, the draft dealt with the whole range of treaties and he did not see, therefore, why difficulties should arise if a particular term was employed throughout.

34. The Commission must bear in mind two basic principles in drafting its rules. The first was that it must respect the view of the many Governments which were unwilling to accept that international organizations had the same status in international law as States, and the second that the articles must be made flexible enough to cover all the various cases which might arise.

35. While he entirely agreed that the Vienna Convention on the Law of Treaties was an appropriate model, he wondered, in the light of the second of those principles, whether articles 9 and 10 had not become a little too rigid in the process of their adaptation from the corresponding articles of that Convention. For example, reference was made in both article 9, paragraph 1, and article 10, sub-paragraph (a), to "potential parties". Difficulties could arise because the word "potential" was always ambiguous in English, but they were even more likely to arise if, as he assumed was the case, the definition of the term "parties" was intended to be that found in article 2, paragraph 1 (g). He was unaware of any multilateral treaty with regard to which the position of an international organization had been identical with that of a State party, as that definition required, and his view was that the positions of States and international organizations would continue to be different in the vast majority of foreseeable cases. Since the mere fact that there would be differences in the nature and details of the obligations of international organizations and States was

no reason for excluding the application of articles 9 and 10, he hoped that the Special Rapporteur would consider making the definition more flexible.

36. As to the comments of earlier speakers concerning the phrase "same rights as States at that Conference" in article 9, paragraph 3, he thought that what was of importance in that context was undoubtedly that the organization had the right to vote on the adoption of the text. It was that which had to be taken into account so far as the voting rule was concerned. He entirely accepted the idea underlying article 9, paragraph 3, and supported the assumption of a presumptive rule on voting on the adoption of the text. It would be remembered that the compromise formula "unless by the same majority they [the States] shall decide . . ." had been included in article 9, paragraph 2, of the Vienna Convention on the Law of Treaties only after considerable debate and reflection. The Commission should adhere to its general policy of following the Vienna Convention and leave it to States to make such changes as they desired.

37. He supported the proposal to refer to articles 9 and 10 and article 2, paragraph 1 (g), to the Drafting Committee.

38. Mr. TSURUOKA said he should point out that, since the phrase "by the same majority", in paragraph 3 of article 9, applied not only to States but also to international organizations it perhaps belonged rather to progressive development than to true codification of international law.

39. Mr. SETTE CÂMARA said that, in his opinion, the definition of the term "party" in article 2, paragraph 1 (g), implied an *ex post facto* criterion: a State or international organization which had participated in the negotiation of a treaty could not be considered a party to that treaty until it had consented to be bound by it. The term "potential parties" used in article 9 was too vague, since a State could become a party to the treaty by accession, irrespective of whether or not it had participated in the negotiation of the treaty. The replacement of the term "potential parties" by a phrase akin to the alternative suggested by the Special Rapporteur in paragraph (3) of his commentary to the article in his fourth report would obviate the addition of yet another definition.

40. He shared the doubts of Mr. Pinto and Mr. Kearney concerning the phrases "possessing the same rights as States" and "position . . . identical to that of a State party", in article 9, paragraph 3, and article 2, paragraph 1 (g), respectively. Even when international organizations had full voting rights, their position with regard to a treaty was rather different from that of States. That could be seen, for example, from article 11, which showed that a State could express its consent to be bound by a treaty through ratification, a concept which could not be extended to international organizations.

41. The two-thirds majority rule in article 9, paragraph 3, was taken from article 9, paragraph 2, of the Vienna Convention on the Law of Treaties, but he did not feel that it was appropriate in the present case. Although the great majority of international conferences took their decisions by a two-thirds majority, that practice could not yet form the basis for a binding rule of international law.

Many United Nations organs operated on the basis of consensus, and even decisions taken by the Security Council in accordance with Article 43 of the Charter of the United Nations, which authorized the Council to conclude agreements with a State or a group of States, were subject to the overriding vote of its five permanent members. International conferences were at present free to establish their own rules of procedure, including the conditions governing voting, and that should continue to be the case.

42. He fully supported the substance of articles 9 and 10 and of article 2, paragraph 1 (g), as proposed by the Special Rapporteur, and was willing for the articles to be referred to the Drafting Committee.

43. Mr. AGO said it should not be forgotten that article 9 of the present draft was based on article 9 of the Vienna Convention on the Law of Treaties, which had two very specific purposes, namely, to codify the principle of the unanimity required for the conclusion of treaties, and to introduce an exception to that rule for treaties adopted during an international conference. Thus, in the case of an international conference such as the ones convened by the United Nations, a treaty was adopted by a two-thirds majority and not unanimously, according to the traditional rule. That was one of the differences between Sir Gerald Fitzmaurice's draft and the draft which the Commission had ultimately adopted and which had led to the Vienna Convention.

44. At first sight, it seemed that the rule stated in article 9, paragraph 2, of the Vienna Convention was a residuary rule, since a conference could decide to apply a different rule from that of the two-thirds majority for the adoption of the text of a treaty. But that rule was absolute when it was a question of deciding by what majority the treaty should be adopted.

45. With regard to article 9, paragraphs 1 and 2, he shared the view that it would be necessary to restore the word "all"—"the consent of all the States" which appeared in the Vienna Convention article—because unanimity was the essence of the rule set forth in those two provisions. He also wondered whether it might not be possible to simplify paragraphs 1 and 2 and combine them in a single paragraph, affirming the principle of unanimity and introducing the exception made in paragraph 3. The paragraph might then read more or less as follows:

"The adoption of the text of a treaty concluded either between one or more States and one or more international organizations, or between several international organizations, takes place by the consent of all the parties which participated in its drawing up".

46. In proposing the rule set forth in paragraph 3, the Special Rapporteur had been very objective because those who had taken part in the Vienna Conference on the Law of Treaties knew that he had then said that he was opposed to the two-thirds majority rule. Paragraph 3 dealt with the case in which one or more international organizations would be invited to take part, on an equal footing with States, in an international conference for the adoption of a multilateral treaty. The case was somewhat theoretical because it was hardly likely that international



organizations would be invited to take part on the same footing as States in the drawing up of a multilateral treaty at an international conference. If international organizations were invited on another footing than States, there would be no problem because it would then be the rule enunciated in paragraph 1 which applied. In the case covered in paragraph 3, however, the rule which would apply was that which the Special Rapporteur had set forth in that paragraph. If the participants in the Conference decided not to apply the two-thirds majority rule for the adoption of the text of the treaty, they would have to take that decision by the same majority. Even if the case dealt with in paragraph 3 was not very likely to occur, it could not be left out of account. Paragraph 3 was therefore necessary because, without it, the unanimity rule stated in paragraph 1 would apply in such a case.

47. Mr. ROSSIDES said he wished to express his appreciation of the Special Rapporteur's draft articles and comments and to thank the Secretariat for the documentation it had provided.

48. He thought that article 9, paragraph 1, should state, in line with article 9, paragraph 1, of the Vienna Convention on the Law of Treaties, that the adoption of the text of a treaty took place by the consent of "all the States" participating in its drawing up. Similarly, the word "all" should be inserted before the words "the organizations participating . . ." in article 9, paragraph 2. The difficulties occasioned by the vagueness of the term "potential parties" used in that paragraph could be resolved by substituting for it the term "prospective parties".

49. With regard to article 9, paragraph 3, there was no doubt that international organizations did not at present have the same powers or rights as States. He believed, however, that it was essential for the survival of the world that States should delegate to the United Nations some part of the powers they derived from their sovereignty. As it stood, paragraph 3 was regrettably far removed from reality, but it looked to the future in a spirit of idealism, as the Commission itself must seek to do in the rules it formulated. An international organization "possessing the same rights as States" at a conference was an organization which was competent under the terms of article 6 of the draft in respect of the subject-matter of the conference. He approved the idea that, at international conferences as referred to in paragraph 3, decisions should be taken by a two-thirds majority.

50. Mr. BILGE, comparing article 9 of the draft with article 9 of the Vienna Convention on the Law of Treaties, said he noted that the Special Rapporteur had added the words "as potential parties" in paragraphs 1 and 2, and the words "possessing the same rights as States" in paragraph 3. The Special Rapporteur had clearly explained in his commentary the reasons for those additions, that international organizations played different parts and might have no intention of becoming parties to the treaty even if they had taken part in its drawing up. The additions seemed perfectly acceptable.

51. The Special Rapporteur had, however, deleted the word "all", which appeared in article 9, paragraph 1, of the Vienna Convention. In his opinion it should be

restored because it was necessary to have the consent of all the participants in the drawing up of the treaty.

52. He had no difficulty with article 2, paragraph 1 (g). In using the phrase "when its position with regard to the treaty is identical to that of a State party", the Special Rapporteur had wished to maintain the principle of the equality of the parties, but perhaps that wording might be softened a little by replacing the word "identical" by the word "similar".

53. Mr. USHAKOV said that the two-thirds majority rule laid down in paragraph 3 of article 9 was totally unrealistic. If an organization such as the Common Market or CMEA concluded at an international conference a multilateral treaty with countries of Asia, Africa or Latin America, the organization in question would not necessarily be included in the two-thirds majority required for the adoption of the treaty and such a situation would be absurd. Similarly, if international organizations with headquarters in Switzerland convened an international conference for the conclusion of a treaty with Switzerland, Switzerland would not necessarily be included in the two-thirds majority required in paragraph 3 and that would make the conclusion of the treaty futile. In such circumstances, no rule, whether of procedure or of substance, could be adopted by a two-thirds majority. Moreover, it was impossible, generally speaking, to conceive of States concluding a treaty with an organization which was not on the same footing as they were.

54. Mr. REUTER (Special Rapporteur) said that he would willingly agree to combine paragraphs 1 and 2 of article 9 into a single paragraph, as proposed by Mr. Ago. The question of the authentication of the text of a treaty by the representative of an international organization duly accredited for that purpose by the organization did not, in his opinion, present any serious difficulty. Apart from questions of a purely drafting nature, however, the discussion had raised two main problems.

55. The first, brought up by Mr. Ago, arose out of article 9, paragraph 3, and there he agreed with everything Mr. Ago had said. The distinction made in article 9 of the Vienna Convention between the case dealt with in paragraph 1 and the case dealt with in paragraph 2 was far from clear. According to the Vienna Convention, it was the two-thirds majority rule which applied in the case of an international conference; in other cases, it was the unanimity rule. The Commission must therefore decide whether to retain the principle laid down in paragraph 3, as Mr. Ago desired, or to delete it. He (the Special Rapporteur), proposed to prepare two versions of article 9 between which the Commission might choose: in the first version paragraph 3 would be retained and improved, and in the second it would be deleted. But even if paragraph 3 were deleted, it would always be for the conference to decide in its rules of procedure by what majority the text of the treaty should be adopted.

56. The second problem was that of the concept of a party to a treaty. It was quite obvious that, when the text of the treaty or the rules of procedure of the conference clearly indicated who the parties were, there was no problem, but there were cases in which the problem could arise. He had therefore adopted the very strict position

of not according the status of a "party" to an international organization which, according to the law of treaties, was not in the same situation as a State party. That position appeared a little less strict, however, if it was remembered that, in principle, it was the rules of procedure of the conference or the text of the treaty which decided the status of a "party". The status of a "party" would thus be accorded to all organizations which had the same rights as the States parties. He was aware that the case in which an international organization had the same status as the States parties to a multilateral treaty must be very hypothetical because there was as yet no multilateral treaty to which an international organization was a party. But it was quite possible to imagine, for example, a treaty on literary or artistic property rights in which an international organization might participate on the same footing as a State, for the purpose of the rights of its own productions. It should not be forgotten that most Governments feared that if an international organization were accorded the same rights as States, it would mean allowing the same States to vote twice, because an international organization obviously voted according to the wishes of the member States which controlled it. He had therefore considered it necessary to propose rather strict wording, but was prepared to find ways of making it more flexible by proposing alternatives.

57. The CHAIRMAN suggested that articles 9 and 10 and article 2, paragraph 1 (g) be referred to the Drafting Committee.

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

The meeting rose at 1.10 p.m.

<sup>3</sup> For resumption of the discussion see 1353rd meeting, paras. 19, 33 and 50.

## 1347th MEETING

*Wednesday, 9 July 1975, at 11.10 a.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

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

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

(A/CN.4/285)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPOREUR  
ARTICLES 11, 2 (PARAGRAPH 1 (b)), 12, 13, 14, 15 AND 16

1. The CHAIRMAN invited the Special Rapporteur to introduce articles 11 to 16 and article 2, paragraph 1 (b), which read:

#### Article 11

##### *Means of expressing consent to be bound by a treaty*

1. The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

2. The consent of an international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, acceptance, approval or accession, or by any other means if so agreed.

#### Article 2, paragraph 1 (b)

##### *Use of terms*

(b) "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State or international organization establishes on the international plane its consent to be bound by a treaty; "ratification" means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

#### Article 12

##### *Consent to be bound by a treaty expressed by signature*

1. The consent of a State or international organization to be bound by a treaty is expressed by the signature of the representative of that State or organization when:

(a) the treaty provides that signature shall have that effect

(b) it is otherwise established that the negotiating States or organizations were agreed that signature should have that effect; or

(c) the intention of the State or organization to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1:

(a) the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States and organizations so agreed;

(b) the signature *ad referendum* of a treaty by a representative of a State or organization, if confirmed by his State or organization, constitutes a full signature of the treaty.

#### Article 13

##### *Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty*

1. The consent of a State or international organization to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or

(b) it is otherwise established that that State and that organization were agreed that the exchange of instruments should have that effect.

2. The consent of two international organizations to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or

(b) it is otherwise established that those organizations were agreed that the exchange of instruments should have that effect.

#### Article 14

##### *Consent to be bound by a treaty expressed by acceptance, approval or ratification*

1. The consent of a State or international organization to be bound by a treaty is expressed by acceptance or approval when:

(a) the treaty provides for such consent to be expressed by means of acceptance or approval;

(b) it is otherwise established that the negotiating States and organizations were agreed that acceptance or approval should be required;

(c) the representative of the State or organization has signed the treaty subject to acceptance or approval; or

(d) the intention of the State or organization to sign the treaty subject to acceptance or approval appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of a State to be bound by a treaty is expressed by ratification under conditions similar to those which apply to acceptance or approval.

#### Article 15

##### *Consent to be bound by a treaty expressed by accession*

The consent of a State or international organization to be bound by a treaty is expressed by accession when:

(a) the treaty provides that such consent may be expressed by that State or organization by means of accession;

(b) it is otherwise established that the negotiating States and international organizations were agreed that such consent may be expressed by that State or organization by means of accession; or

(c) all the parties have subsequently agreed that such consent may be expressed by that State or organization by means of accession.

#### Article 16

##### *Exchange, deposit or notification of instruments of ratification, acceptance, approval or accession*

Unless the treaty otherwise provides or it is otherwise agreed, instruments of ratification, acceptance, approval or accession establish the consent of a State or international organization, as the case may be, to be bound by a treaty upon:

(a) their exchange between a contracting State and a contracting international organization, or between two contracting international organizations;

(b) their deposit with the depositary; or

(c) their notification to the contracting States and international organizations or to the depositary, if so agreed.

2. Mr. REUTER (Special Rapporteur) said he thought that the Commission would have no difficulty in considering articles 11 to 16 and article 2, paragraph 1 (b), at the same time. At earlier meetings, he had amending some of the terms used in preceding articles in order to take account of certain observations, in particular those of Mr. Ushakov.

3. Thus, the expression "full powers" would be used only to designate powers emanating from governments and the word "credentials" to designate those emanating from organizations. The use of the phrase "expressing consent to be bound" in connexion with representatives of international organizations would also be avoided, for the term "expressing" might suggest that, if the constituent instrument of the organization contained no provision relating to the capacity of the organization to conclude treaties, subordinate agents might be able not only to communicate the consent of the organization to be bound, but also to define it. In order to avoid any ambiguities, he therefore proposed that the term "expressing" be replaced by the term "communicating" or "establishing". Other corrections of that kind might be proposed to the Drafting Committee, which would shortly be issuing a revised text of the draft articles already considered by the Commission. If the Drafting Committee decided to adopt those corrections, they would also

apply to the group of articles now about to be considered by the Commission.

4. That group of articles raised two main questions. First, it could be asked whether it was necessary to retain in the draft an article similar to article 11 of the Vienna Convention, which served as an introduction to articles 12 to 16 in that it listed a number of procedures relating to the conclusion of treaties. At the Vienna Conference on the Law of Treaties, an amendment by Poland and the United States had given the text submitted by the Commission a much broader effect.<sup>1</sup> That amendment, which now formed part of article 11 of the Vienna Convention, had radically changed the scope of the provisions by adding to the list of procedures contained in the original text—signature, exchange of instruments, ratification, acceptance, approval, accession—the general formula, "or by any other means if so agreed". The addition of that formula was tantamount to saying that, in public international law, there was a very great deal of flexibility in the means of concluding treaties because treaties could be concluded by any means on which the parties agreed, irrespective of the nature or description of such means. He had considered it essential to formulate an identical rule for treaties concluded between States and international organizations or between two or more international organizations, because such treaties required even more flexibility than treaties between States. The scope of article 11 of the draft was therefore the same as that of article 11 of the Vienna Convention. He was so convinced of the need for such an article that he did not think that the Commission would have any misgivings about accepting the principle it embodied.

5. The draft articles now before the Commission also raised a problem of terminology. The terms used in article 11 of the Vienna Convention and of the present draft did not need to be defined, for two reasons; first, because a number of terms, such as "signature", "exchange of instruments" and "accession" were perfectly clear and, secondly, because even the remaining terms, such as "acceptance", "approval" and "ratification", whose meaning was less obvious and could vary according to the constitutional law of each State and the internal law of each organization, designated, in general public international law, a means of expressing consent to be bound by a treaty. For that reason, the terms "acceptance", "approval" and "ratification" could also be used for treaties concluded by international organizations. The terms "acceptance" and "approval" had, in fact, already been used for that purpose. He had, however, had some misgivings about using the term "ratification", because he had thought that it might not be appropriate to use that term to express the definitive consent of an organization when the organization had already given its provisional consent. In practice, the term "ratification" was not used in connexion with international organizations. In his fourth report (A/CN.4/285), he had stated that he had found only one case in which that term had been used in speaking of international organizations.

<sup>1</sup> See *Official Records of the United Nations Conference on the Law of Treaties, Summary Records, First Session*, p. 83, paras. 42 *et seq.* and p. 344, paras. 67 *et seq.*; *Second Session*, pp. 24 and 25, paras. 60 *et seq.*

He therefore feared that, more for historical than for legal reasons, some Governments might be taken aback by the use of the term "ratification" to indicate the definitive consent given by an international organization. The concept of ratification was linked to the concept of the Head of State, for the history of treaties showed that States had always possessed some organ endowed with a right of general representation in international negotiations. It was the role of the Head of State which was the source of the procedure of ratification, and even though that procedure had changed with time, it was still linked to the existence of a structure which was found in all States, for in all States there was a supreme organ, something which did not exist in international organizations in the same way as it did in States. He had therefore considered it preferable to avoid using the word "ratification", although doing so had caused him some drafting problems. However, if the Commission considered that the word "ratification" could be used to express the definitive consent of an international organization, he would gladly accept its decision, particularly since it would make the drafting much easier.

6. In his view, the group of articles now before the Commission did not require any particular comments. Article 2, paragraph 1 (b), which defined the words "acceptance", "approval", "accession" and "ratification", was taken from the Vienna Convention and took account of what he had just said in connexion with the term "ratification". It did not involve the difficulty to which the term "expressing"—in the words "expressing consent to be bound by a treaty"—could give rise because the corresponding text of the Vienna Convention used the term "establishes".

7. In article 12, he had started from the assumption that the term "full powers" meant both the credentials of representatives of organizations and the powers of representatives of States. If the Commission decided to use those words to mean only the powers of representatives of States, it would then be necessary to make a correction in article 12. Similarly, if the Commission decided no longer to use the word "expressing" in the phrase "expressing consent to be bound by a treaty", it would be necessary to amend all the titles of articles which referred to the expression of consent to be bound by a treaty.

8. In article 16, he had made some minor changes to the Vienna Convention text. In the title, he had added the word "notification", which had been omitted from the Vienna Convention text. In the first sentence of article 16, he had added the phrase "or it is otherwise agreed", which might and perhaps should have been included in the Vienna Convention text, because treaties concluded between States and international organizations or between two or more international organizations required an even more flexible procedure than treaties between States.

9. Mr. TAMMES said that he found little to add after the very instructive and clear statement by the Special Rapporteur and his admirably condensed commentary.

10. The Special Rapporteur had made it clear that articles 12 to 16 had been included after the fundamental

article 11, mainly in order to reassure governments by using terminology with which they were familiar. That being so, and in view of the fact that the list of means of consent contained in article 11 was far from exhaustive, he found it difficult to see why ratification should be omitted. The omission seemed to constitute a deviation from the language of the Vienna Convention on the Law of Treaties which the international treaty relations of international organizations did not really necessitate. Moreover, the contemporary ratification procedures of States were so diverse that in some countries little or nothing remained of the monarchical origins of ratification. Even article 2, paragraph 1 (b), which suggested that international organizations could "accept", "approve" or "accede to" a treaty, and that only a State could "ratify" it, did not really prove that such a distinction was necessary for the purposes of international relations. The question whether such a distinction in fact existed was a matter for the commentary. In his view, the present wording of the article should be replaced by the excellent alternative version proposed by the Special Rapporteur in paragraph (4) of the commentary to article 11 in his fourth report.

11. Mr. KEARNEY said he supported the view expressed by Mr. Tammes with regard to article 11. It was illogical to exclude ratification from the list of means by which an international organization could express its consent to be bound by a treaty when the article went on to say that such consent could be expressed "by any other means if so agreed", a phrase which admitted the possibility of ratification.

12. He supposed that the reason behind the proposed omission was either that international organizations did not in practice ratify treaties, or that ratification had historically been an act of the person who was, in title and in fact, the supreme organ of the State. It was, however, quite possible that international organizations might wish to ratify treaties in the future and the Commission must avoid any implication that they should not do so. In addition, it could happen that the titular Head of State who signed the instruments of ratification was not in fact the supreme organ of the State. In other cases, instruments of ratification were signed by government officials below the rank of Head of State, and it was a fact that article 2 of the Vienna Convention on the Law of Treaties contained no stipulation as to who must authorize the issuance of instruments of ratification on behalf of State. Accordingly, he saw no reason to imply that it was either impossible or undesirable for an international organization to ratify a treaty. Like Mr. Tammes, he thought that the article should be simplified by reinserting "ratification" in the list of possible means of consent. That would have the added advantage of avoiding drafting problems in articles 13, 14 and 16.

13. Mr. HAMBRO said that he agreed with the comments made by Mr. Tammes and Mr. KEARNEY. He saw no reason for not using the word "ratification" in connexion with international organizations because he saw no difference between ratification by a State and ratification by an international organization. If an international organization such as the United Nations gave full powers to an organ or a representative, such as the

Secretary-General, to negotiate and sign a treaty, and if it reserved the right to have the treaty approved by another organ such as the Security Council, the ratification procedure was identical to that followed by a State. As Mr. Kearney had rightly pointed out, ratification was no longer the privilege of the Head of State and was performed with increasing frequency by a popularly elected body. The term "ratification" could therefore very well be used both for States and for international organizations. He was in favour of using that term for philosophical, psychological, linguistic and ideological reasons and saw no reason to reject it out of concern for the traditions and superstitions regarding the State which might subsist in the minds of some jurists, statesmen and diplomats.

14. Mr. CALLE Y CALLE said that the Special Rapporteur, with his profound knowledge of the Vienna Convention on the Law of Treaties, had explained clearly the reasons behind the drafting of article 11, drawing particular attention to the list of means of expressing consent in paragraph 2. That list could be of assistance in the conclusion of agreements with international organizations, since the ways of expressing consent to be bound by a treaty varied from one organization to another. Generally speaking, the Secretary-General or other person authorized to sign the agreement on behalf of the organization did so *ad referendum* and the signature had to be approved or confirmed by the supreme organ of the organization.

15. The possibility of ratifying a treaty should not be limited exclusively to States, since ratification was, in reality, nothing more than a process of approval or confirmation by the competent organ: it took the form of the issuance of an instrument similar to that granting full powers, in other words, a document emanating from the competent authority. If ratifications were limited to States, it would be necessary to provide in a treaty that it was subject to ratification by a State and to confirmation by an international organization, and that would give rise to the problem of determining how many ratifications or confirmations were necessary for the instrument to enter into force.

16. Mr. SETTE CÂMARA said he agreed with the substance of articles 11 to 16 as proposed by the Special Rapporteur, whose introductory statement had been most instructive.

17. With regard to the use of the words "may be expressed" in article 11, paragraphs 1 and 2, he thought it would be better to retain the language of the corresponding article of the Vienna Convention. He approved the definitions proposed by the Special Rapporteur in article 2, paragraph 1 (b) and considered them to be a necessary part of the Commission's draft.

18. He disagreed with other speakers and shared the concern of the Special Rapporteur with regard to the use of the term "ratification" in connexion with international organizations. It was not just a matter of the historical antecedents of the concept; he was concerned about the fact that ratification represented, in all senses of the word, the most solemn means by which a State expressed its consent to be bound by a treaty. Moreover, ratification still involved a two-stage procedure. In the case of a

State, the treaty, once signed, had to be approved by parliament before the instruments of ratification could be issued. If ratification was extended to international organizations, problems would arise from the fact that texts could not be approved without recourse to their complex consultative machinery. He agreed with the Special Rapporteur that there was not a single example in history of the ratification of a treaty by an international organization. Any suggestion that international organizations should be able to ratify treaties would expose the Commission to severe criticism in the Sixth Committee of the General Assembly.

19. Mr. ROSSIDES said that he understood the qualms of the Special Rapporteur regarding the use of the term "ratification" in articles 11 to 16, bearing in mind the differences which existed in that respect between States and international organizations. Ratification as a means of expressing a State's consent to be bound by a treaty had a long history behind it and the Special Rapporteur had made a profound analysis of that historical evolution; ratification by international organizations, on the other hand, had so far not yet appeared in practice.

20. It should be remembered, however, that the draft under consideration by the Commission was intended for the future. The fact that international organizations had not done something until now did not mean that they would never do it. The time might well come when an international organization would wish to express by ratification its consent to be bound by a treaty. Bearing that eventuality in mind, a draft dealing with the treaties of international organizations should not exclude altogether the possibility of ratification of a treaty by an international organization.

21. He therefore urged the inclusion of the term "ratification" in the enumeration in paragraph 2 of article 11 of the various means by which an international organization could express its consent to be bound by a treaty. There would be no disadvantage in retaining for international organizations the complete list of such means given in the corresponding article 11 of the Vienna Convention on the Law of Treaties. International organizations which could not avail themselves of the ratification procedure could resort to acceptance, accession or approval; they would always be free to choose one from among the several means of expression available to them.

22. There were similar reasons for using the term "to express" in connexion with the consent to be bound of an international organization. It was to be hoped that the day would soon come when there would be no hesitation about speaking of an international organization "expressing" its consent. He therefore urged that, there too, the term used in the Vienna Convention should be retained, as had in fact been done by the Special Rapporteur in his proposed text of article 11.

23. Mr. USHAKOV said that members of the Commission obviously did not all have the same category of treaties in mind. Some were considering treaties in whose negotiation international organizations took part, while others were considering treaties which were concluded with international organizations. Treaties in the first category usually embodied rules of international law

applicable to States as well as, sometimes, rules relating to international organizations. When international organizations were allowed to take part in the negotiation of all or part of a treaty, they were not on an equal footing with States. For the purposes of the present articles, it was only treaties in the other category which should be taken into consideration, namely, treaties to which international organizations were parties. It could even happen that an international organization was the principal party to a treaty of that kind, as was the case when the Common Market or CMEA concluded a treaty with States. In such cases, international organizations were parties on the same basis as States. Many misunderstandings could have been avoided during the discussion if members had made a distinction between those two categories of treaties.

24. Article 4, which was entitled "Non-retroactivity of the present articles" and had already been provisionally adopted by the Commission, left open the question whether international organizations could become parties to the future convention. That was why the words "entry into force" had been placed in square brackets. It was likely that that situation, too, had led to the difficulties encountered by some members of the Commission.

25. With regard to the term "ratification", in accordance with Articles 83 and 85 of the United Nations Charter, it was the Security Council which exercised the function of approving trusteeship agreements relating to strategic areas, and the General Assembly which exercised the function of approving trusteeship agreements for all areas not designated as strategic. In both cases, those functions were almost equivalent to ratification. However, in order to avoid applying that term to international organizations, it would be desirable to find a suitable expression, such as "decision of approval", although the word "decision" was not entirely satisfactory.

26. A number of points were not clear to him. For example, could a treaty in fact provide that the signature of the representative of an organization would have the effect of expressing the consent of the organization to be bound by such a treaty, as stated in article 12, paragraph 1 (a)? With regard to paragraph 1 (b) of the same article, he wondered whether a representative who was authorized to negotiate could claim that his signature had the effect of expressing the consent of the organization he was representing to be bound by the treaty. He would prefer to see paragraph 1 (c) deleted because the intention referred to in that provision could not be expressed by the representative during the negotiation; it must be the subject of an authorization by the organization in question. With regard to paragraph 2 (a), he very much doubted whether the initialling of the text of a treaty could constitute a signature for an international organization.

27. The words "instruments exchanged between them", at the beginning of article 13, paragraph 1, would cause many difficulties if they applied not to a treaty between a State and an organization, but to a treaty between several States and several organizations. In article 13, paragraph 1 (b), the words "it is otherwise established" were not satisfactory and the reference to the organization

was not accurate since only an organ of the organization could take the decision referred to in that provision. He was surprised that article 13, paragraph 2, referred to two international organizations and not to two or more international organizations. He also wondered what was the significance of the expression "it is otherwise established" in paragraph 2 (b). The same expression in article 14, paragraph 1 (b) also puzzled him. The concluding phrase of article 14, paragraph 1 (d) caused him the same hesitation as article 12, paragraph 1 (c). Like the preceding articles, article 15 contained the words "it is otherwise established", about which he had already expressed his concern. Lastly, he noted that article 16, sub-paragraph (a), did not cover the case of an exchange of instruments between two or more States and two or more international organizations.

28. It was not enough to make a few drafting changes in the corresponding articles of the Vienna Convention; every conceivable case had to be provided for.

29. Mr. RAMANGASOAVINA said that, in general, he approved articles 11 to 16. In article 12, paragraph 1 (c), he preferred the verb "established" to the verb "expressed". The Special Rapporteur had been right not to use the term "ratification" in article 11, paragraph 2, in connexion with international organizations. In his (Mr. Ramangasoavina's) view, ratification was the expression of a commitment which could emanate only from the organ invested with national sovereignty; only the person invested with national sovereignty could commit his country and express its consent to be bound by a treaty. That role had originally been that of the monarch, then of the Head of State or any other person at the head of the State. According to some constitutions, the people were sovereign and expressed their consent to be bound by a treaty either directly, by referendum, or through the intermediary of a parliament. The exercise of sovereignty was sometimes the function of a collegiate body. In all cases, however, ratification was the expression of national sovereignty and frequently took the form of a law.

30. According to article 2, paragraph 1 (b), of the Vienna Convention on the Law of Treaties, the words "ratification", "acceptance", "approval" and "accession" meant the "international" act by which a State established on the international plane its consent to be bound by a treaty, but that was not really an international act, it was rather a national act of international scope. That act confirmed the entry into force of the treaty in the national legal order, where it would occupy a prominent place in the hierarchy of laws. It was, however, a combination of the national acts of acceptance by all the States concerned which brought about the entry into force of the treaty at the international level. He therefore hoped that, in the definition of the terms "acceptance", "approval" and "accession" in article 2, paragraph 1 (b) of the draft, the words "the international act" would be replaced by the words "the act".

31. Mr. ELIAS said that he had not been convinced by the arguments of those speakers who had suggested that the concept of "ratification" was inapplicable to an international organization. It was generally agreed that the



historical origin of the concept of ratification was not the most important consideration, but much emphasis had been laid on the element of sovereignty—a line of reasoning which he failed to understand. In his country, and also in most common law countries, the act of ratification was not necessarily performed by parliament and could therefore not be described as an act of sovereignty. Ratification was an executive act performed by the government of the day. A treaty which had been ratified could be laid on the table of parliament for information and thereby lead to criticism of the government by members of parliament, but ratification nonetheless remained an act of the executive branch. That being so, there was nothing far-fetched in applying the term “ratification” to an act which emanated from, say, the Director-General of an international organization.

32. He would therefore suggest that articles 11 to 16 and paragraph 1 (b) of article 2 be referred to the Drafting Committee and that the Special Rapporteur be instructed to submit to that Committee the alternative text of article 11 contained in paragraph (4) of the commentary to that article. At the same time, the Special Rapporteur should submit revised texts of the articles which followed article 11 and bring them into line with the corresponding provisions of the Vienna Convention.

33. Apart from that, he saw considerable merit in some of the drafting points which Mr. Ushakov had mentioned, relating to the proper adaptation of the provisions of the Vienna Convention in order to make them suitable for the purposes of international organizations. Those points, however, could conveniently be dealt with by the Drafting Committee.

34. Sir Francis VALLAT said that the distinction between the international act of ratification and the domestic act of ratification, to which Mr. Ramangasoavina had drawn attention, was extremely relevant. In drawing up the Convention on the Law of Treaties great care had been taken to ensure that its provisions dealt exclusively with matters on the international plane. The drafters of that Convention had studiously avoided making any attempt to dictate to States the domestic procedure to be followed in the treaty-making process.

35. If that distinction between acts on the international plane and acts on the domestic plane were kept clearly in mind, many of the difficulties to which Mr. Ushakov had drawn attention would be avoided. Mr. Ushakov had expressed a very proper concern for the manner in which an international organization gave authority when becoming a party to a treaty. The question was governed by the terms of the constituent instrument of the organization and the rules and practice of the organization. That question, however, did not affect very much the precise subject now under discussion, which was the manner in which the consent of an organization to be bound by a treaty, as an international act, was to be given. It would be appropriate to indicate in the commentary that article 11 was not intended to deal with the manner in which authority was given by an international organization, which was a complex and difficult problem relating to the constitution of the organization concerned.

36. It was highly desirable that, throughout articles 11-16, the language of the Vienna Convention regarding consent to be bound by a treaty should be followed in so far as it was compatible with the fact that one or more international organizations might be parties to the treaty. In the light of that general approach, and for the reasons given by Mr. Elias and other speakers, the term “ratification” should be included in the list contained in paragraph 2 of article 11 and also in paragraph 1 (b) of article 2.

37. There were also practical arguments in favour of that solution. He would take the example of a multilateral treaty to which one international organization was going to become a party, and which was signed with the usual clause stating that the treaty was subject to ratification. The parties to the treaty would be faced with a dilemma: either they would have to put in a special provision to deal with the international organization, or they would face the possibility that doubts might arise regarding the applicability of the ratification clause to the international organization. It seemed a more reasonable solution to recognize the possibility that, for the sake of convenience, the parties to the treaty could agree to speak of “ratification”. In dealing with that point, the Commission had to look a little into the future. For those reasons, he preferred the text of article 11 given in paragraph (4) of the commentary to the one put forward by the Special Rapporteur.

38. In article 13, he did not favour the Special Rapporteur’s departures from the text of the Vienna Convention. It was explained in the commentary that the proposed wording was based on the fact that treaties concluded by an exchange of instruments operated in practice “only as bilateral conventions”. In fact, the point was a controversial one. A considerable body of opinion considered that it was perfectly possible to constitute a multilateral treaty by means of a series of exchanges of instruments. The Commission should be reluctant to exclude that possibility merely because one of the prospective parties to the treaty was an international organization. He saw no reason to depart from the formula used in article 13 of the Vienna Convention.

39. In article 16, the change of title in order to include a reference to notification did not call for any comment. But the introduction of the phrase “or it is otherwise agreed”, after the opening words “Unless the treaty otherwise provides” raised a much more difficult problem. In substance, the Special Rapporteur was right in making that addition, for the reasons explained in the commentary. The Drafting Committee, however, should examine very carefully whether the inclusion of those additional words might not have unfortunate implications for the interpretation of the corresponding provision of the Vienna Convention.

40. Mr. AGO said that the Commission was concerned only with treaties to which one or more international organizations were to become parties, not with treaties concluded between States, in the drawing up of which one or more organizations might take part. The Special Rapporteur had noted that, so far, international organizations had never been allowed to take part on an equal footing with States in large international codification



conferences, or subsequently to become parties to the conventions resulting from such conferences. Such a possibility should not, however, be ruled out for the future. The draft the Commission was considering contained rules which were intended to apply both to States and to international organizations, and it was possible that international organizations might be invited to take part in the conference of plenipotentiaries which would embody those articles in a convention and to become parties to that convention. Such a decision would be logical and it was therefore important not to adopt too absolute a position on that point.

41. It was not easy to study seven articles at once, and if the Commission decided to refer those articles to the Drafting Committee without thorough examination, the Committee's work would be much more difficult. He did not propose to make any observations of a drafting nature.

42. With regard to the concept of ratification, he fully shared the point of view expressed by Mr. Ramangasoavina and by Sir Francis Vallat. Ratification was an act governed by internal law and the combination of a number of ratifications enabled the treaty to enter into force. When international organizations were involved, the situation became more complicated because the rules governing the conduct of the negotiation and the acceptance of the treaty by an international organization were rules of international law, although rules of a special kind since they were peculiar to each organization. Consequently, it was important to find a term to characterize the decision by which the highest organ of an international organization approved the conduct of a lower organ which had taken part in the negotiation of a treaty.

43. Personally, he feared that the term "ratification" was not suitable for such a decision of approval, since that term was usually applied to a specific act of certain organs of the State. It might cause difficulties if it were used, for example, in connexion with the decision by which the Security Council approved a trusteeship agreement. Moreover, even States did not always use the term "ratification", and it was precisely for that reason that the Vienna Convention defined the terms "ratification", "acceptance", "approval" and "accession" all at the same time. The Special Rapporteur had therefore been right not to use the term "ratification" in connexion with international organizations. Moreover, the meaning of that term in State practice had changed. Originally, it had applied to the approval of the conduct of an inferior organ by a Head of State but, gradually, the process of negotiating a treaty had come to involve a legislative organ which, normally, did not ratify the treaty, but authorized the Head of State to ratify it. It was sometimes wrongly stated that parliament ratified a treaty, whereas, in fact, it merely authorized the ratification. In those circumstances, it would be better to reserve the term "ratification" for States and not to extend it to international organizations.

44. Some solution of that kind seemed to have prompted the Special Rapporteur to refer, in article 14, to acceptance, approval and ratification in that order, while, in the Vienna Convention, the means of expressing consent

to be bound by a treaty were listed in the following order: ratification, acceptance and approval. It would seem more logical to do the same in article 16.

The meeting rose at 1.5 p.m.

## 1348th MEETING

Thursday, 10 July 1975, at 10.15 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Castañeda, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

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

(A/CN.4/285)

[Item 4 of the agenda]

(continued)

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 11 (Means of expressing consent to be bound by a treaty)

ARTICLE 2 (Use of terms), PARAGRAPH 1 (b)

ARTICLE 12 (Consent to be bound by a treaty expressed by signature)

ARTICLE 13 (Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty)

ARTICLE 14 (Consent to be bound by a treaty expressed by acceptance, approval or ratification)

ARTICLE 15 (Consent to be bound by a treaty expressed by accession) and

ARTICLE 16 (Exchange, deposit or notification of instruments of ratification, acceptance, approval or accession)  
(continued)

1. The CHAIRMAN invited the Commission to continue consideration of articles 11 to 16 and the related provision in paragraph 1 (b) of article 2 (Use of terms).

2. Mr. CASTAÑEDA said he fully supported the Special Rapporteur's formulation of the articles under consideration. Those articles, as pointed out by Mr. Ushakov, related exclusively to treaties to which international organizations became actual parties and not to treaties between States concluded merely under the auspices of an international organization.

3. Most of the treaties in question would be bilateral in character and would be concluded between a State and an International organization. Others would take the form of a treaty concluded by an organization with a group of States and would resemble what Basdevant had

called "semi-collective treaties". The possibility should also not be ruled out of an international organization actually becoming a party to a collective or multilateral treaty in the ordinary way; Mr. Ago had given a good example when he had referred to the convention which would result from the set of draft articles now under consideration.

4. He agreed with the Special Rapporteur that the term "ratification" should not be used to describe the final consent of an international organization to be bound by a treaty. Historically, the institution of ratification had developed as a result of the particular circumstances surrounding negotiations between States, and those circumstances did not exist in the case of international organizations. Where a State was concerned, the essential point was that the negotiator of a treaty was not the same authority as the one empowered to express the final consent of the State to be bound by the treaty. That authority was normally the Head of State and he required time to examine carefully the work performed by the negotiator. It was true that, as Sir Francis Vallat had pointed out, the draft articles were not concerned with determining who were the competent domestic authorities in the treaty-making process. The term "ratification", as used in the draft articles, referred exclusively to the act on the international plane whereby the consent of the State to be bound by the treaty was expressed. It was precisely in that connexion, however, that the two-stage process—signature followed by ratification—had developed in State practice.

5. That two-stage process could not be applied by an international organization. It was difficult to see how a treaty could be examined twice by the same organ of an international organization. In any case, if one took the example of the United Nations, the treaty-making process laid down in the Charter did not correspond at all to the idea of a signature followed by subsequent ratification or confirmation by a higher authority. Thus, the trusteeship agreements made under Articles 83 and 85 of the Charter had not been negotiated by the Secretary-General and subsequently confirmed or ratified by the Security Council in the case of the strategic areas covered by Article 83, or by the General Assembly in the case of the other trust territories covered by Article 85. What had actually happened in each case was that the administering authority had submitted a draft agreement to the Security Council or the General Assembly, as the case might be; upon the draft being adopted by the Security Council or the General Assembly, it had become effective. The Security Council or the General Assembly of course entrusted the Secretary-General with the task of signing the agreement on behalf of the United Nations, but that operation was essentially of a formal character.

6. Again, the two-stage process of signature and ratification had not been envisaged in the Charter for the important agreements mentioned in Article 43, relating to the armed forces to be made available to the Security Council. The intention was that those agreements should be negotiated and concluded directly between the Security Council and the Member States concerned; no mention was made in Article 43, any more than in Articles 83

and 85, of the Secretary-General. Of course, no agreements had actually been entered into under Article 43 of the Charter.

7. Those examples made it clear that the two-stage process of expression of consent which was characteristic of ratification of a treaty by a State did not apply to international organizations. The Special Rapporteur had therefore been right in not using the term "ratification" in connexion with international organizations.

8. Another important consideration was that the consent of an international organization was given by a collective decision. It would therefore be hazardous to introduce the concept of a two-stage process of examination; it would involve the danger of a reversal of the decision to conclude a treaty. The possibility, mentioned during the discussion, that a procedure bearing some resemblance to signature and ratification might in the future be used by an international organization was likely to occur only as a rare exception. In any case, it was amply covered by the concluding words of paragraph 2 of article 11, "or by any other means if so agreed". That proviso made it possible for the parties to a treaty to make the procedure of ratification available to an international organization, if they so desired.

9. Mr. PINTO said that the term "ratification" was used in the articles under discussion in the sense of the endorsement or confirmation of an act of an envoy with respect to a treaty. It was the confirmation by the principal of the act of an agent. Other terms, such as "approval", could have been used in that same sense, but none had that precise connotation which placed it in a special category as a peculiarly sovereign act. The issue was not simply one of semantics but of the special meaning of the word "ratification" as a term of art in the context of treaties. He fully agreed with those speakers who had placed the act of ratification in its proper perspective as the act of the sovereign. Ratification was a type of act which was peculiar to sovereignty, whether that sovereignty resided in a monarch or in the representatives of the people. It was the last act in a long series leading up to the conclusion of a treaty and the commencement of the binding obligation for the ratifying State. It was necessary that that last act of ratification should be associated with the highest expression of sovereignty, which in the case of a democracy was the will of the people. The relationship to sovereignty was neither mystical nor obsolete; on the contrary, it was necessary in any modern democratic State. The multiplicity of tasks, commitments and preoccupations competing for attention and decision made it necessary that important foreign commitments should receive final confirmation after re-examination at the highest level, in order to minimize the possibility that an envoy might undertake obligations unacceptable to the people. In many countries the long treaty-making process was accompanied by varying degrees of publicity, until the final act of ratification took place and the people, through their representative, had their final say. Thus the act of ratification was closely associated in the minds of some with the concept of sovereignty, not in the ancient sense of the sovereignty of the monarchy but in the modern sense of the sovereignty of the people.

10. However attractive or forward-looking it might be, the idea that international organizations should be placed on the same level as States was unlikely to prove acceptable in the foreseeable future. Indeed, it would mean ignoring the nature of the modern international organization, the way in which decisions were made in such an organization, the facets of political and bureaucratic influence which culminated in over-all control, and the fact that an organization's sphere of activities was usually very limited.

11. It was true that the Commission had discussed article 9 (Adoption of the text) in a form which admitted that international organizations could have the same rights as States at a conference. He had not himself favoured that approach, but while it could perhaps be allowed in relation to the specific question of the adoption of the text of a treaty, it was altogether unsuitable in the case of ratification. Consequently, he supported the text proposed by the Special Rapporteur for article 11.

12. There was no inconsistency in having two non-exhaustive lists of terms—one for State action in paragraph 1 and one for action by an international organization in paragraph 2, the word "ratification" being used only for States. That simply implied that a State had the right to use the ratification procedure and that, if an international organization in a particular case was to be allowed to use that procedure it could do so by special agreement.

13. He agreed broadly with the Special Rapporteur's proposed paragraph 1 (b) in article 2. Nevertheless, since paragraph 2 of article 11 provided for the possibility that international organizations might resort to ratification in a particular case by agreement, the provisions of paragraph 1 (b) of article 2 might go too far, in that they restricted the application of the term "ratification" rigidly to States.

14. With regard to article 16, he noted that the clause "or it is otherwise agreed" and the concluding words of sub-paragraph (c), "if so agreed", provided a double possibility of agreement—one for opting out and another for opting in. He would welcome some clarification regarding the combined working of those two provisions.

15. Lastly, there arose a general question regarding the formulas "unless otherwise agreed" and "if so agreed", which were used in a number of places in the draft. It was possible to interpret that type of clause in different ways, when trying to determine where the agreement would be concluded. One was that the agreement should be consigned in the treaty itself; another that it should be consigned in the constituent instrument of the international organization which was a party to the treaty and of which the State party was a member. It was also possible to envisage the agreement being made in a separate instrument.

16. Mr. QUENTIN-BAXTER said that the Special Rapporteur had been right to point out that the choice between using and not using the term "ratification" in relation to international organizations did not depend on any overwhelming historical consideration but rather on a scruple.

17. The importance of the historical aspect of the question should not be exaggerated. In many treaties

concluded between States over the past 25 years the terms "ratification", "acceptance" and "approval" had been used somewhat indiscriminately as a matter of habit or even of fashion, without any implication of a difference of substance. Even in modern practice, the term "ratification" was often used without any thought of solemnity in connexion with treaties which were concluded at governmental level and which were not in any sense subject to confirmation by the Head of State. Another important consideration was the tendency to use the term "acceptance" instead of "ratification" to describe the operation of confirmation which followed the signature of a convention. It appeared to reflect the idea that ratification was a more formal and more symbolic act than acceptance.

18. If the Commission adopted article 11 in the form submitted by the Special Rapporteur, thus deferring to the deeply felt view regarding the difference in character between international organizations and States, it would not thereby deprive international organizations of the possibility of using the device of ratification by agreement of the parties, since that could be done under the concluding proviso "or by any other means if so agreed" in article 11, paragraph 2.

19. For those reasons, he preferred that the Special Rapporteur's proposed text for article 11 should stand. The Special Rapporteur had been right to refrain from using the term "ratification" in connexion with international organizations.

20. Mr. BILGE said that he would confine his remarks to the question of the possibility for an international organization of expressing its consent to be bound by a treaty by means of ratification. He shared the Special Rapporteur's view that, for an international organization, ratification was not a suitable means of expressing its consent. The Charter of the United Nations did not contain any provision which either required or justified that means of expressing consent for an international organization. It was true that the Commission should not have exclusively in mind the organizations of the United Nations system, but there could be no doubt that neither the structure nor the functioning of any international organization called for a procedure of that kind. In general, neither the secretariat nor the secretary-general of an organization exercised any powers distinct from those of the other organs of the organization; they administered rather than governed. Within an international organization, all organs co-operated and there was no genuine hierarchy. In the circumstances, the ratification procedure could only serve for purposes of verification. Even Article 43 (3) of the Charter only made provision for ratification by States. Moreover, the term "ratification" was rather ambiguous in State practice.

21. Article 11, as the Special Rapporteur had pointed out, was a descriptive provision, and the proviso "or by any other means if so agreed" left a great deal of latitude to international organizations. It was thus possible to choose, in each case, from among the various means of expressing consent to be bound by a treaty, including ratification, the means best suited to the international organization concerned.

22. Mr. TSURUOKA said that he would confine his remarks to stating that he had no objection to article 14, provided that an international organization could, in accordance with article 12, express by means of ratification its consent to be bound by a treaty on the international plane, when permitted to do so by its constituent instrument or practice or when, during the negotiation of the treaty, the representative of the organization had either expressly or impliedly indicated that the organization was prepared to give its consent to be bound by the treaty by means of ratification. If article 14 were to deprive international organizations of that possibility, he would be obliged to reserve his position.

23. The CHAIRMAN invited the Special Rapporteur to reply to the comments made during the discussion.

24. Mr. REUTER (Special Rapporteur), referring to a remark by Mr. Ago concerning the Commission's method of work, said that it was in the hope that the Commission might be able to adopt a large number of articles at the present session that he (the Special Rapporteur) had suggested that several articles should be considered together. That method, which seemed to him appropriate in the circumstances, did not however, prevent any member of the Commission from dwelling upon, or reverting to, any provision which seemed obscure to him. There could be no doubt that a great effort would be required from the Drafting Committee, but he had already redrafted for the Committee the articles which the Commission had considered.

25. In reply to the comments by Mr. Ushakov, he explained that the first two paragraphs of article 9 embodied the rule of unanimous consent, but paragraph 3 incorporated the rule laid down in paragraph 2 of article 9 of the Vienna Convention. That provision related to the adoption of the text of a treaty at an international conference of States, but did not specify that it was a general conference. It was possible to arrive at that conclusion on the basis of paragraph 2 of article 20 of the Vienna Convention, where a distinction was drawn between treaties of a general character and treaties which had a special object and purpose and only a limited number of negotiating States, and to infer that the two-thirds majority rule did not apply to the second category. In the redraft of article 9 which he had prepared for the Drafting Committee, he had referred to a "general conference" of States. If one or several international organizations were invited to participate in that conference, the rule in paragraph 3 would apply. It would be inappropriate and illusory to imagine a general conference of international organizations. A conference of the organizations of the United Nations system was conceivable, but such a conference would not have a general character and would not involve the application of the two-thirds majority rule.

26. It had been pointed out by Sir Francis Vallat that article 13 mentioned only an exchange of instruments between two partners, either a State and an international organization, or two international organizations. There were two possible objections to that limitation. The corresponding provision of the Vienna Convention, which applied only to States, concerned both bilateral and

multilateral treaties. Moreover, there was no reason to confine the present draft to bilateral treaties. In the redraft of article 13 which he had prepared for the Drafting Committee, he had taken those objections into account, particularly since they had a historical basis. Until the middle of the nineteenth century, agreements between three or more States were concluded by means of bilateral exchanges of instruments. That was a very cumbersome procedure and, with the growing number of States parties to conventions of a universal character, could lead to absurd situations. Mathematically, the number of instruments to be prepared for " $n$ " contracting parties would be  $n(n-1)$ . Thus if there were three contracting parties, six instruments would be needed, but if the nine States members of the European Community concluded an agreement with the Community itself, under the bilateral exchange procedure, ninety instruments would be needed. If the Drafting Committee considered his redraft of article 13 unacceptable he could simply indicate in the commentary to that article that the system of bilateral exchanges of instruments could be broadened if necessary.

27. With regard to article 16, Sir Francis Vallat had commented that the phrase "or it is otherwise agreed", which appeared in the opening clause of the article, was not necessary. Then Mr. Pinto had pointed out that the words "if so agreed" in sub-paragraph (c) of article 16 duplicated the phrase mentioned by Sir Francis Vallat. He would have no objection to dropping the concluding words of sub-paragraph (c).

28. The question where the rule governing the conclusion of a treaty was to be found if it did not appear from the treaty itself had been raised by both Mr. Pinto and Mr. Ushakov. If it was to be found in the constituent instrument of the international organization concerned, in its rules, or in its general conditions, it would obviously form part of the law of that organization and would be binding upon it. It might then be asked, however, whether the rule could not be embodied in an agreement separate from the treaty itself. In the case of treaties between States, it was obvious that a rule of that kind could be contained in an agreement distinct from the treaty, whether the agreement was written or oral. In their present form, the articles under consideration were based, on that point, on the provisions applicable to treaties between States. Realistic considerations might be an argument for refusing to assimilate international organizations to States. Thus Mr. Ushakov had considered it dangerous to keep the formula "it is otherwise established", because it would open the door to verbal agreements which not everyone was prepared to accept in the case of international organizations. In order to take those views into account, he proposed that the formula in question should be supplemented by the addition of the words "by an agreement between properly accredited organs", in order to stress that any agreement other than the treaty itself had also to be properly concluded.

29. Another reason for not assimilating international organizations to States could be on grounds of expediency or regard for national susceptibilities. In article 7, the expression "full powers" was used both for representa-

tives of States and for representatives of international organizations, but it could be reserved for representatives of States and the more modest term "powers" could be used instead for the representatives of international organizations. In the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,<sup>1</sup> the term "credentials" was used in the case of representatives of States. Regardless of any difference of substance between the two expressions, it might be advisable to use both of them just in case certain governments should be alarmed to see the expression "full powers" applied to the representatives of international organizations.

30. He noted that the Commission seemed evenly divided on the question whether an international organization could express its consent to be bound by a treaty by ratification. The redraft of article 14 which he had prepared for the Drafting Committee departed materially from the original wording. Speaking as a member of the Commission, he said he agreed with Mr. Tsuruoka and Mr. Kearney that there was no logical reason for preventing an international organization from using the word "ratification" to describe a procedure of giving final consent following upon a first or provisional consent. It was quite possible for one and the same organ first to authorize and instruct a representative and then to ratify. That procedure was not used in the United Nations, but it was not uncommon in the case of highly technical negotiations such as trade negotiations within the European Communities. In such cases, the decision to engage in the negotiations was taken by the Council of Ministers which gave instructions to a representative sent by the Commission of the Communities; the Commission negotiated the agreement and initialled it, then the Council deliberated, authorized the signature, and gave its approval before the exchange of the instrument of ratification of the State concerned and the instrument of approval of the Council. It would seem rather petty to prevent an international organization from describing such a procedure as "ratification". An example of the terminological uncertainty in the matter was to be found in the French Constitution, which mentioned both ratification and approval as means of expressing consent to be bound by a treaty. If an international convention specified that it was subject to ratification or acceptance, without specifying how those terms should be interpreted, the French Government took a decision worded as follows: "The present Convention is approved; this approval has the effect of acceptance within the meaning of the Convention". Similarly, there was nothing to prevent an international organization from informing the depositary of a treaty by letter that its instrument of ratification had the effect of acceptance or approval within the meaning of the treaty. Unless article 11 was to be made a rule of *jus cogens*, which was out of the question, international organizations could not be prohibited from taking such a step.

31. Still speaking as a member of the Commission, he said that, in addition to those arguments, there were some political considerations. It was quite possible that some

Governments would not be pleased to see international organizations using the terminology traditionally reserved for States. That aspect of the problem had been brought out by Mr. Pinto and it was precisely because of that psychological factor that he (the Special Rapporteur) had considered it advisable not to use the term "ratification" in connexion with international organizations. To help it to settle that question, the Drafting Committee would have before it the original text of the relevant articles and the text revised by him. The Drafting Committee, and after it the Commission itself, might even decide to submit two alternative texts to the General Assembly. If the Commission decided to model article 14 of the draft on article 14 of the Vienna Convention, it would have to mention ratification first and then assimilate acceptance and approval to it. As far as international organizations were concerned, that would amount to turning the exception into the general rule.

32. The CHAIRMAN suggested that article 11, article 2, paragraph 1 (b), and articles 12, 13, 14, 15 and 16 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>2</sup>

#### ARTICLES 17 AND 18

33. The CHAIRMAN invited the Special Rapporteur to introduce articles 17 and 18, which read:

##### *Article 17*

##### *Consent to be bound by part of a treaty and choice of differing provisions*

1. Without prejudice to articles 19 to 23, the consent of a State or international organization to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States or international organizations so agree.

2. The consent of a State or international organization to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

##### *Article 18*

##### *Obligation not to defeat the object and purpose of a treaty prior to its entry into force*

A State or international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) the State or organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, as the case may be, until the State or organization shall have made its intention clear not to become a party to the treaty; or

(b) the State or organization has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

34. Mr. REUTER (Special Rapporteur) said that international organizations should enjoy, under the same conditions, the options open to States under article 17 of the Vienna Convention. In his view, therefore, article 17 did not pose any special problems, any more than did article 18, which stated a general rule linked with the principle of good faith. The two articles differed from

<sup>1</sup> See document A/CONF.67/16.

<sup>2</sup> For resumption of the discussion see 1353rd meeting, paras. 2 and 57.

the corresponding articles of the Vienna Convention only to the extent of the drafting changes required to take international organizations into account.

35. Mr. USHAKOV proposed that articles 17 and 18 be referred to the Drafting Committee.

36. Mr. KEARNEY supported Mr. Ushakov's proposal. In article 17, paragraph 1, he would like the Drafting Committee to consider replacing the word "or" after the word "permits" by the words "and/or".

37. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to refer articles 17 and 18 to the Drafting Committee.

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

#### ARTICLES 19, 20, 21, 22 AND 23

38. The CHAIRMAN invited the Special Rapporteur to introduce articles 19 to 23 of section 2 (Reservations), which read:

##### *Article 19*

###### *Formulation of reservations*

A State, when signing, ratifying, accepting, approving or acceding to a treaty, and an international organization, when signing, accepting, approving or acceding to a treaty, may formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

##### *Article 20*

###### *Acceptance of and objection to reservations*

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States or international organizations unless the treaty so provides.

2. When it appears from the limited number of the negotiating States or international organizations and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting State or international organization of a reservation constitutes the reserving party a party to the treaty in relation to that other contracting party if or when the treaty is in force for those contracting parties;

(b) an objection by another contracting State or international organization to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving contracting parties unless a contrary intention is definitely expressed by the objecting contracting party;

(c) an act expressing the consent of a contracting State or international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State or international organization has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been

accepted by a contracting State or international organization if it shall have raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

##### *Article 21*

###### *Legal effects of reservations and of objections to reservations*

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23;

(a) modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving party.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a contracting State or international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving contracting party, the provisions to which the reservation relates do not apply as between the two contracting parties to the extent of the reservation.

##### *Article 22*

###### *Withdrawal of reservations and of objections to reservations*

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or international organization which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting State or international organization only when notice of it has been received by that State or international organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the reserving party.

##### *Article 23*

###### *Procedure regarding reservations*

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and international organizations and other States and international organizations entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization, as the case may be, when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

39. Mr. REUTER (Special Rapporteur) said that the article concerning reservations would require an exchange of views on the general problem to which they gave rise. He had taken the view that, once an international organization was admitted as a party to a treaty, it was impossible to deprive it of one of the fundamental privileges deriving from that status, namely, that of admission to

<sup>3</sup> *Ibid.*, para. 84.

enjoyment of the reservations régime. He had also accepted that the legal rules relating to reservations should be the same for international organizations as for States. If the Commission accepted that view, it would have to consider articles 19 to 23 one by one in order to decide what changes should be made to the language of the Vienna Convention in order to take account of the addition of international organizations. If, on the other hand, the principle of the assimilation of international organizations to States gave rise to difficulties—difficulties of which he had not been unaware—a debate on the articles would be very useful, since it would enable him to draft new articles for submission to the Commission at its next session. It was clear that if the articles on reservations gave rise to problems of substance, it would be impossible to solve them in the few days that remained.

40. His view had been that, so far as reservations were concerned, there was no fundamental difference between treaties between States and treaties concluded between States and international organizations or between two or more international organizations. The problem of reservations did not, of course, arise with regard to bilateral treaties, for it was always solved in the case of treaties with a limited number of participating States by means of express provisions, as provided in article 20 of the Vienna Convention. The question of reservations was, however, of great importance in the case of general multilateral treaties. At present it was quite hypothetical so far as international organizations were concerned, for there was as yet no general multilateral treaty to which an international organization was a party.

41. He had, nonetheless, emphasized in his report that there was a risk that serious difficulties might arise if an international organization were admitted as a participant, on the same footing as States, in an international conference in which States members of the organization also participated. Clearly, no problem would arise if an international organization were invited to a conference in which its member States did not participate. For example, there might be an international conference on customs techniques in which a customs union would participate as such, but in which its member States would not participate. But that could only happen if the subject of the conference was very restricted and concerned only matters in respect of which the States had no competence. In a case of that kind, there was no problem. On the other hand, virtually insurmountable difficulties arose when an international organization participated in an international conference convened to draft a treaty in which its member States also participated. Did the international organization have the status of a party—a prospective party, but a party nonetheless—in such a case? There were, as yet, no examples of that kind, for it was hardly conceivable that a group of States should expect to be allowed to add to their own votes at an international conference the vote of the organization which they constituted. States members of the organization would have to choose between two alternatives: either to participate in the conference as individual States, or to participate as members of the organization—and in most cases it would be to their interest not to invoke their membership of the organization, since that would

have the effect of reducing their total number of votes to one. Faced with the inability of the other States to agree to the addition of the vote of the organization to that of its member States, the latter would retain their own individual votes, and the international organization would be admitted to the conference with consultative status only, to express the collective opinion of the member States it represented, and not as a prospective party to the treaty.

42. In approaching the problem of reservations, it would be found that in most international organizations there was no clear and sharp dividing line between the competence of the international organization and that of its members. That situation, which could be illustrated in many ways, was due partly to the fact that the competence of the organization was defined in rather vague terms, but partly also to the fact that the competence of the organization tended to spread further and further, as its member States daily discovered. The member States did not always accept that extension of the organization's competence with a good grace, as was shown by the various cases brought before the courts for the purpose of settling the rival claims of member States and organizations. An example involving the European Economic Community was the European Road Transport Agreement case, No. 22/70.<sup>4</sup>

43. The uncertainty surrounding the respective competence of an international organization and of its member States was so great that, in the case of a treaty between Finland, on the one hand, and the European Economic Community and its members, on the other, it was not always clear, from reading the treaty, what was meant by the phrase "countries other than Finland": did it mean the Community as such, or its member States, or the Community and its member States? The problem had been fully recognized by the authors of the treaty, who had concluded that it was, as the case might be, either the Community alone, or the member States alone, or the Community and the member States.

44. If that conclusion was correct, it could have important consequences for reservations because, if it was agreed that an organization and its members could, at the same time and independently of each other, freely formulate reservations, it would be necessary, in order to avoid insoluble problems, to lay down a rule that reservations bound member States and the organization in exactly the same way. He had therefore concluded that to allow an organization and its member States to participate at the same time in any treaty was a solution which could only be adopted with the greatest circumspection because, if member States and the organization were to be allowed to formulate reservations, it was essential to make sure that such reservations were identical or that the respective competences of the organization and of the member States were quite distinct.

45. If the Commission had to consider all the problems which could arise from reservations to treaties to which international organizations were parties, it would undoubtedly be carried well beyond the range of the present

<sup>4</sup> *Common Market Law Reports* (London), 1971, Part 50, p. 335.



articles. He had submitted those articles nevertheless, because he considered that if, in future, international organizations were allowed to participate in certain general treaties, special arrangements regarding reservations would be made in each case in order to avoid possible conflicts, either by forbidding reservations, or by obliging the organization and the member States to submit identical reservations, or by some other solution of that kind. But that was not a matter which could be made the subject of a general rule and so he had not submitted one.

46. Mr. USHAKOV said that he would confine his observations to articles 19 and 20 because the other articles or reservations depended in one way or another on those two articles.

47. In his opinion, a distinction should be made between two categories of treaties, namely, treaties between States in which international organizations might possibly be able to take part—not to be confused with treaties concluded under the auspices of an international organization—and treaties to which international organizations were parties for the purposes of all the provisions of the treaty. The 1975 Vienna Convention might belong to the first category of treaties, because it dealt not only with the privileges and immunities which host States were required to grant to sending States—which meant the obligations of host States to sending States and, reciprocally, the rights and obligations of sending States—but also, to a certain extent, with the rights and obligations of international organizations. It was therefore the kind of treaty which might possibly allow a degree of participation by international organizations. In that case, the participating international organizations could formulate certain reservations only, relating exclusively to the articles concerning their rights and obligations. In the second case, on the other hand, the international organizations which were parties to the treaty could formulate reservations to any provision of the treaty.

48. In article 17 and 18, which he had suggested should be referred to the Drafting Committee, the general term “a treaty” could be used to mean both treaties between States and international organizations and treaties between two or more international organizations. But that would not be possible in the following articles because, when dealing with reservations, it was necessary to make a distinction between treaties concluded between States and international organizations and treaties concluded between several international organizations. In his opinion, the rule would be very different depending on whether the treaty was concluded between international organizations only or between States and international organizations.

49. With regard to the principle of the formulation of reservations, set forth in article 19, he wondered whether an international organization must always have the possibility of formulating a reservation “unless the reservation is prohibited by the treaty”, as provided in article 19. He was not sure that that question could be answered in the affirmative. The rule stated in article 19 was perhaps valid for treaties concluded between international

organizations only, but was it equally valid for treaties concluded between States and international organizations?

50. He had some strong objections to the provisions of article 20. In particular, he had doubts about the legal meaning of the expression “the limited number of the negotiating States or international organizations” in paragraph 2. It was important to know whether it was States or international organizations that were involved, because the solution could vary, depending on whether it was a question of a treaty concluded between international organizations only, or a treaty concluded between States and international organizations. It was also hard to see how a treaty could be “a constituent instrument of an international organization”, as in the case dealt with in paragraph 3. In his opinion, such a case would be quite impossible according to the definition of an international organization as an intergovernmental organization.

51. With regard to paragraph 4 (a), if a reservation formulated by a State had been accepted by another State, that reservation applied only as between those two States. The question would therefore be governed by the Vienna Convention. In the case dealt with in paragraph 4 (b), the objection to a reservation by a State was also governed by the Vienna Convention.

52. He hoped that his comments would help the Special Rapporteur in the preparation of the new articles which he was to submit to the Commission at the next session; he did not see how such important questions could be settled at the present session.

53. Mr. CALLE Y CALLE said that the Special Rapporteur's comments in introducing articles 19 to 23 were no less apposite and well-founded for having been brief.

54. The Special Rapporteur considered that there would be no special difficulty in placing international organizations and States on the same footing in respect of their right as contracting parties to express reservations to a treaty. Since the Commission was discussing the conclusion of agreements between subjects of international law, a matter which was inevitably governed by international law, it should deal with the question, which affected all the draft articles, of the extent to which the parties concerned possessed the same capacity to conclude treaties, and that applied both to treaties between States and international organizations and to treaties between two or more international organizations. For that reason, he supported the extension to international organizations of all the carefully elaborated machinery relating to reservations. He would remind the Commission that great efforts had been made to make Latin American practice in respect of reservations as flexible as possible.

55. In the Spanish version of article 19, he thought that the order of the words “*ratificar*” and “*aprobar*” should be reversed and that, in order to maintain the distinction which had been made between States and international organizations in respect of ratification, the phrase “*según el caso*” should be inserted after the words “*aceptar o*”.

## 1349th MEETING

Friday, 11 July 1975, at 10.15 a.m.

Chairman: Mr. Abdul Hakim TABIBI

*Members present:* Mr. Bilge, Mr. Calle y Calle, Mr. Castañeda, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

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

(A/CN.4/285)

[Item 4 of the agenda]

(continued)

**DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR**

**ARTICLE 19 (Formulation of reservations)**

**ARTICLE 20 (Acceptance of and objection to reservations)**

**ARTICLE 21 (Legal effects of reservations and of objections to reservations)**

**ARTICLE 22 (Withdrawal of reservations and of objections to reservations) AND**

**ARTICLE 23 (Procedure regarding reservations) (continued)**

1. Mr. REUTER (Special Rapporteur) said that, on the whole, he agreed with the views expressed by Mr. Ushakov at the previous meeting, but he had some reservations on minor points.

2. To justify the inclusion of the provision contained in paragraph 3 of article 20 in the draft, it was necessary to accept that an international organization could become a party to the constituent instrument of another international organization and a member of it. The treaty in question would then be a treaty between the States which had established the organization and an international organization, and thus came within the scope of the articles under consideration. Did such a case actually exist in practice? He had touched on that question in his previous reports and thought that it required a cautious answer. It could, for example, be asked whether the United Nations was a party to the constituent treaties of ITU and UPU, of which it was a member. He was not absolutely sure what the answer to that question was because, although the United Nations had certain rights by virtue of those treaties, it did not have all the rights which flowed from them. It could therefore be said that the United Nations participated in those two organizations, but not necessarily that it was a party to the treaties which had established them. It was possible, however, to imagine an international organization becoming a party to a treaty establishing another international organization. For example, it might be considered that the European Economic Com-

munity, which was a member of GATT, was a party to the Agreement by which GATT had been established. If one international organization were a member of another international organization, there would be the difficulty resulting from the definition of the term "international organization"; according to article 2, paragraph 1 (i), of the Vienna Convention on the Law of Treaties, the wording of which was used in the present draft, "international organization" meant "an intergovernmental organization". Mr. Ushakov considered, therefore, that an intergovernmental organization was an organization whose only members were States, so that an organization whose members included another organization could not claim to possess the status of intergovernmental organization. If, therefore, article 20, paragraph 3, were retained as it now stood, it would be necessary to amend the definition of international organization given in article 2.

3. That position was open to question because it was doubtful whether the definition of an international organization as "an intergovernmental organization" should be interpreted so strictly. In fact, there were a number of international organizations—specialized agencies—whose members included some entities which were not yet States. It could therefore be argued that the term "intergovernmental organization" could have a broader meaning. But he saw no need to discuss that point because article 3 of the Convention on the Law of Treaties had been adopted at the Vienna Conference as a kind of compensation for the drawbacks resulting from the fact that that Convention did not apply to international organizations.

4. If an international organization consisted only of States, its constituent instrument was governed by the Vienna Convention. If the treaty were revised to include a provision opening membership of the organization to one or more international organizations, and an international organization ratified the treaty, all the relations of States as between themselves would continue to be governed by the Vienna Convention. The problem which would arise would be that of the relations of the new member of the organization with the other members with regard to the law of treaties. Paragraph 3 of article 20, therefore, could simply be deleted and the small gap it left could be covered in the commentary. It would be better to stop there instead of embarking on a formal definition of international organization. If the Commission decided to retain paragraph 3, however, it might indicate in the commentary that the expression "intergovernmental organization" applied not only to organizations composed of States, but also to those whose members included a few international organizations. He personally had some serious doubts about the legal efficacy of article 3 (c) of the Vienna Convention because he did not see how that Convention, when it had been ratified by States, could have an effect for third parties which were international organizations, since international organizations were excluded from it.

5. With regard to article 20, it was necessary to consider how the machinery of reservations and objections established by the Vienna Convention could be transposed to the present context. In the case of a treaty in which an

unspecified number of States and two international organizations participated on an equal footing with the States parties, what happened if each of the two organizations formulated a different reservation, if all the States objected to both those reservations and if the two organizations objected to each other's reservation? According to the present text of article 20, as long as the treaty was in the draft stage, it came within the scope of article 20 of the draft articles, but, as soon as the two reservations had been formulated and rejected, the treaty then governed only relations between States and consequently came within the scope of the Vienna Convention. On the other hand, if the organizations had formulated the same reservations, or had not objected to each other's reservations, the situation became more complicated because the treaty governed both relations between the States and relations between the two organizations: it came both within the scope of the Vienna Convention as a treaty between States, and within the scope of the draft articles as a treaty between two organizations. It could thus happen that a treaty lay partly outside the scope of application of the articles under consideration.

6. Some might think that an explicit provision should be included in the draft to cover that case. In his opinion, article 3 (c) of the Vienna Convention made such a provision unnecessary by ensuring that, if a treaty applied only to relations between States as a result of the formulation of reservations and objections, such relations would at least be governed by the Vienna Convention. To take the case of a treaty which was governed by the draft articles until objections were made to the reservations formulated by international organizations: if the objections were general, it would then no longer fall within the scope of the draft, but if an objection were later withdrawn, the treaty would once again be governed by the draft. It might be necessary to take account of that case during the consideration of article 22, on withdrawal of reservations and of objections to reservations, because if a State withdrew its objection to a reservation formulated by an international organization, the entire treaty would thereby come once again within the scope of the draft articles. He did not think it necessary, however, to prepare special provisions on that point. It would be enough to draw attention in the commentary to the difficulties which could arise.

7. The position taken by Mr. Ushakov with regard to the formulation of reservations was perfectly logical, since it was entirely in keeping with the position taken by the Commission with regard to the adoption of treaties. It was, in fact, an essential point which not only affected reservations, but was also closely related to article 9. In that connexion, Mr. Ushakov had been right to draw a distinction between treaties between States and international organizations and treaties between two or more international organizations.

8. At present, treaties between two or more international organizations were never general multilateral treaties but always treaties of a very special character, for which the only reasonable rule was to state that reservations would be authorized only if they were expressly allowed for by the terms of the treaty or by all the other parties of the treaty.

9. With regard to treaties between States and international organizations, a distinction should be made between the general case and a special case already envisaged in article 9. In the general case, it was necessary to apply the same rules as for treaties between international organizations and to state clearly that, when a treaty was characterized by the simple fact that it was concluded between one or more States and one or more international organizations, reservations were permitted only if they were provided for in the treaty or if all the parties—States and organizations—consented to them. In the special case already dealt with in connexion with article 9, the rule relating to the adoption of the text of the treaty and the rule relating to reservations must be parallel in all respects. The special case was the case of a general conference between States which allowed for the additional participation, on the same footing as States, of one or more international organizations. It was in that case—and in that case only—that the principle came into operation of the functioning of the machinery of reservations, which was the most interesting innovation in the Vienna Convention. That principle was retained in the present draft, but again in that particular case only. He had already reached a parallel conclusion in article 9, which stated that the adoption of the text of a treaty took place by the consent of all the parties in the case of a treaty between international organizations or a treaty between States and international organizations, but that it took place by a two-thirds majority in the specific case of a general conference between States which allowed for the participation of one or more international organizations on the same footing as States. That parallelism was perfectly logical because the reason why the Vienna Conference had opened the system of reservations so wide was that it had made the rule concerning the adoption of the treaty far more flexible by adopting the provision relating to the two-thirds majority. That idea formed the basis of the opinion of the International Court of Justice concerning the effects of reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>1</sup>

10. If that position were accepted by the other members of the Commission, it would mean a considerable change in the whole scheme of the articles relating to reservations. It would mean that, at a general conference between States, one or more international organizations could be placed on the same footing as States and that, in that case, but in that case only, the very liberal rules of the Vienna Convention would apply to the adoption of the text of the treaty and to reservations. In the case of treaties between States and international organizations, however, the only prudent rule, which was the traditional rule that reservations must be accepted by all the parties, would apply.

11. Mr. USHAKOV said he wished to thank the Special Rapporteur very much not only for having fully understood his ideas, but also for the brilliant way in which he had expounded them.

12. Mr. TAMMES said that he had no problem in accepting draft articles 19 to 23 as they stood. He agreed

<sup>1</sup> *I.C.J. Reports 1951*, p. 15.

with the Special Rapporteur that it was not necessary at the present stage to include the "special provision" to which the Special Rapporteur had referred in connexion with article 20. In general, the extremely interesting questions raised by the Special Rapporteur at the present meeting required further thought.

13. It seemed to him that acceptance of the provisions of article 11 relating to international organizations implied that such organizations could also consent to be bound by a part only of a treaty, as provided in article 17, the articles on reservations and, perhaps, the final clauses of the treaty itself. By the same reasoning, acceptance of the possibility that international organizations could become parties to treaties on the same footing as States parties as defined in article 2, paragraph 1 (g), implied recognition of the right of international organizations to protect their own position by objecting to reservations entered by other parties.

14. In that case, the problems of potential conflict between the competence of an international organization and that of its member States, to which the Special Rapporteur had alluded in the general commentary to articles 19 to 23 in his fourth report and in the statement he had just made, were not specifically problems relating to reservations but were more general. They were an inevitable consequence of the fact that in most international organizations there was no clear-cut division between the competence of the corporate body, which was the organization itself, and that of its constituent parts. It could be seen from the Convention cited in the Secretariat study<sup>2</sup> that international organizations were already to participate materially on behalf of territories under their administration or for whose international relations they were responsible in multilateral agreements of an extremely complex nature, the application of which might easily bring the organization concerned into conflict with its member States. So long as international organizations remained at their present stage of constitutional development, there seemed to be no solution to potential conflicts other than the adoption of an attitude of good faith, according to which the member States of the organization would try to strike a balance between loyalty to the corporate body and a reasonable concern for their own interests. The same provisional solution would seem to be indicated in the event of conflicts between reservations and objections to treaties entered by international organizations and their constituent States.

15. Mr. PINTO said he had expressed the view on several occasions that the States and international organizations were fundamentally different in nature, and pointed out that States entering into agreements with international organizations normally did so with organizations of which they were members. Seen in that light, the draft articles on reservations, which were otherwise excellent, gave rise to a host of problems. While he did not by any means take the view that States and international organizations should not be considered as parties to the same kind of treaties, there must be no undue haste to adopt the attractive solution of placing them on the same plane in all respects. In practical terms, such action was

impossible at the present stage and would remain so for the foreseeable future.

16. With regard to the formulation of reservations, the fact that States were more often than not members of an international organization with which they concluded an agreement gave rise to problems for both the organization and the State. On the one hand, the organization had constantly to safeguard its own reasonable interests and bear in mind at the same time the interests of its members, and on the other, States had to protect the interests of their nationals while fulfilling their duties as members of the organization. Those problems could be said to result from the "membership connexion" between the State and the international organization. The best solution, in a case in which an international organization had doubts concerning a provision of a treaty to which it was considered desirable in the general interest that it should be admitted as a party, would seem to be to accord to that organization the privilege generally given to the States to enter reservations in accordance with article 19 of the Vienna Convention on the Law of Treaties, much of which was reproduced in article 19 of the draft. He was uncertain, however, in the light of the "membership connexion", whether the range of permissible reservations should be the same in the case of international organizations as in that of States.

17. It would seem advisable to state that the formulation of reservations to a treaty by an international organization would be restricted not only by the provisions of article 19, sections (a) to (c), but also by the constituent instrument and the stated policies of the organization. States would then have an assurance that an international organization would act not simply in the way its officials thought was most expedient for the organization, but in accordance with its charter or with policies which they themselves had drafted or approved. The Special Rapporteur might also wish to draw attention to the fact that States should bear in mind their duties as members of one, or perhaps several, international organizations. Those points could be covered in either the draft articles or the commentary.

18. Mr. KEARNEY said that at the 1346th meeting,<sup>3</sup> during the discussion of article 2, paragraph 1 (g), to the provisions of which Mr. Tammes had referred at the present meeting, he had suggested that it would be better not to state that the position of an international organization with regard to a treaty would be identical with that of a State, but to leave that question open. That view was confirmed by the problems which had been raised with regard to the question of reservations.

19. It was important to bear in mind the nature of the multilateral treaties to which an international organization was likely to become a party. As Mr. Pinto had said, they would usually involve an organization and States which were members of that organization. Moreover, they would be treaties in which, as in the case of those cited in the Secretariat study (A/CN.4/281), the international organization undertook certain duties or responsibilities vis-à-vis the States parties in connexion with the implementation of the treaty. That being so,

<sup>2</sup> Document A/CN.4/281, part one, section B (b).

<sup>3</sup> Paras. 18 and 19.

it seemed impossible to say that the positions of States and international organizations with regard to a treaty were anywhere near to being identical.

20. That point could be illustrated by reference to the provisions of article 20, paragraph 4, under which the effect of a reservation formulated by an international organization in connexion with its interpretation of its functions under a treaty would be very different from that of a reservation entered by a State party. If a reservation made by a State party was the subject of an objection by another State party, that would remain a matter between the States concerned, but objections by one or more States parties to a reservation made by an international organization could affect the operation, and possibly even the entry into force, of the treaty. If, for example, a treaty declared an international organization to be the operating agent of the States parties in respect of a development project, such as the development of a river basin, the objections of those States to a reservation formulated by the organization could prevent it from taking necessary action for the furtherance of the project.

21. For that reason, he found it extremely difficult to apply to international organizations the rules of the Vienna Convention on the Law of Treaties without first considering the role of such organizations in the execution of treaties and the possibility that special rules would be required. The problems to which he had referred were more mechanical in nature than those mentioned by Mr. Pinto and could not, therefore, be solved in the way that speaker had suggested.

22. Mr. HAMBRO said he hoped that the draft would not contain any provision which might in the future prevent international organizations from participating in multilateral treaties and making reservations to them. No one knew what multilateral treaties might be adopted in the future and what kind of reservations international organizations might wish to make, but it was quite certain that international organizations would be called upon to play an increasingly important role in the international community. Nothing should therefore be done which might prevent them from concluding treaties, acceding to treaties and even, where necessary, formulating reservations to treaties.

23. Sir Francis VALLAT said he noted that none of articles 11, 14 and 19 made provision for the ratification of a treaty by an international organization. While he had no strong feelings about that omission in the case of article 11, its effect in the cases of articles 14 and 19 was to restrict the range of choices open to international organizations; that was contrary to the intention of the Commission's draft, which was to assimilate as far as possible the procedures which could be followed by international organizations and States.

24. He was concerned that the provisions of article 3 (c) were not identical with those of article 3 (c) of the Vienna Convention on the Law of Treaties. Was the Commission trying to build up a series of conventions each dealing with a different category of entity or a series of conventions whose provisions would overlap? What worried him was how the draft articles on reservations would relate to the application of the provision of the

Vienna Convention as between the States parties to a treaty, for it was a little difficult to apply identical provisions in respect of reservations to international organizations and to States. That being so, he wondered whether it was theoretically and practically possible to limit the applicability of the Commission's provisions on reservations to the relations between international organizations and States and between international organizations themselves, leaving the relations between States to be governed by the Vienna Convention. He feared that, unless that were done, the slight differences in wording between the Commission's draft articles and the provisions of the Convention might lead to serious, and as yet unforeseen, practical difficulties.

25. It was clear from both the text and what the Special Rapporteur had said that the intention of article 20, paragraph 3, was that the Commission's draft should not apply to organizations consisting entirely of international organizations. He had no objection to that, but the Commission should give the matter some thought since it was theoretically studying treaties between international organizations and should, therefore, theoretically consider treaties between bodies created by such organizations.

26. Mr. ELIAS said that the interesting discussion which had taken place on articles 19 to 23 had shown that the Commission must take a fundamental decision. During the discussion on articles 11 to 16, it had been almost evenly divided on whether provision should be made for the possibility of international organizations using the ratification procedure. That question had not then been settled but it had to be decided now before any real progress could be made with the articles on reservations.

27. It was undeniable that international organizations could not be placed on a par with States for all purposes. The Commission had to take care not to include in its draft any provisions that would be unworkable in practice. The present draft was being considered because both the Commission and the Conference on the Law of Treaties had appreciated the need for a set of articles specially adapted to deal with treaties concluded between States and international organizations or between international organizations. During the present discussion, however, members had stressed the need to keep treaties between States separate from treaties entered into by international organizations.

28. If that was accepted, there was much to be said for Sir Francis Vallat's suggestion that two separate sets of articles should be drafted, one dealing with treaties between States and international organizations and the other dealing with treaties concluded between two or more international organizations; questions relating to treaties between States would be left out altogether. But that approach would have the disadvantage of obliging the Commission to draft a large number of articles, and then to consider whether some of them could be combined for purposes of the final draft. The Commission had already been faced with that problem when preparing its draft on the representation of States in their relations with international organizations.

29. With regard to the texts of the articles on reservations, the Special Rapporteur had expressed his will-

ingness to drop paragraph 3 of article 20. If that course was adopted, a suitable explanation should be given in the commentary.

30. In the light of the difficulties to which Mr. Kearney and Mr. Pinto had drawn attention, the text of article 19 did not appear to be fully satisfactory, not only because it omitted any reference to ratification in connexion with international organizations but also because insufficient provision was made for the case where an organization and one of its members were both parties to a multilateral treaty. Yet some limitation was clearly needed, and the matter was not covered by the present sub-paragraphs (a), (b) and (c). Was it therefore necessary to introduce an additional sub-paragraph? Or should the Commission simply state in the commentary that neither the international organization nor the member States should have the power to make reservations incompatible with the constituent instrument of the organization? On the whole, he thought that the best course would be to adopt articles 19 to 23 broadly in the form in which they had been submitted, with a note showing that adoption was only provisional. The Commission could then reconsider them at the next session.

31. He was concerned that suitable emphasis should be placed on the fact that international organizations were not, and could not be, in exactly the same position as States in relation to the treaty-making process. But he was not convinced that the way to deal with the problem lay in restrictive provisions, such as denying to international organizations all access to the ratification procedure, on what appeared to be historical grounds. The true path of progress lay in the direction of recognition of the law of international organizations. The Commission was not only codifying existing international law but also contributing to its progressive development and should therefore look to the future rather than to the past.

32. Mr. EL-ERIAN said that he wished to make some comments on the question of ratification in its application to international organizations. The Special Rapporteur, in paragraph (4) of his commentary to article 11 (A/CN.4/285), had stated that the term "ratification" was not used in the practice of international organizations and that the single example which could be given was subject to interpretation: as explained in a foot-note, the 1950 agreement between Italy and FAO had referred to the "ratification" of that agreement by the FAO Council, but the obvious intention had been to refer to the adoption of that agreement by the Council.

33. Nevertheless, it was important to bear in mind the anxiety of international organizations that the codification of international law should in no case result in thwarting the evolution of a branch of the law which was in a state of constant development. For that reason, though he was prepared to accept the Special Rapporteur's conclusion not to mention ratification in paragraph 2 of article 11, he would urge that the commentary should explain that there was no intention to rule out altogether the possibility that ratification might be used in the future by an international organization, and that there was no intention either to check the evolution of international law in that respect.

34. There could well be cases in the future of an agreement being concluded between a State and an international organization under circumstances closely resembling signature subject to ratification. For example, in an emergency situation a State might conclude an agreement with the chief executive officer of the organisation, subject to confirmation by what might be called the "sovereign organ" of the organization. In the case of the United Nations the organ in question would be the General Assembly for some purposes and the Security Council for others. Without necessarily establishing a complete analogy between an international organization and a State, it was nevertheless necessary to make it clear that cases of that kind were left to the evolution of the law of international organizations and that the provisions of article 11 were simply intended to codify the existing practice.

35. Mr. ROSSIDES said that there could be no doubt that international organizations in their present condition would not be placed on a par with States. That reality had to be reflected in the draft articles. Nevertheless, it had also to be recognized that the present times were a period of transition and that, under the impact of technological and other changes, the law was rapidly evolving.

36. In the circumstances, the Commission had to strike a balance between codifying the existing law and helping to promote the changes needed to establish legal order in the world. As he saw it, the primary duty of the Commission was to promote the progressive development of international law. The door should therefore be left open for the possibility that an international organization might behave in relation to treaties in a manner not very different from a State.

37. In that process, the Commission also had to strike a balance between reasonable speed and undue haste. It was necessary to move forward without unnecessary delay but not at a pace that States would not be prepared to follow.

38. He fully realized, of course, that the Commission must exercise caution and promote the development of the law in a realistic direction, since any departure from realism would make its proposals ineffective. Though it had to take reality into account, it must not treat present reality as if it were everlasting.

39. The CHAIRMAN invited the Special Rapporteur to comment on the discussion.

40. Mr. REUTER (Special Rapporteur), referring to the observations by Mr. Kearney, said it was obvious that the Commission would have to reconsider the definition of the expression "party" in article 2, paragraph 1 (g). In particular, it would have to replace the word "identical" by an expression such as "on a par with". Some of Mr. Kearney's difficulties were undoubtedly due to the fact that, in the explanations he (the Special Rapporteur) had given to Mr. Ushakov, he had moved quite a long way from the position he had adopted when drafting articles 19 and 20 in their original form. He had now taken Mr. Ushakov's views into account and his new drafts of articles 19 and 20 were based on principles which reflected the real situation but were expressed much more clearly than previously.



41. Those principles could be summarized in the following way: reservations must be accepted by all the parties to a treaty, whether States or international organizations; there could be no exception to that rule for treaties between international organizations: for treaties between one or more States and one or more international organizations, the only exception allowed was in the case of a treaty of a universal character between States, to which one or more international organizations could become parties.

42. The rule that reservations must be accepted by all States, which was stated in article 20, paragraph 2, of the Vienna Convention, was thus the general rule. He was satisfied that that was realistic and was the only possible solution. As soon as an international organization became a party to a treaty, all sorts of problems arose since it was not possible to assimilate an international organization to a State. At present, the idea of a conference of a universal character consisting only of international organizations was inconceivable because a group of international organizations could not represent the international community, which consisted of States, and the concept of universality could be understood only in terms of States. Mr. Kearney's objections would all disappear once the general rule which he (the Special Rapporteur) was now proposing was accepted.

43. Mr. Kearney had envisaged the case of a treaty concluded between a number of States and one international organization assigning to the organization functions which gave it a predominant position in relation to the States. In Mr. Kearney's view, any reservation which the organization or a State might make concerning such functions would upset the balance of the treaty. But that case fell clearly within the scope of a provision to which there could be no exceptions, namely, article 19 (c) of the Vienna Convention. According to that provision, a State could not formulate a reservation if it was incompatible with the object and purpose of the treaty. It was obvious that any reservation to a treaty establishing an international organization or entrusting new functions to an existing organization would be considered invalid if it had the effect of impairing the structure of the organization, because it would be contrary to the object and purpose of the treaty. Another example cited by Mr. Kearney related to the development of a river basin by a small number of States and the establishment of an organization entrusted with specific functions. A treaty of that kind, however, would not be of a universal character and any reservations to it must be accepted by all the parties.

44. The approach which he (the Special Rapporteur) was now proposing was a sensible one because it provided that the consent of all the parties was necessary when reservations were formulated to a treaty to which at least one international organization was a party. It also implied a certain measure of open-mindedness. When the Commission had prepared its draft on the law of treaties, it had at first accepted the concept of a general multilateral treaty. If that concept was not to be found in the Vienna Convention, it was not for reasons of principle, but only because of political circumstances, which

had now changed. The 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character was a recent example of a general multilateral treaty of a universal character.

45. It was now therefore necessary for the Commission to be realistic. In article 9, the two-thirds majority rule was stated for a certain category of treaties, and, with the new version of articles 19 and 20, the Commission might be able to take a small step forward. In the future, international organizations should not be prevented from participating in conferences of a universal character to draw up general multilateral conventions. Of course, there were no examples of that so far, but it would be quite normal, for instance, for customs unions to be able to participate one day in conventions relating to customs nomenclature. The Commission did not have to take a position on that matter; all it had to do was simply to give governments an opportunity to take such a decision. It was quite impossible to exclude such a case from the present topic.

46. A case of that kind was bound to cause difficulties and he had not overlooked them in his report. He had mentioned the contradiction which might appear if both an international organization and the member States of the organization were allowed to participate in a conference. But the Commission did not intend to give international organizations the right to participate in conferences of a universal character; it would merely provide a régime to cover the case in which governments might, in certain circumstances and in clearly defined conditions, decide to grant them that right, taking into account the object and purpose of the treaty.

47. Referring to Sir Francis Vallat's comments, he said that the Commission had decided that the draft now being prepared should form a self-contained set of articles which could enter into force independently of the Vienna Convention on the Law of Treaties. The draft related to treaty relations between the States parties to a treaty to which entities other than States were also parties. Such a situation gave rise to problems which were very different from those dealt with in the 1969 Vienna Convention. He understood the misgivings expressed by Mr. Elias, but thought that they should be less strong now that a new solution was being proposed. With regard to Mr. El-Erian's comments on the subject of ratification, he agreed that it would be necessary to establish an equitable balance between the content of the articles and the content of the commentary. Perhaps the simplest solution would be to allow ratification for international organizations and to explain in the commentary that, although ratification by international organizations was not prohibited, it was also not recommended and was in any case not customary.

48. To assist the Drafting Committee, he had redrafted not only articles 19 and 20, but also a number of the other provisions considered by the Commission at the present session.

The meeting rose at 1.10 p.m.



## 1350th MEETING

Monday, 14 July 1975, at 3.15 p.m.

Chairman: Mr. Abdul Hakim TABIBI

*Members present:* Mr. Ago, Mr. Bilge, Mr. Castañeda, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

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

(A/CN.4/285; A/CN.4/L.234)

[Item 4 of the agenda]

(continued)

**DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR**

**ARTICLE 19 (Formulation of reservations)**

**ARTICLE 20 (Acceptance of and objection to reservations) AND**

**ARTICLE 21 (Legal effects of reservations and of objections to reservations) (continued)**

1. The CHAIRMAN invited the Commission to continue consideration of articles 19 to 21.<sup>1</sup> The Special Rapporteur's revised text of articles 19 and 20 read:

*Article 19*

*Formulation of reservations*

1. A treaty between one or more States and one or more international organizations and a treaty between several international organizations may only be the subject of a reservation:

- (a) if the reservation is expressly authorized by the treaty; or
- (b) if the reservation is expressly accepted by all the States and international organizations parties to the treaty.

2. Notwithstanding the rule laid down in the preceding paragraph, a treaty concluded between States on the conclusion of a general conference, in which one or more international organizations participate on the same footing as those States and in respect of which it does not appear [either from the limited number of the negotiating States or] from the object and purpose of the treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, may be the subject of a reservation formulated by a State or an international organization, when signing, accepting, approving, ratifying or acceding to a treaty, unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

*Article 20*

*Acceptance of and objection to reservations*

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States or international organizations unless the treaty so provides.

2. In the case falling under article 19, paragraph 2, and unless the treaty otherwise provides:

(a) acceptance by another contracting State or international organization of a reservation constitutes the reserving party a party to the treaty in relation to that other contracting party if the treaty is in force or when it comes into force for those contracting parties;

(b) an objection by another contracting State or international organization to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving contracting parties unless a contrary intention is definitely expressed by the objecting contracting party;

(c) an act expressing the consent of a contracting State or international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State or international organization has accepted the reservation.

3. For the purposes of the preceding paragraph and unless the treaty otherwise provides, a reservation is considered to have been accepted by a contracting State or international organization if it shall have raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which its consent to be bound by the treaty was established, whichever is later.

2. Mr. REUTER (Special Rapporteur) said that the new texts of articles 19 and 20 reflected the position which he had outlined at the previous meeting. Rather than open a fresh discussion, he considered that it would be better to refer them to the Drafting Committee since they involved only minor changes to articles 21, 22 and 23.

3. The only point to which he need draw attention in draft article 21 was a drafting point. If the Commission accepted his new article 19, it would probably have to make a minor change in article 21, paragraph 3. The new article 19 first enunciated a general principle, that of unanimous consent to reservations, and then provided for a fairly limited exception, that of the application of the reservations régime of the Vienna Convention on the Law of Treaties. Consequently, it should be specified that article 21, paragraph 3, applied only to the special case referred to in article 19, paragraph 2. That could be done by wording the beginning of paragraph 3 of article 21 to read: "When, in the case provided for in article 19, paragraph 2, a contracting State or international organization ...".

4. Mr. USHAKOV said that article 21 did not cause him any difficulty, but if the new articles 19 and 20 were adopted, article 21 would apply only to treaties of a universal character. Since reservations to restricted treaties had to be accepted by all the parties, the provisions of article 21 could not apply in that case. Consequently, article 21 could be referred to the Drafting Committee, which would determine its precise scope.

5. Mr. REUTER (Special Rapporteur) said he had thought about the question raised by Mr. Ushakov but had reached the conclusion that article 21, paragraphs 1 (a) and (b), and paragraph 2, could apply in the general case referred to in article 19, paragraph 1. According to the latter provision, the reservation must either be authorized by the treaty or be accepted by all the parties to the treaty. He had in mind the case of a treaty concluded between a number of States and an international organization, which permitted the States and the organization to formulate a specific reservation. If a State made the reservation, the reservation was then in conformity with the

<sup>1</sup> For the text of article 21, see 1348th meeting, para. 38.

treaty and applied only in relations between that State and the other contracting parties, and not in the relations between the contracting parties themselves. Those relations were governed by the text of the treaty as a whole. The Drafting Committee should take that case into account when it came to consider article 21.

6. Sir Francis VALLAT said that, in view of the lack of time, there appeared to be no alternative to referring article 21 to the Drafting Committee, though he seriously doubted the possibility of arriving at a satisfactory draft. The position had been materially altered by the Special Rapporteur's redrafts of articles 19 and 20. Those new texts cut across the classifications of the Vienna Convention on the Law of Treaties and called for consideration of the substance.

7. Mr. USHAKOV said he was in full agreement with those remarks. One solution might be for the Drafting Committee to prepare a text of article 21 and place it between square brackets; the Commission would then take its decision at the next session.

8. Mr. KEARNEY said he noted the reference to a "general conference" in paragraph 2 of the Special Rapporteur's redraft of article 19 and the fact that Mr. Ushakov had equated the product of such a conference with a treaty of a "universal character". He himself had misgivings about the use of both the term "general conference" and the term "treaty of a universal character". It seemed to him that very large and important conferences in which all the States in a large region of the world participated, such as conferences of the Organization of American States or the Organization of African Unity, could properly be described as "general conferences", even though they did not produce treaties of a universal character. In view of the many unknowns involved, he felt that if article 21 were referred to the Drafting Committee, it was doubtful whether satisfactory results would be obtained.

9. The CHAIRMAN said that the Commission would have full latitude to discuss whatever texts eventually emerged from the Drafting Committee.

10. Mr. USHAKOV, in reply to the point raised by Mr. Kearney, said that the essence of the Special Rapporteur's new proposal was in the idea it contained, rather than in the actual texts of articles 19 and 20. The expression "general conference", for example, gave rise to misgivings in some quarters. It would be for the Drafting Committee to examine the underlying idea of the Special Rapporteur's proposal and to formulate redrafts of articles 19 and 20 for submission to the Commission.

11. Mr. HAMBRO said that it would be much wiser not to press for the adoption of articles 21 to 23 at the present session. It was important that the Commission should not submit to the General Assembly any articles which had not been the subject of a thorough discussion.

12. Mr. PINTO said that he wished to place on record the fact that his reservation regarding like treatment of States and international organizations applied to all the articles, and therefore to the articles now under discussion.

13. It would be a great help to the reader if the texts of the draft articles were presented in such a manner as

to show clearly, by means of underlining, where they differed from the corresponding texts of the Vienna Convention on the Law of Treaties. In the Special Rapporteur's fourth report (A/CN.4/285), the corresponding provisions of the Convention were given in foot-notes, a method which involved tiresome checking.

14. The CHAIRMAN said he could assure Mr. Pinto that his first point would be reflected in the Commission's report. The second would be examined by the Secretariat.

15. If there were no further comments, he would take it that the Commission agreed to refer articles 19, 20 and 21 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*

16. Mr. REUTER (Special Rapporteur) said that, if the Drafting Committee was unable to agree on the articles relating to reservations, or if the Commission wished to obtain further clarifications, those articles should not be adopted at the present session. Nevertheless, it was very important that he should know the views of members of the Commission for the purposes of the continuation of his work. If the Commission decided not to submit any draft articles to the General Assembly, it should state that it had been obliged to follow that course for lack of time, a point which would inevitably raise the question of its methods of work.

ARTICLE 22 (Withdrawal of reservations and of objections to reservations) AND

ARTICLE 23 (Procedure regarding reservations)<sup>2</sup> (*continued*)

17. Mr. REUTER (Special Rapporteur), said that, with regard to article 22, he would confine himself to drawing attention to a question which might either be dealt with in the commentary, or be reflected in an amendment to paragraph 3 (b) of the article. He would take the case of a general conference in which an international organization was participating on the same basis as States. The treaty which resulted from the conference would be governed by the future convention. If the international organization formulated a reservation to which all the States objected, and which would prevent them from considering the international organization as a party to the treaty, the organization would lose its status as a party. The treaty would then become a treaty concluded between States and the Vienna Convention would apply to all the effects subsequent to the last objection by the last State. If one of those States subsequently withdrew its objection, the international organization would again become a party to the treaty, which would again fall within the scope of the draft articles. In a situation of that kind, notification of the withdrawal of the objection should normally be addressed not only to the international organization, but to all the States concerned, since each of them would be interested in learning of the change of régime applicable to the treaty.

18. Consequently, he suggested that the following sentence be added to article 22, paragraph 3 (b): "If, how-

<sup>2</sup> For the texts of articles 22 and 23, see 1348th meeting, para. 38

ever, the withdrawal of an objection to a reservation has the effect of making an international organization a party to a treaty to which no international organization was any longer a party before such withdrawal, notice of the withdrawal shall be given to all the parties". That sentence might be placed in square brackets, in order to leave the Drafting Committee free to delete it, adopt it or reproduce its substance in the commentary.

19. Article 23 did not call for any particular remarks on his part.

20. Mr. KEARNEY said it seemed to him an over-elaboration to make provision in the article for the hypothetical case mentioned by the Special Rapporteur, which was highly unlikely to occur in practice. It was difficult to see how a treaty adopted at a conference of the kind envisaged could lead to a participating organization making reservations to which all the other parties objected; a majority of the States concerned would also be members of the international organization and if the organization made a reservation, it would not seem within the reasonable bounds of possibility that all its members should object to that reservation.

21. He was much more concerned with the more likely possibility that one or two States might object to a reservation made by an international organization. Such objections would undoubtedly lead to complications.

22. Sir Francis VALLAT said that paragraph 3 (b) of the Special Rapporteur's proposed article 22 stated that the withdrawal of an objection to a reservation became operative only when notice of it had been received "by the reserving party", whereas paragraph 3 (b) of article 22 of the Vienna Convention used the words "by the State which formulated the reservation". The use of the expression "the reserving party" illustrated the effect of changing the structure of the Vienna Convention. According to paragraph 1 (g) of article 2 of the draft, the term "party" meant a State or an international organization which had consented to be bound by the treaty and for which the treaty was in force. Consequently, the text now proposed, by introducing the concept of "reserving party", also introduced the requirement of the treaty being in force. The corresponding text of the Vienna Convention, by simply referring to the State "which formulated the reservation" had avoided that requirement.

23. In his view the proposed provision would not work satisfactorily. It would restrict the effect of the provisions of article 22, not only in relation to international organizations but also in relation to States. It was for that reason that he had mentioned the possibility of dealing with the relations between States in one way, and relations involving international organizations in another.

24. An examination of paragraph 1 of article 19 as redrafted by the Special Rapporteur showed that the concept of the "formulation" of reservations had disappeared. That concept had been at the heart of the corresponding provision of the Vienna Convention on the Law of Treaties. He had serious misgivings on that point and about the effect of that alteration on the subsequent articles.

25. Mr. USHAKOV, referring to the case, mentioned by the Special Rapporteur, of a change of the régime applicable to a treaty, said that he would take another case, that in which an international organization was participating, as a party and on terms of equality with States, in a treaty of a universal character. If a State formulated a reservation to the treaty and the reservation was accepted by the other States but objected to by the international organization, the legal effects of the reservation would operate solely between States and would be governed by the 1969 Vienna Convention. That case was much more likely to occur than one where a reservation formulated by the international organization was objected to by all the States parties to the treaty.

26. To cover those different cases, he would suggest including a general saving clause applicable to the draft as a whole, to the effect that relations between States only would be governed by the Vienna Convention on the Law of Treaties or by the relevant rules of general international law.

27. Mr. REUTER (Special Rapporteur) said he was inclined to accept Mr. Ushakov's suggestion. A general saving clause could apply not only to the case mentioned by Mr. Ushakov, but also to other cases, unrelated to reservations. The Commission should indicate in its commentary that such a clause would be drafted later.

28. Referring to Sir Francis Vallat's remarks, he said that the Commission had decided, a long time ago and after lengthy debate, that the draft articles should be regarded as an autonomous whole, independent of the Vienna Convention. If the Commission maintained that position, it would have to draft provisions applicable to relations between States, even if those relations only came into being on the conclusion of a treaty between States and international organizations. There was nothing to prevent the Commission from reversing its decision, but it should delay doing so as long as possible, because such a reversal would involve changing a great many articles. If it maintained its decision, the Commission would have to make sure that it did not draft any articles, for relations between States resulting from the conclusion of a treaty governed by the future convention, which differed from the corresponding provisions of the Vienna Convention.

29. The Vienna Convention had established two régimes: first a general régime and, secondly, a special régime applicable when it was apparent from the limited number of the negotiating States and the object and purpose of the treaty that the application of the treaty in its entirety between all the parties was an essential condition of the consent of each party to be bound by it. His personal view was that as soon as an international organization became a party to a treaty, it became a treaty *intuitu personae*, since no international organization was equal to a State or to another international organization. For that reason he proposed, as a general rule, the régime which constituted the exception in the Vienna Convention, and conversely, as an exception, the general rule in that Convention.

30. Referring to an observation by Mr. Ushakov, that the articles referred solely to treaties of a universal character, he said that the treaties could be general treaties, particularly regional treaties. Those treaties could also be defined, as he had defined them in paragraph 2 of his new article 19, by expressing in negative form the criteria laid down in article 20, paragraph 2, of the Vienna Convention. Then, if it did not follow either from the limited number of the negotiating States, or from the object and purpose of the treaty, that the application of the treaty in its entirety between all the parties was an essential condition of the consent of each one to be bound by the treaty, the general rule in article 20, paragraph 1, of the Vienna Convention applied to a treaty to which an international organization was a party.

31. Mr. AGO said it was important to consider all the possible consequences of the change of régime which the Commission was preparing to accept. He had in mind the case where a treaty was adopted at a general conference in which States and international organizations were participating on terms of equality. It was not only through the operation of reservations that an international organization might cease to be a party to that treaty; it could happen that, after the adoption of the treaty, an international organization might consider that it was not entirely satisfactory and refrain from approving it. The treaty, when ratified by the States concerned, would become a treaty concluded between States. Must it then be considered to be governed by the Vienna Convention? In his opinion it must not, because the international organizations retained the right to become parties to the treaty. If they subsequently approved it, the treaty, which would in the meantime have been governed by the Vienna Convention, would once again fall within the scope of the future convention.

32. Sir Francis VALLAT said that he was anxious that there should be no doubt as to which of the two régimes would apply. He was thinking of the possibility that a State might in the future be a party both to the Vienna Convention on the Law of Treaties and to the convention that would result from the draft articles now under discussion. Care would have to be taken to show clearly which of the two conventions would apply in a particular situation. It was essential that the Commission should clarify its views on the fundamental point of the relationship between the rights and obligations under the Vienna Convention and those provided for in the draft. That problem had only stood out sharply when the Commission had taken up the articles on reservations.

33. As he saw it, the effect of paragraph 1 of draft article 19 would be to apply to any treaty not falling under paragraph 2 the régime applicable under article 20, paragraph 2, of the Vienna Convention, if one State participated in the treaty. According to the Special Rapporteur, if an international organization participated in a treaty together with States, then of necessity the treaty became a restricted multilateral treaty in the sense of article 20, paragraph 2, of the Vienna Convention; but it was doubtful whether that was necessarily so. There might be many conferences in the future in which an organization would participate in much the same way as a State. Was it contended that, simply because a

conference was not a universal conference, even States were to be prevented from making reservations in accordance with the facilities granted to them by article 19 of the Vienna Convention? That seemed to be a very restrictive view.

34. Mr. USHAKOV said that only treaties between one or more States and one or more international organizations, excluding treaties between international organizations only, could fall within the scope of the Vienna Convention. As regards treaties between international organizations, he agreed with the Special Rapporteur that they could not be of a universal character. As for treaties in the other category, he wondered how their restricted character was to be decided. Was it the number of States or the number of international organizations which had participated in the negotiation of the treaty that had to be limited? Perhaps it would be better, in the articles on reservations, to separate treaties between international organizations, which created fewer problems, from treaties between States and international organizations, which could lead to the application of the rules of the Vienna Convention. For the latter category of treaties, a general rule might be formulated.

35. Mr. REUTER (Special Rapporteur), referring to the case envisaged by Mr. Ago, said that a general saving clause would appear to be necessary, but a decision on its wording should be left until later. In reply to Mr. Ushakov, he said that the Commission might consider examining separately the case of treaties between international organizations and that of treaties between States and international organizations. With regard to the terms to be used to describe the scope of treaties, he would suggest abandoning the adjectives "universal" and "general", which had no equivalents in the Vienna Convention on the Law of Treaties. As he had already said, it would be better to state in negative form the criteria set out in article 20, paragraph 2, of that instrument.

36. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer articles 22 and 23 to the Drafting Committee, which would thus have before it the whole section on reservations, articles 19 to 23.

*It was so agreed.*

The meeting rose at 4.30 p.m.

## 1351st MEETING

*Wednesday, 16 July 1975, at 10.15 a.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

*Members present:* Mr. Ago, Mr. Bilge, Mr. Castañeda, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

**Draft report of the Commission on the  
work of its twenty-seventh session  
(A/CN.4/L.231 and L.232)**

*Chapter I*

ORGANIZATION OF THE SESSION

1. The CHAIRMAN invited the Commission to examine chapter I of its draft report (A/CN.4/L.231) paragraph by paragraph.

*Paragraph 1*

2. Mr. KEARNEY suggested that the final phrase of the third sentence should be amended to read "... as well as commentaries to the six of those articles provisionally adopted ..." and that the fourth, fifth and sixth sentences should be amended in the same way.

*It was so agreed.*

*Paragraph 1, as amended, was approved.*

*Paragraph 2*

*Paragraph 2 was approved.*

*Paragraph 3*

3. Mr. ŠAHOVIĆ proposed that, in paragraph 3, a sentence be added to the effect that, because of their official duties, certain members of the Commission had not been able to attend a number of meetings.

4. Mr. USTOR supported that proposal.

*Mr. Šahović's proposal was adopted.*

*Paragraph 3, as amended, was approved.*

*Paragraph 4*

*Paragraph 4 was approved.*

*Paragraph 5*

5. Mr. ELIAS suggested that, since Sir Francis Vallat had been absent for only a few meetings, the final sentence of the paragraph should be amended to read "Mr. Juan José Calle y Calle also served on the Committee for some time."

*It was so agreed.*

*Paragraph 5, as amended, was approved.*

*Paragraph 6*

*Paragraph 6 was approved.*

*Paragraph 7*

6. Mr. SETTE CÂMARA asked whether the Commission would in fact take up item 7 of its agenda at the present session.

7. Mr. KEARNEY said that the Planning Committee<sup>1</sup> hoped to be able to circulate its report on item 7 to the Commission the following week.

*Paragraph 7 was approved.*

*Paragraph 8*

*Paragraph 8 was approved.*

*Chapter I of the draft report, as a whole, as amended, was approved.*

<sup>1</sup> See 1302nd meeting, para. 32.

*Chapter II*

STATE RESPONSIBILITY

8. The CHAIRMAN invited the Commission to examine the introduction to chapter II of its draft report (A/CN.4/L.232).

A. INTRODUCTION

1. *Historical review of the work of the Commission.*

9. Mr. KEARNEY said that some criticism had been expressed of the increasing length of the Commission's reports and he accordingly suggested that the historical review of the Commission's work be condensed wherever possible.

10. Mr. AGO (Special Rapporteur) said that the historical review of the work of the Commission had been included in the report, at the request of the Secretariat, mainly for the benefit of those members of the Sixth Committee of the General Assembly who might not have seen the previous reports and therefore might not be familiar with what had been done in the field of State responsibility. The present historical review, which was somewhat shorter than in previous years, was characterized by the fact that it was a nearly complete review, not only of what had already been done, but also of what was being prepared in part I of the draft. He therefore hoped that it would prove useful.

11. Mr. TSURUOKA said that he understood the concern expressed by Mr. Kearney, but felt that it was necessary to retain the historical review of the Commission's work because it would facilitate reading of the report, particularly for young officials of Ministries of Foreign Affairs in the various countries.

12. Mr. HAMBRO said he would be reluctant to approve a lot of new matter which he had not yet had time to study.

13. Mr. AGO (Special Rapporteur) said that paragraphs 1 to 22 did not contain any really new matter; it was all to be found in the reports of previous years. Paragraphs 23 to 43, however, and particularly paragraphs 30 to 36, concerning the general plan of the draft, required careful consideration.

*Paragraphs 1-22 were approved.*

2. *General remarks concerning the draft articles.*

*Paragraphs 23 and 24*

*Paragraphs 23 and 24 were approved.*

*Paragraphs 25 and 26*

14. Mr. ŠAHOVIĆ said that paragraph 25 stressed the difference between the question of the responsibility of States and the question of liability for risk, while paragraph 26 stated that those two topics possessed "certain common features". He therefore wondered whether the distinction made in paragraph 25 between those two topics was not too rigid.

15. Mr. AGO (Special Rapporteur) said that, in that respect as well, the report contained no substantive innovation as compared with the reports of previous years. It would not be very advisable to introduce

changes which might give the impression that the Commission had changed its mind.

16. Mr. SETTE CÂMARA, supported by Mr. CASTAÑEDA, proposed that, in view of the interest shown by the Sixth Committee of the General Assembly in the study by the Commission of the topic of international liability for injurious consequences arising out of certain acts not prohibited by international law, the Commission should indicate more positively in the first sentence of paragraph 26 its willingness to take up that subject in the future.

17. Mr. AGO (Special Rapporteur) said that that proposal involved some risk. He could agree to state that the Commission would consider the possibility of carrying out such a study, but it would then be necessary to appoint a working group to consider the matter and report to the Commission. In his own opinion the question of international responsibility for injurious consequences arising out of certain acts not prohibited by international law was a very wide topic which was still developing, and it was probably not quite ripe for codification. The Commission should be very careful not to commit itself definitely to codification of the topic without first deciding that codification was possible.

18. Mr. KEARNEY suggested that the point raised by Mr. Sette Câmara and Mr. Castañeda might be covered by deleting from the first sentence of paragraph 26 the words "in due time".

19. Mr. ELIAS said that the words "in due time" were necessary in view of the programme of work on the topic of State responsibility already established by the Commission.

*Paragraphs 25 and 26 were approved.*

*Paragraphs 27-30*

*Paragraphs 27-30 were approved.*

*Paragraph 31*

20. Mr. KEARNEY suggested that the word "pragmatic" be deleted from the final sentence of the paragraph.

*It was so agreed.*

*Paragraph 31, as amended, was approved.*

*Paragraph 32*

21. Mr. SETTE CÂMARA suggested that the word "prefacing" in the first sentence of the English version of the paragraph be replaced by the word "beginning".

22. Mr. AGO (Special Rapporteur) said that definitions were not rules and that they came before rules. He therefore found the word "prefacing" satisfactory, but it could just as well be replaced by the word "beginning".

*It was so agreed.*

*Paragraph 32, as amended, was approved.*

*Paragraph 33*

23. Mr. ŠAHOVIĆ said he wondered whether the words "Broadly speaking", at the beginning of the second sentence, were necessary.

24. Mr. AGO (Special Rapporteur) suggested that they be replaced by the equivalent words "In general".

*Paragraph 33, as amended, was approved.*

*Paragraph 34*

*Paragraph 34 was approved.*

*Paragraph 35*

*Paragraph 35 was approved.*

*Paragraph 36*

25. Mr. USHAKOV said that it should once again be stressed that the plan of a possible third part of the draft was entirely provisional and that the Commission had not yet taken any decision in the matter.

26. Mr. AGO (Special Rapporteur) said that Mr. Ushakov was perfectly right. He (the Special Rapporteur) was convinced that a third part was completely unnecessary; he could see no good reason to introduce into the draft a part dealing with the so-called "implementation" of responsibility, an expression which in fact covered something different from the responsibility itself. The final sentence of paragraph 36 stated clearly that "It is in any case too early to take a final decision in the matter".

27. Mr. ŠAHOVIĆ said he wondered whether that was why the Special Rapporteur had placed the word "implementation" in quotation marks.

28. Mr. AGO (Special Rapporteur) said that the implementation of responsibility was a vague concept used only by certain writers and that the Commission must consider the matter carefully before definitely deciding to use it. The question of the exhaustion of local remedies would be considered in part I of the draft, since in his view it was at the very source of responsibility.

*Paragraph 36 was approved.*

*Paragraph 37*

29. Mr. AGO (Special Rapporteur) said he wished to draw attention to foot-note 33. He had described in advance the plan of the various chapters in part I of the draft because he thought that it might be useful for the members of the Sixth Committee to have a general idea of the structure and contents of that part.

30. Mr. ŠAHOVIĆ said that the table was very useful because it would provide an excellent basis for discussion in the General Assembly and enable the Commission to know what States thought of it.

31. Mr. USHAKOV suggested that, in foot-note 33, the word "very" should be added before the word "approximate".

*It was so agreed.*

*Paragraph 37, as amended, was approved.*

*Paragraphs 38-40*

*Paragraphs 38-40 were approved.*

*Paragraph 41*

32. Sir Francis VALLAT said that he would be glad to have an explanation from the Special Rapporteur of the meaning of the words "or other" in the phrase "customary, convention or other", which appeared after the words "the source of the international legal obligation breached" in the third sentence of paragraph 41.

33. Mr. AGO (Special Rapporteur) said that the words "or other" were intended to cover cases of obligations

which had their source neither in customary international law nor in the provisions of a treaty. He could give two examples: obligations arising from a decision of the International Court of Justice and obligations imposed by an organ established by a treaty.

34. Sir Francis VALLAT said he was glad to have that explanation but he feared that the point would not be clear to the average reader of the Commission's report. He suggested that a foot-note be added containing the Special Rapporteur's explanation.

35. Mr. AGO (Special Rapporteur) said that he had no objection to including a foot-note, but the paragraph in question was merely intended to indicate the work on which the Commission proposed to embark in 1976.

36. Mr. HAMBRO said that perhaps the most practical solution was simply to delete the phrase "customary, convention or other". In view of the purpose of paragraph 41, it was not necessary to enter into a classification of the sources of international legal obligations.

37. The CHAIRMAN suggested that the Special Rapporteur be invited to amend paragraph 41 either by adding an appropriate foot-note or by deleting the phrase in question.

*It was so agreed.*

38. Mr. KEARNEY drew attention to the sentence towards the end of paragraph 41 which read: "A matter which will be examined in this context is the validity of the rule that local remedies must be exhausted before, for example, the breach of certain obligations relating to the treatment of aliens can be established". That sentence was placed after a sentence which drew a distinction between an obligation of conduct and an obligation of result.

39. At the same time, he noted that in paragraph 37 the words "exhaustion of internal remedies" (placed between brackets) had been appended to the title of article 20 which read "Breach of an obligation of result". The title of article 19 was: "Breach of an obligation of conduct". That presentation, taken in conjunction with the remarks in paragraph 41, appeared to imply that the problem of exhaustion of local remedies was related to the whole question whether the breach related to an obligation of conduct or to an obligation of result. In actual fact, the question of the exhaustion of local remedies went far beyond the problem of obligations of conduct or of result. The exhaustion of local remedies could be affected by factors which were completely external to the type of obligation involved.

40. Mr. AGO (Special Rapporteur) said that obligations under international law were for the most part obligations of result; that being so, it was immaterial how the result intended by international law was achieved, provided that it was finally assured. The question of the exhaustion of local remedies arose in connexion with obligations of result, and he expected that the whole question would be discussed by the Commission at its next session; the reference to the matter in paragraph 41 was only a passing one.

41. He had considered it necessary to include a parenthetical reference to the exhaustion of local remedies in

the list of headings which appeared as titles of articles in chapter III (Breach of an international obligation) in paragraph 37 of the draft report because it would have seemed strange to delegations in the General Assembly if no mention had been made in that list of the well-known rule of the exhaustion of local remedies. The list of headings was, of course, only a very provisional one and the Commission was not committed in any way to it.

42. In order to allay the concern expressed by Mr. Kearney, the opening words of the sentence quoted by him might be amended on the following lines: "A matter which the Special Rapporteur proposes to study in this context is the validity of the rule that local remedies must be exhausted . . .". The responsibility would thus rest with the Special Rapporteur and not with the Commission.

43. Mr. CASTAÑEDA suggested that the difficulty be overcome by retaining the heading "Exhaustion of internal remedies", not as an appendix to the title of article 20 but as the title of an entirely separate article. The rule of the exhaustion of local remedies was sufficiently important to be the subject of an article on its own. His suggestion would have the advantage of not tying the rule of the exhaustion of internal remedies to any particular type of breach. The reference to that important rule would thus be retained, but without prejudging the issue.

44. Mr. AGO (Special Rapporteur) said that he was opposed to the suggestion that there should be a special article on the exhaustion of internal remedies in the particular context. In his own opinion, the rule in question was completely tied to the breach of an obligation of result. It was only in relation to that type of obligation that the rule had a substantive meaning. In connexion with other types of obligation, it could only have a procedural meaning.

45. Another possibility would be simply to delete the words "exhaustion of internal remedies" which appeared in parentheses immediately after the title of article 20, although he would be reluctant to do so.

46. Mr. USHAKOV said that all the headings appearing in chapter III were of a very approximate character, as already stressed in foot-note 33.

47. The CHAIRMAN suggested that the Special Rapporteur be asked to adjust the table in paragraph 37 and paragraph 41 to meet the point raised by Mr. Kearney.

*It was so agreed.*

*Paragraph 41, as amended, was approved.*

*Paragraph 42*

*Paragraph 42 was approved.*

*Paragraph 43*

48. Mr. PINTO said he noted the use in the title of section (5) and in the first sentence of paragraph 43 of the phrase "attenuating or aggravating circumstances". Consideration might be given to replacing the word "attenuating" by the word "extenuating", which was the more usual adjective.



49. Sir Francis VALLAT said that the two words had virtually the same meaning but, on reflection, he would prefer to see the word "attenuating" retained.

*Paragraph 43 was approved.*

*The introduction to chapter II, as amended, was approved.*

**Succession of States in respect of matters  
other than treaties**

(A/CN.4/282; A/CN.4/L.237)

[Item 2 of the agenda]

*(resumed from the 1330th meeting)*

**NEW ARTICLE PROPOSED BY THE SPECIAL RAPPORTEUR  
(A/CN.4/L.237) <sup>2</sup>**

50. The CHAIRMAN drew attention to the new article proposed by the Special Rapporteur, which read:

1. If part of a State's territory becomes part of the territory of another State, the passing of State property of the predecessor State to the successor State shall be settled by agreement between the predecessor and successor States.

2. In the absence of such agreement:

(a) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in the territory to which the succession of States relates shall pass to the successor State;

(c) movable State property other than that mentioned in sub-paragraph (b) shall pass to the successor State in an equitable proportion.

He invited members to comment on the article with a view to its being referred to the Drafting Committee as early as possible.

51. Mr. ELIAS said that, in view of the importance of the proposed new article, it was essential that it should be introduced by the Special Rapporteur, so that the Commission could hold an informed discussion.

52. Mr. USHAKOV said that, with regard to the topic of succession of States in respect of matters other than treaties, the Commission should first adopt the relevant chapter of its report. When it had done so, it could proceed to deal with the proposed new article.

53. Mr. KEARNEY said that the text of the proposed new article seemed inconsistent with the general approach adopted in preceding articles which had been referred to the Drafting Committee. In the new article a distinction was made between immovable and movable State property. A new classification was introduced with regard to succession of States to the two types of property, as well as a new type of qualification regarding two kinds of movable State property. That approach departed completely from the position taken by the Commission in

earlier articles, which dealt with the effects of a succession of States on all State property.

54. In view of the fundamental nature of those issues, it was necessary that they should be discussed in the presence of the Special Rapporteur. Only in that manner could the Commission reach a reasoned view on the proposal now before it.

55. Sir Francis VALLAT said that it was not possible for the Commission to do justice to the very important proposed new article in less than two full meetings, with the assistance of the Special Rapporteur. In view of the pressure of time, he felt that the only course open to the Commission was to do as it had done at the previous session with certain proposed articles that it had not been able to discuss, namely, to mention the proposal contained in document A/CN.4/L.237 in a foot-note, explaining that the Commission had not had time to deal with it.

56. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that it would not be right for such an important proposal to be referred to the Drafting Committee without a full discussion in the Commission itself. There was also a problem of administrative convenience: the Drafting Committee had at present to give first priority to the draft articles on treaties concluded between States and international organizations or between two or more international organizations.

57. Mr. HAMBRO said that, in view of the serious objections raised by Mr. Elias, Mr. Kearney, Sir Francis Vallat and the Chairman of the Drafting Committee, it was evident that the proposed new article could not be referred to the Drafting Committee. He agreed that the only course open to the Commission was to mention it in a foot-note.

58. Mr. USHAKOV said that it was essential that the Commission should adopt, in the presence of the Special Rapporteur, the chapter of its report dealing with the topic of the succession of States in respect of matters other than treaties. Should the time available at the present session so permit, the Commission could examine the proposal contained in document A/CN.4/L.237; in that case, the Commission should focus its attention on the general idea embodied in the proposal rather than on the wording.

The meeting rose at 12.45 p.m.

**1352nd MEETING**

*Thursday, 17 July 1975, at 10 a.m.*

*Chairman: Mr. Abdul Hakim TABIBI*

*Members present: Mr. Ago, Mr. Bilge, Mr. Castañeda, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.*

<sup>2</sup> See discussion on article 12 at the 1325th meeting, para. 6, and following meetings.

**Most-favoured-nation clause**

(A/CN.4/266,<sup>1</sup> A/CN.4/280,<sup>2</sup> and A/CN.4/286;  
A/CN.4/L.228/Rev.1 and A/CN.4/L.238)

[Item 3 of the agenda]

(resumed from the 1344th meeting)

**DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE****ARTICLE 6<sup>3</sup>**

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the articles proposed by the Drafting Committee (A/CN.4/L.238), starting with article 6, which read:

*Article 6 [8]**Unconditionality of most-favoured-nation clauses*

A most-favoured-nation clause in a treaty is unconditional unless that treaty otherwise provides or the parties otherwise agree.

2. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that, before introducing article 6, he wished to make some general comments on the present series of draft articles proposed by the Drafting Committee. In 1973 the Commission had adopted at first reading articles 1 to 7.<sup>4</sup> The articles now proposed for adoption should logically follow on from that numbering. For the present, however, they had been given the numbers originally assigned to them by the Special Rapporteur which had been used throughout the discussion in the Commission. The suggested renumbering of the articles, to bring them into line with the numbering of the articles adopted in 1973, was given in square brackets. In order to avoid confusion, he would refer to the articles by their original numbers.

3. In general, the order and arrangement of the articles had been left as proposed by the Special Rapporteur. In two cases, however, the Drafting Committee had rearranged the articles so as to bring related texts into proximity and to place the more general articles nearer the end. The new article 6 *ter/bis* had been placed immediately before article 8 and article 6 *quater* immediately after article 16.

4. Another general point should be mentioned concerning certain terms used throughout the draft articles. The Drafting Committee had decided to use the verb "extended" to indicate treatment given by a granting State to a third State, whether in law or in fact. The word "accord" had been reserved to indicate treatment given by a granting State on the basis of a treaty provision, such as the most-favoured-nation clause. That distinction had been adhered to consistently throughout the draft articles. In the other language versions, different verbs had been used to render the English terms "extended" and "accorded" respectively.

5. The Drafting Committee had been very conscious of the fact that the rules stated in the articles were in general intended to be residual rules and should be understood as

being always subject to the agreement of the parties concerned. One way of making that point clear was to include a proviso such as "unless the treaty otherwise provides or it is otherwise agreed" in the articles in question. That course had been adopted in article 13, where the proviso had been placed between square brackets. The commentary would indicate that it had been included because many members had considered that it was necessary in that particular case. The fact that it had been introduced in article 13 did not imply that a similar qualification was unnecessary in other contexts. The Special Rapporteur intended to give further consideration to the question whether a general provision on the matter should be included somewhere in the draft.

6. Article 6 had originally been entitled "presumption of unconditional character of the most-favoured-nation clause" but now bore the title "Unconditionality of most-favoured-nation clauses". The redraft now proposed represented an attempt to streamline the earlier text; it avoided the use of the phraseology "except when in appropriate cases most-favoured-nation treatment is accorded under the condition of material reciprocity"; it referred rather more simply to the unconditionality of the clause.

7. Mr. KEARNEY said the Special Rapporteur and the Drafting Committee were to be congratulated on the excellent manner in which they had reviewed the series of articles contained in document A/CN.4/L.238 so as to remove many of the doubts expressed by members during the discussion. He had no comments on article 6 and proposed that it be approved by the Commission.

8. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 6 in the form in which it had been submitted by the Drafting Committee.

*It was so agreed.*

**ARTICLE 6 *bis*<sup>5</sup>**

9. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 6 *bis* as proposed by the Drafting Committee, which read:

*Article 6 bis [9]**Effect of an unconditional most-favoured-nation clause*

If a most-favoured-nation clause is not made subject to conditions, the beneficiary State acquires the right to most-favoured-nation treatment without the obligation to accord material reciprocity to the granting State.

10. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that, in briefly introducing article 6 *bis*, he would also say a few words about article 6 *ter*. Those two articles were intended to underline the essential distinction between a most-favoured-nation clause that was subject to material reciprocity, the matter dealt with in article 6 *ter*, and a clause which was not subject to that requirement, the matter dealt with in article 6 *bis*. The latter type of clause could be subject to independent conditions that would not affect the application of article 6 *bis* to the most-favoured-nation clause.

<sup>1</sup> Yearbook . . . 1973, vol. II, pp. 97-116.

<sup>2</sup> Yearbook . . . 1974, vol. II, Part One, pp. 117-134.

<sup>3</sup> For previous discussion see 1330th meeting, para. 43.

<sup>4</sup> Yearbook . . . 1973, vol. II, pp. 213-221.

<sup>5</sup> For previous discussion see 1330th meeting, para. 43.

11. Paragraph 2 of the Special Rapporteur's original text of article 6 *bis*, as he had already pointed out in his introductory remarks, had been placed in a new article, article 6 *ter/bis*. The present text of article 6 *bis* was based on the first paragraph only of the original article.

12. Mr. TSURUOKA said that, although he had accepted the text of article 6 *bis* in the Drafting Committee, he still thought that the opening phrase of the article could be considerably simplified. A clause which was "not made subject to conditions" was simply an "unconditional clause". Since article 6 defined what was meant by an "unconditional clause" and since that expression already appeared in the title of article 6 *bis*, he would suggest, though he had no wish to press the point, that the same expression be introduced into the text of article 6 *bis*.

13. Mr. SETTE CÂMARA said the Drafting Committee had had remarkable success in improving and simplifying the earlier texts of the articles, but in the case of article 6 *bis* he was inclined to share Mr. Tsuruoka's views.

14. Mr. USHAKOV said that the amendment suggested by Mr. Tsuruoka would have the effect of turning article 6 *bis* into a purely descriptive provision void of all legal content.

15. Mr. TSURUOKA said that he withdrew his suggestion, although he did not accept the view expressed by Mr. Ushakov.

16. Mr. KEARNEY asked whether the Special Rapporteur was considering the possibility of submitting to the Commission at its next session a definition of "material reciprocity".

17. Mr. USTOR (Special Rapporteur) said that he had not yet reached a decision on that point. He had, however, included an explanation of material reciprocity in the commentary.

18. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 6 *bis* in the form in which it had been submitted by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 6 *ter*<sup>6</sup>

19. The Chairman invited the Special Rapporteur to introduce article 6 *ter* as proposed by the Drafting Committee, which read:

##### *Article 6 ter [10]*

##### *Effect of a most-favoured-nation clause conditional on material reciprocity*

If a most-favoured-nation clause is made subject to the condition of material reciprocity, the beneficiary State acquires the right to most-favoured-nation treatment only upon according material reciprocity to the granting State.

20. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that article 6 *ter* was the counterpart of article 6 *bis*. It corresponded to the first paragraph of the Special Rapporteur's original article 6 *ter*;

the second paragraph of that original text was covered by the new article 6 *ter/bis*.

21. The Drafting Committee had given some consideration to the question of a definition of the expression "material reciprocity", and it had been agreed that the Special Rapporteur should give further thought to the problem.

22. Mr. KEARNEY said that, in view of the remarks of the Chairman of the Drafting Committee regarding the use of the terms "extended" and "accorded" throughout the draft articles, he was not certain that it was appropriate to use, in the concluding phrase of article 6 *ter*, the form of words "according material reciprocity to the granting State". The contractual obligation would already exist in that case and the question which arose was whether in fact material reciprocity was going to be extended.

23. Mr. USTOR (Special Rapporteur) said that the verb "to accord" had been used in the draft articles with reference to the grant to the beneficiary State of a certain treatment by the granting State; the verb "extend" had been used for the grant to a third State.

24. The passage mentioned referred to yet a third situation and it might be desirable to avoid using either the verb "to accord" or the verb "to extend". One possibility was to use the verb "to confer". It was a question which had not been considered by the Drafting Committee. On the whole, the reference in the context was not to a factual situation but to a legal obligation: a promise on the part of the beneficiary State was necessary.

25. Mr. ELIAS said that, in the light of that explanation, the word "according" should be retained in the concluding phrase of article 6 *ter*.

26. Mr. USHAKOV said he noticed that paragraph 2 of article 15 referred to the communication by the beneficiary State to the granting State of its consent "to extend" material reciprocity.

27. Sir Francis VALLAT said that the use of the verb "to extend" in paragraph 2 of article 15 ruled out its use in the passage of article 6 *ter* mentioned by Mr. Kearney. He supported the view of Mr. Elias that the word "accord" should be retained.

28. Mr. KEARNEY said that he had no basic objection to the use of the word "according", but the fact remained that the verb "to accord" had been used elsewhere in a different sense. His remark had been made in the interests of consistency but if the word "according" was retained, the resulting ambiguity would not be sufficient to raise a serious problem.

29. Mr. TSURUOKA said that he was in favour of retaining the verb "to accord". When the Commission came to examine article 15, it would have to decide whether the distinction between the verbs "to accord" and "to extend" was being correctly made in that case.

30. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 6 *ter* in the form in which it had been submitted by the Drafting Committee.

*It was so agreed.*

<sup>6</sup> *Ibid.*

ARTICLE 7<sup>7</sup>

31. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 7 as proposed by the Drafting Committee, which read:

*Article 7 [11]**Scope of rights under a most-favoured-nation clause*

1. Under a most-favoured-nation clause the beneficiary State is entitled, for itself or for the benefit of persons or things in a determined relationship with it, only to those rights which fall within the scope of the subject-matter of the clause.

2. The beneficiary State is entitled to the rights under paragraph 1 only in respect of those categories of person or things which are specified in the clause or implied from the subject-matter of that clause.

32. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that articles 7 and 7 *bis* were the heart of the whole set of articles prepared by the Special Rapporteur. They had been the subject of much attention in the Drafting Committee and should be read together. The new texts which had emerged from the Drafting Committee's examination corresponded in scope to the original texts but the Drafting Committee had adopted a different distribution of the various elements contained in the original draft articles. Under the Drafting Committee's redistribution of the original material, article 7 dealt with the potential scope of the most-favoured-nation clause—the scope that the most-favoured-nation clause allowed; article 7 *bis* dealt with actual scope—the scope for which there was a matching grant to a third State.

33. Paragraph 1 of article 7 corresponded basically to the Special Rapporteur's original article 7, which had been entitled "The *ejusdem generis* rule" but a new element had been introduced: the Drafting Committee had thought it desirable to reflect the fact that the beneficiary State might be entitled to a right for itself and not merely for the benefit of persons or things in a determined relationship with it. That element had therefore been added to the text of the original paragraph 1 of article 7. He understood that the commentary would deal specifically with the question of the meaning of "rights which fall within the scope of the subject-matter of the clause".

34. Paragraph 2 of article 7 was patterned on paragraph 1 of the original article 7 *bis*. It provided further clarification of the rights to which the beneficiary State was entitled under paragraph 1 for the benefit of persons and things in a determined relationship with it.

35. When examining articles 7 and 7 *bis*, it was necessary to bear in mind also articles 15 and 16, which dealt with the time factor and the right to enjoyment of rights under a most-favoured-nation clause; the provisions of articles 15 and 16 brought the clause into operation and enabled enjoyment to begin. The scope dealt with in article 7 and the entitlement dealt with in article 7 *bis* had to be understood in conjunction with the provisions of articles 15 and 16.

36. The CHAIRMAN said that if there were no comments he would take it that the Commission agreed to

approve article 7 in the form in which it had been submitted by the Drafting Committee.

*It was so agreed.*

ARTICLE 7 *bis*<sup>8</sup>

37. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 7 *bis* as proposed by the Drafting Committee, which read:

*Article 7 bis [12]**Entitlement to rights under a most-favoured-nation clause*

1. The beneficiary State is entitled to the rights under article 7 [11] for itself only if the granting State extends to a third State treatment which is within the field of the subject-matter of the most-favoured-nation clause.

2. The beneficiary State is entitled to the rights in respect of persons or things within categories under paragraph 2 of article 7 [11] only if they (a) belong to the same category of persons or things as those which benefit from the treatment extended by the granting State to a third State and (b) have the same relationship with the beneficiary State as those persons or things have with that third State.

38. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that he had already referred to the links between articles 7 and 7 *bis*. The key word in article 7 *bis* was the opening word of its title: "Entitlement"—entitlement to rights which were already within the scope of the clause and which now fell within the ambit of the matching grant to a third State.

39. Paragraph 1 of the text now submitted was a new provision, which did not appear in the original text and which dealt with the beneficiary State's entitlement to rights for itself under article 7. There had been a difference of views in the Drafting Committee regarding the need for that paragraph, but the predominant view had been that, since reference had been made in article 7 to the State's entitlement for itself, there was a case for including a similar reference in article 7 *bis*.

40. Paragraph 2 of article 7 *bis* followed closely the main thought and structure of paragraph 2 of the Special Rapporteur's original article 7 *bis*. It maintained the Special Rapporteur's tests for the entitlement of persons and things in a defined relationship with the beneficiary State.

41. Mr. KEARNEY said he would like an explanation of the use of the term "field" in paragraph 1 of the article as applied to a concept for which the term "scope" was used elsewhere in the draft.

42. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) explained that it would not be strictly correct to use the term "scope" in the present context, since that term applied only to the relations between the beneficiary State and the granting State. The purpose of using the word "field" instead was to show that paragraph 1 did not refer to the relationship between the granting State and the beneficiary State but rather to the position of the third State. It indicated that the intention was to draw an analogy or to make a comparison.

43. Mr. KEARNEY said he hoped the Special Rapporteur would include an explanation of the point in the commentary.

<sup>7</sup> For previous discussion see 1333rd meeting, para. 1.

<sup>8</sup> *Ibid.*

44. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 7 *bis* in the form in which it had been submitted by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 6 *ter/bis*

45. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the article 6 *ter/bis* proposed by the Drafting Committee, which read:

##### *Article 6 ter/bis [13]*

##### *Irrelevance of the fact that treatment is extended gratuitously or against compensation*

The beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, acquires under a most-favoured-nation clause the right to most-favoured-nation treatment independently of whether the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended gratuitously or against compensation.

46. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the new article 6 *ter/bis* replaced paragraph 2 of the original article 6 *bis* and paragraph 2 of the original article 6 *ter*. The Drafting Committee had decided to place it immediately before article 8 and 8 *bis* because, like those two articles, it concerned the relevance of certain matters for purposes of the entitlement of the beneficiary State to most-favoured-nation treatment.

47. The new title of the article reflected the rule stated in the text, the irrelevance of the fact that treatment was extended gratuitously or against compensation by the granting State to a third State.

48. The CHAIRMAN said that if there were no comments he would take it that the Commission agreed to approve article 6 *ter/bis* in the form in which it had been submitted by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 8 <sup>9</sup>

49. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 8 as proposed by the Drafting Committee, which read:

##### *Article 8 [14]*

##### *Irrelevance of restrictions agreed between the granting and third States*

The beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is extended under an agreement limiting its application to relations between the granting and third States.

50. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that article 8 corresponded to the Special Rapporteur's original article 8. The Drafting Committee, however, had made some drafting changes. In particular, it had preferred not to use the verb "affected" and had recast the text in a more direct form.

51. The CHAIRMAN said that if there were no comments he would take it that the Commission agreed to

approve article 8 in the form in which it had been submitted by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 8 *bis* <sup>10</sup>

52. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 8 *bis* as proposed by the Drafting Committee, which read:

##### *Article 8 bis [15]*

##### *Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement*

The beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is extended under a bilateral or a multilateral agreement.

53. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that article 8 *bis* had been the subject of much discussion in the Commission. Many members had expressed doubts as to the necessity of including an article on the subject-matter of article 8 *bis*. The view had been expressed that it contained a self-evident proposition which did not need to be expressly stated. There had been a similar difference of opinion in the Drafting Committee, but on balance it had been felt desirable to keep the article, partly on the grounds that it was always easier to focus attention on issues raised by a text that had been included in a draft than on issues raised by a text which had been excluded.

54. It was not the intention of the Drafting Committee that the rule stated in article 8 *bis* should in any way prejudice the question of exceptional cases such as customs or economic unions, or the special position of developing States. There was no intention whatsoever to restrict the scope of the Commission's inquiry into those special cases.

55. The CHAIRMAN said that if there were no comments he would take it that the Commission agreed to approve article 8 *bis* in the form in which it had been submitted by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 13 <sup>11</sup>

56. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 13 as proposed by the Drafting Committee, which read:

##### *Article 13 [16]*

##### *Right to national treatment under a most-favoured-nation clause*

[Unless the treaty otherwise provides or it is otherwise agreed,] the beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is extended as national treatment.

57. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that, in his general opening remarks on the whole set of articles in document A/CN.4/L.238, he had referred to the problem of the proviso "Unless the treaty otherwise provides or it is otherwise agreed"

<sup>10</sup> *Ibid.*

<sup>11</sup> For previous discussion see 1337th meeting, para. 5.

<sup>9</sup> For previous discussion see 1334th meeting, para. 26.

which had been placed between square brackets at the beginning of the text of article 13. It had been placed there because of the desire of many members to stress that the rule embodied in article 13 must be subject to any agreement reached by the parties.

58. Whether that opening proviso would be maintained would depend ultimately on the Commission's decision on the question whether or not to include in the draft a general provision to deal with the predominance of the intention of the parties. The fact that the opening proviso appeared in article 13 did not imply that a similar proviso would not be needed in other articles where no such phrase appeared between square brackets.

59. The Special Rapporteur's original text of article 13, which consisted of two paragraphs, had been shortened and reformulated in an endeavour to give better expression to the intended rule.

60. The CHAIRMAN said that if there were no comments he would take it that the Commission agreed to approve article 13 in the form in which it had been submitted by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 14<sup>12</sup>

61. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 14 as proposed by the Drafting Committee, which read:

##### *Article 14 [17]*

##### *Most-favoured-nation treatment, national or other treatment with respect to the same subject-matter*

If a granting State has undertaken by treaty to accord to a beneficiary State most-favoured-nation treatment and national or other treatment with respect to the same subject-matter, the beneficiary State shall be entitled to whichever treatment it prefers in any particular case.

62. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Special Rapporteur's original formulation of article 14 referred to the right of the beneficiary State to claim with respect to the same subject-matter either most-favoured-nation treatment or national treatment, whichever it deemed more favourable, assuming that the State was entitled to more than one kind of treatment. The redraft of the article now proposed contained an additional element, relating to a possible third type of treatment, described as "other treatment". The point was one on which the Drafting Committee had not been unanimous. Some members had wanted the scope of article 14 to be restricted so as to deal solely with the relationship between most-favoured-nation treatment and national treatment; others, however, had felt that it was possible that the beneficiary State might be entitled to a third type of treatment, perhaps to a direct grant of some sort, or another kind of special régime. The Committee had therefore concluded that the article should have a wider purpose and make it clear that, where a State was entitled to the benefit of alternative régimes, it should be able to claim the most favourable one.

63. The concluding words of the article, "in any particular case", had caused some difficulty in the Drafting

Committee. There had been no difference of opinion on the need to include some wording to show that a beneficiary State which was entitled to two or more kinds of treatment did not have to make some irrevocable decision applicable at all times and in all cases. The beneficiary State was entitled to take full advantage of the benefits accorded to it; that entitlement involved a right of choice. The text of article 14 made it clear that the right of choice belonged to the beneficiary State itself, and not to the persons or things which might be benefited. There were consequently some reservations regarding the inclusion of the words "in any particular case", and those reservations would be reflected in the commentary to article 14. There was no doubt about the need for a formula on those lines, but there was a slight doubt as to whether or not the particular phrase might introduce administrative difficulties in determining which kind of treatment should be granted in any given case.

64. There had been some discussion in the Drafting Committee on the possible need to deal in greater detail with the communication of the choice to the granting State by the beneficiary State. Subsidiary problems of that kind could well be left over for further consultation.

65. One or two members of the Drafting Committee were inclined to the view that, because of the difficulties to which he had referred, further consideration might yet be given to the possibility of drafting the rule in article 14 in the form of a general saving clause. That was by no means the view of the majority in the Drafting Committee, however.

66. Mr. KEARNEY said that, as far as he was concerned, article 14 was the only one in the present series of articles which gave rise to any substantive problems.

67. First, however, he wished to draw attention to a problem of drafting. The title referred to "Most-favoured-nation treatment, national or other treatment", a presentation which suggested that the text of the article would deal with the interplay of three types of treatment. When one turned to the text of the article itself, however, one found that the formula used was "most-favoured-nation treatment and national or other treatment". That formulation seemed to group together national treatment and "other treatment", thereby suggesting that the rule in article 14 related to the interplay of most-favoured-nation treatment on the one and with "national or other treatment" on the other. The title and the text of the article should be brought into line so as to avoid the ambiguity created by the present difference between them.

68. The reference to "other treatment" created a serious problem. The expression "other treatment" had no generally accepted meaning in the particular context. The Chairman of the Drafting Committee had mentioned the possibility of a grant being made to a third State. The type of grant referred to was not at all clear to him. To take an extreme example, he would assume that the granting State had made a grant of money to the third State. Was it being suggested that all States entitled to most-favoured-nation treatment should be able to claim a similar grant of money from the granting State? An explanation in the commentary would not be sufficient to dispel all the doubts that would be created by the

<sup>12</sup> For previous discussion see 1339th meeting, para. 1.

reference to "other treatment". He would therefore urge that the provisions of article 14 be confined to most-favoured-nation treatment and national treatment and that the problem of "other treatment" be dealt with exclusively in the commentary. It would obviously be unwise to include that expression in the text without thorough research into the subject-matter it was intended to cover.

69. He now wished to deal with the difficulties created by the inclusion of the concluding words "in any particular case". As he saw it, the situation envisaged in article 14 was that the beneficiary State would request either most-favoured-nation treatment or national treatment, whichever it preferred, for certain categories of persons or things. It would give rise to almost insoluble administrative difficulties if the beneficiary State were allowed to make that choice not for whole categories of persons or things but for individual persons or companies. It had to be remembered that it was not the beneficiary State which was involved at the operational level in the situation envisaged in article 14, it was the individual trader or company which would put in an application to the appropriate administrative authorities of the granting State; in that application, the person or company concerned would ask to be dealt with as a member of a certain category of persons.

70. For those reasons, he urged that the words "in any particular case" be replaced by a formula which dealt with the matter in terms of categories.

71. Mr. USTOR (Special Rapporteur) said that the meaning of the expression "other treatment" would be explained in the commentary. The expression was intended to refer mainly, although not exclusively, to some kind of direct advantage given to the beneficiary State without reference to nationality; it would thus consist of a special treatment which was not a "national treatment".

72. The concluding words "in any particular case" had given rise to considerable difficulty in the Drafting Committee, but it had been finally agreed to keep them in the text and to explain in the commentary that the whole matter would be reconsidered by the Commission at its next session.

73. Sir Francis VALLAT said that, as he had pointed out during the Commission's discussion at the 1339th meeting, the difficulties which arose in connexion with article 14 were due to the fact that it was couched in terms of a positive right and had therefore to cover all conceivable cases. It was precisely in order to avoid those difficulties that he had proposed that article 14 be redrafted in the form of a saving clause.<sup>13</sup>

74. Mr. USTOR (Special Rapporteur) said that the commentary to article 14 would contain a reference to Sir Francis Vallat's view and to his suggestion for a redraft of article 14 in the form of a saving clause.

75. Mr. USHAKOV said that, regardless of the form in which article 14 was drafted, it was not the Commission's task to define in detail the relationship between the granting State and the beneficiary State. Article 14 contained the general rule; the meaning of the expression

"in a particular case" was a matter which would be determined by the two States concerned.

76. Mr. ŠAHOVIĆ said that, in the Drafting Committee, he had only accepted the wording of article 14 on the understanding that it would be reviewed by the Commission at second reading.

77. Mr. USTOR (Special Rapporteur), replying to Mr. Kearney's suggestion regarding the title, said that, in order to bring it into line with the text, the title might be amended to read, "Most-favoured-nation treatment and national or other treatment with respect to the same subject-matter".

78. Mr. KEARNEY said that the change in the title suggested by the Special Rapporteur only strengthened his misgivings regarding the reference to "other treatment".

79. Mr. ELIAS said that he shared those misgivings and accordingly proposed the deletion of the words "or other", which appeared before the word "treatment", both in the title and in the text of article 14. The question of "other treatment" could be dealt with in the commentary.

80. Mr. SETTE CÂMARA said he strongly supported the proposal by Mr. Elias. Despite all the explanations which had been given, he did not understand how a beneficiary State could claim any so-called "other treatment" otherwise than as a most-favoured-nation treatment.

81. Mr. USHAKOV said that the reference to "other treatment" was necessary because cases did exist where the beneficiary State would claim a certain treatment which was neither most-favoured-nation treatment nor national treatment. To take the example of port dues, most-favoured-nation treatment might mean dues of 50 cents per ton and national treatment dues of 20 cents per ton but, under a particular agreement, a special régime could be established under which no dues at all were payable in a particular port. That special régime for the particular port would be more favourable than national treatment itself.

82. Mr. HAMBRO said that the present discussion had convinced him of the desirability of dropping the reference to "other treatment".

83. Sir Francis VALLAT said that cases did exist, in such matters as the treatment of aliens, where a particular class of alien was given a special treatment. If the provisions of article 14 confined the choice to most-favoured-nation treatment and national treatment, cases of that kind would be left out altogether. Similar cases of special treatment existed with regard to the administration of justice, and care should be taken that they did not remain outside the scope of the article.

84. As he had already pointed out, the whole problem could be avoided by framing article 14 in a negative form so as just to preserve the rights of the beneficiary State under the most-favoured-nation clause. In that way it would be possible to avoid the trap into which the Commission had fallen of having to deal with all possible cases.

85. Mr. RAMANGASOAVINA said that article 14 had been framed so as to cover the situation where a choice was possible between different treatments. The case

<sup>13</sup> See 1339th meeting, para. 14.



could arise of a number of States being bound by one or more treaties which provided for most-favoured-nation treatment, national treatment and a mixed type of treatment. In its present form, article 14 drew a distinction between most-favoured-nation treatment on the one hand, and "other treatment with respect to the same subject-matter" on the other. In his view, the words "other treatment" covered national treatment. According to article 13, the beneficiary State was entitled to the treatment extended by the granting State to a third State, even if that treatment was extended as national treatment, which constituted the extreme case. In article 14, the expression "other treatment with respect to the same subject-matter" covered all cases of treatment other than most-favoured-nation treatment, including national treatment. Accordingly, he suggested the deletion of the reference to "national" treatment from both the title and the text of article 14.

86. The CHAIRMAN said that the Commission might wish to consider approving article 14 as it stood, subject to an explanation being given in the commentary regarding the problems raised by the reference to "other treatment".

87. Mr. ELIAS proposed that the words "or other" in both the title and the text of article 14 be placed between square brackets and that the different views which had been put forward in that connexion be set out fully in the commentary.

88. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 14 as proposed by the Drafting Committee, but with the change in the title suggested by the Special Rapporteur and with the words "or other" placed between square brackets in both title and text, as proposed by Mr. Elias.

*It was so agreed.*

#### ARTICLES 15 AND 16<sup>14</sup>

89. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 15 and 16 as proposed by the Drafting Committee, which read:

##### *Article 15 [18]*

##### *Commencement of enjoyment of rights under a most-favoured-nation clause*

1. The right of the beneficiary State to any treatment under a most-favoured-nation clause not made subject to the condition of material reciprocity arises at the time when the relevant treatment is extended by the granting State to a third State.

2. The right of the beneficiary State to any treatment under a most-favoured-nation clause made subject to the condition of material reciprocity arises at the time of the communication by the beneficiary State to the granting State of its consent to extend material reciprocity in respect of the treatment in question.

##### *Article 16 [19]*

##### *Termination or suspension of enjoyment of rights under a most-favoured-nation clause*

1. The right of the beneficiary State to any treatment under a most-favoured-nation clause not made subject to the condition of

material reciprocity is terminated or suspended at the time when the extension of the relevant treatment by the granting State is terminated or suspended.

2. The right of the beneficiary State to any treatment under a most-favoured-nation clause made subject to the condition of material reciprocity is also terminated or suspended at the time when the termination or suspension of the material reciprocity in question is communicated by the beneficiary State to the granting State.

90. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that articles 15 and 16, which constituted a pair, were to be read side by side with other articles, including articles 7 and 7 *bis*. The Drafting Committee had not thought it necessary to include internal references in the article to make that clear. In both articles, the Committee had followed the fundamental distinction illustrated by articles 6 *bis* and 6 *ter* between most-favoured-nation clauses which were subject to material reciprocity and those which were not. Consequently, article 15, paragraph 1, dealt with the commencement of the enjoyment of rights under a most-favoured-nation clause not subject to material reciprocity, while article 15, paragraph 2, dealt with the same subject in the case of clauses which were subject to that condition.

91. The Committee had considered it desirable to include in article 15, paragraph 2, mention of the notion of "communication", the intention being that the granting State should be given adequate evidence that the potential beneficiary State intended to respect the condition of reciprocity. Some members of the Committee had felt that the question of how that notion could best be expressed would require further thought.

92. Mr. PINTO said that the wording of both articles 15 and 16 should be reviewed at some future stage, possibly at the next session. It was clear from the discussion of the topic of the most-favoured-nation clause that the operation of the clause depended, on the one hand, on the clause itself or the treaty containing it, and, on the other, on the treatment given to a third State. If ambiguity was to be avoided, those two elements should be constant twin points of reference in any discussion of the commencement of the enjoyment of rights under the clause. But there was no mention in article 15, paragraph 1, of the commencement of operation of the clause, and no mention in article 15, paragraph 2, of the treatment accorded to a third State.

93. The fact that article 15, paragraph 1, referred only to the "time when the relevant treatment is extended [. . .] to a third State" could give rise to substantial uncertainty as to when the enjoyment of rights under a most-favoured-nation clause should actually begin. It would, he supposed, be clear that, where favourable treatment had been granted to a third State long before the conclusion of a most-favoured-nation clause, such treatment could not be claimed by the beneficiary State, but it was possible to construe the present wording of the paragraph as implying that, when the grant to the State preceded the conclusion of the clause by a relatively short period of time, say, less than a year, action of the clause would be retroactive. That such a possibility should exist was unacceptable.

<sup>14</sup> For previous discussion of articles 15 and 16 see 1339th meeting, para. 34.

94. Mr. KEARNEY said he found the comments by Mr. Pinto very interesting. They seemed to be directed as much towards the question whether enjoyment of the rights under a most-favoured-nation clause was contingent upon some positive effort by the beneficiary State to exercise that right as to the question of when the right arose. Neither of those questions was answered by the draft articles as they stood and each merited further study.

95. He noted that articles 15 and 16 contained the first references in the draft to "any treatment", rather than simply to "treatment" under a most-favoured-nation clause, and he would be interested to learn the reason for that change.

96. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that, as he understood it, the phrase "any treatment" was intended to mean the treatment, of whatever kind, for which a most-favoured-nation clause might provide. The members of the Drafting Committee were not entirely satisfied with that phrase, but had been unable, partly for linguistic reasons, to find a suitable alternative. The phrase "certain treatment", for example, was acceptable in English but not in other languages.

97. Mr. KEARNEY proposed that the words "to all third States" be inserted between the word "extension" and the words "of the relevant treatment" in article 16, paragraph 1. His proposal was justified by the fact that it was perfectly possible for treatment accorded to one third State to have ceased, but for identical treatment to another third State, and thus the operation of the most-favoured-nation clause, to continue. While he realized that the expression "relevant treatment" might be intended to cover that point, he could see no harm in making it perfectly clear.

98. Mr. USTOR (Special Rapporteur) said that Mr. Kearney had correctly interpreted the intention behind the phrase "relevant treatment". It would seem preferable, in order to avoid overburdening the text of the article itself, to draw attention to Mr. Kearney's point in the commentary.

99. The phrase "not made subject to the condition of material reciprocity" should be deleted from article 16, paragraph 1, since the statement in that paragraph applied to both conditional and unconditional most-favoured-nation clauses.

100. Mr. BILGE said that article 16, paragraph 2, might give the impression that when material reciprocity ceased, the operation of the clause also ceased, whereas in fact it was merely suspended. The point should be made clear in the commentary.

101. Mr. KEARNEY said that he did not see any necessity to substitute for his proposed amendment, which was very simple, an explanation in the commentary.

102. Mr. HAMBRO said he supported the amendment proposed by Mr. Kearney.

103. Mr. ELIAS said that it had already been explained, with regard to article 7 and other articles, that the reference to "extension" always meant extension to third States, and that, as Mr. Kearney himself had recognized, the fact that the phrase "relevant treatment" meant the

treatment accorded to third States was apparent from the context. If the Commission wished to make article 16, paragraph 1, clear beyond all doubt, it could entertain Mr. Kearney's proposal, but that might entail amending all other articles in which similar language appeared.

104. Mr. USHAKOV said that the Drafting Committee had spent a great deal of time discussing the wording of the paragraph in question, in the hope of avoiding difficulties. It had preferred not to make any mention of third States, since "relevant treatment" might be extended to only one such State. The reason for that decision would be explained in the commentary. The possible inclusion of a reference to "all third States" was more a matter for a saving clause relating to non-discrimination than an article such as article 16 and the commentary would, indeed, also state that an article on non-discrimination as between third States and as between beneficiary States might be submitted at a later stage.

105. Mr. SETTE CÂMARA said he supported Mr. Kearney's proposal, since he thought it essential to make clear that the right of a beneficiary State would cease only when favourable treatment had been withheld or withdrawn from each and every one of the third States involved. In his view the amendment would not affect other articles.

106. Mr. USTOR (Special Rapporteur) said he agreed that the aim of article 16, paragraph 1, was to state that, with the exception of the case mentioned in paragraph 2, enjoyment of the rights accruing to the beneficiary State of a most-favoured-nation clause could be terminated only when the granting State no longer accorded favourable treatment to any third State. That being so, he would not object to the inclusion, at the point proposed by Mr. Kearney, of either the phrase "to any third State", or the words "to all third States".

107. Mr. TSURUOKA said that the general arrangement of the draft required the maintenance of a triangular relationship between the beneficiary State, the granting State and the third State by employing the singular throughout. He saw no sufficient legal justification for speaking of "all third States".

108. Mr. ŠAHOVIĆ said he thought Mr. Kearney's amendment was acceptable because it referred to a special case.

109. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that one of the points the Drafting Committee had had in mind in drafting article 16, paragraph 1, had been the fact that there was a certain parallelism between that paragraph and article 15, paragraph 1. The right of the beneficiary State was considered to arise under the latter paragraph whenever the treatment in question was accorded to any third State, and it had thus seemed to be quite logical to deal only with a single case in article 16, paragraph 1. A second point had been that it was extremely difficult to use the words "any" or "all" in ways which were not ambiguous. That was a problem which could have been resolved only through the use of a cumbersome paraphrase. It was such drafting matters, rather than any more funda-

mental considerations, which lay behind the current wording of the paragraph.

110. Mr. USHAKOV said he agreed with the explanation given by the Chairman of the Drafting Committee.

111. Mr. KEARNEY said that in his view it was the phrase "relevant treatment" which was ambiguous. His proposal was designed to provide the necessary clarification.

112. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the problems to which the use of the phrase "all third States" might give rise could be illustrated by taking a case in which favourable treatment of the kind promised under a most-favoured-nation clause was accorded to ten third States. If that treatment were withheld from one of those States, it could be argued that operation of the most-favoured-nation clause should cease since relevant treatment was no longer accorded to "all" of the third States involved, but to ten minus one of those States.

113. Mr. ELIAS proposed that the Commission approve the draft article as amended by the Special Rapporteur while stating in the commentary that several members had shared the view expressed by Mr. Kearney, and that efforts would be made to find more satisfactory wording in time for the next session.

114. Mr. KEARNEY said that he would agree to Mr. Elias's proposal in the hope that that would enable the Commission to complete its work on time. He would, however, continue to deprecate what he felt was the unfortunate approach of employing the commentary, rather than direct amendments, to modify articles produced by the Drafting Committee.

115. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 15 in the form in which it had been submitted by the Drafting Committee, and article 16 as amended by the Special Rapporteur.

*It was so agreed.*

#### ARTICLE 6 *quater*<sup>15</sup>

116. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 6 *quater* as proposed by the Drafting Committee, which read:

##### *Article 6 quater* [20]

*The exercise of rights arising under a most-favoured-nation clause and compliance with the laws of the granting State*

The exercise of rights arising under a most-favoured-nation clause for the beneficiary State and for persons or things in a determined relationship with that State is subject to compliance with the relevant laws of the granting State. Those laws, however, shall not be applied in such a manner that the treatment of the beneficiary State and of persons or things in a determined relationship with that State becomes less favourable than that of the third State or of persons or things in the same relationship with that third State.

117. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that article 6 *quater* as pro-

posed by the Drafting Committee corresponded to articles 6 *quater* and 6 *quinquies* as proposed by the Special Rapporteur. It provided a balance within a single article between the rule that a beneficiary State must comply with the relevant laws of the granting State and the rule that the granting State must not apply those laws in such a way as to frustrate the enjoyment of the rights it granted.

118. In the English version of the article, the term "laws" referred both to laws proper and to regulations, or "subordinate legislation", whereas in the other language versions the concept had been expressed *in extenso*. Precedents for that procedure could be found in texts already approved by the Commission and established in treaty form.

119. Mr. BILGE asked whether article 6 *quater* also applied to national treatment accorded under a most-favoured-nation clause.

120. Mr. USTOR (Special Rapporteur) said it seemed reasonable that the rule that the beneficiary State should enjoy its right to favourable treatment only within the framework of the laws of the granting State should apply whatever the nature of the treatment.

121. Mr. USHAKOV said that, in his opinion, national treatment implied compliance with the laws of the State concerned.

122. Mr. KEARNEY said he noted that the second sentence of the article directed organs of a State to conduct themselves in a certain fashion. Such language was unusual in a draft international treaty and he hoped that the Commission would be able to find wording more appropriate to the context.

123. He proposed that in the second sentence the word "becomes" be replaced by the word "is", since both the initial and the subsequent effects of application of the laws of the granting State were concerned.

124. Mr. SETTE CÂMARA said he agreed with the comments by Mr. Kearney concerning the tone of the article.

125. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 6 *quater* in the form in which it had been submitted by the Drafting Committee, as amended by Mr. Kearney.

*It was so agreed.*

#### ARTICLE 0<sup>16</sup>

126. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 0 as proposed by the Drafting Committee, which read:

##### *Article 0* [21]

*Most-favoured-nation clauses in relation to treatment under a generalized system of preferences*

A beneficiary State is not entitled under a most-favoured-nation clause to any treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a generalized system of preferences established by that granting State.

<sup>15</sup> For previous discussion see 1331st meeting, para. 30, and 1332nd meeting, para. 3.

<sup>16</sup> For previous discussion see 1341st meeting, para. 1.

127. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the fact that article 0 appeared in square brackets did not indicate any doubt on the part of the members of the Drafting Committee that the Commission would wish to deal with the matters to which it referred, but rather reflected a feeling arising out of the discussion within the Commission itself that the subject was one which had not been fully explored. In addition, the majority of the members of the Drafting Committee did not believe, and did not feel that the Commission as a whole believed, that article 0 could stand alone as an adequate statement of special measures in favour of developing States.

128. The Drafting Committee had based itself on the text submitted by the Special Rapporteur in document A/CN.4/L.228/Rev.1. The Committee had considered that the aim of the article should be to reproduce faithfully a situation founded in current State practice within UNCTAD and illustrated by the waivers to GATT, and that it would be consistent with the existing rules to replace the opening phrase of the Special Rapporteur's version of the article, "A developed beneficiary State", by the phrase "A beneficiary State".

129. It had also considered it unnecessary, and indeed undesirable, to retain the phrase "trade advantages", since the meaning of those words was not clear and the context of the article was, in any case, governed by the reference to a "generalized system of preferences".

130. The fact that the title of the article contained no reference to developing countries as such was linked with a feeling in the Drafting Committee that that would avoid giving the impression that the article went further than it really did. As matters stood, the article represented an attempt to include a reference to the existing state of affairs in the draft, on the assumption that the Commission would at some later stage wish the Special Rapporteur to prepare additional articles on the same or related topics.

131. Mr. HAMBRO said that the explanations given by the Chairman of the Drafting Committee were so wide in scope that they would require further discussion.

132. The CHAIRMAN speaking as a member of the Commission, said that he was afraid that to approve the article within square brackets might give the impression that the entire Commission had doubts about its value, which was not the case.

133. Mr. USHAKOV said that, for him, the fact that the article appeared in square brackets indicated only that the Commission intended to devote further attention to it at its next session, particularly since the Commission would then be taking up the article only in first, and not in second reading.<sup>17</sup>

The meeting rose at 1.15 p.m.

## 1353rd MEETING

Monday, 21 July 1975, at 3.10 p.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

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

(A/CN.4/285; A/CN.4/L.240)

[Item 4 of the agenda]

(resumed from the 1350th meeting)

### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

#### ARTICLE 2 (Use of terms), PARAGRAPHS 1 (b) AND 1 (b bis)<sup>1</sup>

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the articles proposed by the Drafting Committee (A/CN.4/L.240), starting with article 2, paragraphs 1 (b) and 1 (b bis).

2. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following texts for article 2, paragraphs 1 (b) and 1 (b bis):

(b) "ratification" means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(b bis) "act of formal confirmation" means an international act corresponding to that of ratification by a State, whereby an international organization establishes on the international plane its consent to be bound by a treaty;

3. Mr. REUTER (Special Rapporteur) said that article 2, paragraph 1 (b), did not call for any comment by him or any decision by the Commission, since it merely reproduced the corresponding provision of the Vienna Convention on the Law of Treaties. It would be seen that the expression "ratification" meant only the act of a State. The Drafting Committee had considered that it was preferable, largely for historical reasons, not to use the term "ratification" in respect of international organizations.

4. In his own approach to the concept of ratification, he had distinguished between the historical background of the practice of States in that respect and the actual mechanism of ratification, whereby an initial expression of consent, not implying a formal commitment, was followed by a second act which did represent a formal commitment. That mechanism, which comprised the provisional indication of an intention followed by a definitive decision, could be useful to international organizations, but there was at present no generally accepted term, on the international plane, to designate the act by which an international organization manifested, in two stages, its consent to be bound.

<sup>17</sup> For resumption of the discussion see next meeting, para. 101

<sup>1</sup> For previous discussion see 1347th and 1348th meetings.

5. The Drafting Committee had therefore tried to meet the needs of international organizations by describing the operation by the expression "act of formal confirmation", which appeared in paragraph 1 (*b bis*). Although it was true that that expression was more a description than a definition, it was easily understood, since the act of ratification was an act of confirmation. That expression should be taken to apply on the international plane because the Drafting Committee had not wished to limit the freedom of international organizations, which could always use the term "ratification" for internal purposes if it was recognized in their constituent instruments.

6. Mr. ŠAHOVIĆ said he thought that, in view of the meaning given to it in the Vienna Convention, the term "ratification" could also apply to the practice of international organizations. The expression proposed in paragraph 1 (*b bis*) represented a compromise between the views expressed in the general discussion. He could therefore accept it, although he regretted that the Commission had not considered it advisable to use the word "ratification" for international organizations and hoped the question might be settled in a more satisfactory manner in the future.

7. Mr. HAMBRO and Mr. KEARNEY said that they entirely agreed with the comments made by Mr. Šahović.

8. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 2, paragraphs 1 (*b*) and 1 (*b bis*) as proposed by the Drafting Committee.

*It was so agreed.*

ARTICLE 2 (Use of terms), PARAGRAPHS 1 (*b ter*), <sup>2</sup> 1 (*c*) <sup>3</sup> AND 1 (*c bis*)

9. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following texts for article 2, paragraphs 1 (*b ter*), 1 (*c*) and 1 (*c bis*):

(*b ter*) "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State or an international organization establishes on the international plane its consent to be bound by a treaty;

(*c*) "full powers" means a document emanating from the competent authority of a State and designating a person or persons to represent the State for the purpose of negotiating, adopting or authenticating the text of a treaty between one or more States and one or more international organizations, expressing the consent of the State to be bound by such a treaty, or performing any other act with respect to such a treaty;

(*c bis*) "powers" means a document emanating from the competent organ of an international organization and designating a person or persons to represent the organization for the purpose of negotiating, adopting or authenticating the text of a treaty, communicating the consent of the organization to be bound by a treaty, or performing any other act with respect to a treaty;

10. Mr. REUTER (Special Rapporteur) said that the only point to which he need draw attention was the use of the term "expressing". That term, which appeared in connexion with representatives of States in many provi-

sions and even in the title of certain articles of the Vienna Convention on the Law of Treaties, had been retained in the present draft in connexion with representatives of States.

11. Serious objections had, however, been raised, both in the Commission and in the Drafting Committee, to the use of the term "expressing" in connexion with representatives of international organizations. It had been considered that it was somewhat ambiguous, particularly in the case of rather vague constituent instruments, and might imply that the representative of an international organization could replace the organization for the purpose of establishing its consent to be bound by a treaty. The Drafting Committee had therefore tried to avoid the use of the expression "expressing consent to be bound" in connexion with international organizations by using the expression "establishing consent to be bound", which was to be found in the Vienna Convention. When it had had to use a single word which could be used both for the consent of a State and for that of an organization, it had chosen the word "establish" in order to avoid any ambiguity. Thus, it had used the word "establishes" in sub-paragraph (*b ter*) to refer both to the consent of a State and to that of an international organization, whereas it had retained the word "expressing" in sub-paragraph (*c*), which related only to the consent of a State.

12. With regard to the document certifying the capacity of a natural person to represent a State or an international organization, the Drafting Committee had decided, in order to take account of certain observations, to reserve the expression "full powers" for the document emanating from a State and to use the expression "powers" to designate the document emanating from an international organization. International practice in the matter was very flexible and the Vienna Convention of 14 March 1975 on the Representation of States in their Relations with International Organizations of a Universal Character used the two expressions interchangeably for documents emanating from States. The Drafting Committee, however, had considered it more suitable to avoid using the expression "full powers" in connexion with representatives of international organizations.

13. Mr. KEARNEY said that he thought the distinction made in sub-paragraphs (*c*) and (*c bis*) between "full powers" and "powers" was unnecessary. It presumably implied some difference in the authority of the documents concerned, but since they were issued for the same purpose, he could not see why that should be so. He hoped the distinction was not part of an attempt to play down the role that an international organization could assume in becoming a party to the treaty. He had indicated his willingness to accept the distinction made earlier in article 2 between "ratification" and an "act of formal confirmation" for the sake of compromise, but it would be an excessive compromise to accept a distinction which, as in the present case, was both unnecessary and confusing.

14. Mr. HAMBRO said he agreed with Mr. Kearney that the distinction between the expressions "powers" and "full powers" was entirely artificial.

15. Mr. PINTO said that his attitude to article 2 as a whole would determine his attitude to the entire set of

<sup>2</sup> For previous discussion see 1347th and 1348th meetings.

<sup>3</sup> For previous discussion see 1344th meeting, para. 3, and 1345th meeting, para. 62.

draft articles. He had explained during the general debate the difficulties he had with any approach to the topic which started by placing States and international organizations on an equal footing. He had pointed out at that time the fundamental differences between States and international organizations.

16. In considering article 2, the Drafting Committee had had before it other views which sought to distinguish between States and international organizations in certain respects, and it would seem that it was those views which were reflected in the text now proposed. The differences illustrated in the text were essentially procedural and, in his opinion, did not adequately reflect the fundamental differences between States and international organizations which existed at present and would continue to exist for the foreseeable future. The Drafting Committee had tried to differentiate between States and international organizations by using three sets of terms, referring to "ratification", the "expression" of consent and "full powers" in the case of States, and to an "act of formal confirmation", the "establishment" of consent and "powers" in the case of international organizations, but where treaty relationships were concerned the differences went much further.

17. Mr. USHAKOV said he associated himself with Mr. Pinto's comments.

18. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 2, paragraphs 1 (b ter), 1 (c) and 1 (c bis) as proposed by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 2 (Use of terms), PARAGRAPH 1 (g) <sup>4</sup>

19. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 2, paragraph 1 (g):

(g) "party" means a State or an international organization which has consented to be bound by the treaty and for which the treaty is in force;

20. Mr. REUTER (Special Rapporteur) said that subparagraph (g), which had been proposed by Mr. Kearney, was exactly the same as the corresponding subparagraph of the Vienna Convention, with the addition of the words "or an international organization".

21. In adopting that text, the Drafting Committee had left aside a problem which would come up again later and which related to the status of party of international organizations. Thus, there were international organizations which participated in the drawing up of the text of a treaty but could not become parties to the treaty and there were international organizations which could become parties to a treaty, but which would, as parties, have specific characteristics. The Drafting Committee had considered that that question should be dealt with in the commentary. The problem would arise again in article 10 in connexion with the expression "international organizations participating in its negotiation".

<sup>4</sup> For previous discussion see 1345th meeting, para. 72, and 1346th meeting, para. 1.

22. The CHAIRMAN said that, if there were no further comments he would take it that the Commission agreed to approve article 2, paragraph 1 (g) as proposed by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 7 <sup>5</sup>

23. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 7:

##### Article 7

##### Full powers and powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty between one or more States and one or more international organizations or for the purpose of expressing the consent of the State to be bound by such a treaty if:

(a) he produces appropriate full powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the State for such purposes without having to produce full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty between one or more States and one or more international organizations;

(b) heads of delegations of States to an international conference, for the purpose of adopting the text of a treaty between one or more States and one or more international organizations;

(c) heads of delegations of States to an organ of an international organization, for the purpose of adopting the text of a treaty between one or more States and that organization;

(d) heads of permanent missions to an international organization, for the purpose of adopting the text of a treaty between one or more States and that organization;

(e) heads of permanent missions to an international organization, for the purpose of signing, or signing *ad referendum*, a treaty between one or more States and that organization, if it appears from practice or from other circumstances that those heads of permanent missions are considered as representing their States for such purposes without having to produce full powers.

3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty if:

(a) he produces appropriate powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the organization for such purposes without having to produce powers.

4. A person is considered as representing an international organization for the purpose of communicating the consent of that organization to be bound by a treaty if:

(a) he produces appropriate powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the organization for that purpose without having to produce powers.

24. The article employed the terms "full powers" and "powers" as they had been defined in article 2, para-

<sup>5</sup> For previous discussion see 1344th meeting, para. 3, and 1345th meeting, para. 62.

graphs 1 (c) and 1 (c bis) respectively. The term "treaty", when standing alone, referred to both the types of treaty defined in article 2, paragraph 1 (a). Where the term was intended to refer only to one of those types of treaty, that was expressly indicated in the text. In line with the distinction made between the "expression" of consent to be bound by a treaty in the case of a State, and the "establishment" of such consent in the case of an international organization, article 7 referred to the "expression" of consent in the case of a State and to the "communication" of consent in the case of an international organization.

25. The Drafting Committee had added a number of sub-paragraphs to paragraph 2 of the article as proposed by the Special Rapporteur, in order to take account in particular of pertinent developments at the recent Vienna Conference on the Representation of States in their Relations with International Organizations of a Universal Character. The Committee had also decided to refer only to practice in general, rather than to specify the source of the practice, in order to avoid difficulties in achieving a balance between States and international organizations.

26. Mr. CASTAÑEDA said that article 7, paragraph 1, referred to the expression, while article 2, paragraph 1 (b) referred to the establishment of the consent of a State to be bound by a treaty. He suggested that the wording of article 7 be brought into line with that of article 2, since the context of the two cases appeared to be identical.

27. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee had found that the Vienna Convention on the Law of Treaties was not always consistent in its use of terms. On occasion, the Committee had had to decide whether to follow the language of the Vienna Convention, or whether to make what seemed to be an obvious correction at the risk that greater significance would be read into the change than was warranted. Where, as in the present case, nothing of substance turned on the difference in language, the Committee had followed the text of the corresponding articles of the Vienna Convention.

28. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 7 as proposed by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 8<sup>6</sup>

29. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 8:

##### *Article 8*

##### *Subsequent confirmation of an act performed without authorization*

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State or international organization for that purpose is without legal effect unless afterwards confirmed by that State or organization.

30. The title and text proposed by the Drafting Committee were those submitted by the Special Rapporteur and should pose no problems.

31. Sir Francis VALLAT suggested the insertion of the word "an" before the words "international organization" in the English version.

32. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 8 as proposed by the Drafting Committee, with the change in the English version suggested by Sir Francis Vallat.

*It was so agreed.*

#### ARTICLE 9<sup>7</sup>

33. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 9:

##### *Article 9*

##### *Adoption of the text*

1. The adoption of the text of a treaty takes place by the consent of all the participants in the drawing up of the treaty except as provided in paragraph 2.

2. The adoption of the text of a treaty between States and one or more international organizations at an international conference in which one or more international organizations participate, takes place by the vote of two-thirds of the participants present and voting, unless by the same majority the latter shall decide to apply a different rule.

34. Paragraph 1 of the text proposed by the Drafting Committee corresponded to paragraphs 1 and 2 of the Special Rapporteur's text for the article. The Committee had decided that the difficulties associated with the use of the terms "parties" or "potential parties" in connexion with treaties between States and international organizations or international organizations themselves could best be avoided by the use of the phrase "participants in the drawing up of the treaty".

35. He understood that the Special Rapporteur intended to consider further the exact meaning of the word "participants" and the necessity of including a definition of that term.

36. With regard to paragraph 2, the Drafting Committee had eventually decided to maintain the two-thirds majority rule, as proposed by the Special Rapporteur. Some members of the Committee had considered that it would have been preferable to preface that rule with a statement emphasizing the right of an international conference to determine its own rules of procedure, but the Committee had eventually decided, as had the Vienna Conference on the Law of Treaties, that the two-thirds majority rule did not constitute a departure from basic principles so much as a necessary measure of discipline.

37. As could be seen from the text of paragraph 2, article 9 was intended mainly to cover the most likely situation, that in which the participants in an international conference would include a relatively large number of

<sup>6</sup> For previous discussion see 1345th meeting, para. 69.

<sup>7</sup> For previous discussion see 1345th meeting, para. 72, and 1346th meeting, para 1.



States and a small number of international organizations. The somewhat hypothetical case of an international conference involving only international organizations was covered by the provisions of paragraph 1.

38. The Drafting Committee had thought it advisable not to use the expression "general international conference", but to employ the term "international conference" and to indicate in the commentary that it was to be understood in the sense in which it was used in the Vienna Convention on the Law of Treaties.

39. Mr. PINTO said that, in his view, paragraph 2 of the Drafting Committee's proposed text did not take into account the autonomy of a modern international conference. The article should have contained a primary reference to the rules of procedure adopted by an international conference and a secondary reference to the application of the two-thirds majority rule in cases not covered by the conference's rules of procedure. As it stood, paragraph 2 prejudged the very important matter of decision-making. He was aware that a precedent for the two-thirds majority rule was to be found in the Vienna Convention on the Law of Treaties, but he believed that modern international life and the context to which article 9 related required a more flexible approach.

40. Mr. CASTAÑEDA said he supported the view expressed by Mr. Pinto. Since the adoption of the Vienna Convention on the Law of Treaties, there had been great changes in the ways in which decisions were taken at international conferences. The current practice was for a conference itself to decide, in the light of its subject, what its voting rules would be. Article 9 should therefore stress the primacy of the rules of procedure of the conference.

41. Mr. USTOR said he noted that the word "participants" was not used in the same way in paragraphs 1 and 2 of the article. He assumed that the reason for that difference would be explained in the commentary.

42. Mr. USHAKOV said that in his opinion, neither article 9 of the Vienna Convention on the Law of Treaties nor article 9 of the present draft placed any obligation whatever on the conference. The rule enunciated in article 9 applied only when the rules of procedure of the conference contained no provisions relating to the adoption of the text of the treaty. There was no need for a provision of that kind in article 9 because it was clear that, if the rules of procedure of the conference contained a rule different from the rule enunciated in article 9, it was the rule of procedure which would prevail.

43. Mr. HAMBRO said it might appear that, by stating that, in principle, the adoption of the text of a treaty at an international conference took place by a vote of two-thirds of the participants present and voting, article 9 required that the two-thirds majority rule should also apply to the adoption of the rules of procedure of the conference, thereby limiting the freedom of the conference.

44. Mr. REUTER (Special Rapporteur) said he agreed with Mr. Ushakov that article 9 left the participants in

an international conference perfectly free to adopt any rules of procedure they wished. The two-thirds majority rule could be useful if there were no other rule.

45. Mr. CASTAÑEDA said he agreed that, as it stood, article 9 would not prevent an international conference from choosing its own rules of procedure. It would, however, be more logical to begin by stating the general rule, namely, that a conference was free to determine its own procedure for the adoption of a text, and to follow that by the exception, in the form of a reference to the application of the two-thirds majority rule when no other solution was possible.

46. Mr. PINTO said that he shared the view expressed by Mr. Castañeda. If the rule stated in paragraph 2 was not to be binding on signatories of the convention, it was pointless. If, on the other hand, it was intended only as a residual rule, problems would arise from the fact that a two-thirds majority would be required for the introduction of a different rule. No doubt the Special Rapporteur would explain the reasons for the present proposal in the commentary.

47. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that members of the Drafting Committee had thought that caution was needed with regard to proposals such as that made by Mr. Castañeda. If that proposal were adopted, it would imply that the Commission was trying to lay down the rules of procedure of conferences, rather than the procedure of parties to an international treaty.

48. A majority of the members of the Drafting Committee had not considered either that the Vienna Convention on the Law of Treaties was wrong in putting forward the two-thirds majority rule, or that there was any substantial difference between a conference involving States alone and the type of conference to which the draft articles would most frequently be applied, namely, a conference involving States and one or two international organizations. Some members of the Drafting Committee had emphasized that the two-thirds majority rule contributed significantly to ensuring stability, and did not in practice interfere with the right of an international conference to determine its own procedure.

49. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 9 as proposed by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 10<sup>8</sup>

50. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 10:

##### *Article 10*

##### *Authentication of the text*

1. The text of a treaty between one or more States and one or more international organizations is established as authentic and definitive:

<sup>8</sup> *Ibid.*

(a) by such procedure as may be provided for in the treaty or agreed upon by the States and international organizations participating in its negotiation; or

(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those States and international organizations of the text of the treaty or of the final act of a conference incorporating the text.

2. The text of a treaty between international organizations is established as authentic and definitive:

(a) by such procedure as may be provided for in the treaty or agreed upon by the international organizations participating in its negotiation; or

(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those international organizations of the text of the treaty or of the final act of a conference incorporating the text.

51. Article 10 was in a way the corollary of article 9. Its division into two paragraphs was governed by the distinction made between two types of treaty in article 2.

52. Mr. REUTER (Special Rapporteur) said that, on reflection, he thought that it would be better to replace the word "negotiation" by the words "drawing up" in paragraphs 1 (a) and 2 (a).

53. He had thought the word "negotiation" preferable because it often happened that organizations participated in the drawing up of the text of a treaty in a purely technical or advisory capacity, without themselves becoming parties to the treaty. But it would be more logical to bring the text of article 10 into line with that of article 9, which dealt with the participants in the drawing up of the treaty, and to give the necessary explanations in the commentary, thus making it possible for the Commission to consider, at a later stage, the question whether a formal definition of the expression "participating in the drawing up of a treaty" was required. The Vienna Convention used that expression in article 10 (a) without defining it, though in article 2, paragraph 1 (e), in defining the expression "negotiating State", it referred to "a State which took part in the drawing up ... of the text of the treaty". A formal definition of the expression "participating in the drawing up of the treaty" might be justified in the present draft provided that international organizations, unlike States, could take part in the preparatory work for a treaty to which it was obvious that they would never become parties.

54. Mr. USHAKOV said that there was an error in paragraphs 1 (a) and 2 (a) which should be corrected. The words "in the treaty" should be replaced by the words "in the text", in accordance with article 10 of the Vienna Convention. It was not possible to refer to the procedure provided for "in the treaty" because the treaty as such did not yet exist.

55. Mr. REUTER (Special Rapporteur) said he agreed with Mr. Ushakov.

56. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 10 as proposed by the Drafting Committee, with the amendments proposed by the Special Rapporteur and Mr. Ushakov.

*It was so agreed.*

## ARTICLE 11<sup>9</sup>

57. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 11:

### Article 11

#### *Means of establishing consent to be bound by a treaty*

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

2. The consent of an international organization to be bound by a treaty is established by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed.

58. In line with article 2, paragraphs 1 (b) and 1 (b bis), article 11 spoke of the "ratification" of a treaty by a State and of its "formal confirmation" by an international organization.

59. The CHAIRMAN said that if there were no comments he would take it that the Commission agreed to approve article 11 as proposed by the Drafting Committee.

*It was so agreed.*

## ARTICLE 12<sup>10</sup>

60. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 12:

### Article 12

#### *Signature as a means of establishing consent to be bound by a treaty*

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by the signature of the representative of that State when:

- (a) the treaty provides that signature shall have that effect;
- (b) the participants in the negotiation were agreed that signature should have that effect; or
- (c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is established by the signature of the representative of that organization when:

- (a) the treaty provides that signature shall have that effect; or
- (b) the intention of that organization to give that effect to the signature appears from the powers of its representative or was established during the negotiation.

3. For the purposes of paragraphs 1 and 2:

- (a) the initialling of a text constitutes a signature when it is established that the participants in the negotiation so agreed;
- (b) the signature *ad referendum* by a representative of a State or an international organization, if confirmed by his State or organization, constitutes a full signature.

61. The first two paragraphs of the article dealt respectively with the two types of treaty to which the draft as

<sup>9</sup> For previous discussion see 1347th and 1348th meetings.

<sup>10</sup> *Ibid.*

a whole referred. Thus, paragraph 1 referred to "a treaty between one or more States and one or more international organizations" while paragraph 2, which concerned both types of treaty defined in article 2, paragraph 1 (a), spoke simply of "a treaty". With regard to paragraph 1 (b), the Drafting Committee had considered that it would be inappropriate to adopt the language of the corresponding provision of the Vienna Convention on the Law of Treaties, partly because the word "established", which appeared in that provision, had been reserved for use in a different connexion in the draft articles.

62. Mr. KEARNEY said that he did not understand why paragraph 2 did not contain a provision akin to that of paragraph 1 (b). Was that omission intended to suggest that, while the representative of an international organization could agree that the signature of the representative of a State would have the effect of establishing that State's consent to be bound by a treaty, States and international organizations would be unable to agree that the signature of the representative of an international organization would have the same effect in respect of that organization?

63. Mr. REUTER (Special Rapporteur) said that the provision contained in paragraph 1 (b) of the former article 12 had not been included in paragraph 2 of the present text, which dealt with the consent of an international organization to be bound by a treaty.

64. The main objection to his former paragraph 1 (b) had related to the word "otherwise". It could hardly be denied that, in the spirit of the Vienna Convention, the words "it is otherwise established that the . . . States . . . were agreed" could apply to an oral or even a tacit agreement, but it was to the use of such liberal wording in connexion with international organizations that objections had been raised. Sub-paragraph (b) of the Vienna Convention text had not been completely eliminated, however, since the words "or was established during the negotiation" implied that, during the negotiation, an agreement could be reached on that point. But in the case of international organizations it could not be stated that the signature was binding, because the possibility of a second stage of consideration leading to formal confirmation would thus be eliminated.

65. Mr. KEARNEY said that the reason for the omission to which he had referred was still not clear to him. From the Special Rapporteur's explanation, it would seem that there was some concern that representatives of international organizations might exceed their powers, but it seemed to him that that was unlikely.

66. Sir Francis VALLAT said that behind all the draft articles was the feeling that international organizations could not act in precisely the same way as States. Viewed in that context, the omission to which Mr. Kearney had drawn attention was easier to understand, if not to accept.

67. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 12 as proposed by the Drafting Committee.

*It was so agreed.*

## ARTICLE 13<sup>11</sup>

68. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 13:

### *Article 13*

#### *An exchange of instruments constituting a treaty as a means of establishing consent to be bound by a treaty*

1. The consent of States and international organizations to be bound by a treaty between one or more States and one or more international organizations constituted by instruments exchanged between them is established by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or

(b) those States and those organizations were agreed that the exchange of instruments should have that effect.

2. The consent of international organizations to be bound by a treaty between international organizations constituted by instruments exchanged between them is established by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or

(b) those organizations were agreed that the exchange of instruments should have that effect.

69. The text did not call for any comments of principle. It differed in construction from the earlier articles, but only for practical reasons. The material in article 13 had been divided into two paragraphs, corresponding to the two types of treaty governed by the draft articles. The purpose of that rearrangement was to achieve clearer drafting.

70. The original text of article 13 had contemplated only the normal case of the exchange of instruments in a bilateral treaty. It had been considered desirable by the Drafting Committee to draft article 13 in such a manner that it would be applicable even if there were more than two parties involved. The practice of using the procedure of exchange of instruments was perhaps obsolescent with regard to multilateral treaties, but cases might still occur. It was therefore sensible to allow for that possibility.

71. The CHAIRMAN said that if there were no comments he would take it that the Commission agreed to approve article 13 as proposed by the Drafting Committee.

*It was so agreed.*

## ARTICLE 14<sup>12</sup>

72. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 14:

### *Article 14*

#### *Ratification, act of formal confirmation, acceptance or approval as a means of establishing consent to be bound by a treaty*

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by ratification when:

(a) the treaty provides for such consent to be expressed by means of ratification;

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

(b) the participants in the negotiation were agreed that ratification should be required;

(c) the representative of the State has signed the treaty subject to ratification; or

(d) the intention of the State to sign subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is established by an act of formal confirmation when:

(a) the treaty provides for such consent to be established by means of an act of formal confirmation;

(b) the participants in the negotiation were agreed that an act of formal confirmation should be required;

(c) the representative of the organization has signed the treaty subject to an act of formal confirmation; or

(d) the intention of the organization to sign subject to an act of formal confirmation appears from the powers of its representative or was expressed during the negotiation.

3. The consent of a State to be bound by a treaty between one or more States and one or more international organizations, or the consent of an international organization to be bound by a treaty is established by acceptance or approval under conditions similar to those which apply to ratification or to an act of formal confirmation.

73. Article 14 did not call for any comments of principle. It was somewhat lengthy because of the nature of the cases covered. It followed faithfully the rules established in the earlier articles.

74. Two corrections should be made in the text. First, the words "the treaty" should be inserted after the words "the intention of the State to sign", in paragraph 1 (d), and also after the words "the intention of the organization to sign", in paragraph 2 (d). Secondly, in paragraph 2 (d), the words "was expressed" should be replaced by the words "was established". Since the passage referred to the intention of an international organization, it was necessary to use the verb "to establish".

75. The CHAIRMAN said that if there were no comments he would take it that the Commission agreed to approve article 14 as proposed by the Drafting Committee, with the corrections indicated by the Chairman of the Drafting Committee.

*It was so agreed.*

#### ARTICLE 15<sup>13</sup>

76. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 15:

##### *Article 15*

##### *Accession as a means of establishing consent to be bound by a treaty*

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by accession when:

(a) the treaty provides that such consent may be expressed by that State by means of accession;

(b) the participants in the negotiation were agreed that such consent might be expressed by that State by means of accession; or

(c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

2. The consent of an organization to be bound is established by accession when:

(a) the treaty provides that such consent may be established by that organization by means of accession;

(b) the participants in the negotiation were agreed that such consent might be given by that organization by means of accession; or

(c) all the parties have subsequently agreed that such consent may be given by that organization by means of accession.

77. In preparing its definition of "party" for the purposes of paragraph 1 (g) of article 2 (Use of terms), the Drafting Committee had decided to follow the wording of the Vienna Convention on the Law of Treaties in preference to the more elaborate formula put forward by the Special Rapporteur. The possibility had been discussed of international organizations being bound by treaties in ways other than the obvious ones analogous to those used by States. It had, however, been considered advisable to maintain the definition of the 1969 Vienna Convention, but the Special Rapporteur would explain in the commentary the distinction between being bound by a treaty and being bound by the rules which it contained.

78. Two corrections needed to be made to the opening sentence of paragraph 2. First, the word "international" should be inserted before the word "organization". Secondly, the words "by a treaty" should be inserted after the words "to be bound".

79. The CHAIRMAN said that if there were no comments he would take it that the Commission agreed to approve article 15 as proposed by the Drafting Committee, with the corrections indicated by the Chairman of the Drafting Committee.

*It was so agreed.*

#### ARTICLE 16<sup>14</sup>

80. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 16:

##### *Article 16*

##### *Exchange, deposit or notification of instruments of ratification, formal confirmation, acceptance, approval or accession*

1. Unless the treaty otherwise provides, instruments of ratification, formal confirmation, acceptance, approval or accession establish the consent of a State or of an international organization to be bound by a treaty between one or more States and one more international organizations upon:

(a) their exchange between the contracting States and the contracting international organizations;

(b) their deposit with the depositary; or

(c) their notification to the contracting States and to the contracting international organizations or to the depositary, if so agreed.

2. Unless the treaty otherwise provides, instruments of formal confirmation, acceptance, approval or accession establish the consent of an international organization to be bound by a treaty between international organizations upon:

(a) their exchange between the contracting international organizations;

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

(b) their deposit with the depositary; or

(c) their notification to the contracting international organizations or to the depositary, if so agreed.

81. Article 16 did not raise any points of principle.

82. Sir Francis VALLAT said that paragraph 1 referred to instruments of formal confirmation. That language represented a slight departure from the expression "act of formal confirmation" which was used in paragraph 1 (b bis) of article 2 and elsewhere in the draft. The departure was deliberate, but there was no intention to change the sense.

83. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 16 as proposed by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 17<sup>15</sup>

84. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 17:

##### *Article 17*

##### *Consent to be bound by part of a treaty and choice of differing provisions*

1. Without prejudice to articles [19 to 23], the consent of a State or of an international organization to be bound by part of a treaty between one or more States and one or more international organizations is effective only if the treaty so permits or if the other contracting States and contracting international organizations so agree.

2. Without prejudice to articles [19 to 23], the consent of an international organization to be bound by part of a treaty between international organizations is effective only if the treaty so permits or if the other contracting international organizations so agree.

3. The consent of a State or of an international organization to be bound by a treaty between one or more States and one or more international organizations which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

4. The consent of an international organization to be bound by a treaty between international organizations which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

85. The reference to articles 19 to 23 in paragraphs 1 and 2 had been placed between square brackets because, owing to pressure of time, those articles had not yet been considered by the Drafting Committee, so that the Commission would not be examining them at the present session.

86. The article consisted of four paragraphs instead of the previous two; the purpose was to reflect the two main types which were the subject-matter of the draft articles.

87. The CHAIRMAN said that if there were no comments he would take it that the Commission agreed to approve article 17 as proposed by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 18<sup>16</sup>

88. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 18:

##### *Article 18*

##### *Obligation not to defeat the object and purpose of a treaty prior to its entry into force*

1. A State or an international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty between one or more States and one or more international organizations when:

(a) that State or that organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, an act of formal confirmation, acceptance or approval, until that State or that organization shall have made its intention clear not to become a party to the treaty, or

(b) that State or that organization has expressed its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

2. An international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty between international organizations when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to an act of formal confirmation, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

89. The former text of the article had been divided into two parts in order to state separately the rules relating to the two main types of treaty referred to in the draft articles.

90. Mr. KEARNEY said he noted that article 18 used the expression "act of formal confirmation", whereas in article 16, the words "act of" had been dropped. He suggested that this be dropped in article 18 also and throughout the draft wherever the expression "act of formal confirmation" appeared. The fact that it had been found necessary to eliminate those words in article 16 clearly demonstrated that they were unnecessary.

91. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the expression "formal confirmation" was not a term of art or an established term of treaty terminology. The Drafting Committee had felt that it would be more convincing if the expression "act of formal confirmation" were used. The Committee had considered the use of that expression in paragraphs 1 (a) and 2 (a) of article 18 and had decided to retain the words "act of" as suitable in connexion with a treaty. In article 16 those words had been dropped because their use in connexion with "instruments" would have resulted in a tautology.

92. Mr. USHAKOV said that the expression "act of formal confirmation" had been used in order to emphasize the difference between the confirmation in question and the "subsequent confirmation" which was the subject-matter of article 8. In article 16, there was no need to use the words "act of" because an "instrument" was always an "act".

<sup>15</sup> For previous discussion see 1348th meeting.

<sup>16</sup> *Ibid.*

93. Mr. KEARNEY said that the explanations which had just been given only served to emphasize the artificial character of the distinction which was being drawn between "formal confirmation" and "ratification".

94. He moved the deletion of the words "act of" before the words "formal confirmation" in paragraph 1 (*b bis*) of article 2, and wherever they appeared in the draft.

95. Sir Francis VALLAT said he would ask Mr. Kearney not to make a formal motion of his proposal at this present juncture. All members were conscious that there was a drafting difficulty in the text, and the formula "act of formal confirmation" had been arrived at only after delicate negotiations to overcome a problem which had arisen because of the strong feeling of many members that the term "ratification" could not be used in relation to international organizations.

96. The purpose of using the term "act" in that formula was to distinguish between the formal confirmation now under discussion and the "subsequent confirmation" referred to in article 8. The expression "act of formal confirmation" contained an extra element which made the distinction clearer. It was possible that, at a later stage, the Commission might decide that an additional definition was necessary in order to show that the words "act of formal confirmation" and "instrument of formal confirmation" were used in the same sense. That matter, however, could be left until the second reading.

97. Mr. REUTER (Special Rapporteur) said that the expression "an act of formal confirmation" was not a term of art; it was merely descriptive. It was because there was no "label" in the terminology of international law which covered both the act and the instrument of formal confirmation that it had been necessary to fall back on a descriptive paraphrase. In the title of article 14, the terms "ratification", "acceptance" and "approval" were well-known "labels", whereas the expression "act of formal confirmation" was new, and the reaction to it on the part of States and international organizations would be awaited with interest.

98. After having analysed the substance of ratification, the Commission had reached the conclusion that it was a formal confirmation. It was important to draw a distinction between the instrument of confirmation, which was a material concept, and the act of confirmation, which was a legal concept. Both Sir Humphrey Waldock, the Special Rapporteur for the topic of the law of treaties, and the Commission itself had always been careful not to define the term "instrument" and the Commission should not decide to reconsider that wise position now.

99. Mr. KEARNEY said that, in deference to the wishes of his colleagues, he was prepared to withdraw his motion but he still considered that a new label was being created, whether the formula used was "formal confirmation" or "act of formal confirmation".

100. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 18 as proposed by the Drafting Committee.

*It was so agreed.*

#### Most-favoured-nation clause

(A/CN.4/266,<sup>17</sup> A/CN.4/280,<sup>18</sup> and A/CN.4/286;  
A/CN.4/L.228/Rev.1 and A/CN.4/L.238)

[Item 3 of the agenda]

*(resumed from the previous meeting)*

#### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 0 [21] (Most-favoured-nation clauses in relation to treatment under a generalized system of preferences)  
*(continued)*

101. The CHAIRMAN invited the Commission to resume consideration of article 0 of the draft articles on the most-favoured-nation clause, as proposed by the Drafting Committee (A/CN.4/L.238).

102. Mr. SETTE CÂMARA proposed the deletion of the square brackets from the title and text of article 0. No other article was presented in that manner and to place a single article between square brackets might give the General Assembly a wrong impression. The article was, of course, subject to reconsideration on second reading, but that was true of all the other draft articles.

103. If the intention was to indicate that article 0 was only the first of a series of articles, that should be explained in the commentary; there was no reason to place it between square brackets for that purpose.

104. Mr. USHAKOV said that the purpose of placing the article in square brackets was to indicate that, at its next session, the Commission would re-examine article 0 on first reading.

105. Mr. PINTO said that he was in favour of retaining the square brackets. As far as the substance was concerned, the effect of article 0 would be to assist rich granting States to withhold certain preferential treatment from other rich States. It did not materially assist the developing countries at all.

106. It was his understanding that the Special Rapporteur was examining the question of including other provisions which would be of assistance to the developing countries. He accordingly wished to place on record his desire to see included in the draft some provision which would avoid the possible inequitable consequences of a rigid application of the articles in all cases and to all States at different levels of economic development. One possibility would be to include a provision on the following lines: "A State may, when expressing its consent to be bound by a clause granting most-favoured-nation treatment, declare that such treatment is granted subject to specified conditions, or that it excludes one or more categories of favours granted to a third State."

107. Mr. HAMBRO said that he supported article 0 and understood that its intention was precisely to help the developing countries. His own country, Norway, had always been in the forefront of the so-called "rich" countries in the matter of assisting the developing countries. To make the legal position clear, however, he would like to see it stated in the commentary to article 0 that certain members of the Commission, while favouring

<sup>17</sup> Yearbook . . . 1973, vol. II, pp. 97-116.

<sup>18</sup> Yearbook . . . 1974, vol. II, Part One, pp. 117-134.

the article, had stressed the fact that it represented progressive development and not codification.

108. The commentary should also state that the adoption of article 0 was without prejudice to the consideration of customs unions and free trade areas, subjects in respect of which progressive development had gone further than in respect of developing countries. The question of customs unions and free trade areas was, in any case, just as relevant to the developing countries as to other countries. Customs unions were likely to play an important part in assisting developing countries in the future.

109. Mr. BILGE said he shared the view of Mr. Sette Câmara that, in the present instance, the square brackets were not being used for their usual purpose. He suggested that an asterisk be placed after article 0 and a foot-note added explaining that the contents of the article represented the minimum on which the Commission had so far been able to agree, but that other supplementary provisions would be included later.

110. Mr. KEARNEY said he supported the proposal by Mr. BILGE. There had not been any great difference of opinion in the Commission with regard to the substance of article 0, but it had been considered desirable to review its provisions at the Commission's next session.

111. Mr. USHAKOV said that, in accordance with the Commission's practice, square brackets were used to indicate the intention of re-examining a text on first reading.

112. Sir Francis VALLAT said that he was prepared to support Mr. Bilge's proposal on the understanding that the asterisk would be used to indicate that article 0 was subject to further discussion on first reading.

113. Mr. USHAKOV said that he was prepared to take the same view.

114. Mr. PINTO said that the Commission should indicate in some way that article 0 was being set aside as the first of a series of articles. That result could be achieved either by means of square brackets or by means of an asterisk.

115. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 0 and the proposal by Mr. Bilge to replace the square brackets by an asterisk and an explanation.

*It was so agreed.*

The meeting rose at 6 p.m.

## 1354th MEETING

*Tuesday, 22 July 1975, at 10.15 a.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

*Members present:* Mr. Ago, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

## Draft report of the Commission on the work of its twenty-seventh session

(A/CN.4/L.232/Add.3 and 4; A/CN.4/L.235)

*(resumed from the 1351st meeting)*

### Chapter II

#### STATE RESPONSIBILITY

*(continued)*

#### B. DRAFT ARTICLES ON STATE RESPONSIBILITY

1. The CHAIRMAN invited the Commission to continue consideration of chapter II of the draft report, paragraph by paragraph, commencing with the commentary to article 12.

#### *Commentary to article 12*

*(Conduct of organs of another State)*

*(A/CN.4/L.232/Add.3)*

#### *Paragraphs (1)-(3)*

*Paragraphs (1)-(3) were approved.*

#### *Paragraph (4)*

2. Mr. KEARNEY proposed the deletion, in the penultimate sentence of the English version, of the word "hypothetical" before the word "cases".

*Paragraph (4) was approved with that amendment.*

#### *Paragraph (5)*

3. Mr. KEARNEY proposed that, in the antepenultimate sentence, the words "prevail over" be replaced by a more suitable wording such as "outweigh"; also, that the words "on the grounds that" be replaced by the words "on such grounds as that".

4. Mr. AGO (Special Rapporteur) said that the first of those proposals did not involve any change in the French version.

5. Sir Francis VALLAT proposed that, in the English version of the last sentence, the words "appears diminished" be replaced by the words "appears less significant". The change would not affect the French original.

6. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved paragraph (5) with the changes proposed by Mr. Kearney and Sir Francis Vallat.

*It was so agreed.*

#### *Paragraph (6)*

7. Mr. USTOR said that the statement in the last sentence that the territorial State "was blamed only for a breach of its own obligations to protect third States" was not appropriate. The previous sentence made it clear that the territorial State was really being blamed for placing its territory at the disposal of others to commit wrongful acts, not for any failure "to protect third States".

8. Mr. AGO (Special Rapporteur) said that the reference was to obligations in respect of the protection of third States (*obligations de protection des Etats tiers*.)



9. Mr. USTOR said that there was a discrepancy between the statement in the last sentence and the statements which preceded it.

10. Mr. AGO (Special Rapporteur) suggested that the problem might be solved simply by dropping the concluding words "to protect third States" (*de protection des Etats tiers*).

*Paragraph (6) was approved with that amendment.*

*Paragraph (7)*

*Paragraph (7) was approved.*

*Paragraph (8)*

11. Mr. TSURUOKA suggested that the opening words of the penultimate sentence, "In all the last-mentioned cases", be replaced by a more suitable formula, such as "In all the above-mentioned cases".

12. Sir Francis VALLAT suggested that the words in question be replaced by the words "In all these cases".

*It was so agreed.*

*Paragraph (8), as amended, was approved.*

*Paragraphs (9) and (10)*

*Paragraphs (9) and (10) were approved.*

*Paragraph (11)*

13. Sir Francis VALLAT proposed that, in the first sentence of the English version, the words "conduct adopted in the territory of a State by organs of a foreign State" be replaced by the following more suitable wording: "conduct of organs of a foreign State in the territory of a State". He further proposed that a similar change be made wherever the formula "conduct adopted . . ." was used.

*It was so agreed.*

14. Mr. KEARNEY proposed that, in the fifth sentence, the words "in the presence of local authorities" be replaced by the words "in its territory", and that in the seventh sentence, the words "to disown" be replaced by the words "to dissociate itself from the conduct of".

*It was so agreed.*

*Paragraph (11), as amended, was approved.*

*Paragraph (12)*

15. Mr. KEARNEY proposed the deletion of the fourth, fifth, sixth and seventh sentences, commencing with the words "In a recent incident" and ending with the words "failure by the State against which the operation was directed?"

*It was so agreed.*

*Paragraph (12), as amended, was approved.*

*Paragraph (13)*

16. Mr. KEARNEY said that some of the examples given in the last sentence of the paragraph, of territories, spaces, zones, places or things under the jurisdiction of a State, were somewhat doubtful. Thus, the concept of an "exclusive economic zone" was still unsettled.

17. Sir Francis VALLAT suggested that all the examples be deleted, commencing with the words "for instance". The sentence would then conclude with the words "acts

committed in any other territory, space, zone, place or thing under the jurisdiction of such other State".

18. Mr. AGO (Special Rapporteur) said that, during the discussion of article 12 in the Commission, he had been specifically asked to include some examples in order to make the meaning more precise.

19. Mr. TSURUOKA said that he was in favour of retaining the examples, since they helped to make clearer and more precise the reference to certain areas and things under the jurisdiction of the State concerned, a reference which would otherwise be rather vague. Perhaps the difficulty could be removed by eliminating the example of the exclusive economic zone.

20. Mr. CASTAÑEDA said that the example of the exclusive economic zone was correct and should be retained with a clarification regarding its exact scope. The coastal State had exclusive jurisdiction in that zone only in respect of certain matters, such as conservation of fishery resources. In certain other matters, such as pollution control, its jurisdiction was concurrent with that of the other States concerned.

21. Mr. AGO (Special Rapporteur) said that it would be cumbersome to try to enter into such distinctions. He suggested that the words "in an exclusive economic zone" be dropped, leaving the last sentence of the paragraph otherwise unchanged.

22. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved paragraph (13) with the amendment suggested by the Special Rapporteur.

*It was so agreed.*

*Paragraph (14)*

*Paragraph (14) was approved.*

*Paragraph (15)*

23. Mr. ŠAHOVIĆ suggested that, in the second sentence, the word "circumstances" before the word "envisaged" be replaced by the word "situation". That change would only affect the English version.

24. Sir Francis VALLAT suggested that, in the third sentence of the English version, the word "either" be inserted after the word "exhibit" and that the word "else" be deleted.

*Paragraph (15) was approved with those amendments to the English version.*

*The commentary to article 12, as amended, was approved.*

#### *Commentary to article 12 bis [13]<sup>1</sup>*

(Conduct of organs of an international organization)  
(A/CN.4/L.232/Add.4)

25. The CHAIRMAN invited the Commission to consider the commentary to article 12 bis [13], paragraph by paragraph.

*Paragraphs (1) and (2)*

*Paragraphs (1) and (2) were approved.*

<sup>1</sup> The figures in square brackets represent the numbers of the articles as they appear in the report.

*Paragraph (3)*

26. Mr. KEARNEY said that he had serious doubts regarding the statement in the second sentence of paragraph (3). It appeared to suggest the possibility of holding a State responsible for decisions of a collective body of an international organization, such as the General Assembly of the United Nations. It also referred to the possibility of attaching responsibility to the "State of nationality of the person or persons constituting the organ in question". Nationality did not seem to be always a relevant factor. To give an example, the World Health Organization might send a team of doctors to deal with an epidemic and there would appear to be no valid reason for attributing any responsibility for the actions of such a team to the States of which the doctors happened to be nationals.

27. Mr. AGO (Special Rapporteur) said that the sentence in question rightly reserved a number of special situations. He had in mind particularly the presence of the United Nations armed forces in Cyprus; an internationally wrongful act committed by them could have involved either the responsibility of the United Nations or that of the United Kingdom, since the forces were composed of British troops. If a collective organ, such as the Security Council, were guilty of an internationally wrongful act, the act could be attributed either to the organization to which that organ was subordinate or to the States members of the organ. For that reason no hard and fast rule should be laid down concerning the question of the attribution of an internationally wrongful act to an international organization, since that question was more delicate than that of the attribution of an internationally wrongful act to a State.

28. Mr. KEARNEY said that he found the example rather alarming. The explanation just given would seem to indicate that the language was broad enough to cover a Security Council decision, and that a decision taken by the Council as such could give rise to the responsibility of the States members of the Security Council which had voted in favour of the decision. Any attempt to deal with such delicate matters would mean entering into vast problems which required much study before a position could be taken.

29. Mr. AGO (Special Rapporteur) said that the meaning of the sentence under discussion was that it was not always absolutely certain that the action of an organ of an international organization acting in that capacity would in all cases be attributed to the international organization as such. There was a possibility that it might be attributed to the States members of the organ. He had no intention of affirming that responsibility would attach to those States; he had merely indicated that the attribution would not always be to the international organization as such.

30. He had not been thinking so much of the Security Council, which would certainly not commit an internationally wrongful act, as of some lesser collective body.

31. Mr. USHAKOV said that it was he who had urged that no rule should be laid down on the question of the responsibility of international organizations. It should be indicated, as was in fact apparent from the passage

under consideration, that the Commission had not considered that question in detail. An internationally wrongful act of the Security Council could involve either its own responsibility, or that of its member States, or the joint responsibility of the Security Council and its member States.

32. Mr. KEARNEY said that he fully understood the position of Mr. Ushakov. In order to take it into account, he suggested that the sentence under discussion be reworded on the following lines: "On the other hand, the Commission is not at this point taking any position regarding the question whether responsibility can be attributed to States whose representatives are serving on a collective organ".

33. Mr. AGO (Special Rapporteur) said that one possible solution would be to delete the concluding portion of the sentence commencing with the words "rather than, for example . . .".

34. Mr. CASTAÑEDA said that he was not in favour of deleting that passage, which was very useful. He would prefer to use some wording which would make the meaning clearer in the English version and show that there were two possibilities: first, that the action might be attributed to the international organization as such; secondly, that the action might be attributed to the States members of the organ. The attribution to the organization or to the States concerned would depend on the circumstances of each case.

35. Mr. ŠAHOVIĆ said that he supported that solution.

36. Mr. AGO (Special Rapporteur) said that the sentence in question was not intended as a statement of the Commission's position; it merely envisaged certain conceivable cases.

37. Mr. ŠAHOVIĆ said that the following sentence clearly indicated that the Commission had in no way taken a position on the question of the attribution of an internationally wrongful act to an international organization.

38. Mr. AGO (Special Rapporteur) suggested that the sentence be reworded to read: "On the other hand, it is not always sure that the action of an organ of an international organization acting in that capacity will always be purely and simply attributed . . .".

39. Mr. KEARNEY suggested that the words "for example" be replaced by the words "in appropriate circumstances".

40. Sir Francis VALLAT suggested that it might help to overcome the difficulties which had arisen if the words "States members of the organ in question" were replaced by the words "States members of the organization".

41. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved paragraph (3) with the changes suggested by the Special Rapporteur, Mr. Kearney and Sir Francis Vallat.

*It was so agreed.*

*Paragraph (4)*

*Paragraph (4) was approved.*

*Paragraph (5)*

42. Mr. KEARNEY said that it was inaccurate to describe as "a belief" the proposition that the acts of the organs of an international organization were attributable to the organization. The sentence simply stated a generally accepted rule of international law to the effect that, if an organ of an organization committed a breach of an obligation assumed by the organization, the breach would involve the organization's responsibility.

43. Mr. AGO (Special Rapporteur) suggested that the opening words of the paragraph be amended to read: "the fact that acts of organs of an international organization . . .".

*Paragraph (5), as amended, was approved.*

*Paragraphs (6) and (7)*

*Paragraphs (6) and (7) were approved.*

*Paragraph (8)*

44. Mr. KEARNEY said that he was not satisfied with the last sentence of the paragraph, and more particularly with its opening words "Where the organization is not in that situation". Since the previous sentence concluded with the words "an international organization possessing an international personality of its own", the opening words of the last sentence suggested that there could exist international organizations without an international personality of their own.

45. Mr. AGO (Special Rapporteur) said that there did in fact exist international organizations which had no international personality. Nevertheless, he would be prepared to delete the last sentence.

46. Sir Francis VALLAT said that he was not in favour of deleting the last sentence, for the problem was a very real one and should not be ignored. A better solution would be to replace the opening words of the last sentence by a formula on the following lines: "If the organization were not considered to be in that situation . . .". Wording of that kind would have the advantage of indicating that the question was an open one, while at the same time recognizing the theoretical possibility of an international organization not having international personality.

47. Mr. CASTAÑEDA said that the difficulty arose perhaps from the use of the word "organization" in the opening words of the last sentence. A body which did not have international personality would not properly be an international organization. He suggested that the beginning of the sentence in question be amended to read: "Where the entity is not in that situation . . .".

48. Mr. HAMBRO said that an "international organization" was already clearly defined as "an intergovernmental organization" in paragraph 1 (i) of article 2 (Use of terms) of the Vienna Convention on the Law of Treaties, in paragraph 1 (l) of article 1 (Use of terms) of the 1975 Convention on the Representation of States in their Relations with International Organizations of a Universal Character, and in numerous drafts drawn up by the International Law Commission. In the circumstances, it did not seem necessary to discuss any other organizations.

49. Mr. AGO (Special Rapporteur) suggested that the phrase "Where the organization is not in that situation" be replaced by the phrase "In other situations". The international organizations referred to in that passage were clearly intergovernmental organizations but it should not be concluded therefrom that every international organization possessed an international personality separate from that of its member States. For many of them that was not the case.

50. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved paragraph (8), with the amendment to the opening phrase of the last sentence suggested by the Special Rapporteur.

*It was so agreed.*

*Paragraph (9)*

*Paragraph (9) was approved.*

*Paragraph (10)*

51. Mr. KEARNEY asked whether article 12 *bis* did in fact presuppose that the organ of the international organization in question acted in both the ways mentioned in the first sentence of paragraph (10). In his view, article 12 *bis* could presuppose that the organ performed functions common to two or more organizations and was not necessarily under the exclusive control of its parent organization.

52. Mr. AGO (Special Rapporteur) said he agreed with Mr. Kearney. He suggested that the words "and under its exclusive control" in the first sentence be replaced by the phrase "and not under the control of the territorial State".

*It was so agreed.*

53. Mr. KEARNEY suggested that the phrase "functions peculiar to the organization" in the first sentence be amended to read "functions of the organization".

*It was so agreed.*

*Paragraph (10), as amended, was approved.*

*Paragraph (11)*

54. Sir Francis VALLAT suggested that the word "genuine" in the first sentence of the paragraph be deleted.

*It was so agreed.*

55. Mr. SETTE CÂMARA said that, so far as he could recall, the "legal status of a United Nations peace-keeping force", to which reference was made in the third sentence of the paragraph, was always the same. What varied was the legal arrangements under which the force was employed.

56. Mr. AGO (Special Rapporteur) said that the legal status of United Nations forces had varied considerably from one case to another. In some cases they had been considered as national forces, and in others as United Nations forces, depending on the command under which they had been placed. Thus, in the case of the Congo, they had been considered as United Nations forces. In the case of Cyprus, on the other hand, they had been United Kingdom contingents under the United Nations

flag: the responsibility had therefore been a national responsibility.

57. Mr. SETTE CÂMARA said that the problem of peace-keeping forces was extremely complex. Under the Charter of the United Nations, peace-keeping forces could be constituted only in the way laid down in Article 43, but there had been cases in which that rule had not been followed. Efforts had long been in progress within the United Nations to establish rules for the operation of peace-keeping forces, but the situation in that respect was still nebulous. Since no one knew exactly what was meant by the expression "legal status" of a United Nations peace-keeping force, it would be preferable to replace the relevant part of the third sentence by a phrase such as "legal arrangements for the functioning of a United Nations peace-keeping force".

58. Mr. AGO (Special Rapporteur) said that it was not a question of stating what was the nature of the forces in question, because no definition had yet been worked out. It was simply a question of noting that the legal status of such forces could vary from one situation to another, because such variation had an effect on the attribution of responsibility.

59. Mr. SETTE CÂMARA said that he would not press his amendment, but the remarks of the Special Rapporteur only strengthened his doubts concerning the present language. In his view, responsibility for the acts of members of a United Nations peace-keeping force lay not with the State which had contributed the contingent involved but, since the troops were under the United Nations flag, with the United Nations itself.

*Paragraph (11), as amended, was approved.*

*Paragraphs (12) and (13)*

*Paragraphs (12) and (13) were approved.*

*The commentary to article 12 bis [13], as amended, was approved.*

#### *Chapter IV*

##### THE MOST-FAVOURLED-NATION CLAUSE

##### A. INTRODUCTION

60. The CHAIRMAN invited the Commission to consider the introduction to chapter IV of its draft report (A/CN.4/L.235), paragraph by paragraph.

##### 1. *Summary of the Commission's proceedings* (paragraphs 1-24)

*Paragraphs 1-8*

*Paragraphs 1-8 were approved.*

*Paragraph 9*

61. Mr. BILGE suggested that the words "Owing to lack of time", at the beginning of paragraph 9, be deleted.

*It was so agreed.*

*Paragraph 9, as amended, was approved.*

*Paragraphs 10-24*

*Paragraphs 10-24 were approved.*

##### 2. *Scope of the draft articles* (paragraphs 25-28)

*Paragraphs 25 and 26*

*Paragraphs 25 and 26 were approved.*

*Paragraph 27*

62. Mr. SETTE CÂMARA said it seemed inappropriate to retain the phrase "in the field of international trade", which appeared in the final sentence of the paragraph, since the Commission had decided to delete from draft article 0, to which the paragraph referred, the restrictive phrase "trade advantages".

63. Mr. USTOR (Special Rapporteur) said that the deletion to which Mr. Sette Câmara referred had not changed the essence of article 0, the scope of which was still governed by the reference in that article to the "generalized system of preferences". Accordingly, he thought that the phrase "in the field of international trade", which had appeared in a similar context in the report of the Commission on the work of its twenty-fifth session, could be retained.

64. Mr. USHAKOV suggested that the phrase to which Mr. Sette Câmara had referred be amended to read "in the field of economic relations".

*It was so agreed.*

*Paragraph 27, as amended, was approved*

*Paragraph 28*

*Paragraph 28 was approved.*

##### 3. *The most-favoured-nation clause and the national treatment clause* (paragraphs 29-32)

*Paragraphs 29-31*

*Paragraphs 29-31 were approved.*

*Paragraph 32*

65. Mr. KEARNEY said that the Commission should also mention in the paragraph the fact that it had decided to include in its draft what were now articles 13 and 14, concerning the interrelationship between the most-favoured-nation clause and national treatment.

66. Mr. USTOR (Special Rapporteur) said that he would amend the paragraph accordingly.

*Paragraph 32, as amended, was approved.*

##### 4. *The most-favoured-nation clause and the principle of non-discrimination* (paragraphs 33-36)

*Paragraphs 33-36*

*Paragraphs 33-36 were approved.*

##### 5. *The most-favoured-nation clause and the different levels of economic development* (paragraphs 37-39)

*Paragraphs 37 and 38*

*Paragraphs 37 and 38 were approved.*

*Paragraph 39*

67. Mr. BILGE suggested that, in the second sentence, the words "in the sphere of international trade" be replaced by the words "in the sphere of economic relations", in conformity with the Commission's decision on paragraph 27.

*It was so agreed.*

*Paragraph 39, as amended, was approved.*

68. Mr. USTOR (Special Rapporteur) said that he would shortly be circulating the text of three paragraphs to be added to the introduction to chapter IV of the report.<sup>2</sup> Those paragraphs would deal respectively with the relationship between the draft articles on the most-favoured-nation clause and the Vienna Convention on the Law of Treaties, and the residual and the general character of the rules contained in the draft articles.

#### B. DRAFT ARTICLES ON THE MOST-FAVOURED-NATION CLAUSE

##### *Commentary to articles 6 [8]*

(Unconditionality of most-favoured-nation clauses), 6 bis [9] (Effect of an unconditional most-favoured-nation clause) and 6 ter [10] (Effect of a most-favoured-nation clause conditional on material reciprocity) (A/CN.4/L.235/Add.2)

69. The CHAIRMAN invited the Commission to examine the commentary to articles 6 [8], 6 bis [9] and 6 ter [10] paragraph by paragraph.

##### *Paragraphs (1)-(10)*

*Paragraphs (1)-(10) were approved.*

##### *Paragraph (11)*

70. Mr. KEARNEY proposed that the phrase "for the purposes of international commerce" be added to the end of the second sentence of the paragraph, since conditional most-favoured-nation clauses still existed in consular treaties.

71. Mr. USTOR (Special Rapporteur) said that the most-favoured-nation clauses found in consular treaties were conditional on material reciprocity and were thus not of the type referred to in paragraph (11). He suggested that, in order to clarify the paragraph in the way desired by Mr. Kearney, the first sentence be amended to read "Because of the general abandonment of this conditional form of the clause, it is now . . .".

*It was so agreed.*

*Paragraph (11) was approved with that amendment.*

##### *Paragraphs (12)-(14)*

*Paragraphs (12)-(14) were approved.*

##### *Paragraph (15)*

72. Mr. KEARNEY proposed that the effect of the Hull interpretation be made clear by the addition at the end of the paragraph of a sentence reading "The consequence of this change in interpretation was to produce a system in which conditional treatment was merged to a certain extent with unconditional treatment."

<sup>2</sup> See 1356th meeting, para. 1.

73. Mr. USTOR (Special Rapporteur) said that he would like time to consider that proposal.

*Paragraph (15) was approved, subject to the decision of the Special Rapporteur, concerning the proposal by Mr. Kearney.*

##### *Paragraphs (16)-(22)*

*Paragraphs (16)-(22) were approved.*

##### *Paragraph (23)*

74. Mr. KEARNEY suggested that the word "completely" be deleted from the second sentence of the paragraph.

*It was so agreed.*

*Paragraph (23), as amended, was approved.*

##### *Paragraphs (24)-(31)*

*Paragraphs (24)-(31) were approved.*

##### *Paragraph (32)*

75. Mr. KEARNEY suggested that the mention of his name should be replaced by the expression "one member", in accordance with the practice of the Commission.

*It was so agreed.*

*Paragraph (32), as amended, was approved.*

##### *Paragraphs (33)-(43)*

*Paragraphs (33)-(43) were approved.*

*The commentary to articles 6 [8], 6 bis [9] and 6 ter [10] was approved.*

The meeting rose at 1 p.m.

## 1355th MEETING

*Wednesday, 23 July 1975, at 10.10 a.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

*Members present:* Mr. Ago, Mr. Bedjaoui, Mr. Castañeda, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

### Draft report of the Commission on the work of its twenty-seventh session

(A/CN.4/L.232 and Add.5 and 6; A/CN.4/L.233 and Add.1-3)

*(continued)*

### Chapter III

#### SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

##### A. INTRODUCTION

1. The CHAIRMAN invited the Commission to consider section A of chapter III of its draft report (A/CN.4/L.233/Add.2).

2. Mr. BEDJAOU (Special Rapporteur) said that the portion of the draft report contained in document A/CN.4/L.233/Add.2 was, in substance, a reproduction of the Commission's 1973 report<sup>1</sup> and could therefore be approved as a whole.

3. There were, however, a number of changes in paragraph 22 to which he wished to draw the Commission's attention. Acceptance of that paragraph would mean that, at the request of the Special Rapporteur, the Commission would have to forgo consideration of certain questions in order to devote itself to the study of others, so as to be able to complete the draft articles on the succession of States in respect of matters other than treaties within a reasonable period of time, in accordance with General Assembly resolution 3315 (XXIX), which recommended that the Commission should proceed with the preparation of the draft on a priority basis. After having limited its study to public property and, more particularly to State property, the Commission would have to take up the question of public debts and, more especially, of State debts. Consequently, while reserving the possibility of considering other problems relating to public property and debts, the Commission would, in future, confine its study to State property and debts. It would then have studied three important questions: treaties, State property and State debts.

4. He also drew the Commission's attention to the third sentence of paragraph 14 concerning the question of rights in respect of the authority to grant concessions. That question was dealt with in draft article 10, which the Commission had provisionally set aside. The few lines relating to rights in respect of the authority to grant concessions which now appeared in paragraph 14 had been included to take account of the concern expressed by certain members of the Commission, particularly Mr. Pinto.

5. Mr. KEARNEY said he wondered whether it might not be better to postpone a decision on paragraph 22 until study of the report of the Planning Committee had been completed. It was not so much that there was any substantial difference between the schedule for study of the topic proposed by the Planning Committee and that outlined by the Special Rapporteur in paragraph 22, but rather that the Planning Committee had suggested that the question of public property should be studied before that of public debts.

6. Mr. BEDJAOU (Special Rapporteur) said that there was no question in paragraph 22 of tying the Commission's hands in respect of its future work. It was simply a matter of an "intention" of the Special Rapporteur. It was for the Commission to "decide later in what order the other questions concerning public property, and the other matters included in the topic" were to be considered. Personally, he could not see any contradiction between the intention announced by the Special Rapporteur in paragraph 22 and the proposal of the Planning Committee. Accordingly, he could see no difficulty in approving paragraph 22.

*Section A of chapter III was approved.*

<sup>1</sup> Yearbook . . . 1973, vol. II, pp. 198-209, document A/9010/Rev.1, paras. 50-92.

## B. DRAFT ARTICLES ON SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

### *Commentary to article 9*

(General principle of the passing of State property)  
(A/CN.4/L.233)

7. The CHAIRMAN invited the Commission to consider the commentary to article 9 paragraph by paragraph.

#### *Paragraphs (1)-(4)*

*Paragraphs (1)-(4) were approved.*

#### *Paragraph (5)*

8. Sir Francis VALLAT suggested that the words "and also", which made it appear that article 9 was more rigid than was intended, be deleted from the second sentence of the paragraph.

9. Mr. BEDJAOU (Special Rapporteur) said that the phrase "and also applies" was less rigid than it seemed, for, as he had explained in paragraphs (2) and (3) of his commentary, the rule stated in article 9 was accompanied by two saving clauses: "subject to the provisions of the articles of the present Part" and "unless otherwise agreed or decided".

*Paragraph (5) was approved.*

#### *Paragraphs (6)-(10)*

*Paragraphs (6)-(10) were approved.*

*The commentary to article 9 was approved.*

### *Commentary to article [11]*

[Passing of debts owed to the State]

(A/CN.4/L.233/Add.1)

10. The CHAIRMAN invited the Commission to consider the commentary to article [11] paragraph by paragraph.

11. Mr. BEDJAOU (Special Rapporteur) said that the whole of article 11 had been placed within square brackets, so that it did not commit the Commission. Some members had contended that certain State claims did not automatically pass to the successor State. He had shown, however, that State claims passed to the successor State when they arose from the activity or the sovereignty of the predecessor State in the territory. It was the link between the claim and the territory which justified the passing of the claim to the successor State and avoided the passing to the successor State of claims which had no connexion with the territory.

#### *Paragraphs (1) and (2)*

*Paragraphs (1) and (2) were approved.*

#### *Paragraph (3)*

12. Mr. KEARNEY, referring to the last sentence of the paragraph, said that the exact meaning of the phrase "true sovereignty", or of its presumed corollary, "false" sovereignty, was not clear to him. Moreover, the sentence suggested that General Assembly resolutions were, as a matter of course, capable of transforming "true sovereignty" into something else, whereas that was only exceptionally so, as in the Namibia case.

13. Mr. BEDJAOUI (Special Rapporteur) suggested that the word "true" be deleted.

14. Mr. AGO suggested that the phrase in question be amended to read "did not have sovereignty", in order to avoid giving the impression that the predecessor State had had but had not exercised sovereignty over the territory.

15. Mr. USHAKOV proposed that the second half of the final sentence, following the words "in particular", be replaced by the words "in dependent territory situations".

16. Sir Francis VALLAT said that he wished to make it perfectly clear that he did not accept the inevitable implication of Mr. Ushakov's proposal that every territory to which the label "dependent" could be attached was necessarily not under the sovereignty of the parent State. Such a conclusion would be very dangerous for the Commission and should be avoided. That there were dependent territories over which the parent State did not have sovereignty was generally accepted, but it was not accepted as a complete and absolute proposition that a parent State could not have sovereignty over a dependent territory.

17. Mr. BEDJAOUI (Special Rapporteur) proposed that, as a compromise, the last sentence of paragraph (3) be amended to read: "Obviously, only the second condition can apply in any case in which the predecessor State did not have sovereignty over the territory to which the succession of States relates and in particular in certain situations concerning dependent territories".

*Paragraph (3) was approved with that amendment.*

#### *Paragraph (4)*

18. Mr. KEARNEY suggested that the paragraph should make clear at what date the registration taxes in question had become due. He assumed that the taxes had been owed to Savoy.

19. Mr. BEDJAOUI (Special Rapporteur) said it seemed hardly necessary to state the date when the registration taxes had become due, since it was clear that it must have been prior to the date on which the succession of States had occurred. He suggested that the words "to the predecessor State" be inserted after the word "owed" in the second sentence.

*It was so agreed.*

20. Mr. CASTAÑEDA said he wondered whether a distinction should not be made between ordinary claims which passed to the successor State, and certain duties, dues or taxes payable for services provided by the predecessor State, the passing of which to the successor State was not justified.

21. Mr. BEDJAOUI (Special Rapporteur) said that article 11 was based precisely on that understanding. The article did not relate to every kind of claim, since the debts owed to the predecessor State did not pass to the successor State in their entirety. The only claims which did pass were those which were linked with the territory, by reason either of the activity or of the sovereignty of the predecessor State in the territory.

22. Mr. AGO, referring to the case mentioned in paragraph (4), said it was true, as the *Cour de Cassation* had held, that the petitioner was not released from certain debts which he owed to the tax authorities of the predecessor State under the laws of the predecessor State. It should be made clear, however, who was the creditor from whose claim he was not released.

23. Mr. BEDJAOUI (Special Rapporteur) said that, in the case mentioned in paragraph (4), the French Government had argued that the disappearance of Sardinian sovereignty from Savoy did not mean the disappearance of Sardinian law relating to registration taxes and that the petitioner was liable to the French Treasury for those taxes.

24. Mr. AGO said that he did not agree with the Special Rapporteur's conclusion. It was true that, under the French Empire, Savoy had continued to be subject to certain laws inherited from the Kingdom of Sardinia and that those laws, which from then on had become French laws, had continued to be applied. But that did not justify the conclusion that, if a private individual had omitted to pay to the Kingdom of Sardinia, before the succession of States, a tax relating to a period prior to the succession, that tax was transferable to the successor State. The question was whether a debt contracted by a private individual, before the succession of States, in respect of services provided to him by the Sardinian State, automatically became a debt owed to the French Empire. That was a question which had nothing to do with continuity of laws.

25. Mr. BEDJAOUI (Special Rapporteur) said that, in the case mentioned in paragraph (4), the debt had arisen before the transfer of the territory but had not yet been settled by the time the change of sovereignty had occurred. The petitioner had claimed that he had been released from his obligation by the disappearance of Sardinian law which, according to him, had followed automatically from the disappearance of Sardinian sovereignty in Savoy. The answer to his claim had been that not only had Sardinian law continued to apply, but that the debt owed to the predecessor State which had not been paid, was now payable to the successor State.

26. Mr. CASTAÑEDA said that, in the light of Mr. Ago's comments, he wondered whether the rule laid down in article 11 was correct. In the case mentioned in paragraph (4), the debt was bound to pass to the successor State since it related to registration taxes which were linked with the sovereignty and the activity of the predecessor State in the territory. In the case of taxes payable for services provided by the predecessor State, however, it was the predecessor State which should remain the creditor, since it was to that State that the taxes were owed. A distinction should, therefore, be made between debts linked to the sovereignty and activity of a State in the territory and certain special debts—duties, taxes, or dues—payable in respect of a service provided by the predecessor State.

27. Mr. BEDJAOUI (Special Rapporteur) said that Mr. Castañeda's comment had been at the heart of the debate in the Commission on article 11.



28. Mr. AGO had referred to the case in which a predecessor State had made a loan to a region which subsequently separated from the State.<sup>2</sup> He (the Special Rapporteur) had pointed out that in such a case there was no link between the claim and the territory to which the succession of States related and that, as a result, the debt did not pass.<sup>3</sup> He had also pointed out, however, that the predecessor State could not continue to collect certain debts—particularly certain taxes—because it had lost its *imperium* over the territory.<sup>4</sup> It was for that reason that he had proposed the rule in article 11, which applied especially to tax debts. The question was far from settled because, in the view of certain members of the Commission such as Mr. Ushakov, tax debts which had been due to the predecessor State remained due to that State. The Commission would therefore have to take up the question again at some later stage.

29. Mr. USHAKOV said it should not be overlooked that article 11 had been placed within square brackets. Although, in his own opinion, the article did not belong to the succession of States, he thought that the Commission should not reopen the discussion on the substance.

30. Mr. TSURUOKA said it would be better to mention at the outset the reasons why the Commission had placed article 11 between square brackets, rather than in paragraphs (10) and (11).

31. Mr. BEDJAOUI (Special Rapporteur) said that, before giving the reasons why the article had been placed in square brackets, it was essential to explain the contents of the article.

*Paragraph (4), as amended, was approved.*

#### *Paragraph (5)*

32. Mr. KEARNEY suggested that it would be clearer if the phrase “on 28 October 1918” were inserted after the word “existence” at the end of the first clause in the first sentence of the paragraph.

*It was so agreed.*

33. Mr. KEARNEY said that the circumstances surrounding the decision in the Territory of Hlučín case were not clear. It was possible to construe the last sentence of the paragraph as meaning that the Czechoslovak Supreme Court had held that the debt remained due even though the duty had been paid to the German Treasury prior to the transfer of the territory. If that construction was correct, the case should not be cited, since the decision was at variance with the rule the Commission had adopted in draft article 11.

34. Mr. BEDJAOUI (Special Rapporteur) said he agreed that the Territory of Hlučín case, as outlined in the 1963 *Yearbook*,<sup>5</sup> was not very clear. He therefore proposed that all references to the case in paragraph (5) be deleted.

*It was so agreed.*

<sup>2</sup> See 1329th meeting, para. 14.

<sup>3</sup> *Ibid.*, para. 17.

<sup>4</sup> See 1322nd meeting, para. 3.

<sup>5</sup> *Yearbook ... 1963*, vol. II, p. 135, document A/CN.4/157, paras. 355-356.

35. Sir Francis VALLAT said he could appreciate that many members of the Commission had doubts about the value of the precedents cited, since they were decisions of national courts in cases where the nation concerned had been the party in interest. Such doubts should not, however, be used as justification for any redrafting at the current stage of article 11, which, it should not be forgotten, appeared in square brackets.

*Paragraph (5), as amended, was approved.*

#### *Paragraph (6)*

36. Sir Francis VALLAT proposed that the names of the predecessor and successor States should be given in the paragraph.

*It was so agreed.*

*Paragraph (6), as amended, was approved.*

#### *Paragraph (7)*

37. Sir Francis VALLAT said it was an exaggeration to employ the word “confirmed” in the first sentence of the paragraph. He would suggest that the first part of that sentence be amended to read: “The principles which appear from these decisions may be supported by the provisions of several agreements . . .”.

*It was so agreed.*

*Paragraph (7), as amended, was approved.*

#### *Paragraphs (8)-(10)*

*Paragraphs (8)-(10) were approved.*

*The commentary to article [11] was approved.*

#### *Commentary to article 3, sub-paragraph (e)*

*(Use of terms) (A/CN.4/L.233/Add.3)*

*The commentary to article 3, sub-paragraph (e), was approved.*

#### *Commentary to article X*

*(Absence of effect of a succession of States on third State property) (A/CN.4/L.233/Add.3)*

*The commentary to article X was approved.*

*Section B, as amended, was approved.*

*Chapter III of the draft report, as a whole, as amended, was approved.*

## *Chapter II*

### *STATE RESPONSIBILITY*

*(resumed from the previous meeting)*

#### *B. DRAFT ARTICLES ON STATE RESPONSIBILITY (continued)*

38. The CHAIRMAN invited the Commission to resume consideration of chapter II of the draft report, paragraph by paragraph, starting with the commentary to article 12 *ter* [14].

*Commentary to article 12 ter [14]<sup>6</sup>*  
 (Conduct of organs of an insurrectional movement)  
 (A/CN.4/L.232/Add.5)

*Paragraph (1)*

39. Mr. KEARNEY proposed that the words "in the extreme case" towards the end of the second sentence should be deleted, as their meaning was not clear.

40. Mr. AGO (Special Rapporteur) said that the original French was *à la rigueur*. He suggested that the expression be deleted wherever it occurred.

*It was so agreed.*

*Paragraph (1), as amended, was approved.*

*Paragraph (2)*

41. Mr. KEARNEY suggested that, in the first sentence, the words "is often dealt with" should be replaced by the words "is often treated". That change would make it clear that it was writers who often dealt with the two subjects in conjunction, not that the subjects arose together in practice.

*It was so agreed.*

42. Mr. AGO (Special Rapporteur) pointed out that the amendment did not affect the French version.

*Paragraph (2), as amended, was approved.*

*Paragraph (3)*

43. Mr. KEARNEY said he had some misgivings regarding the use of the expression "a genuine insurrectional movement", in the third sentence, and the suggestion in that sentence that the expression was acquiring a new meaning in international law. The question of insurrectional movements had a long history in the jurisprudence of international law and there had been no significant change recently in that jurisprudence.

44. Mr. AGO (Special Rapporteur) suggested that the English version should be amended to read: "... a real insurrectional movement, in the sense which this term has in international law ...".

45. Sir Francis VALLAT proposed that the word "genuine"—or "real" in the Special Rapporteur's suggested wording—be dropped. The intended meaning was rendered quite clearly by the expression "an insurrectional movement, in the sense which this term has in international law".

*Paragraph (3) was approved with that amendment.*

46. Mr. SETTE CÂMARA said he noted that the expression "a genuine insurrectional movement" was also used elsewhere, in particular at the end of the first sentence of paragraph (2). He suggested that it be replaced throughout the text by the words "an insurrectional movement".

*It was so agreed.*

*Paragraphs (4)-(11)*

*Paragraphs (4)-(11) were approved.*

<sup>6</sup> The figures in square brackets represent the numbers of the articles as they appear in the report.

*Paragraph (12)*

47. Mr. KEARNEY said he noted the reference in the fifth sentence to the fact that the authorities of a State had "failed to punish adequately the perpetrators of the injurious acts committed" during a struggle with an insurrectional movement. Paragraph (12) appeared to him to place exaggerated emphasis on the responsibility of the territorial State on the grounds that it had failed to punish adequately the wrongdoers. In actual fact, in almost all the examples which were given in the commentary, international responsibility was attached to a State because of the failure by its authorities to prevent the occurrence of an internationally wrongful act rather than because of their failure to punish the wrongdoers.

48. A related problem arose in connexion with the fourth sentence of paragraph (26) which read: "Another alleged exception to the general principle which seems to call for a negative conclusion is the attribution to a State of the wrongful conduct of an unsuccessful insurrectional movement in the event of a grant of amnesty by the State concerned".

49. Mr. AGO (Special Rapporteur) said that he now regretted his decision to eliminate from the commentary the reference to certain cases which were of interest in connexion with the point raised by Mr. Kearney. In particular, there was a typical case in which the claimant was the United States and where the respondent State had been blamed for granting an amnesty to the perpetrator of an internationally wrongful act. The fact that the wrongdoer had been released after a short period of imprisonment instead of serving his full sentence had been considered as a failure to punish him adequately and hence as a breach of international law.

50. A government was always free to grant an amnesty for offences against internal law. It could not, however, grant an amnesty for internationally wrongful acts. The distinction was one on which much emphasis was placed by authoritative writers.

51. It was worth bearing in mind that, during the struggle against an insurrectional movement, it was extremely difficult for a State to prevent internationally wrongful acts from being committed by the insurgents. It was, however, comparatively easy for the State to punish the wrongdoers after the insurrection had been overcome. It should also be remembered that the first duty of the State was to endeavour to prevent the commission of an offence; if it did not succeed in preventing the offence, it had a duty to punish the offenders.

52. Mr. KEARNEY suggested that a reference be included in the commentary to the case mentioned by the Special Rapporteur.

53. Mr. AGO (Special Rapporteur) said that he was prepared to do that.

54. Sir Francis VALLAT said he agreed that the commentary placed undue emphasis on failure to punish and not enough emphasis on actual negligence with regard to prevention in the course of the insurrectional movement.

55. He suggested that, in the fifth sentence, the words "putative negligence" be replaced in the English version by the words "alleged failure".

*It was so agreed.*

*Paragraph (12), as amended, was approved.*

*Paragraph (13)*

56. Sir Francis VALLAT suggested the deletion, in the first sentence, of the word "moreover".

*It was so agreed.*

*Paragraph (13), as amended, was approved.*

*Paragraphs (14) and (15)*

*Paragraphs (14) and (15) were approved.*

*Paragraph (16)*

57. Sir Francis VALLAT suggested that the opening words of the paragraph "The principle of the non-responsibility of the State for damage . . ." should be reworded in the English version to read: "The principle that the State is not responsible for damage . . .".

58. Mr. AGO (Special Rapporteur) proposed that the words "The principle of" be deleted.

*Paragraph (16), was approved with that amendment.*

*Paragraphs (17)-(30)*

*Paragraphs (17)-(30) were approved.*

*Paragraph (31)*

59. Mr. AGO (Special Rapporteur) said that the second sentence should be amended by deleting the words "The principle of" before the words "the non-attribution to a State . . .".

60. Mr. KEARNEY said that a correction was necessary to the English version of the third sentence, where the word "not" should be inserted after the opening words "the purpose of this clause is . . .".

*Paragraph (31) was approved with those changes.*

*The commentary to article 12 ter [14], as amended, was approved.*

*Commentary to article 13 [15]*

(Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State)  
(A/CN.4/L.232/Add.6)

*Paragraph (1)*

61. Mr. KEARNEY suggested that, in the second sentence of the English version, the phrase "against the authority of which it rose up" be reworded to read "against whose authority it rebelled".

*Paragraph (1) was approved with that amendment.*

*Paragraph (2)*

62. Mr. KEARNEY suggested that, in the second sentence of the English version, the words "according as" be replaced by the words "according to whether".

*Paragraph (2) was approved with that amendment.*

*Paragraphs (3)-(5)*

*Paragraphs (3)-(5) were approved.*

*Paragraph (6)*

63. Sir Francis VALLAT said that the second part of the third sentence should read: "... without any break in the continuity . . .".

64. Mr. KEARNEY said that the English version of the third sentence needed to be redrafted.

*Paragraph (6) was approved on that understanding.*

*Paragraph (7)*

65. Mr. KEARNEY said he had some misgivings regarding the content of the last sentence of paragraph (7). The question whether an insurrectional movement replaced the structures of the State in such a manner as to amount to the establishment of a new State was one on which very different views were strongly held both by writers and by governments. And since it was not directly connected with State responsibility, it was undesirable to speculate on it. The same issue was dealt with in the second part of the concluding sentence of paragraph (21) of the commentary, giving rise to the same difficulties. The inclusion of those two passages made it appear as though the Commission were adopting a theory which it would not necessarily have endorsed had it held a thorough discussion on what was a rather confused subject.

66. Mr. AGO (Special Rapporteur) said that he agreed with Mr. Kearney's remarks. He suggested that the concluding portion of the last sentence of paragraph (7) be deleted and the whole sentence redrafted to read: "It would no longer be a matter of attributing to the State the conduct of organs of a previous government of the same State but rather a question involving the existence of two different States".

*Paragraph (7) was approved with that amendment.*

*Paragraph (8)*

67. Mr. KEARNEY said he had doubts about the content of the last sentence, which suggested that the difficulties experienced by an insurrectional movement could be accepted as extenuating circumstances when determining the international responsibility of the State.

68. Mr. AGO (Special Rapporteur) said that the sentence had been included in order to cover the comment of two members, during the discussion on article 13, that an insurrectional movement sometime experienced difficulties in abiding by the rules of international law.

69. Mr. KEARNEY said that very serious issues would be raised if a general statement were made to the effect that such difficulties constituted extenuating circumstances. He was thinking, in particular, of the problem of war crimes, for which no such excuse could be attempted.

70. Mr. AGO (Special Rapporteur) suggested that the last sentence of paragraph (8) be deleted.

*It was so agreed.*

*Paragraph (8), as amended, was approved.*

*Paragraphs (9)-(14)**Paragraphs (9)-(14) were approved.**Paragraph (15)*

71. Sir Francis VALLAT suggested that, in the second sentence, the words "stated flatly" in the English version should be replaced by the words "stated clearly".

*Paragraph (15) was approved with that amendment.**Paragraphs (16)-(20)**Paragraphs (16)-(20) were approved.**Paragraph (21)*

72. Mr. AGO (Special Rapporteur), referring to Mr. Kearney's comments on paragraph (7), suggested that the concluding part of the last sentence of paragraph (21) beginning with the words "in which the success of a revolutionary movement might involve a change . . ." be deleted.

*Paragraph (21) was approved with that amendment.**Paragraph (22)**Paragraph (22) was approved.*

*The commentary to article 13 [15], as amended, was approved.*

The meeting rose at 1.10 p.m.

**1356th MEETING**

Wednesday, 23 July 1975, at 4.45 p.m.

*Chairman:* Mr. Abdul Hakim TABIBI

*Members present:* Mr. Ago, Mr. Bedjaoui, Mr. Castañeda, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

**Draft report of the Commission on the work of its twenty-seventh session**

(A/CN.4/L.235 and Corr.1 and Add.1, and Add.3-6)

(continued)

*Chapter IV*

THE MOST-FAVOURLED-NATION-CLAUSE

(resumed from the 1354th meeting)

1. The CHAIRMAN invited the Commission to resume consideration of chapter IV of the draft report.

A. INTRODUCTION (A/CN.4/L.235/Corr.1) (continued)

*Paragraphs (40)-(42)**Paragraphs (40)-(42) were approved.*

*The introduction to chapter IV of the draft report, as amended, was approved.*

B. DRAFT ARTICLES ON THE MOST-FAVOURLED-NATION CLAUSE (A/CN.4/L.235/Add.1) (continued)

2. The CHAIRMAN said that section B of chapter IV included the text of the draft articles on the most-favoured-nation clause already adopted by the Commission at the 1352nd and 1353rd meetings and the commentaries to those articles.<sup>1</sup>

*Commentary to article 6 ter/bis [13]<sup>2</sup>*

(Irrelevance of the fact that treatment is extended gratuitously or against compensation) (A/CN.4/L.235/Add.3)

3. The CHAIRMAN invited the Commission to resume its consideration, paragraph by paragraph, of the commentaries to the draft articles on the most-favoured-nation clause, starting with the commentary to article 6 ter/bis [13].

*Paragraph (1)*

4. Mr. KEARNEY suggested that, in the concluding phrase of the last sentence of paragraph (1), the words "do the rights of the beneficiary State depend on whether the promises of the granting State were made . . .?" should be reworded to read: "are rights of the beneficiary State affected by whether the promises of the granting State to a third State were made . . .?".

*It was so agreed.*

*Paragraph (1), as amended, was approved.*

*Paragraphs (2)-(6)*

*Paragraphs (2)-(6) were approved.*

*Paragraph (7)*

5. Mr. USTOR (Special Rapporteur) said that the Latin expression "*cadit quaestio*" should be replaced by the words "the question does not arise".

*Paragraph (7) was approved with that amendment.*

*The commentary to article 6 ter/bis [13], as amended, was approved.*

*Commentary to article 6 quater [20]*

(The exercise of rights arising under a most-favoured-nation clause and compliance with the laws of the granting State) (A/CN.4/L.235/Add.3)

6. Mr. TSURUOKA said that the commentary to article 6 quater dealt only with the unconditional most-favoured-nation clause. Perhaps a commentary should be added on the subject of the conditional most-favoured-nation clause.

7. Mr. USTOR (Special Rapporteur) said that paragraph (6) explained that, although the commentaries and precedents referred to cases of unconditional clauses, the rule proposed in article 6 quater applied also to cases where the clause was coupled with the requirement of material reciprocity.

<sup>1</sup> The commentary to articles 6 [8], 6 bis [9] and 6 ter [10] was approved at the 1354th meeting.

<sup>2</sup> The figures in square brackets represent the numbers of the articles as they appear in the report.

8. Mr. TSURUOKA said that there might be some advantage in making that point in paragraph (1).

9. Mr. USTOR (Special Rapporteur) said that he preferred to keep the explanation in paragraph (6).

*Paragraph (1) was approved.*

*Paragraph (2)*

*Paragraph (2) was approved.*

*Paragraph (3)*

10. Mr. KEARNEY said that the sixth sentence, which read: "The petitioner was the consul-general of the Kingdom of Italy", and the sentence which followed it, should be amended to read: "The consul-general of the Kingdom of Italy filed a petition to administer the estate. The public administrator, though duly served, did not appear". In the sentence which followed, the words "the facts as to" should be dropped as redundant.

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

*Paragraph (4)*

*Paragraph (4) was approved.*

*Paragraph (5)*

11. Mr. USTOR (Special Rapporteur) said that footnote 9 would be expanded to include a reference to the Swiss Cow case, which was mentioned in paragraphs (20) and (21) of the commentary to articles 7 and 7 bis.

*Paragraph (5) was approved with that amendment.*

*Paragraph (6)*

*Paragraph (6) was approved.*

*Paragraphs (7) and (8)*

*Paragraphs (7) and (8) were approved.*

*The commentary to article 6 quater [20], as amended, was approved.*

*Commentary to articles 7 [11]*

*(Scope of rights under a most-favoured-nation clause  
and 7 bis [12])*

*(Entitlement to rights under a  
most-favoured-nation clause)  
(A/CN.4/L.235/Add.4 and Corr.1)*

*Paragraphs (1) and (2)*

*Paragraphs (1) and (2) were approved.*

*Paragraph (3)*

12. Mr. KEARNEY said it was desirable to follow a uniform practice with regard to the use of quotation marks. They should be avoided wherever, as was the case in paragraph (3), the text of the passage quoted was indented.

13. Mr. HAMBRO suggested that, in the quotation from the award of the Commission of Arbitration in the *Ambatielos* case, wherever the expression "the Commission" appeared, it should be expanded to read: "the Commission [of Arbitration]" so as to avoid any possible confusion with the International Law Commission.

14. The CHAIRMAN said that the Secretariat had taken note of those useful suggestions and would apply them throughout the text of the commentaries.

*Paragraph (3) was approved.*

*Paragraphs (6)-(8)*

*Paragraphs (6)-(8) were approved.*

*Paragraph 9*

15. Mr. USTOR (Special Rapporteur) suggested that paragraph (9) be deleted.

*It was so agreed.*

*Paragraphs (10) and (11)*

*Paragraphs (10) and (11) were approved.*

*Paragraph (12)*

16. Mr. KEARNEY suggested that, in the penultimate sentence, the words "from the principle of sovereignty and independence of States" be replaced by the wording: "from the general principles of treaty interpretation".

*It was so agreed.*

*Paragraph (12), as amended, was approved.*

*Paragraph (13)*

17. Mr. USTOR (Special Rapporteur) said that the passage in brackets at the end of the third sentence should be deleted, since it referred to the case mentioned in paragraph (9), which had now been deleted.

*Paragraph (13) was approved with that amendment.*

*Paragraph (14)*

*Paragraph (14) was approved.*

*Paragraph (15)*

18. Mr. KEARNEY suggested that, in the second sentence, the words "may indicate the scope of those persons, ships, products, etc." be replaced by the words: "may indicate those persons, ships, products, etc., to which it applies".

*It was so agreed.*

*Paragraph (15), as amended, was approved.*

*Paragraph (16)*

19. Mr. KEARNEY suggested that the opening words "The beneficiary State cannot claim most-favoured-nation treatment but for that category . . ." should be reworded to read: "The beneficiary State may claim most-favoured-nation treatment only for that category . . ."

*It was so agreed.*

*Paragraph (16), as amended, was approved.*

*Paragraph (17)*

*Paragraph (17) was approved subject to the correction of two clerical errors.*

*Paragraph (18)*

*Paragraph (18) was approved.*

*Paragraph (19)*

20. Mr. KEARNEY suggested that, in the last sentence, the words "... may not claim most-favoured-nation treatment, but for the goods ..." should be reworded to

read: "... may claim most-favoured-nation treatment only for the goods ...".

*Paragraph (19) was approved with that amendment.*

*Paragraph (20)*

21. Mr. KEARNEY suggested that the semicolon in the middle of the first sentence be replaced by a full stop followed by a new sentence beginning with the words "The following paragraphs". In that new sentence, the words "serve to give a brief information only" would be replaced by the words "supply a brief explanation".

*It was so agreed.*

*Paragraph (20), as amended, was approved.*

*Paragraphs (21)-(25)*

*Paragraphs (21)-(25) were approved.*

*Paragraphs (26) and (27) (A/CN.4/L.235/Add.4/Corr.1)*

*Paragraphs (26) and (27) were approved with minor drafting changes.*

*The commentary to articles 7 [11] and 7 bis [12], as amended, was approved.*

*Commentary to article 8 [14]*

(Irrelevance of restrictions agreed between the granting and third States) (A/CN.4/L.235/Add.5)

*Paragraph (1)*

22. Mr. USTOR (Special Rapporteur) suggested that paragraph (1) be deleted.

*It was so agreed.*

*Paragraph (2)*

*Paragraph (2) was approved subject to a drafting change in the last sentence.*

*Paragraph (3)*

*Paragraph (3) was approved.*

*Paragraph (4)*

23. Mr. USTOR (Special Rapporteur) proposed that the title placed before paragraph (4), 'The "clause réservée"', be deleted.

*It was so agreed.*

*Paragraph (4) was approved.*

*Paragraph (5)*

*Paragraph (5) was approved subject to a minor drafting change in the first sentence.*

*Paragraph (6)*

*Paragraph (6) was approved.*

*Paragraph (7)*

24. Mr. SETTE CÂMARA suggested that, in the opening sentence, the words "which was signed", which qualified the reference to the Havana Charter, be amended to read "which was prepared".

*It was so agreed.*

*Paragraph (7), as amended, was approved.*

*Paragraphs (8)-(12)*

*Paragraphs (8)-(12) were approved.*

*The commentary to article 8 [14], as amended, was approved.*

*Commentary to article 8 bis [15]*

(Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement) (A/CN.4/L.235/Add.6)

*Paragraphs (1)-(12)*

*Paragraphs (1)-(12) were approved.*

*Paragraph (13)*

65. Mr. KEARNEY said he noted that paragraph (13) contained a reference to a judgement by the District Court for the Southern District of New York. He would urge that care be taken, when citing United States court decisions, not to suggest that a ruling had been given on some point merely because some inference could be drawn from the decision.

26. Mr. USTOR (Special Rapporteur) suggested that paragraph (13) be deleted.

*It was so agreed.*

*Paragraphs (14)-(18)*

*Paragraphs (14)-(18) were approved.*

*Paragraph (19)*

27. Mr. USTOR (Special Rapporteur) proposed that the second paragraph, containing a long extract from a decision of the Greek Council of State, be deleted. Foot-note 37 would be retained, however, and the reference to it would be moved to the end of the first paragraph, the opening phrase of which would be reworded to read: "In a third case, it has been expressly recognized that ...".

*Paragraph (19) was approved with those changes.*

*Paragraphs (20)-(22)*

*Paragraphs (20)-(22) were approved.*

*Paragraph (23)*

28. Mr. USTOR (Special Rapporteur) proposed that, at the end of paragraph (23), the phrase "(paragraphs (24) to (78) below)" be added in parentheses. It would then be clear that all those paragraphs reflected the views of the Special Rapporteur himself and not those of the Commission.

*It was so agreed.*

*Paragraph (23), as amended, was approved.*

*Paragraphs (24)-(78)*

29. Mr. USTOR (Special Rapporteur) said that the quotation in paragraph (27) from the 1965 Trade Agreement between the USSR and Australia should be shortened so as to give only the text of article 5 of that Agreement.

30. There were a number of clerical errors in paragraphs (43), (56), (57), (58), (59), (60), (61), (68) and (70) which needed to be corrected.

*Paragraphs (24)-(78) were approved subject to those corrections.*

*Paragraphs (79)-(82)**Paragraphs (79)-(82) were approved.**Paragraph (85)*

31. Mr. KEARNEY suggested that, in accordance with the Commission's usual practice, the name of the member who had proposed the text quoted in paragraph (83) be replaced by the words "one member".

*Paragraph (83) was approved with that amendment.**Paragraph (84)**Paragraph (84) was approved.*

*The commentary to article 8 bis [15], as amended, was approved.*

The meeting rose at 6.10 p.m.

**1357th MEETING**

*Thursday, 24 July 1975, at 10.10 a.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

*Members present:* Mr. Ago, Mr. Castañeda, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tsu-ruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

**Draft report of the Commission on the work of its twenty-seventh session**

(A/CN.4/L.235/Add.7 and 8; A/CN.4/236 and Add.1 and Add.1/Corr.1 and 2, and Add.2)

*(continued)*

*Chapter V*

**QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS**

1. The CHAIRMAN invited the Commission to consider chapter V of the draft report, paragraph by paragraph, starting with the introduction (A/CN.4/L.236).

**A. INTRODUCTION***Paragraph 1**Paragraph 1 was approved.**Paragraph 2*

2. Mr. REUTER (Special Rapporteur) said that there were two corrections to be made to paragraph 2. In the penultimate sentence, the words "and *Reservations*" should be deleted, since the Commission had not yet adopted any articles on the subject of reservations. In the last sentence, the phrase "at the next session" should read: "at its next session".

*Paragraph 2 was approved with those changes.**Paragraph 3*

3. Sir Francis VALLAT suggested that the adjective "nice" which qualified the word "balance" in the single sentence of paragraph 3 be deleted.

4. Mr. REUTER (Special Rapporteur) said he could accept that amendment.

*Paragraph 3, as amended, was approved.**Paragraph 4**Paragraph 4 was approved.**Paragraph 5*

5. Mr. KEARNEY said he was not clear about the meaning of the first part of the second sentence, which read: "For while all States are the expression of a natural society which everywhere presents qualitatively the same essential characteristics". That phrase seemed to express a belief in a tenet of natural law. He would welcome a clarification from the Special Rapporteur.

6. Mr. REUTER (Special Rapporteur) suggested that the passage in question be replaced by the words "While all States are equal before international law".

*Paragraph 5 was approved with that amendment.**Paragraphs 6 and 7**Paragraphs 6 and 7 were approved.**Paragraph 8*

7. In response to an observation by Mr. KEARNEY, Mr. REUTER (Special Rapporteur) proposed that the French version of the end of the paragraph be amended to read: "*munis de pouvoirs, tout en apportant à cette règle tous les tempéraments requis par la pratique*". The English version could be adjusted later.

*Paragraph 8 was approved with that amendment.**Paragraph 9**Paragraph 9 was approved with a minor drafting change in the French version.**Paragraph 10*

8. Mr. REUTER (Special Rapporteur) proposed that the concluding phrase of the paragraph, "customs unions could be invited because their competence would extend to questions of nomenclature", be replaced by the phrase "customs unions, whose competence would extend to questions of nomenclature, could be invited in order that they might participate in the drafting of the text of a treaty and in its adoption, and become parties to a treaty relating to the object of the conference". As certain members of the Commission had observed, it was not just a question of inviting international organizations to participate in a conference; they must be able to participate in the drafting and adoption of the text of the treaty and to become parties to the treaty.

*It was so agreed.**Paragraph 10, as amended, was approved.**Paragraphs 11 and 12**Paragraphs 11 and 12 were approved.**Paragraphs 13*

9. Mr. KEARNEY suggested that the second part of the last sentence, beginning with the words "it is for the Governments of the States participating in a conference . . ." be reworded so as not to exclude the possibility



that international organizations participating in a conference might also participate in determining the feasibility and advisability of the course of action in question.

10. Mr. REUTER (Special Rapporteur) suggested that the passage in question be replaced by the words "it is for the States and international organizations participating in a conference".

*Paragraph 13 was approved with that amendment.*

#### *Paragraph 14*

11. Mr. REUTER (Special Rapporteur) proposed that, in order to define the precise scope of article 9, paragraph 2, of the Vienna Convention on the Law of Treaties, the proviso "unless by the same majority it should be decided to apply a different rule" be inserted after the words "two-thirds majority", and that the word "rule", after the words "paragraph 2," be replaced by the word "principle". It was clearly understood that the participants in a conference were free to adopt any rule on the subject that they wished, but their decision must be taken by a specified majority.

*It was so agreed.*

*Paragraph 14, as amended, was approved.*

#### *Paragraph 15*

12. Mr. REUTER (Special Rapporteur) proposed that a full stop be placed after the words "specific solution" in the first sentence of paragraph 15. The remainder of the original sentence, and the whole of the second and third sentences, down to the words "general respects", would be replaced by a passage reading:

"As a general rule, international organizations are individualist entities, each having its own special characteristics. The treaties in which they participate are concluded with special regard to the organizations destined to become participants to them; in that sense they are instruments *intuitu personae*. Thus, except in the case described in paragraph 13 above, the only rule applicable, for such treaties, to the adoption of the text is that of the unanimous consent of the participants. A similar rule will probably apply to the authorization of reservations, a question which the Commission was unable to consider during the present session except in certain general aspects."

Apart from the substitution of the words "a similar rule" for the words "the same rule", his new wording involved no change in the substance.

*The Special Rapporteur's proposal was adopted.*

13. Mr. PINTO suggested that, in the penultimate sentence, the words "it is only right that" be replaced by the words "it may seem reasonable to assume that". The view expressed in that sentence was not a unanimous one. Many, including himself, thought that some provision ought to be made for the rules of procedure of the conference.

14. Mr. USHAKOV said that, at its previous session, the Commission had decided to simplify the title of the draft articles, as compared with the title of the question under consideration, by wording it as follows: "Draft articles on treaties concluded between States and international organizations or between international organ-

izations". Consequently, it would not seem necessary, at least in the commentary, to use each time such an unwieldy formula as "treaties concluded between organizations, or between one or more States and one or more international organizations".

15. Mr. REUTER (Special Rapporteur) said that he would bear in mind the observations made during the discussion and amend the paragraph accordingly.

*Paragraph 15, as amended, was approved on that understanding.*

#### *Paragraph 16*

16. Sir Francis VALLAT suggested that, in the penultimate sentence, the concluding words "the specific character of the treaties to which international organizations become parties" be amended to read: "the specific character of international organizations participating in treaties". That rewording would indicate that it was the character of the organizations themselves and not that of the treaties which constituted the major factor.

17. In the last sentence, the concluding words "has endeavoured to leave room for future developments" should be made clearer. As it now stood, the sentence could be taken to mean that the Commission had left blanks in its draft which would be covered by future provisions. The intended meaning was rather that the rules embodied in the articles were flexible enough to cover future developments. The provisions of the 1969 Vienna Convention, on which those rules were based, were in fact sufficiently flexible to cover situations as they developed.

18. For those reasons, he proposed that the concluding words "but has endeavoured to leave room ..." be replaced by some such wording as: "and has endeavoured to draft the articles in a sufficiently flexible manner so as to meet the needs of future developments".

19. Mr. REUTER (Special Rapporteur) said he could accept the amendments suggested by Sir Francis Vallat.

*Paragraph 16, as amended, was approved.*

#### *Paragraph 17*

*Paragraph 17 was approved.*

*Section A, as amended, was approved.*

### **B. DRAFT ARTICLES ON TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN INTERNATIONAL ORGANIZATIONS**

20. The CHAIRMAN said that section B of chapter V included the text of the draft articles on treaties concluded between States and international organizations or between international organizations which the Commission had adopted at the 1353rd meeting, and the commentaries to those articles.

#### *Commentary to article 7*

(Full powers and powers)

(A/CN.4/L.236/Add.1 and Corr.1)

#### *Paragraphs (1)-(5)*

*Paragraphs (1)-(5) were approved.*

*Paragraph (6)*

21. Sir Francis VALLAT said that he was not satisfied with the concluding words of the first sentence "which contain the most recent rule adopted by States in the 1975 Vienna Convention should more properly be described as rules embodied in the text of a multilateral treaty. They had not necessarily been adopted by States.

22. Mr. SETTE CÂMARA suggested that the phrase in question be reworded to read: "which contain the most recent rule drafted by representatives of States in the matter".

*It was so agreed.*

*Paragraph (6), as amended, was approved.*

23. Mr. AGO said he wished to make an observation which, properly speaking, related not to paragraphs (5) and (6) but to the rule referred to in those paragraphs. It would seem that delegations of States to an organ of an international organization were considered to possess full powers to conclude a convention between certain States and that international organization. But while that might be the case for permanent representatives, it was not the case for delegation to an organ of an international organization. For instance, delegations to the International Labour Conference did not need to produce full powers in order to conclude general conventions between States members of the International Labour Organisation. On other hand, they would have no right to represent States in the conclusion of a treaty with that organization. Hence the rule in question did not reflect practice; it was bound to provoke a sharp reaction from the international organizations and he wished to enter the most serious reservations on the point.

24. The CHAIRMAN said that the text of article 7 had already been adopted on first reading, but the Commission would be able to return to the point raised by Mr. Ago on second reading.

*Paragraph (7)*

25. Mr. REUTER (Special Rapporteur) proposed that, in the third sentence, the words "it cannot be argued, the case being quite the contrary, that" be deleted, and that the word "not" be inserted after the word "organizations".

*Paragraph (7) was approved with that amendment.*

*Paragraphs (8)-(11)*

*Paragraphs (8)-(11) were approved.*

*The commentary to article 7, as amended, was approved.*

*Commentary to article 2*

(Use of terms), paragraphs 1 (c) and 1 (c bis)

(A/CN.4/L.236/Add.1)

*The commentary to article 2, paragraphs 1 (c) and 1 (c bis), was approved.*

*Commentary to article 8*

(Subsequent confirmation of an act performed without authorization (A/CN.4/L.236/Add.1)

26. In response to an observation by Mr. USHAKOV, Mr. REUTER (Special Rapporteur) proposed that the

word "drafting" be deleted, since the changes referred to were changes *mutatis mutandis* rather than drafting changes.

*It was so agreed.*

27. Mr. ŠAHOVIĆ said he hoped that, at the second reading, the Commission would say exactly what those changes *mutatis mutandis* were.

*The commentary to article 8, as amended, was approved.*

*Commentary to article 9*

(Adoption of the text) (A/CN.4/L.236/Add.1)

*Paragraphs (1)-(4)*

*Paragraphs (1)-(4) were approved.*

*Paragraph (5)*

28. Mr. REUTER (Special Rapporteur) proposed that, in order to avoid any erroneous interpretation of article 9, paragraph 2, of the Vienna Convention on the Law of Treaties, the passage in the fourth sentence, following the words "would be inapplicable", be amended to read: "which would leave no alternative to the application of a rule of unanimous consent, possibly for the adoption of the text of a treaty and in any case for the adoption of the rule according to which the text of the treaty is to be adopted."

*It was so agreed.*

29. Mr. PINTO suggested that, in the second sentence, the words "it would be proper that" be replaced by the words "it would seem reasonable to assume that". He also suggested the insertion, before the penultimate sentence, of an additional sentence reading: "Nor was it the intention of the Commission that the provisions of paragraph 2 should be interpreted as impairing the autonomy of international conferences in the adoption of their own rules of procedure which might prescribe a different rule for the adoption of the text of a treaty or in filling any gaps in their procedure on this subject."

30. Mr. REUTER (Special Rapporteur) said he could accept those suggestions.

*Paragraph (5), as amended, was approved.*

*The commentary to article 9, as amended, was approved.*

*Commentary to article 10*

(Authentication of the text)

(A/CN.4/L.236/Add.1 and Corr.2)

31. Mr. REUTER (Special Rapporteur) said an important change, the subject of a corrigendum (A/CN.4/L.236/Add.1/Corr.2) had been made to the commentary to article 10. It involved replacing the third sentence, beginning with the word "Furthermore", by the following sentence: "In paragraph 2 (a), the expression 'the international organizations participating in its drawing up' [i.e. the drawing up of the treaty referred to in paragraph 2] eliminates doubts where an international organization assists and co-operates in preparing the text of a convention to which it is not to be a party". That correction followed from the change in the text of article 10, where the words "participating in the negotiation

of the treaty" had been replaced by the words "participating in its drawing up", taken from the Vienna Convention.

*The commentary to article 10 was approved with that amendment.*

#### *Commentary to article 11*

(Means of establishing consent to be bound by a treaty)  
(A/CN.4/L.236/Add.1)

*The commentary to article 11 was approved.*

*Commentary to article 2 (Use of terms), paragraphs 1 (b), 1 (b bis) and 1 (b ter) (A/CN.4/L.236/Add.1)*

*The commentary to article 2, paragraphs 1 (b), 1 (b bis) and 1 (b ter) was approved.*

#### *Commentary to article 12*

(Signature as a means of establishing consent to be bound by a treaty) (A/CN.4/L.236/Add.1)

*The commentary to article 12 was approved.*

#### *Commentary to article 13*

(An exchange of instruments constituting a treaty as a means of establishing consent to be bound by a treaty)  
(A/CN.4/L.236/Add.1)

32. Mr. REUTER (Special Rapporteur) proposed that the word "drafting" should be deleted.

33. Sir Francis Vallat had suggested that reference should be made in the commentary to the fact that the wording of article 13 permitted the conclusion of a treaty by an exchange of instruments, even when there were more than two contracting parties. In order to take account of that observation, he proposed that the following sentence be added at the end of the commentary: "The wording of this draft article reflects the fact, although cases of the kind are now rare, that a treaty may also be constituted by an exchange of instruments when there are more than two contracting parties".

*It was so agreed.*

*The commentary to article 13, as amended, was approved.*

#### *Commentary to article 14*

(Ratification, act of formal confirmation, acceptance or approval as a means of establishing consent to be bound by a treaty) (A/CN.4/L.236/Add.2)

34. Sir Francis VALLAT said that the word "denomination" had no particular legal significance in English. He suggested that the words "... not a 'denomination' but ...", in the last sentence of the commentary, be deleted.

35. Mr. REUTER (Special Rapporteur) proposed that the passage in question be altered to read: "... is a verbal expression describing an operation which has not so far had any generally accepted term bestowed on it in international practice".

*It was so agreed.*

*The commentary to article 14, as amended, was approved.*

#### *Commentary to article 15*

(Accession as a means of establishing consent to be bound by a treaty) (A/CN.4/L.236/Add.2)

*The commentary to article 15 was approved.*

*Commentary to article 2, (Use of terms), paragraph 1 (g)*  
(A/CN.4/L.236/Add.2)

*The commentary to article 2, paragraph 1 (g), was approved.*

#### *Commentary to article 16*

(Exchange, deposit or notification of instruments of ratification, formal confirmation, acceptance, approval or accession) (A/CN.4/L.236/Add.2)

36. Mr. ŠAHOVIĆ suggested that, in the second sentence of the commentary, the word "denomination" be replaced by the word "term", in accordance with the change made in the commentary to article 14.

*The commentary to article 16 was approved with that amendment.*

#### *Commentary to article 17*

(Consent to be bound by part of a treaty and choice of differing provisions) (A/CN.4/L.236/Add.2)

*The commentary to article 17 was approved.*

#### *Commentary to article 18*

(Obligation not to defeat the object and purpose of a treaty prior to its entry into force) (A/CN.4/L.236/Add.2)

*The commentary to article 18 was approved.*

*Section B, as amended, was approved.*

*Chapter V of the draft report, as a whole, as amended, was approved.*

### *Chapter IV*

#### THE MOST-FAVOURLED-NATION CLAUSE (resumed from the previous meeting)

#### B. DRAFT ARTICLES ON THE MOST-FAVOURLED-NATION CLAUSE (continued)

37. The CHAIRMAN invited the Commission to resume consideration of chapter IV, section B, of its draft report, starting with the commentary to article 13 [16].

#### *Commentary to article 13 [16]<sup>1</sup>*

(Right to national treatment under a most-favoured-nation clause) (A/CN.4/L.235/Add.7)

#### *Paragraphs (1)-(7)*

*Paragraphs (1)-(7) were approved.*

#### *Paragraph (8)*

38. Mr. KEARNEY suggested that, in the penultimate sentence of the paragraph, the words "to be taken even if" be replaced by the word "that".

*Paragraph 8 was approved with that amendment.*

<sup>1</sup> The figures in square brackets represent the numbers of the articles as they appear in the report.

*Paragraph (9)**Paragraph (9) was approved.**The commentary to article 13 [16], as amended, was approved.**Commentary to article 14 [17]**(Most-favoured-nation treatment, national [or other] treatment with respect to the same subject-matter) (A/CN.4/L.235/Add.7)**The commentary to article 14 [17] was approved.**Commentary to article 15 [18]**(Commencement of enjoyment of rights under a most-favoured-nation clause) (A/CN.4/L.235/Add.8)**Paragraphs (1) and (2)**Paragraphs (1) and (2) were approved.**Paragraph (3)*

39. Mr. KEARNEY said that he could accept the paragraph on the understanding that the Special Rapporteur would make clearer the connexion between the treaty concluded between Belgium and Italy on 2 December 1882 and the court decision quoted.

*Paragraph (3) was approved on that understanding.**Paragraph (4)**Paragraph (4) was approved.**Paragraph (5)*

40. Mr. HAMBRO said that he wished to place on record his view that the Commission did not show sufficient discrimination with regard to the authority of the authors it quoted in its reports and the frequency with which they were quoted.

*Paragraph (5) was approved.**The commentary to article 15 [18] was approved.**Commentary to article 16 [19]**(Termination or suspension of enjoyment of rights under a most-favoured-nation clause) (A/CN.4/L.235/Add.8)*

41. Mr. KEARNEY said he did not believe that the process of communication referred to in paragraph 2 of the article was the only means by which the operation of a most-favoured-nation clause subject to material reciprocity could be terminated or suspended. The beneficiary State might simply cease to accord material reciprocity to the granting State without informing the latter of its action.

42. Mr. USTOR (Special Rapporteur) said that means of terminating the operation of a most-favoured-nation clause other than communication were mentioned in paragraph (10). The view prevailing in the Drafting Committee had been that termination or suspension of material reciprocity by a beneficiary State would constitute a breach of obligation and would, as such, entail consequences differing from those described in article 16, paragraph 2.

43. Mr. KEARNEY said that, unlike the possibility to which he had referred, the events mentioned in the second

sentence of paragraph (10) were extraneous to the operation of the most-favoured-nation clause. In his opinion, the Drafting Committee's view concerning the termination or suspension of material reciprocity without communication was incorrect.

44. Mr. AGO said he considered that, at any rate in the French version, the second sentence of paragraph (1) was incorrect.

45. Sir Francis VALLAT said he wished to place on record that the view that termination of reciprocal treatment necessarily constituted a breach of obligation had not been accepted by all the members of the Drafting Committee.

46. Mr. USTOR (Special Rapporteur) proposed that, in order to clarify the second sentence of paragraph (10), a semicolon be inserted after the word "clause", and that the words "as to termination;" be inserted after the words "the beneficiary State".

47. In order to take account of the comments made by Mr. Kearney and Sir Francis Vallat, he further suggested the addition at the end of paragraph (10) of a sentence reading "Some members of the Commission were of the view that the termination or suspension of material reciprocity without communication would also have the effect of terminating or suspending the enjoyment of the rights of the beneficiary State".

*It was so agreed.**The commentary to article 16 [19], as amended, was approved.*

The meeting rose at 1.10 p.m.

**1358th MEETING***Thursday, 24 July 1975, at 4.10 p.m.**Chairman: Mr. Abdul Hakim TABIBI**Members present: Mr. Ago, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.***Draft report of the Commission on the work of its twenty-seventh session****(A/CN.4/L.232/Add.1; A/CN.4/L.235/Add.9 and Corr.1; A/CN.4/L.239 and Corr.1 and Add.1)***(continued)**Chapter IV***THE MOST-FAVOURLED-NATION CLAUSE***(continued)***B. DRAFT ARTICLES ON THE MOST-FAVOURLED-NATION CLAUSE (continued)**

1. The CHAIRMAN invited the Commission to continue consideration of section B of chapter IV of the draft report.

*Commentary to article 0 [21]<sup>1</sup>*

(Most-favoured-nation clauses in relation to treatment under a generalized system of preferences) (A/CN.4/L.235/Add.9 and Corr.1)

*Paragraphs (1)-(4)*

*Paragraphs (1)-(4) were approved.*

*Paragraph (5)*

2. Mr. KEARNEY said that paragraph (5) reproduced lengthy extracts from the "agreed conclusions" on a generalized system of preferences adopted by the Trade and Development Board in October 1970 by its decision 75 (S-IV).<sup>2</sup> As he understood it, those extracts had been included in order to indicate areas of possible interest for the International Law Commission in its future work; but it was doubtful whether some of that material, particularly section VII, on rules of origin, was relevant when viewed in that light.

3. Mr. USTOR (Special Rapporteur) suggested that the extract from section VII be deleted; the title "Rules of origin" would remain, followed by suspension points, in order to indicate the break in continuity of the quotation.

*Paragraph (5) was approved with that amendment*

*Paragraphs (6)-(11)*

*Paragraphs (6)-(11) were approved.*

*Paragraph (12)*

4. Mr. USTOR (Special Rapporteur) suggested that, in the first sentence, the reference to General Assembly resolution 3281 (XXIX) be completed by inserting the title: "Charter of Economic Rights and Duties of States".

*Paragraph (12) was approved with that amendment.*

*Paragraph (13)*

5. Mr. PINTO said that the first sentence of paragraph (13) was much too strongly worded; it suggested that the international community represented in the United Nations organs had "unanimously agreed" to adopt the generalized system of preferences outlined earlier in the commentary. He proposed that the sentence should be reworded to read: "There appears to be general agreement in principle, expressed within United Nations organs, that States should adopt a generalized system of preferences, the characteristics of which are outlined above".

6. Mr. HAMBRO said he supported that proposal.

7. Mr. USTOR (Special Rapporteur) said he could accept that amendment.

*Paragraph (13), as amended, was approved.*

*Paragraph (14)*

*Paragraph (14) was approved, subject to a drafting change in the first sentence.*

*Paragraph (15)*

8. Mr. HAMBRO suggested that, in accordance with the Commission's usual practice, the name of the member

who had made the proposal referred to at the end of the paragraph should not be mentioned.

*It was so agreed.*

*Paragraph (15), as amended, was approved.*

9. Mr. PINTO proposed that an additional paragraph be inserted at that point to reflect his statement in connexion with the proposal referred to in paragraph (15), which he had supported.<sup>3</sup> The proposed text would read:

"One member felt that article 0 did little to protect, let alone enhance, the position of the developing countries. Most-favoured-nation clauses were often concluded without an appreciation of their full implications for States, and what was needed were provisions that might assist developing countries to avoid any adverse effects that could result from the rigid application of the articles as drafted. Provisions which precluded the operation of the articles with regard to certain treaties entered into with developing countries, such as those contemplated under the proposal in the preceding paragraph, or at the very least which expressly reaffirmed a State's right to make specific exceptions and exclusions when concluding a clause, might go some way in this direction."

10. Mr. TSURUOKA said that he had some sympathy for Mr. Pinto's proposed additional paragraph but he doubted whether the individual opinion of a member of the Commission should be cited in the report, since it was already recorded in the summary record for the meeting at which it had been expressed. The Commission had always been very prudent in that respect and had mentioned in its reports the individual opinion of one of its members only when that opinion reflected a general trend, which was not the case in the present instance. The statement made by Mr. Pinto expressed a view which raised a serious problem touching on the very substance of international law and the application of the *pacta sunt servanda* rule. He therefore did not favour the inclusion of the paragraph as proposed, since its insertion would run counter to the practice so far followed by the Commission.

11. Mr. USTOR (Special Rapporteur) said that he would not object to the inclusion of a paragraph to reflect Mr. Pinto's special point of view, but he thought that the proposed language was much too strong. It would be going too far to say that article 0 "did little to protect, let alone enhance, the position of the developing countries". As he understood it, Mr. Pinto's position had been that the effect of article 0 was somewhat limited.

12. Mr. HAMBRO said that he had doubts about the propriety of including the proposed paragraph. A mention in the report of the opinion of "one member" would seem to imply that the opinion in question had had no support from other members, which was not the case.

13. Mr. PINTO said that, in order to meet the point raised by the Special Rapporteur, he would reword the first sentences of his proposed paragraph as follows: "One member felt that article 0 was of limited effect. Most-favoured-nation clauses had far-reaching implica-

<sup>1</sup> The figures in square brackets represent the numbers of the articles as they appear in the report.

<sup>2</sup> Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 15 (A/8015/Rev.1), pp. 265 et seq.

<sup>3</sup> See 1353rd meeting, paras. 105 and 106.

tions that were not always apparent. What was needed. . . .”

14. Mr. ŠAHOVIĆ said that, with those changes, the proposed additional paragraph would no longer simply represent the individual opinion of Mr. Pinto; it would reflect the view of several members, who concurred with the statement contained in the reworded text.

15. Mr. KEARNEY suggested that the opening words of the proposed new paragraph “One member felt that . . .” be replaced by the following wording: “The view was also expressed that . . .”. That wording was in keeping with the Commission’s tradition of not citing individual opinions.

16. Secondly, in what was now the third sentence of the proposed additional paragraph, he suggested that the words “rigid application” be replaced by the words “mechanical application”.

17. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved the proposed additional paragraph as amended by Mr. Pinto and Mr. Kearney.

*It was so agreed.*

*Paragraph (16) (A/CN.4/L.235/Add.9/Corr.1)*

*Paragraph (16) was approved*

*Section B was approved*

*Chapter IV of the draft report as a whole, as amended, was approved*

## Chapter II

### STATE RESPONSIBILITY

*(resumed from the 1355th meeting)*

#### B. DRAFT ARTICLES ON STATE RESPONSIBILITY (*continued*)

18. The CHAIRMAN invited the Commission to consider the commentary to article 10 paragraph by paragraph.

#### *Commentary to article 10*

(Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity) (A/CN.4/L.232/Add.1)

*Paragraphs (1)-(15)*

*Paragraphs (1)-(15) were approved.*

*Paragraph (16)*

19. Mr. KEARNEY suggested that, for the sake of clarity, the phrase “the first draft”, in foot-note 37, be amended to read “the Japanese draft”.

*It was so agreed.*

*Paragraph (16), as amended, was approved.*

*Paragraphs (17) and (18)*

*Paragraphs (17) and (18) were approved.*

*Paragraph (19)*

20. Mr. KEARNEY said that the phrase “were not on an equal footing with other States” in the second sentence cast doubts on the sovereign equality of States. He could

accept the paragraph on the understanding that that phrase would be replaced by less ambiguous language.

*Paragraph (19) was approved on that understanding*

*Paragraphs (20)-(22)*

*Paragraphs (20)-(22) were approved.*

*Paragraph (23)*

*Paragraph (23) was approved, subject to drafting changes in the final sentence.*

*Paragraphs (24) and (25)*

*Paragraphs (24) and (25) were approved.*

*Paragraph (26)*

21. Mr. AGO (Special Rapporteur), replying to a comment by Mr. PINTO, proposed that the phrase in the ninth sentence, “individuals, acting as organs, in a private capacity”, be replaced by the phrase “individuals having the status of organs, acting in a private capacity”.

*It was so agreed.*

*Paragraph (26), as amended, was approved.*

*Paragraphs (27)-(29)*

*Paragraphs (27)-(29) were approved.*

*The commentary to article 10, as amended, was approved.*

## Chapter VI

### OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

22. The CHAIRMAN invited the Commission to consider chapter VI of its draft report (A/CN.4/L.239 and Corr.1 and Add.1) section by section.

#### A. THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

*Section A was approved.*

#### B. LONG-TERM PROGRAMME OF WORK AND

#### C. ORGANIZATION OF FUTURE WORK

23. After a discussion in which Mr. ŠAHOVIĆ, Mr. SETTE CÂMARA, Mr. USHAKOV, Mr. HAM-BRO and Mr. KEARNEY took part, the CHAIRMAN suggested that the Chairman of the Planning Group be requested to prepare, in the light of the discussion, a text for inclusion in the draft report covering both the long-term programme of work and the organization of future work.

*It was so agreed.*

#### D. CO-OPERATION WITH OTHER BODIES

*Section D was approved.*

#### E. DATE AND PLACE OF THE TWENTY-EIGHTH SESSION

24. The CHAIRMAN proposed that the Commission hold its twenty-eighth session at Geneva from 3 May to 23 July 1976.

*It was so agreed.*

*Section E was approved.*

F. REPRESENTATION AT THE THIRTIETH SESSION OF THE  
GENERAL ASSEMBLY

G. GILBERTO AMADO MEMORIAL LECTURE and

H. INTERNATIONAL LAW SEMINAR

*Sections F, G and H were approved.*

The meeting rose at 6 p.m.

**1359th MEETING**

*Friday, 25 July 1975, at 10.25 a.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

*Members present:* Mr. Ago, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Raman-gasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

**Draft report of the Commission on the work of  
its twenty-seventh session**

(A/CN.4/L.232/Add.2)

*(continued)*

**Chapter II**

**STATE RESPONSIBILITY**

*(resumed from the previous meeting)*

**B. DRAFT ARTICLES ON STATE RESPONSIBILITY *(continued)***

1. The CHAIRMAN invited the Commission to consider the commentary to article 11 paragraph by paragraph.

*Commentary to article 11*

*(Conduct of persons not acting on behalf  
of the State) (A/CN.4/L.232/Add.2)*

*Paragraph (1)*

2. Mr. KEARNEY suggested that the word "indication" in the first sentence be replaced by the word "presentation".

*It was so agreed.*

3. Mr. AGO (Special Rapporteur), replying to a comment by Mr. KEARNEY, suggested that the phrase "and whose exclusion from attribution to the State is still implicit" be deleted from the last sentence.

*It was so agreed.*

*Paragraph (1), as amended, was approved.*

*Paragraph (2)*

4. Sir Francis VALLAT said that it would not be clear to the majority of common lawyers that words such as "natural persons who have the status of organs of the State", which appeared in the last sentence, referred to persons such as soldiers, policemen and the like.

5. Mr. AGO (Special Rapporteur) suggested that he include a foot-note explaining the meaning of the phrase mentioned by Sir Francis Vallat.

*It was so agreed.*

6. Mr. KEARNEY suggested that the words "or quasi-public" be inserted after the word "parastatal".

*It was so agreed.*

7. Sir Francis VALLAT said that he had supported Mr. Kearney's suggestion because he believed that the Commission's report should be written in language which would be clear to persons other than experts in international law.

8. Mr. KEARNEY said that the phrase "have nothing to do with their belonging to the machinery of the State" in the last sentence seemed too sweeping.

9. Mr. AGO (Special Rapporteur) proposed that it be replaced by the phrase "and have no connexion with the machinery of the State".

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

*Paragraph (3)*

*Paragraph (3) was approved.*

*Paragraph (4)*

10. Mr. KEARNEY, referring to the sixth sentence of the paragraph, said that, despite the presence of a saving clause, it was unrealistic to impose on States the obligation to afford "effective" protection to "ordinary nationals" of a foreign State. He suggested that the word "effective" be deleted.

*It was so agreed.*

11. Mr. KEARNEY said that the language of the ninth sentence was too strong.

12. Sir Francis VALLAT suggested that the word "would" in the second part of the sentence be replaced by the word "might". He further suggested that the words "of one of the other" be deleted from the tenth sentence.

*It was so agreed.*

*Paragraph (4), as amended, was approved.*

*Paragraphs (5)-(8)*

*Paragraphs (5)-(8) were approved.*

*Paragraph (9)*

*Paragraph (9) was approved, subject to redrafting of the fourth sentence.*

*Paragraph (10)*

13. Mr. KEARNEY said that he did not find the fifth sentence of the paragraph very clear.

14. Sir Francis VALLAT said he was concerned that the paragraph seemed to deal with both primary and what might be called "tertiary" rules, concerning methods of reparation for breach. He wondered whether the passages on remedy for breach were really necessary.

15. Mr. AGO (Special Rapporteur) said that the passages in question were extremely important. A number of writers believed that the wrongful act attributed to



the State was the act of the private person and not the omission of the organ, and based their argument on the fact that the amount of reparation was calculated according to the damage caused by the private individual.

16. The CHAIRMAN suggested that consultations should be held on the point raised by Mr. Kearney and that the matter raised by Sir Francis Vallat should be further discussed during the second reading of the draft articles.

*It was so agreed.*

*Paragraph (10) was approved on that understanding.*

*Paragraphs (11)-(16)*

*Paragraphs (11)-(16) were approved.*

*Paragraph (17)*

*Paragraph (17) was approved, subject to redrafting of the second sentence.*

*Paragraphs (17)-(37)*

*Paragraphs (17)-(37) were approved.*

*The commentary to article 11, as amended, was approved.*

*Section B, as amended, was approved.*

*Chapter II of the draft report, as a whole, as amended, was approved.*

## Chapter VI

### OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

*(Resumed from the previous meeting)*

#### B. PROGRAMME AND ORGANIZATION OF WORK

17. The CHAIRMAN invited the Commission to consider the new section B (Programme and Organization of Work) which would combine the former sections B (Long-term programme of work) and C (Organization of future work).

18. After a discussion in which Mr. KEARNEY, Mr. USHAKOV, Mr. SETTE CÂMARA, Sir Francis VALLAT, Mr. USTOR, Mr. AGO, Mr. ŠAHOVIĆ and Mr. CASTAÑEDA took part, Mr. KEARNEY, in accordance with the Commission's instructions at the previous meeting,<sup>1</sup> proposed the following text for inclusion in section B (Programme and Organization of Work), immediately after the paragraph dealing with the list of topics in the Commission's current programme of work. The proposed text would read :

Following discussion in the Commission, a planning group was established in the Enlarged Bureau to study the functioning of the Commission and formulate suggestions regarding its work. The Group was composed of Mr. Elias, Mr. Kearney (Chairman), Mr. Sette Câmara, Mr. Tsuruoka and Mr. Ushakov.

As an initial project the Group undertook a review of the existing work load of the Commission with a view to proposing general goals towards which the Commission might direct its efforts. On the basis of

this review, the Group concluded that work on the most-favoured-nation clause had reached the point at which it should be possible to complete work on the set of articles in first reading at the 1976 session. As this session will bring to an end the term of office of the present members of the Commission, the Group suggested that every effort be made to achieve the goal of the first reading of articles on this subject for submission to the thirty-first session of the General Assembly.

The Group devoted considerable study to the two priority topics on its agenda—State responsibility and succession of States in respect of matters other than treaties. As the introduction to chapter II of this report points out, three chapters of the First Part of the articles on State responsibility remain to be considered. These are:

Chapter III—Breach of an international obligation

Chapter IV—Participation by other States in an internationally wrongful act of a State

Chapter V—Circumstances precluding wrongfulness and attenuating or aggravating circumstances.

The First Part when completed will contain a complete statement of the most fundamental aspects of State responsibility and will constitute an integrated whole. The Group considered that, in view of the high priority assigned to this topic by the General Assembly, the first reading of this set of articles should be completed during the first part of the term of office of the members elected to the Commission in 1976. This would permit submission of the set of articles to Governments and the receipt of governmental comments in sufficient time to permit the second and final reading of the articles to take place prior to the expiration of that term of office. This would mean final completion of these articles by 1981 at the latest, but with the possibility of earlier completion.

With regard to succession of States in respect of matters other than treaties, the Group's review of this topic resulted in the conclusion that the most important aspects of the topic, from the viewpoint of the present needs of international law, are public property, upon which considerable progress has already been achieved in the area of State property, and public debts. Concentration upon these aspects would permit the drafting of a balanced set of articles that, when adopted in treaty form, would provide a basis for dealing with the questions which ordinarily present the majority of problems regarding non-treaty matters arising in the course of a succession of States. Having regard to the complicated and difficult issues involved in this work, the Group suggested that completion of a set of articles in respect of succession of States to public property and public debts in first reading should be a minimum goal for the 1976-1981 term of the Commission.

The fourth topic under active consideration, the question of treaties concluded between States and international organizations or between two or more international organizations has been moving ahead at a good rate of progress. The Group, therefore, con-

<sup>1</sup> See para. 23.

sidered that establishment of the goal of completion of the second reading of a set of articles on this subject by or prior to 1981 was justified.

Response to the Commission's questionnaire on the non-navigable uses of international watercourses had not been sufficient up to the present to permit determination of the scope and content of the work on this topic. The Group suggested that consideration of any goal for this topic should be deferred until the 1976 session of the Commission.

The Enlarged Bureau submitted these suggestions of the Group to the Commission for consideration. After reviewing them the Commission reached the conclusion that while the adoption of any rigid schedule of operations would be impracticable, the use of the goals in planning its activities would afford a helpful framework for decision-making. The Commission also endorsed continued activity by a planning group to review periodically the progress of the Commission's work, as well as the suggestion that, in order to assist the Group in its work, members should submit proposals regarding the activities and needs of the Commission for study by the Group.

19. After some discussion, the CHAIRMAN said he took it that the Commission approved section B (Pro-

gramme and Organization of Work) of chapter VI of the draft report, in the form proposed by Mr. Kearney.

*It was so agreed.*

*Chapter VI of the draft report, as a whole, as amended, was approved.*

*The draft report of the Commission on the work of its twenty-seventh session, as a whole, as amended, was adopted.*

**Expression of appreciation to Mr. Teslenko,  
Deputy Director of the Codification Division**

20. *On the proposal of the CHAIRMAN, the Commission expressed to Mr. N. Teslenko, Deputy Director of the Codification Division of the Office of Legal Affairs, who would shortly be retiring, its deep appreciation of his devoted service to the Commission over many years.*

**Closure of the session**

21. After an exchange of congratulations and thanks, the CHAIRMAN declared the twenty-seventh session of the International Law Commission closed.

The meeting rose at 12.45 p.m.







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