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Report on the most-favoured-nation clause, by Mr. Nikolai A. Ushakov, Special Rapporteur

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MOST-FAVOURED-NATION CLAUSE

[Agenda item 6]

DOCUMENT A/CN.4/309 and ADD.1 and 2*

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CONTENTS

	<i>Page</i>
<i>Abbreviations</i>	2
	<i>Paragraphs</i>
I. INTRODUCTION	1-15 2
A. Basis of the report	1-12 2
B. Structure of the report	13-15 3
II. COMMENTS ON THE DRAFT ARTICLES AS A WHOLE	16-55 4
A. The importance of the problem and of the work of codification	18-32 4
B. The most-favoured-nation clause and the principle of non-discrimination	33-34 5
C. The most-favoured-nation clause and the different levels of economic development of States	35-43 6
D. The general character of the draft articles	44-55 7
(a) Scope of the draft	45 7
(b) Form of the draft	46-55 7
III. COMMENTS ON INDIVIDUAL PROVISIONS OF THE DRAFT ARTICLES	56-323 7
Introductory comments of the Special Rapporteur	56-59 7
Article 1	60-75 8
Article 2	76-98 9
Article 3	99-101 11
Article 4	102-111 11
Article 5	112-122 12
Article 6	123-125 13
Article 7	126-137 13
Article 8	138-140 14
Article 9	141-142 15
Article 10	143-164 15
Article 11	165-166 17
Article 12	167-169 17
Article 13	170-174 17
Article 14	175-177 18
Article 15	178-229 18
Article 16	230-241 22
Article 17	242-244 23
Article 18	245-246 23
Article 19	247-250 23
Article 20	251-254 24

* The initial report of the Special Rapporteur (A/CN.4/309) was established in the light of the comments received by him from Member States, United Nations organs, specialized agencies and other intergovernmental organizations as at 15 February 1978. Comments received after that date, as well as the relevant comments of the Special Rapporteur, which were originally incorporated in documents A/CN.4/309/Add.1 and 2, have been inserted in the appropriate headings of the present document.

	<i>Paragraphs</i>	<i>Page</i>
Article 21	255-299	24
Article 22	300-304	28
Article 23	305-312	28
Article 24	313-314	29
Article 25	315-316	29
Article 26	317-319	29
Article 27	320-323	29
IV. THE PROBLEM OF THE PROCEDURE FOR THE SETTLEMENT OF DISPUTES RELATING TO THE INTERPRE- TATION AND APPLICATION OF A CONVENTION BASED ON THE DRAFT ARTICLES	324-332	30

ABBREVIATIONS

CCC	Customs Co-operation Council
ECE	Economic Commission for Europe
ECWA	Economic Commission for Western Asia
EEC	European Economic Community
EFTA	European Free Trade Association
GATT	General Agreement on Tariffs and Trade
GSP	Generalized system of preferences
IAEA	International Atomic Energy Agency
IBEC	International Bank for Economic Co-operation
ICAC	International Cotton Advisory Committee
ILO	International Labour Organisation
IMCO	Inter-Governmental Maritime Consultative Organization
IMF	International Monetary Fund
LAFTA	Latin-American Free Trade Association
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDO	United Nations Industrial Development Organization
WFC	World Food Council
WHO	World Health Organization
WMO	World Meteorological Organization
WTO	World Tourism Organization

I. Introduction

A. BASIS OF THE REPORT

1. In its resolution 31/97 of 15 December 1976, the General Assembly welcomed the fact that the International Law Commission had completed the first reading of the draft articles on the most-favoured-nation clause and recommended that the Commission should complete at its thirtieth session, in the light of comments received from Member States, from organs of the United Nations which have competence on the subject-matter and from interested inter-governmental organizations, the second reading of the draft articles on the most-favoured-nation clause adopted at its twenty-eighth session.

2. In its resolution 32/151 of 19 December 1977, the General Assembly approved the programme of work planned by the International Law Commission

for 1978, which provided, among other things, that at the Commission's thirtieth session priority should be given to consideration of the question under discussion, and again recommended that the Commission should complete at its thirtieth session the second reading of the draft articles on the most-favoured-nation clause adopted at its twenty-eighth session, as recommended by the General Assembly in resolution 31/97.

3. Accordingly, the current report must be based on the draft articles on the most-favoured-nation clause contained in the report of the Commission on the work of its twenty-eighth session.¹ In accordance with the resolutions of the General Assembly, these draft articles must be considered in the light of the written comments of Member States and the oral comments

¹ See *Yearbook ... 1976*, vol. II (Part Two), pp. 11 *et seq.*, document A/31/10, chap. II, sect. C.

made by them in the course of the discussion of the draft articles in the Sixth Committee and the General Assembly, and in the light of the comments made by the appropriate United Nations organs and inter-governmental organizations, with a view to making the changes and improvements in the draft considered necessary by the Commission.

4. Accordingly the duty of the Special Rapporteur, as he sees it, is to help the Commission to accomplish its task on the basis of the draft articles adopted in first reading. At this stage, any substantial revision of the concepts on which the draft articles are based would hardly be useful or advisable, particularly since, in the opinion of the Special Rapporteur, the draft as a whole was warmly received by the General Assembly and its basic premises were approved.

5. The Special Rapporteur is extremely pleased to note this generally positive response to the Commission's draft articles; in his opinion, this response is mostly the result of the extensive knowledge and outstanding competence in the field in question of Mr. Endre Ustor, the Commission's Special Rapporteur. Mr. Ustor's extremely scholarly and interesting reports, on which the Commission's work is based, are as valuable as ever at the current stage of the Commission's work. The Commission has already realized the value of the work done by Mr. Ustor, but will obviously do so again during the second reading of the draft articles under discussion.

6. In the view of the Special Rapporteur, there is no need here to go over the Commission's work on the draft articles on the most-favoured-nation clause. The progress made is summarized in the report of the Commission on its twenty-eighth session,² which gives references to all related documentation. A reference to chapter II of this report is unavoidable, since the draft articles and commentaries contained in it are to provide the basis for the completion of the Commission's work and the second reading at its thirtieth session.

7. The question of the draft articles on the most-favoured-nation clause was discussed by the Sixth Committee at the thirty-first session of the General Assembly during the consideration of the Commission's report on its twenty-eighth session. The oral comments of Member States on the draft are summarized in the report of the Sixth Committee.³

8. Some general oral comments on the draft articles were made by Member States in the Sixth Committee at the thirty-second session of the General Assembly during the consideration of the question of the programme of work for the Commission's thirtieth session. These comments are summarized in the report of the Sixth Committee.⁴

9. As at 10 May 1978, written comments on the draft articles had been received from the following Member States: the Byelorussian Soviet Socialist Republic, Colombia, Czechoslovakia, the German Democratic Republic, Guyana, Hungary, Luxembourg, Sweden, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics and the United States of America.⁵

10. As of the same date, written comments had been received from the following organs of the United Nations, specialized agencies and other international organizations: ECE,⁶ ECWA, UNESCO, IAEA, WTO, GATT, the Caribbean Community Secretariat, the Board of the Cartagena Agreement, EEC, EFTA, LAFTA, as well as CCC and the Central Office for International Railway Transport.⁷

11. A number of organs and international organizations stated that they had no comments on the draft. Such statements were received from UNIDO, WFC, ILO, WHO, IMF, WMO, IMCO, IBEC and ICAC.

12. The Commission's secretariat also kindly sent the Special Rapporteur the Secretary-General's notes transmitting the report of the Conference on International Economic Co-operation⁸ and the addendum to that note,⁹ as well as the Secretary-General's report entitled "Economic co-operation among developing countries".¹⁰ Section II, paragraph 1, of the report of the Conference on International Economic Co-operation and subsections A and B of the Secretary-General's report contain useful information on the most-favoured-nation clause.

B. STRUCTURE OF THE REPORT

13. This report is divided into four sections, as follows:

Section I: Introduction

Section II: Comments on the draft articles as a whole

Section III: Comments on individual provisions of the draft articles

Section IV: The problem of the procedure for the settlement of disputes relating to the interpretation and application of a convention based on the draft articles.

⁵ See *Yearbook ... 1978*, vol. II (Part Two), p. 162, document A/33/10, annex, sect. A. (Note: In the mimeographed version of the present document, the references to written comments referred to documents A/CN.4/308 and Add. 1-2. As the latter have been reproduced as an annex to the Commission's report, contained in volume II (Part Two) of the *Yearbook*, it is felt that it is more convenient to refer the reader directly to that publication.)

⁶ *Ibid.*, sect. B.

⁷ *Ibid.*, sect. C.

⁸ A/31/478 and Corr. 1.

⁹ A/31/478/Add. 1 and Add. 1/Corr. 1.

¹⁰ A/32/312.

² *Ibid.*, pp. 4 *et seq.*, document A/31/10, paras. 10-36.

³ *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, paras. 14-85.

⁴ *Ibid.*, *Thirty-second Session, Annexes*, agenda item 112, document A/32/433, paras. 188-191.

14. Sections II, III and IV will deal with both the oral comments of Member States on the draft articles, comments which, as indicated above,¹¹ are summarized in the reports of the Sixth Committee to the General Assembly at its thirty-first and thirty-second sessions, and the written comments of Member States, organs of the United Nations and international organizations.¹²

15. The Special Rapporteur will also give his own comments on editorial questions which, in his opinion, should be considered during the second reading of the draft articles.

II. Comments on the draft articles as a whole

16. In the opinion of the Special Rapporteur, the debates on the Commission's report at the thirty-first and thirty-second sessions of the General Assembly show that, on the whole, the draft articles on the most-favoured-nation clause adopted by the Commission at its twenty-eighth session were generally approved by Member States as a basis for the completion of work on the draft in second reading. The report of the Sixth Committee to the General Assembly at its thirty-first session indicates that those representatives who spoke on chapter II of the Commission's report expressed their general satisfaction with regard to the fact that the Commission had completed the first reading of the draft articles on this question.¹³ There was general agreement that the draft articles should be passed on to Governments and competent United Nations bodies for their comments.¹⁴ At the thirty-second session, representatives widely supported the Commission's intention to complete the second reading of the draft articles at its 1978 session;¹⁵ it was said that the draft was well conceived and that it was to be hoped that it could take the form of an international instrument.¹⁶ Note was taken of the outstanding services of Professor Endre Ustor.

17. However, many representatives, in commenting on the draft articles adopted by the Commission in first reading, referred either to the draft articles as a whole or to specific provisions. One of the tasks of the Special Rapporteur in this report is to organize and examine these comments. Some oral comments also dealt with related issues not touched upon in the draft articles.

¹¹ See paras. 7-8.

¹² See paras. 9-10.

¹³ See *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 14.

¹⁴ *Ibid.*, para. 19.

¹⁵ *Ibid.*, *Thirty-second Session, Annexes*, agenda item 112, document A/32/433, para. 188.

¹⁶ *Ibid.*, para. 189.

A. THE IMPORTANCE OF THE PROBLEM AND OF THE WORK OF CODIFICATION

Comments of States

Oral comments

18. According to the 1976 report of the Sixth Committee, some delegations stated that the application of most-favoured-nation treatment was of the greatest importance for co-operation among States in the sphere of economic relations in general and in the development of international trade in particular. This was shown by numerous international documents such as the Final Act of the Conference on Security and Co-operation in Europe¹⁷ and the Charter of Economic Rights and Duties of States.¹⁸ The view was expressed that the most-favoured-nation clause was an important instrument for the promotion of equitable and mutually advantageous economic relations among all States, regardless of existing differences in social systems and levels of development.¹⁹

19. In the opinion of some representatives, there could be no doubt of the timeliness of the Commission's work on the topic. Several representatives considered the set of 27 draft articles to be generally acceptable and a good basis for further work. The opinion was expressed that the set of articles on the most-favoured-nation clause met in general the requirements in respect of such articles, for it included all the questions the codification of which might be useful for the practical application of the clause.

*Written comments*²⁰

20. *Byelorussian Soviet Socialist Republic.* In the opinion of the Byelorussian SSR, the most-favoured-nation principle is extremely important for ensuring co-operation among States in their economic relations in general and in the development of international trade in particular. The Byelorussian SSR favours the general recognition and universal application of the most-favoured-nation principle in international economic relations. In its view, the draft articles on the most-favoured nation clause prepared by the Commission provide a fully satisfactory basis for drafting an international convention on the matter.

21. *German Democratic Republic.* In the opinion of the German Democratic Republic, most-favoured-nation treatment, which over the centuries has become an important element of international commercial relations, promotes co-operation based on

¹⁷ *Final Act of the Conference on Security and Co-operation in Europe*, Helsinki, 1975 (Lausanne, Imprimeries Réunies), p. 75.

¹⁸ General Assembly resolution 3281 (XXIX).

¹⁹ *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 15.

²⁰ See *Yearbook ... 1978*, vol. II (Part Two), p. 162, document A/33/10, annex, sect. A.

equality and mutual advantage among all States. Its application is thus in the interests of world peace and international security. The draft articles drawn up by the Commission are therefore of fundamental importance. The Commission has succeeded in elaborating a well-considered draft which embodies the experience of many years in concluding most-favoured-nation clauses and takes due account of the most recent developments in this field.

22. *Luxembourg.* The Government of Luxembourg paid tribute to the work accomplished by the Commission, which is characterized by the exceptionally abundant body of material on treaties, judicial practice and doctrine on the subject collected as a basis for a study in depth. Whatever the ultimate fate of the draft articles, this research in itself constitutes a useful and lasting contribution to the development of international law.

23. *Union of Soviet Socialist Republics.* In the opinion of the USSR, the mutual granting by States of most-favoured-nation treatment is one way of implementing the generally recognized international legal principle of the sovereign equality of States by which the Soviet Union is unfailingly guided in its foreign policy and which, among other things, is laid down in the new 1977 Constitution of the USSR. The application of the principle of most-favoured-nation treatment creates maximum opportunity for developing peaceful economic co-operation among States.

24. The ever-increasing application in international economic relations of most-favoured-nation treatment is an important objective that greatly promotes the development of co-operation in trade and economic matters among States with different social systems. The measures being taken to achieve this objective are deserving of support. This is also true of the Commission's work on the codification of general principles of international law determine the legal nature, conditions and consequences of applying treaty provisions on most-favoured-nation treatment.

25. *Sweden.* In the opinion of the Swedish Government, the draft articles are to be commended. The draft articles as well as the commentary are of a high quality and reflect the seriousness and thoroughness with which the Commission has performed its important work of codification. Except for a few points, the draft articles seem to be acceptable to the Swedish Government.

26. *Hungary.* The Hungarian Government attaches great importance to the work of codification within the framework of the United Nations. The importance and topicality of this draft are underlined by the fact that an ever broader unconditional application of the most-favoured-nation principle, free from discrimination and based on mutual advantages, is bound to play a most significant role in the economic and commercial relations of States.

27. *United States of America.* The United States Government generally and warmly supports the Commission's draft articles and favours their adoption.

28. *Ukrainian Soviet Socialist Republic.* The Ukrainian SSR believes that, in present-day conditions, the codification of principles and norms conducive to the development of mutually beneficial economic co-operation among States on a footing of equality is very timely and has great practical significance. The draft articles on the most-favoured-nation clause prepared by the Commission have a very important role to play in this connexion.

29. *Czechoslovakia.* The draft articles on the most-favoured-nation clause established by the Commission form a good basis for international regulation of that institution. In principle, the proposed articles correspond to the needs of international economic relations.

30. *Colombia.* The Republic of Colombia is in agreement with the draft as a whole.

Comments of international organizations

31. *General Agreement on Tariffs and Trade.*²¹ In the opinion of the GATT secretariat, the draft articles prepared by the Commission would contribute substantially to the understanding of the most-favoured-nation clause and would help reduce uncertainty and conflicts in its application. A wealth of jurisprudence, practice and doctrine on the most-favoured-nation clause has been condensed into a few clear rules.

32. *Board of the Cartagena Agreement.*²² The Board believes that the draft articles prepared by the Commission have great merit.

B. THE MOST-FAVOURED-NATION CLAUSE AND THE PRINCIPLE OF NON-DISCRIMINATION

Comments of States

Oral comments

33. The 1976 report of the Sixth Committee shows that some representatives quoted with approval from passages contained in paragraphs 37 to 40 of the Commission's report on its twenty-eighth session concerning the relationship between the clause and the principle of non-discrimination.²³

OPINION OF THE SPECIAL RAPporteur

34. In the opinion of the Special Rapporteur, the passages prepared by the Commission on this question are of vital importance to an understanding of the draft articles on the most favoured-nation-clause and it should restore them and possibly develop

²¹ *Ibid.*, p. 178, document A/33/10, annex, sect. C, subsect. 3.

²² *Ibid.*, p. 179, subsect. 4.

²³ *Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 106, document A/31/370, para. 20.*

them further in its report on the results of the second reading of the draft articles.

C. THE MOST-FAVOURLED-NATION CLAUSE AND THE DIFFERENT LEVELS OF ECONOMIC DEVELOPMENT OF STATES

Comments of States

Oral comments

35. According to the 1976 report of the Sixth Committee,²⁴ some Member States considered that the draft articles rested on a firm foundation, for the Commission, in formulating the articles, had proceeded from the generally recognized principles and rules of international law and from an evaluation of State practice, judicial decisions and legal writings. The articles took into account the fundamental changes that had taken place in international economic relations, and especially in international trade, during recent years, and also the need to abolish unjustified trade barriers and promote international co-operation on the basis of mutual respect and equity. In particular, they took into consideration United Nations resolutions on the new international economic order. At a time when efforts were being made to institute a new international economic order, due account must be taken of the negative impact of the clause on economically disadvantaged partners and some restrictions regarding its application should be established. In this connexion, satisfaction was expressed by some members of the Sixth Committee at the elaboration by the Commission of new rules relating to exceptions to commitments in the most-favoured-nation clause.

36. Certain representatives, nevertheless, wondered whether the Commission had given sufficient study to the relationship between the application of the clause and the position of the developing countries. That aspect of the draft should be given further study at the second reading, taking into account the specific measures that could be adopted in order to institute a new international economic order.

37. In the view of a number of representatives, the draft articles did not effectively reflect the spirit of new economic principles generated by recent international events and approved by various legislative forums. Some of the articles did not adequately take account of the declarations and resolutions which had been adopted to preserve the interests of the developing countries, in particular the Declaration on the Establishment of a New International Economic Order,²⁵ the Charter of Economic Rights and Duties of States,²⁶ the resolutions of the General Assembly

concerning the permanent sovereignty of all peoples in relation to their natural wealth and resources,²⁷ and various resolutions of UNCTAD.

38. Although the Commission referred to developments in UNCTAD and elsewhere, its draft articles did not reflect the progressive development of rules in international trade which might be beneficial to developing countries.

39. The Commission should review those provisions of its draft which did not take due account of different levels of economic development and should promote the development of contemporary trade relations in conformity with the decisions of UNCTAD and other forums. It should take into account the pivotal role of regional economic integration movements in the development of the agricultural and industrial sectors of developing countries participating in such movements, the right of developing countries to accord advantages to one another, without according them to developed third States, and their right to receive non-reciprocal and non-discriminatory preferential treatment for their products from the developed countries.

OPINION OF THE SPECIAL RAPPORTEUR

40. The Special Rapporteur is of the opinion that, in working on the draft articles in first reading, the Commission as a whole and each of its members were concerned with the need to take due account of the interests of developing countries within the framework of the draft. He is convinced that the Commission will continue to be guided by this concern during the second reading of the draft articles.

41. However, in the draft articles under discussion, the Commission does not deal with the problem of the rules of international law governing economic relations between States in the broad sense; those are the "primary" rules to which, in particular, specific clauses in treaties between States relate. The draft articles on the most-favoured-nation clause contain "secondary" rules, concerning a number of general legal conditions for the application of specific clauses.

42. Thus, the question of taking due account of the interests of developing countries in the draft articles under discussion comes down to the question of allowing exceptions to commitments in the clause in order to favour developing countries, a topic dealt with in articles 21 and 27.

43. The specific suggestions of Member States and international organizations on this question will be considered by the Special Rapporteur in the context of the articles referred to.

²⁴ *Ibid.*, paras. 21-26.

²⁵ General Assembly resolution 3201 (S-VI).

²⁶ General Assembly resolution 3281 (XXIX).

²⁷ See, for instance, resolutions 626 (VII), 1803 (XVII), 2158 (XXI), 2386 (XXIII), and 2692 (XXV).

D. THE GENERAL CHARACTER OF THE DRAFT ARTICLES

*Comments of States**Oral comments*

44. According to the 1976 report of the Sixth Committee, several representatives of Member States noted with satisfaction that the Commission had followed the Vienna Convention on the Law of Treaties²⁸ closely in drafting the articles and that it considered that the draft articles should be interpreted in the light of that Convention. They agreed with the Commission that the draft articles should be an autonomous set and not an annex to the Vienna Convention.²⁹

(a) Scope of the draft

Oral comments

45. According to the 1976 report of the Sixth Committee, the opinion was expressed that the Commission had appropriately focused on the legal character of the clause and the effects of the clause as a legal institution in the context of all aspects of its practical application. The Commission had studied the legal consequences of the application of the most-favoured-nation clause, as well as the rules of interpretation to be adopted and, more generally, the legal problems involved in the application of the clause. That approach had enabled the Commission to submit draft articles in which the clause was considered in a general manner and not in relation to the specific field in which it was applied.³⁰

(b) Form of the draft

Oral comments

46. In the Sixth Committee, in 1976, the representatives of some Member States, referring to the question of the final form of the codification of the topic, said that they found the draft articles generally acceptable as a basis for the elaboration at a future date of a convention which would be an effective instrument for promoting international trade on a non-discriminatory basis. Other representatives, however, reserved their position on this matter.³¹

²⁸ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289. The Convention is hereafter referred to as the "Vienna Convention".

²⁹ *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 27.

³⁰ *Ibid.*, para. 28.

³¹ *Ibid.*, para. 33.

*Written comments*³²

47. *Byelorussian SSR*. In the view of the Byelorussian SSR, the draft articles on the most-favoured-nation clause provide a fully satisfactory basis for drafting an international convention on the matter.

48. *German Democratic Republic*. In view of the fact that the German Democratic Republic drafted a special paragraph for inclusion "in the preamble to the convention on the most-favoured-nation clause", the Special Rapporteur is inclined to conclude that that State is in favour of turning the draft articles into a convention at some future date.

49. *USSR*. In the opinion of the USSR, the draft articles on the most-favoured-nation clause prepared by the Commission are an entirely satisfactory basis for the drafting of an international convention on the subject.

50. *Luxembourg*. The Government of Luxembourg believes it would be inappropriate to continue work on these draft articles with the intention of preparing the text of a treaty. The most that could be expected to result would be a collection of aids to interpretation in the form of very flexible recommendations.

51. *Hungary*. The Hungarian Government feels that the draft text on the most-favoured-nation clause provides in general an appropriate basis, as regards both its concept and its provisions, for the elaboration of an international treaty.

52. *Ukrainian SSR*. The Ukrainian SSR considers that the draft articles on the most-favoured-nation clause can serve as an entirely satisfactory basis for the preparation of an international convention.

63. *Czechoslovakia*. Czechoslovakia considers that a convention would represent a most suitable form of codification.

OPINION OF THE SPECIAL RAPPORTEUR

54. According to established practice, the Commission's decision on the final form of the codification of the topic should be taken after the completion of the draft articles in second reading.

55. The Special Rapporteur therefore considers that it would be premature for him to suggest that the Commission should decide one way or another on this question at this stage.

III. Comments on individual provisions of the draft articles

INTRODUCTORY COMMENTS OF THE SPECIAL RAPPORTEUR

56. As was the case in the preceding section, the comments on each article made by Member States in

³² See foot-note 20 above.

the Sixth Committee and summarized in the 1976 and 1977 reports of the Sixth Committee will be given below under the heading "Oral comments". The written comments of Member States will be given under the heading "Written comments". The written comments of United Nations bodies, specialized agencies and other intergovernmental organizations will be given under the heading "Comments of international organizations". The absence of any of these headings indicates that no oral or written comments were made on the article in question.

57. The Special Rapporteur intends to give the comments of States and international organizations in the order which, in his opinion, will best serve to clarify the substance of the comments. In some cases, therefore, the alphabetical order of the names of States and organizations will not be observed.

58. According to established practice, the Commission gives its definition of the terms used after it has considered all the draft articles. Accordingly, the views of the Special Rapporteur on the provisions of article 2 are preliminary in nature.

59. The question of the order of the draft articles is also normally considered by the Commission on the completion of all the draft articles. Accordingly, the Special Rapporteur does not deal with that question in this report.

Article 1. Scope of the present articles

Comments of States

Oral comments

60. It was suggested that the words "in written form" should be added after the word "treaties" in the text of article 1.³³

*Written comments*³⁴

61. *Luxembourg.* According to this article, the scope of the articles would be restricted to most-favoured-nation clauses contained "in treaties between States". This provision restricts the scope of the draft articles since, following the establishment of regional economic groupings in various parts of the world, the clause might be found more and more frequently in agreements concluded by unions or groups of States. This development should be taken into account and the scope of the articles should be defined accordingly.

62. *Czechoslovakia.* Czechoslovakia notes that in article 1, and possibly article 2, the application of the draft convention is limited only to the most-favoured-nation clauses contained in written agree-

ments concluded between States. This will substantially limit its application in practice. The most-favoured-nation clause is primarily applied in the commercial and political fields, in which some States have transferred the right to conclude international agreements to the international organizations of which they are members. This applies primarily to EEC. As they now stand, the draft articles would not apply to the most-favoured-nation clauses contained in EEC treaties and agreements with other States. It would therefore be expedient to change the main subject of the draft articles in such a way that they would apply also to the most-favoured-nation clause contained in international treaties whose parties include those international organizations which conclude treaties with the most-favoured-nation clause on behalf of their member States, such treaties being effective in the territory of those States.

OPINION OF THE SPECIAL RAPPORTEUR

63. The Special Rapporteur considers it unnecessary to stipulate in article 1 that the articles apply to treaties in written form. The meaning of the word "treaty" as used in this article and in the draft articles as a whole is defined in article 2 (a) which provides, in particular, that "treaty" means an agreement in written form.

64. Article 1 and the draft articles as a whole concern most-favoured-nation clauses, by which is meant, according to article 4, treaty provisions whereby a State undertakes to accord most-favoured-nation treatment to another State. Such undertakings between States may be found, and in fact are found, in treaties between States, both bilateral and multilateral. With respect to the "unions of States" or "groups of States" referred to in the comments of the Government of Luxembourg, it may be asked whether there are any such "unions of States" or "groups of States" that could enter into international treaties and bind their member States to those treaties. The Special Rapporteur knows of no such unions or groups of States.

65. The Special Rapporteur believes that, in fact, the comments of Luxembourg concern unions, which, in the absence of any other established term, the Special Rapporteur is inclined to refer to as an international organization of a supranational character. Among other things, such "supranational organizations" claim, within the limits of some established competence, to represent their member States and to bind them to treaties with non-member States.

66. "Supranational organizations" are, to say the very least, an extremely new phenomenon in the modern world. The Special Rapporteur knows of only one example of such an organization. He also doubts whether, in contemporary international law, there are any firmly established generally recognized rules applicable to "supranational organizations".

³³ *Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 106, document A/31/370, para. 34.*

³⁴ See foot-note 20 above.

67. The Special Rapporteur therefore considers that it would be advisable to retain the present text of article 1.

Comments of international organizations

68. EEC.³⁵ The Community feels that, in their over-all conception, the draft articles prepared by the Commission are directed exclusively at States and appear to ignore integrated groups of States or groups in the process of integration. The existence and functioning of the Community are only one example among many of the growing tendency throughout the world to establish regionally integrated areas. Account should be taken of the fact that this causes the application of the clause to be transferred from the State to the regional level.

69. In the opinion of EEC, the Community is a customs union, but it is also much more than that. One of its aims is to promote "closer relations between its Member States" (Art. 2 of the Treaty establishing the European Economic Community).³⁶ Article 3 of the Treaty therefore provides not only for the elimination of customs duties and quantitative restrictions, the establishment of a common customs tariff, the abolition between Member States of the obstacles to the free movement of persons, services and capital, and the approximation of their respective municipal law, but also the establishment of a whole series of common policies, including common policies in the fields of agriculture and transport and common institutions to promote advanced economic integration.

70. Member States have transferred to the Community their individual powers to determine trade policy. As a result, questions relating to the application of the most-favoured-nation clause in trade matters now fall exclusively within the competence of the Community, so that it is the Community and not its member States which accords and receives most-favoured-nation treatment vis-à-vis all the contracting parties of GATT and others. To that extent, the Community exercises powers in this specific area which are normally wielded by States.

71. In the light of its observations concerning the trend towards the establishment of regionally integrated areas and of the fact that the Community has exclusive powers in the field of trade comparable to those exercised by States, EEC suggests that draft article 2 should be supplemented by the following definition:

"The expression 'State' shall also include any entity exercising powers in spheres which fall within the field of application of these articles by virtue of a transfer of power made in favour of that entity by the sovereign States of which it is composed."

³⁵ See *Yearbook ... 1978*, vol. II (Part Two), p. 179, document A/33/10, annex, sect. C, subsect. 6.

³⁶ For the text of the Treaty establishing the European Economic Community (Treaty of Rome), see United Nations, *Treaty Series*, vol. 298, p. 11.

OPINION OF THE SPECIAL RAPPORTEUR

72. The Special Rapporteur feels that, even though the proposal of EEC is intended to supplement article 2 (Use of terms), the Community's comment and proposal nevertheless relate in fact to the substance of article 1. Under article 1, treaties concluded by EEC which contain a clause (within the Community's sphere of competence) actually do not fall within the purview of the draft articles, even where the clause itself conforms to what is now said about it in article 4.

73. However, the Community, in so far as relates to its recently acquired power to take action in a specific sphere that is binding on its member States, represents a very new and, at present, obviously unique phenomenon. The Special Rapporteur has described this phenomenon, which clearly cannot be equated with either a State or an international organization, as a "supranational organization".³⁷

74. The Special Rapporteur believes that, where problems of any kind relating to international law arise with reference to "supranational organizations", they are broader problems than those relating to most-favoured-nation clauses. One problem that may arise is the question of what rules in the sphere of treaty law are applicable to "supranational organizations", including EEC. The proposal to treat EEC in the same manner as a State would, for example, hardly provide a solution to the problem of the applicability of the Vienna Convention to treaties to which EEC is a party.

75. The Special Rapporteur therefore feels that it is not advisable to attempt to solve, within the framework of these draft articles, the problems of groups having supranational competence.

Article 2. Use of terms

Comments of States

PARAGRAPH (a)

Oral comments

76. According to the 1976 report of the Sixth Committee in 1976, some representatives suggested the elimination of article 2, paragraph (a), since the definition of the term "treaty", as laid down in the Vienna Convention, was a broad definition the purpose of which was to restrict the meaning to treaties in written form between States.³⁸

*Written comments*³⁹

77. *Luxembourg.* In the opinion of Luxembourg, paragraph (a) reproduces the corresponding provision of the Vienna Convention.

³⁷ See paras. 65–66 above.

³⁸ *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 35.

³⁹ See foot-note 20 above.

OPINION OF THE SPECIAL RAPPORTEUR

78. It is true that article 2, paragraph (a), contains exactly the same wording as article 2, paragraph 1 (a) of the Vienna Convention. However, in both the Vienna Convention and these draft articles, the terms are defined solely for the purposes of the instrument concerned. The Special Rapporteur therefore suggests that paragraph (a) should be retained in its present form.

PARAGRAPH (b)

*Written comments*⁴⁰

79. *Luxembourg* considers paragraph (b) to be necessary and useful in the régime established by the draft articles.

OPINION OF THE SPECIAL RAPPORTEUR

80. The Special Rapporteur suggests that paragraph (b) should be retained in its present form.

PARAGRAPH (c)

*Written comments*⁴¹

81. *Luxembourg* considers paragraph (c) to be necessary and useful in the régime established by the draft articles.

OPINION OF THE SPECIAL RAPPORTEUR

82. The Special Rapporteur suggests that paragraph (c) should be retained in its present form.

PARAGRAPH (d)

*Written comments*⁴²

83. *Luxembourg* considers paragraph (d) to be necessary and useful in the régime established by the draft articles.

OPINION OF THE SPECIAL RAPPORTEUR

84. The Special Rapporteur suggests that paragraph (d) should be retained in its present form.

PARAGRAPH (e)

Oral comments

85. According to the 1976 report of the Sixth Committee, some representatives approved draft para-

graph (e), since a definition of the term "material reciprocity" was essential to a proper understanding and interpretation of the articles, making it possible, in particular, to distinguish between the terms "material reciprocity" and "formal reciprocity".

86. Other representatives considered that the meaning of the terms "material reciprocity" and "equivalent treatment" was not completely clear, even though the commentary to articles 8 to 10 shed some light on the point. It was said that neither paragraph (e) nor articles 9, 10, 18, paragraph 2, and 19, paragraph 2, clarified the relationship between the most-favoured-nation clause and material reciprocity, a question which should be given further attention by the Commission. It was also said that paragraph (e) was more of a substantive provision than a definition. Doubts were also expressed about the usefulness of paragraph (e).⁴³

Written comments.⁴⁴

87. *Luxembourg*. In the opinion of the Government of Luxembourg, the term "material reciprocity" concerns a secondary and atypical aspect of the clause, as can be seen from articles 8 to 10. It should therefore be excluded from the definitions in article 2.

88. *Byelorussian SSR*. In the view of the Byelorussian SSR, the use in the draft articles of the expression "material reciprocity" to indicate the acceptable conditions for granting most-favoured-nation treatment is unwarranted, because the expression is extremely imprecise.

89. The *USSR* expresses serious doubts regarding the value of introducing the term "material reciprocity" into the draft.

Comments of international organizations

90. *EEC*. The proposal of EEC for supplementing article 2 with a new provision is mentioned and discussed above in the paragraphs relating to article 1.⁴⁵

OPINION OF THE SPECIAL RAPPORTEUR

91. The Special Rapporteur considers that the definition of the term "material reciprocity" in paragraph (e) should be retained, since this term is used in articles 9, 10, 18, paragraph 2, and 19, paragraph 2, and is extremely important for an understanding of the substance of these articles.

92. In actual fact, the whole concept of the draft is based on the fact that, in contemporary treaty relationships between States, use is made of two types of most-favoured-nation clause: unconditional clauses and clauses conditional upon material reciprocity.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 106, document A/31/370, para. 36.*

⁴⁴ See foot-note 20 above.

⁴⁵ See paras. 68 *et seq.* above.

93. In this connexion, it should be noted in particular that the application of clauses that are conditional upon material reciprocity is limited to certain spheres of relations between States, such as consular and diplomatic relations or treaties relating to establishment, that is to say, those spheres where material reciprocity is possible in practice. The Special Rapporteur would like to emphasize as forcefully as possible that, in the most traditional sphere of application of the clause, namely trade, material reciprocity is simply impossible, and the same is true in certain other spheres. However, in certain other spheres, it is appropriate and logical to use clauses that are conditional on material reciprocity.

94. The Special Rapporteur shares the doubts expressed with regard to the term "material reciprocity" itself. The term in itself is not sufficiently clear in describing a situation which, in a specific clause, could be expressed, for example, by the word "reciprocity" alone. Thus, from the point of view of clarity, it would be enough to stipulate that a State should accord the consulate of the contracting State the same privileges that it accorded to third States, on the basis of reciprocity. However, although he does not consider the term "material reciprocity" to be fully adequate, the Special Rapporteur cannot suggest anything better. Thus, in his view, the term "effective reciprocity", which is to be found in some clauses, is no more satisfactory than the term "material reciprocity" in the context of these draft articles. In the opinion of the Special Rapporteur, the fact that paragraph (e) gives the definition of the term "material reciprocity" means that the concept expressed by the term is more important than the term itself.

95. With respect to the actual definition in paragraph (e), the least satisfactory—and, to some extent, doubtful element—is the term "equivalent treatment". The Commission might consider the possibility of replacing this term with the expression "the same treatment" or "similar treatment". However, the Special Rapporteur is not sure whether this is the best solution to the problem.

96. Accordingly, the Special Rapporteur considers that it would be advisable not to alter the substance of article 2, paragraph (e).

97. Paragraph (e) is merely a description of what is contained in specific clauses and what is referred to, at present, as "material reciprocity". What is meant by material reciprocity in specific instances will be seen from the text of the clauses themselves.

98. Unfortunately, the Special Rapporteur is unable to suggest anything more satisfactory than "material reciprocity" and "equivalent treatment". and he leaves the question of the use of these terms in the draft articles open.

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

Comments of States

Oral comments

99. According to the 1976 report of the Sixth Committee, some representatives said that this article could be retained although its object was covered by article 1 and by the norms of general international law.⁴⁶

Written comments⁴⁷

100. *Luxembourg* considers that the meaning of this article is difficult to comprehend. If the artificial restrictions could be removed from article 1, then article 3 could also be deleted without any difficulty.

OPINION OF THE SPECIAL RAPPORTEUR

101. Article 3 is what is called a saving clause. It reflects generally accepted provisions of international law. The Special Rapporteur considers that it would be advisable to retain article 3 in its present form.

Article 4. Most-favoured-nation clause

Comments of States

Oral comments

102. According to the 1976 report of the Sixth Committee, some representatives expressed the view that article 4 should state explicitly that it was a question of a relationship between States deriving from the valid terms of a treaty in force, because there were many treaties concluded in historical circumstances which no longer prevailed. The opinions were also expressed that articles 4 and 5 should be combined in a single article and that the provisions of those two articles should be incorporated in article 2 so as not to detract from the traditional importance of definitions.⁴⁸

Written comments⁴⁹

103. *Luxembourg*. In the view of the Government of Luxembourg, this provision would be more suit-

⁴⁶ *Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 106, document A/31/370, para. 37.*

⁴⁷ See foot-note 20 above.

⁴⁸ *Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 106, document A/31/370, para. 38.*

⁴⁹ See foot-note 20 above.

ably included among the definitions in article 2. As a separate article, it gives the impression of being completely tautological.

104. The Government of Luxembourg also emphasized the importance for the draft as a whole of the expression "in an agreed sphere of relations".

OPINION OF THE SPECIAL RAPPORTEUR

105. In its 1976 report, the Commission pointed out (para. 58) that the first seven articles of the draft might be considered as introductory articles of a definitional nature.⁵⁰ This is quite logical, since it is essential to define the subject-matter of the clauses before describing their general legal consequences. However, in the context of this draft, article 4 is more of a substantive article than a simple definition.

106. It is clearly unnecessary to introduce greater precision in article 4 in order to indicate the scope of the clause, since the scope of the clause is one of the topics dealt with in article 7 of the draft.

107. Accordingly, the Special Rapporteur considers that it would be advisable to retain article 4 in its present form.

*Written observations*⁵¹

108. *Czechoslovakia.* Czechoslovakia observes that articles 4 and 5 have basic significance for the draft and that the contents of the most-favoured-nation clause should follow from them. It is proper to consider whether it would not be expedient to connect the two articles and harmonize them in order to make their interpretation easier. Certain interpretation difficulties may arise in connexion with the fact that the term "treatment" is used in both of the said articles but in a different sense. Article 4 deals only with the granting of "most-favoured-nation treatment to another State", and the purpose of this wording is clearly to stipulate the subjects of rights and obligations from the most-favoured-nation clause, i.e. the contracting States. Article 5 deals with treatment accorded "to the beneficiary State or to persons or things", and its purpose is to delimit the contents of the most-favoured-nation clause.

109. In the opinion of the Czechoslovak Government, the proposed wording of articles 4 and 5 does not correspond to some conclusions contained in the commentary on the articles, particularly in paragraph 13 of the commentary on article 4.

OPINION OF THE SPECIAL RAPPORTEUR

110. The Special Rapporteur feels that it would be inadvisable to combine draft articles 4 and 5.

111. The Special Rapporteur will try to take account of comments relating to the commentary when he prepares it in its final version.

Article 5. Most-favoured-nation treatment

Comments of States

Oral comments

112. According to the 1976 report of the Sixth Committee, the opinion was expressed that articles 5 and 7 should be reviewed to take into account the fact that a beneficiary State should not automatically be entitled, under a most-favoured-nation clause, to all the privileges enjoyed by the third State when, owing to the existence of a special relationship between the granting and third States, the extension of those privileges to the third State in a particular field was something more than an act of commerce.⁵²

*Written comments*⁵³

113. *The Byelorussian SSR* expressed its satisfaction with the definition of most-favoured-nation treatment.

114. *The USSR* considers that one of the merits of the draft articles prepared by the Commission is that they clearly reflect the concept of most-favoured-nation treatment as generally accepted in contemporary international law.

115. *Luxembourg.* The Government of Luxembourg expressed doubt as to whether it was even possible to establish a general definition of most-favoured-nation treatment. In its opinion, it is particularly difficult to explain the meaning of the terms "persons" or "things" which are in a "determined relationship" with a given State. Thus, while the situation may be clear enough in the case of physical persons, it is not clear in the case of economic enterprises, whether or not corporate bodies. Does the reference to "things" apply only to material objects or also to intangible goods such as intellectual property rights?

OPINION OF THE SPECIAL RAPPORTEUR

116. The oral comment referred to above concerning a special relationship between two States which should constitute an exception to the operation of the clause clearly relates to special historical privileges enjoyed by one State in the territory of another State.

117. In the view of the Special Rapporteur, such rare and exceptional cases, should they occur, are normally regarded as exceptions to the most-

⁵⁰ *Yearbook ... 1976*, vol. II (Part Two), p. 11, para. 58.

⁵¹ See foot-note 20 above.

⁵² *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 39.

⁵³ See foot-note 20 above.

favoured-nation clause. However, it would hardly seem appropriate to devote a special provision to such an exception in this draft.

118. With regard to the specific meaning of the terms "persons", "things" and "in a determined relationship" (with a given State), the real meaning of these terms in each case can be established only in the context of the specific clause concerned. In this connexion, it is quite possible that more or less serious problems will arise in connexion with the interpretation of a given specific clause, as sometimes occurs, too, in actual practice. However, this problem concerns existing treaty provisions on most-favoured-nation treatment rather than this draft.

119. Accordingly, the Special Rapporteur considers that it would be advisable to retain article 5 in its present form.

*Written comments*⁵⁴

120. *Guyana*. The Government of Guyana believes that, in article 5, the most-favoured-nation clause is stated in absolute terms and takes as its starting point the "quantum" of benefit enjoyed by the third State, the *tertium comparationis*. This starting point ignores the fact that there may be other considerations, e.g. a special relationship, which influence the granting of most-favoured-nation treatment in a certain area, making it more than an act of mere commerce, and that the potential beneficiary State should at least be in a position of equivalence with the third State before it should properly claim all the benefits enjoyed by that third State under a most-favoured-nation clause.

OPINION OF THE SPECIAL RAPPORTEUR

121. The Special Rapporteur believes that, in very rare and exceptional cases, most-favoured-nation treatment obviously can be granted on some basis other than a treaty provision. However, such exceptional cases should not be dealt with in the draft articles.

122. The Special Rapporteur feels that it would be advisable to retain the present wording of article 5.

Article 6. Legal basis of most-favoured-nation treatment

Oral comments

123. According to the 1976 report of the Sixth Committee, the view was expressed in support of the article that its provisions recognized the principle of the sovereignty and liberty of action of States.⁵⁵

⁵⁴ *Ibid.*

⁵⁵ *Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 106, document A/31/370, para. 40.*

*Written comments*⁵⁶

124. *Luxembourg* pointed out that article 6 states a legal truth of a general nature and could therefore easily be deleted.

OPINION OF THE SPECIAL RAPPORTEUR

125. The article does indeed state an obvious rule of international law, and therein lies its value. The Special Rapporteur considers that it would be useful to retain the article in its present form.

Article 7. The source and scope of most-favoured-nation treatment

Comments of States

Oral comments

126. In the opinion of the Special Rapporteur, the comments made in respect of articles 5 and 7 in the 1976 report of the Sixth Committee⁵⁷ do not apply to article 7.

*Written comments*⁵⁸

127. *Luxembourg*. The Government of Luxembourg questioned the argument underlying this article, an argument based on a distinction between a right which "arises" from the clause (para. 1 of the article) and the way in which the right is "determined" (para. 2 of the article). It noted that, in fact, the clause creates only a conditional obligation, the condition depending upon the favours that may subsequently be extended to a third State. It may therefore be going too far to say, as in paragraph (1) of the Commission's commentary, that the clause is the "exclusive" source of the beneficiary State's rights.

OPINION OF THE SPECIAL RAPPORTEUR

128. The Special Rapporteur fully shares the opinion expressed by the Commission in its commentary that the article sets out the basic principles of the operation of the clause. Paragraph 1 of the article establishes that *the right of the beneficiary State to most-favoured-nation treatment* arises only and exclusively on the basis of the clause in force, in other words, only on the basis of a treaty which is in force and which contains the clause. In this draft, of course, the Commission is not concerned with the conditions governing the validity of the clauses or of treaties containing them, since this is dealt with in

⁵⁶ See foot-note 20 above.

⁵⁷ *Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 106, document A/31/370, para. 39.*

⁵⁸ See foot-note 20 above.

the Vienna Convention. Thus, the right to a given type of treatment is not in itself conditional. An unconditional right arises as soon as a clause enters into force.

129. However, *the treatment itself*, the right to which is acquired through the clause, is “conditional”, or, rather, is subject to change, since it is determined by the treatment accorded to the third State or, to some extent, to persons and things related to that State. This is the topic dealt with in paragraph 2 of the article.

130. Accordingly, the Special Rapporteur considers that it would be advisable to retain article 7, with some drafting changes to clarify paragraphs 1 and 2.

131. In the light of the Commission’s commentary and the points raised above, the Special Rapporteur considers that the word “only” should be inserted between the words “arises” and “from”. The advisability of this drafting change is self-evident.

132. The Special Rapporteur would also like to draw the attention of the Commission to the fact that, in the English text of article 5 and of article 7, paragraph 1, the words “third State” are used with the indefinite article (“a third State”). In article 7, paragraph 2, they are used with the definite article (“the third State”). The Special Rapporteur would suggest that, in the English text of article 7, paragraph 2, the words in question should be used with the indefinite article (“a third State”). The other texts should be brought into line with the English. In the opinion of the Special Rapporteur, the advisability of this drafting change is also self-evident.

*Written comments*⁵⁹

133. *Colombia.* Colombia notes that the article lays down, as the basis of the beneficiary State’s right to most-favoured-nation treatment, “the most-favoured-nation clause in force between the granting State and the beneficiary State”. Logically, however, the term “in force” used here defines neither the prerequisite nor the effects of the rule in question. Indeed, if a treaty between the granting State and the beneficiary State regulated the content and scope of the most-favoured-nation clause, there would be no grounds whatever for referring to a relationship between the granting State and a third State.

134. This view is confirmed by article 18 of the draft, which states that 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”. However, there is no direct reference to the basic treaty as the source of the right, the substance of which is defined by the treatment accorded by the granting State to a third State.

135. In view of the above, the Government of Colombia proposes that the words “in force” in ar-

title 7, paragraph 1, should be replaced by “agreed”. The structure of this article could also be made more logical if the end of the sentence were amended to read (as a variant, retaining the words “in force”): “... the most-favoured-nation clause in force between the granting State and the third State”.

OPINION OF THE SPECIAL RAPPORTEUR

136. The Special Rapporteur considers that article 7, paragraph 1, indicates quite clearly that the sole source of the beneficiary State’s rights to most-favoured-nation treatment is the most-favoured-nation clause in force between that beneficiary State and the granting State. It is, of course, assumed that the clause—which is by definition a provision of a treaty—is in force, in as much as the treaty containing the clause is in force. The clause may, in addition, be applicable if there are any *direct* relationships covered by the clause between the granting State and the third State. This point is also reflected in article 7.

137. The Special Rapporteur therefore considers it would not be advisable to make the proposed amendments to article 7, paragraph 1.

Article 8. Unconditionality of most-favoured-nation clauses

Comments of States

Oral comments

138. According to the 1976 report of the Sixth Committee, doubts were expressed as to the reservation in article 8 whereby the parties could agree to make the application of the clause subject to certain conditions. It was stated that clauses made conditional upon material reciprocity were not conducive to the unification and simplification of international relations. The view was also expressed, in connexion with paragraph (24) of the Commission’s commentary to articles 8, 9 and 10, that the draft articles, by acknowledging the necessity of establishing equivalence, would offer the most disadvantaged countries an invaluable asset in their negotiations with their more developed counterparts.⁶⁰

OPINION OF THE SPECIAL RAPPORTEUR

139. The Special Rapporteur would like to emphasize once again the point made above,⁶¹ namely, that the draft as a whole, and articles 8, 9 and 10 in particular, are based on the fact that there are, at

⁵⁹ *Ibid.*

⁶⁰ *Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 106, document A/31/370, para. 41.*

⁶¹ See paras. 92 and 93.

present, two types of clauses: unconditional clauses and clauses conditional upon material reciprocity. In this connexion, clauses conditional upon material reciprocity can be used and are advisable only for certain types of relations; in some spheres, such as trade, their use is simply impossible.

140. The Special Rapporteur suggests that article 8 should be retained in its present form.

Article 9. Effect of an unconditional most-favoured-nation clause

141. There are no comments on this article.

OPINION OF THE SPECIAL RAPPORTEUR

142. The Special Rapporteur suggests that article 9 should be retained in its present form.

Article 10. Effect of a most-favoured-nation clause conditional on material reciprocity

Comments of States

*Written comments*⁶²

143. *Luxembourg*. The Government of Luxembourg recommends the deletion of article 10 on the grounds that it is merely a truism.

144. It expresses doubts about the advisability of introducing here the idea of "reciprocity" which, in its view, is ambiguous. What is involved here is less a question of reciprocity than one of "compensation" or material "equivalent".

OPINION OF THE SPECIAL RAPPORTEUR

145. The Special Rapporteur shares the view that the provisions of article 10 are sufficiently obvious. Nevertheless, he would consider it advisable to retain the article in the draft.

146. In connexion with the question of the term "material reciprocity"⁶³, the Special Rapporteur would like to refer the Commission to the comments relating to article 2, paragraph (e), above and to remind it that the Special Rapporteur would prefer to leave the question of that term open.

147. The Special Rapporteur would also like to draw the Commission's attention to the fact that *the acquisition of the right to most-favoured-nation treatment*, which forms the substance of article 10, is closely related to the similar substance of article 7,

paragraph 1. He suggests that it might be preferable, in this article, to speak of the acquisition of the right *to enjoy most-favoured-nation treatment*.

*Written comments*⁶⁴

148. *Hungary*. The Hungarian Government feels that the inclusion of the concept of material reciprocity in a treaty raises certain problems in so far as the draft fails to consider the fact that, under contemporary international law, material reciprocity is applicable only in certain non-commercial fields. Its application under trade agreements, on the other hand, may give rise to discrimination. In view of this, the inclusion of material reciprocity in the draft raises uncertainties of interpretation of the different articles and might prejudice non-discrimination in the application of the most-favoured-nation clauses in commercial relations. Therefore, the Hungarian Government believes that the best solution would be offered if the Commission, in keeping with its position expressed in its commentaries to the articles concerned, provided a formulation of the most-favoured-nation principle which would state explicitly that the concept of material reciprocity is not linked to the principle of the most-favoured-nation treatment in the case of its application in commercial relations.

149. The *Ukrainian SSR* considers that the term "material reciprocity", used to designate the conditions under which most-favoured-nation treatment is granted, gives rise to doubts. As the term is extremely vague, it allows various interpretations, including a broad one. A broad interpretation could render meaningless the very principle of most-favoured-nation treatment.

OPINION OF THE SPECIAL RAPPORTEUR

150. The Special Rapporteur entirely concurs with the view that material reciprocity is applicable in only a few spheres of relations between States. It is, for instance, virtually impossible to apply it to commerce and many other fields. However, the draft is based on the assumption, which the Commission feels is fully justified by international usage, that in modern treaty practice two sorts of most-favoured-nation clause are in use: the unconditional clause, and the clause conditional on material reciprocity. The text adopted by the Commission derives from this usage. Within the framework of the draft, however, it cannot be shown in which fields material reciprocity is possible, and in which it is not. For the purposes of the draft, this is unnecessary since the draft is concerned with certain legal effects of the clause, and not with the clause itself.

151. In the opinion of the Special Rapporteur, the term "material reciprocity" used in the draft, in so

⁶² See foot-note 20 above.

⁶³ See paras. 85-98.

⁶⁴ See foot-note 20.

far as it is defined in article 2 (e), is specific enough not to admit of different interpretations. However, he would still prefer to leave open the question of whether it is advisable to use this particular term.

New article 10 bis. Effect of a most-favoured-nation clause under special conditions of reciprocity on exchanges of goods and services between countries with different socio-economic systems

Comments of international organizations

152. EEC.⁶⁵ The Community considers that relations between countries with different socio-economic systems are governed by certain rules. The special conditions prevailing in the economies of countries in which the State enjoys a monopoly of trade mean that most-favoured-nation treatment is without real effect unless the conditions in which it is accorded are specified. This simply means that it is necessary to recognize the existing difference in trade conditions which result from the differences between economic systems. Real reciprocity in advantages should be measured in terms of concrete, comparable results, e.g. increases in the volume and variety of trade between countries with different economic systems to the satisfaction of the trading partners.

153. In the light of these and other considerations it has advanced, EEC would prefer to see the draft take fuller account of the concern felt and the experience acquired by the Community and its member States vis-à-vis countries with different socio-economic systems. In that connexion, it would like the provisions concerning commercial exchanges in the Final Act of the Conference on Security and Co-operation in Europe to be taken into account.⁶⁶

154. The Community therefore proposes that the draft articles should be supplemented by an article to be placed after article 10, the title and text of which would be as follows:

“Effect of a most-favoured-nation clause under special conditions of reciprocity on exchanges of goods and services between countries with different socio-economic systems.

“Nothing in these articles shall be construed as obliging the conceding State to grant most-favoured-nation treatment to the beneficiary State in respect of exchanges of goods and services between countries with different socio-economic systems, unless the beneficiary State accords to the conceding State a status permitting, on the basis of equality and mutual satisfaction of the partners, as a whole, an equitable distribution of advantages and obligations of comparable scale, in accordance with bilateral and multilateral agreements.”

⁶⁵ See *Yearbook ... 1978*, vol. II (Part Two), p. 179, document A/33/10, annex, sect. C, subsect. 6.

⁶⁶ For reference, see foot-note 17 above.

OPINION OF THE SPECIAL RAPPORTEUR

155. The Special Rapporteur has his own view, which differs from that of the Community, with regard to the advantages, particularly in the field of international trade, enjoyed by States with planned economies vis-à-vis States with market economies. He does not, however, consider it would be appropriate to discuss the question within the context of the present articles.

156. He also feels that the provision of the Final Act of the Conference on Security and Co-operation in Europe which the Community uses in its proposed formulation of the article has no direct relevance to relations between States on the basis of the most-favoured-nation clause.

157. In his opinion, in the section of the Final Act, on “Co-operation in the Field of Economics, of Science and Technology and of the Environment”, the participating States outlined the general desirable conditions for such co-operation. In the provision referred to above, they recognized, *inter alia*, that

such co-operation, with due regard for the different levels of economic development, can be developed, on the basis of equality and mutual satisfaction of the partners, and of reciprocity permitting, as a whole, an equitable distribution of advantages and obligations of comparable scale, with respect for bilateral and multilateral agreements.

158. General desirable conditions for economic co-operation between States are also outlined today in many other international instruments, including the Charter of Economic Rights and Duties of States.⁶⁷

159. The basic intent of the proposed article 10 *bis* is clearly to establish that the articles drafted by the Commission do not in themselves oblige a conceding State to grant most-favoured-nation treatment to a beneficiary State in one particular field.

160. In the opinion of the Special Rapporteur, the text of this article can be interpreted in another way, namely, that if the condition stipulated in the article is met, the conceding State will be obliged to grant most-favoured-nation treatment to the beneficiary State in that particular field of relations. However, the proposed provision does not conform to the spirit and letter of the draft articles either in the first case, or, still less, in the second.

161. In fact, according to articles 1, 4, 6 and 7, the right of a beneficiary State to receive most-favoured-nation treatment arises solely and exclusively as a result of a most-favoured-nation clause in effect between the granting State and the beneficiary State. As a result, neither the conditions set out in the draft articles nor, still less, any other conditions, can oblige any State to accord most-favoured-nation treatment to another State.

162. In its draft, the Commission proceeds on the assumption that, in modern treaty relations between States, two forms of the clause are used: unconditional clauses and clauses conditional on material re-

⁶⁷ General Assembly resolution 3281 (XXIX).

reciprocity. This, of course, does not prevent States from establishing their relations on the basis of a different sort of clause, for example, clauses conditional on factors other than material reciprocity.

163. Judging from the title of the proposed article 10 *bis*, it is intended to deal with this third sort of conditional clause. In such a case, however, the conditional clause goes beyond the assumption underlying the draft; in other words, it exceeds the scope of the present draft.

164. For the above reasons, the Special Rapporteur believes that it would be inadvisable to include the proposed article 10 *bis* in the draft.

Article 11. Scope of rights under a most-favoured-nation clause

Comments of States

Oral comments

165. In the Sixth Committee in 1976, the view was expressed that the threefold condition of similarity of subject-matter, category of persons or things and relationship with the beneficiary State and a third State, which must be fulfilled under articles 11 and 12, was in keeping with the free will of the parties and with judicial practice.⁶⁸

OPINION OF THE SPECIAL RAPPORTEUR

166. The Special Rapporteur suggests that the article should be retained as it stands.

Article 12. Entitlement to rights under a most-favoured-nation clause

Comments of States

*Written comments*⁶⁹

167. *Luxembourg*. Article 11 sets forth the well-known *ejusdem generis* rule. A problem arises with regard to the relationship between this article and article 4. According to article 4, the clause applies only in "an agreed sphere of relations". According to article 11, it entitles a State only to those rights which fall within the scope "of the subject-matter of the clause". In the opinion of the Government of Luxembourg, these two conditions are cumulative. It would be desirable, in the interests of clarity, to draw attention to the fact that the *ejusdem generis* rule applies also to the aforementioned provision of article 4.

⁶⁸ *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 42.

⁶⁹ See foot-note 20 above.

OPINION OF THE SPECIAL RAPPORTEUR

168. The Special Rapporteur believes that the above comments relate to the Commission's commentaries to articles 11 and 12 and should be taken into account in the future.

169. The Special Rapporteur suggests that article 12 should be retained in its present form.

Article 13. Irrelevance of the fact that treatment is extended gratuitously or against compensation

Comments of States

Oral comments

170. According to the 1976 report of the Sixth Committee, some representatives supported articles 13 and 14 in general. With respect to article 13, it was said that the rule stated in that article was in conformity with modern thinking on the operation of the clause. One suggestion was made to add to the article a statement to the effect that the most-favoured-nation clause should either not mention any condition at all or should explicitly formulate such condition if a conditional clause is involved. It was also suggested that article 13 should be linked with article 8 so as to be subject to the exception contained in article 8, regarding the principle of the independence of the contracting parties.⁷⁰

*Written comments*⁷¹

171. *Luxembourg*. The Government of Luxembourg feels that article 13 duplicates articles 8 and 9, concerning the unconditionality of the clause.

OPINION OF THE SPECIAL RAPPORTEUR

172. The Special Rapporteur shares the view that the clauses relating to most-favoured-nation treatment and, where appropriate, conditions concerning material reciprocity should be formulated in a more explicit, more rational and more exhaustive manner. However, this problem, which concerns the parties to treaties containing such a clause, is outside the scope of these draft articles.

173. The Special Rapporteur feels that the subject-matter of articles 8, 9 and 10 and of article 13 is not the same. Articles 8, 9 and 10 deal with the clauses themselves and whether they are unconditional or conditional on material reciprocity. The subject-matter of article 13 is the treatment extended to a third State, the irrelevance to the beneficiary State of the fact that such treatment is extended to a third State gratuitously or against compensation.

⁷⁰ *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 43.

⁷¹ See foot-note 20 above.

174. The Special Rapporteur therefore feels that it would be advisable to retain article 13 in its present form.

Article 14. Irrelevance of restrictions agreed between the granting and third States

Comments of States

*Written comments*⁷²

175. *Luxembourg.* In the view of the Government of Luxembourg, the wording of this article is difficult to understand. It seems that the intention is to present a simple idea, namely, that a State may not limit the scope of the clause, to the detriment of the beneficiary, as the result of an agreement concluded with a third State. This simple truth was stated more comprehensibly in the resolution adopted by the Institute of International Law quoted in paragraph (2) of the Commission's commentary. It would be better to use that formulation.

OPINION OF THE SPECIAL RAPPORTEUR

176. The Special Rapporteur fully agrees that the article presents the simple idea referred to in the aforementioned comment. He would, however, like to support the present wording of article 14, which seems to him clearer than the corresponding provision of the resolution of the Institute of International Law.

177. The Special Rapporteur therefore feels that it would be advisable to retain article 14 in its present form.

Article 15. Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement

Comments of States

Oral comments

178. According to the 1976 report of the Sixth Committee, in relation to article 15, representatives addressed themselves to the question whether or not the most-favoured-nation clause attracts benefits granted within customs unions and similar associations of States.⁷³

179. Many representatives agreed that the Commission had been right not to attempt to formulate a rule establishing a general exception to the principle of application of the most-favoured-nation clause in the case of customs unions and other associations of States.⁷⁴ In the opinion of some representatives, there

was no general rule of contemporary international law providing for the exclusion of the benefits granted within a customs union from the scope of application of the most-favoured-nation clause. The fact that particular agreements contained provisions making specific exceptions to the operation of the clause confirmed the absence of a rule to that effect.⁷⁵

180. In the opinion of some representatives, the question was one which should be solved through agreements between the States concerned, for practice had shown that in that way solutions could be found to all complicated problems arising when the obligations deriving from the clause were to be harmonized with those deriving from membership in a customs union or economic community.⁷⁶

181. Many other representatives were of the view that the draft should allow for an exception from the operation of the clause in the cases of customs unions, free-trade areas and other similar associations of States. Regional integration was an increasingly important reality reflecting a special relationship of an objective character which did not come under the influence of the clause.⁷⁷ It was emphasized that the question did not concern only EEC or other such associations of developed States, but affected all regional groupings.⁷⁸ It was stated that one reason for not applying the clause to customs unions and similar associations was the difference in the degree of freedom which States enjoyed according to whether or not they were members of such groups.⁷⁹

182. Several representatives supported the inclusion in the draft of an exception to the operation of the clause for customs unions or other similar associations when their members were developing States. It was said in this respect that exceptions for customs-union agreements among developed countries were contrary to the principles of preferential and differentiated treatment of developing countries.⁸⁰

183. A number of representatives supported the inclusion of a customs-union exception with particular reference to EEC.⁸¹

184. In the Sixth Committee in 1977, it was stated that the Commission should keep in mind situations involving new and more extensive modes of co-operation between countries with like interests. Any integration process, whether regional, subregional or between neighbouring States, should automatically be considered an exception to the application of the most-favoured-nation clause.⁸²

⁷⁵ *Ibid.*, para. 47.

⁷⁶ *Ibid.*, para. 49.

⁷⁷ *Ibid.*, para. 51.

⁷⁸ *Ibid.*, para. 53.

⁷⁹ *Ibid.*, para. 54.

⁸⁰ *Ibid.*, para. 55.

⁸¹ *Ibid.*, paras. 56 and 57.

⁸² *Ibid.*, *Thirty-second Session, Annexes*, agenda item 112, document A/32/433, para. 191.

⁷² *Ibid.*

⁷³ *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 44.

⁷⁴ *Ibid.*, para. 45.

*Written comments*⁸³

185. The *Byelorussian SSR* and the *USSR* consider the exceptions to the clause provided for by the Commission in draft articles 21 to 23 to be the only ones justified.

186. The *German Democratic Republic* feels that exceptions from the application of most-favoured-nation treatment must not be permitted to rob the clause of its value. The exceptions provided for by the Commission in draft articles 21, 22 and 23 fulfil this requirement. No other exceptions should be provided for, including exceptions relating to customs unions or economic communities. Such problems should be solved by agreement between the States members of such a community and the beneficiaries of the clause. Mutual interests are better served in this manner; this is also in conformity with the spirit of article 12 of the Charter of Economic Rights and Duties of States.⁸⁴

187. *Luxembourg*. The Government of Luxembourg stated that article 15 does not in itself call for comment. However, the Commission chose to consider in the commentary to article 15 (paras. (24) *et seq.*) the question whether the most-favoured-nation clause does or does not attract benefits accorded within Customs unions and similar associations of States. It is regrettable that this problem, which is one of the major problems raised by the clause, could not be solved.

188. The Government of Luxembourg was surprised that the report of the Commission makes no reference to the resolution adopted by the Institute of International Law at its Edinburgh session in 1969, which affirms, *inter alia* that:

States to which the clause is applied should not be able to invoke it in order to claim a treatment identical with that which States participating in an integrated regional system concede to one another.⁸⁵

189. The Government of Luxembourg feels that this approach is the only one which is in conformity with universal practice and can accommodate the differences in quality and nature existing between economic integration systems and international trade. Whereas a large number of economic integration systems have been functioning since the nineteenth century, parallel with the most-favoured-nation clause mechanism, there is no known precedent of a State demanding and obtaining, by virtue of the clause, the advantages of a customs-union or free-trade system of which it was not a member. The frequency of explicit exceptions in treaty practice referred to in the Commission's commentary, such as article XXIV of GATT, show only that practice is uniform.

190. *Sweden*. The Government of Sweden holds the view that an exception from the general rule in re-

spect of customs unions and free-trade areas should be included in the draft articles. Such an exception has been included in the General Agreement on Tariffs and Trade⁸⁶ and in numerous bilateral treaties. It cannot be considered reasonable that a State which is not a member of a customs union or is not included in a free-trade area should be entitled, on the basis of a most-favoured-nation clause, to claim special benefits resulting from the customs union or free-trade agreement. A customs union or a free-trade agreement entails a number of rights as well as obligations for the States involved, and these rights cannot be separated from the obligations. The parties to a treaty containing a most-favoured-nation clause do not normally intend the clause to be applicable to benefits which either of them might subsequently grant to another State in connexion with the establishment of a customs union or free-trade area. An exception for such cases should therefore normally be considered to be implicit in the most-favoured-nation clause and this should be reflected in the draft articles.

191. *Hungary*. The Hungarian People's Republic considers the provisions of article 15, which, in full accordance with the correct principles of codification, seeks the broadest possible application of the most-favoured-nation treatment, to be appropriate and important.

192. *Guyana*. The Government of Guyana comments that the draft makes no provision for customs unions and other similar forms of association to be an exception to the clause, notwithstanding the frequency of their use in some form or other by several countries, but especially by developing countries, as an instrument of economic development. It feels that the draft articles could benefit from the inclusion of this exception.

Comments of international organizations

193. The *secretariat of GATT*⁸⁷ agreed that the application of the clause with respect to some of the issues that arise in the field of international trade would seem to require the reconciliation of diverging interests through negotiations in specialized organizations which therefore do not lend themselves easily to codification. It noted further that the proposed articles would apply only to future treaties embodying a most-favoured-nation clause and that States would remain free to agree on different provisions. The proposed articles would therefore not alter the existing law on GATT and would preserve the freedom of the contracting parties to GATT to negotiate any changes in this law. The Commission's draft does not refer to customs unions, free-trade areas and similar groupings. However, the secretariat of GATT

⁸³ See foot-note 20 above.

⁸⁴ General Assembly resolution 3281 (XXIX).

⁸⁵ *Annuaire de l'Institut de droit international*, 1969 (Basel), vol. 53, vol. II, p. 362.

⁸⁶ General Agreement on Tariffs and Trade. Text in GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No. GATT/1969-1).

⁸⁷ See *Yearbook ... 1978*, vol. II (Part Two), p. 178, document A/33/10, annex, sect. C, subsect. 3.

assumed that in its further work the Commission would take into account the developments that have taken place in this area.

194. *The Economic Commission for Western Asia*⁸⁸ notes that draft article 15 could be interpreted as the obligation to extend to third countries the advantages enjoyed by members of a customs union. If an ECWA country should conclude a trade agreement with any country outside the customs union, it might be legally obliged to apply to imports from that country the same treatment as is granted to other members of the customs union. A possible way to avoid this would be to make the most-favoured-nation clause conditional, including a phrase stating that it does not refer to the intra-customs union treatment. This measure was included in all three of the EEC agreements with Jordan, Lebanon and Syria, in which these ECWA countries committed themselves to granting most-favoured-nation treatment to imports from EEC. If article 15 were to remain unchanged, ECWA countries would have to recognize its implications and make most-favoured-nation clauses conditional.

195. *The Board of the Cartagena Agreement*⁸⁹ considers that the advantages provided for in an integration agreement cannot be invoked by States benefiting from the most-favoured-nation clause, as might be understood from the text of article 15. The Board is therefore in favour of making exceptions to the general rule in the cases of customs unions and free-trade areas, as is done in the General Agreement on Tariffs and Trade.

196. *European Free Trade Association*.⁹⁰ EFTA feels that, in view of the importance of regional economic integration, free-trade areas and customs unions are generally recognized exceptions to the most-favoured-nation treatment of trade. In the opinion of EFTA, therefore, the draft articles should be supplemented by a provision which explicitly recognizes such exceptions, as does article XXIV of GATT.

197. *EEC*.⁹¹ The Community feels that article 15 could be interpreted as meaning that, under the most-favoured-nation clause, the advantages which the States members of a customs union grant among themselves by virtue of that union should be extended to third countries. It also considers that article 16 would imply that the mutual non-discriminatory commitments granted to each other by States members of a customs union should be extended to third countries.

198. In its opinion, the argument of the Special Rapporteur (Professor Endre Ustor) that there is no customary rule under international law which would implicitly exclude customs unions from the effects of the clause is not adequate. Customs unions are regarded in the doctrine and practise of States as automatically exempt from the normal application of the

most-favoured-nation clause. Moreover, even if no such exception existed either in a customary rule or in modern State practice, an exemption would have to be established under international law both for the industrialized and the developing countries.

199. Consequently, the Community suggests that draft articles 15 and 16 should be supplemented by an article 16 *bis*, which would read as follows:

"Effects of the clause on rights and obligations established within economic and other unions"

"Notwithstanding articles 15 and 16, the present articles shall not affect rights and obligations which are established within entities in the sense of article 2, in particular economic unions, customs unions or free-trade areas, and which confer benefits or impose responsibilities on the members of such entities."

OPINION OF THE SPECIAL RAPPORTEUR

200. The Special Rapporteur feels that the question of customs unions, free-trade areas and similar associations of States, in the broad sense of economic unions of States, is not directly related to the subject-matter of article 15. Economic unions of States are obviously established on the basis of bilateral or multilateral agreements, but there is more to them than that. The Commission has undoubtedly always clearly understood this.

201. The Special Rapporteur considers that article 15 in itself does not call for any comment and he suggests that it should be retained in its present form.

202. Undoubtedly, the question of customs unions and similar associations of States was considered by the General Assembly and in the written comments of States and international organizations in connexion with article 15 only because the Commission considered it in its commentary, which now appears to be inadequate. In fact, this question is part of the problem of the existing or possible general exceptions to the clause reflected in draft articles 21, 22, 23 and 27. The Special Rapporteur also feels that, in referring to customs unions and similar associations of States in the commentary, the Commission also has in mind the more general case of economic unions between States, which it would therefore be advisable to refer to specifically.

203. The Special Rapporteur considers that very convincing, even irrefutable, arguments can be adduced to support the view that the functioning of any specific economic union of States is incompatible with the obligations assumed by its members, under the clause, concerning matters relating to international trade. Among other things, the many corresponding exceptions provided for in clauses or in treaties now in effect which include such clauses testify to this.

204. However, in the opinion of the Special Rapporteur, all this is not convincing proof that in international law there is a generally recognized excep-

⁸⁸ *Ibid.*, p. 175, sect. B.

⁸⁹ *Ibid.*, p. 179, sect. C, subsect. 4.

⁹⁰ *Ibid.*, p. 184, subsect. 7.

⁹¹ *Ibid.*, p. 179, subsect. 6.

tion to the clause in favour of economic unions of States, or that it is advisable to introduce one in the process of the progressive development of international law, or, finally, that the interests of any economic union of States require it.

205. The Special Rapporteur is firmly convinced that any attempts to formulate legal rules applicable to the draft articles concerning exceptions of that kind would encounter insuperable difficulties of both a theoretical and a practical nature. In this connexion, at least three fundamental problems would obviously have to be solved, namely:

1. With regard to which areas of the operation of the clause are exceptions in favour of economic unions of States necessary.

2. In favour of which specific economic unions of States and on what specific conditions should an exception to the clause be provided.

3. Is it sufficient to provide for exceptions only in favour of economic unions of States or are other unions of States or States parties to certain economic agreements in a similar situation.

206. The Special Rapporteur will attempt very briefly to state the main difficulties involved in the aforementioned problems.

207. In the commentary to article 15, it is stated that it is evident for the Commission that the "customs union issue", as the problem has been briefly called, is not a general problem of most-favoured-nation clauses, that is to say, it does not arise with regard to all existing and conceivable clauses but to clauses of the type contained in commercial treaties, especially those relating to customs duties.⁹²

208. However, that remark is justified only in the case of a customs union as such and, obviously, a free-trade area. If we refer to other existing and possible economic unions of States, for example of the type of EEC, then it becomes obvious that exceptions are desirable, not only to clauses relating to trade but, perhaps, to clauses relating to establishment, finance, transport, transit, occupations of many different kinds, etc.

209. In short, the Special Rapporteur has not taken it upon himself to determine from which clauses exceptions should be provided in favour of any given type of economic union of States. In general, this task appears to be impossible. At the same time, a specific union of States, or, rather, its member States, can easily establish which specific existing clauses and which agreements containing such clauses should be reviewed and revised with a view to introducing certain exceptions.

210. These are the main difficulties involved in the first of the problems mentioned above.

211. In the Commission's commentary, the problem of exceptions in respect of economic unions of States is referred to as "the case of customs unions and similar associations of States". If it is a question

of indicating the inadvisability of formulating exceptions, then such a formula is adequate. Otherwise, it is necessary to establish to what specific unions the term "similar associations of States" applies.

212. In the oral and written comments on the draft articles mentioned above, reference is made to customs unions, free-trade areas, economic communities, and regional and subregional integration. The question is how to compile an exhaustive list of economic unions of States to which exceptions to clauses (of different kinds) would apply. The Special Rapporteur does not have a satisfactory answer to that question. However, it would be necessary not only to draw up a list of such unions, but to give a legal definition of each type, and also to specify the conditions which they should fulfil in order to be entitled to benefit from an exception.

213. The complexity of such a task is illustrated by GATT, article XXIV of which, for the purposes of that Agreement (and not for the broader purposes of the Commission's draft articles), gives definitions of a customs union and a free-trade area and also sets out the conditions applicable to them. In this connexion, it is important to bear in mind that in practice definitions may always prove inadequate. What, for example, is EEC? A customs union, a free-trade area, a financial union, an integration community, or all these together, and something more? Most probably the latter, and it is still constantly changing.

214. These, in short, are the main difficulties involved in the second of the problems mentioned above.

215. It may be considered that, apart from customs unions and free-trade areas, exceptions to the obligations deriving from GATT relate also to "preliminary agreements" leading to the establishment of a customs union or free-trade area. Thus, what is involved is an economic agreement of some kind.

216. The Special Rapporteur has considered economic unions of States as institutions being more than merely an agreement.⁹³ EEC, for example, is clearly not only an agreement. However, in principle, economic integration, for example, can be effected on the basis of an economic agreement and entail the need for the application of a clause with exceptions in favour of the parties to the agreement. Should certain economic agreements fall under the general exceptions to the clause and, if so, which specific agreements? The Special Rapporteur feels that, having said A, one would have to say B, and there is no knowing where to stop.

217. This is the kind of difficulty involved in the third of the problems mentioned above.

218. During the discussion of the question of customs unions and similar associations of States, for some reason the question was not raised of a State which is a contracting party to the clause and which subsequently joins an economic community of the type, for example, of a customs union.

⁹² *Yearbook ... 1976*, vol. II (Part Two), p. 45, document A/31/10, chap. II, sect. C, article 15, para. (26) of the commentary.

⁹³ See para. 200 above.

219. Let us assume that, after State A has joined such a community, goods from State B must not enjoy the preferences given to goods from members of the community. However, thanks to State A, goods from the whole community can, on the basis of the clause, receive all the privileges which formerly only goods from State A received in the territory of State B. In short, are there recognized exceptions to the clause for contracting members of "customs unions and similar associations of States", and what are they?

220. In view of the fact that the question whether or not there are generally recognized exceptions to the clause in favour of members of customs unions and similar associations of States has been considered thoroughly and in depth by Professor Endre Ustor, the Special Rapporteur has dwelt above on another problem, namely, how far is this possible and advisable *de lege ferenda*.

221. He continues to be firmly convinced that there are insurmountable difficulties in the way as a result of the wide range of problems (clauses) covered by the draft articles and the need for a generalized (abstract) solution to them. However, in practice, in international relations, no substantial difficulties, at least of a legal nature, have arisen. When the matter needs to be developed further, clauses are reviewed and revised, naturally with the agreement of the parties concerned and in the light of their mutual interests.

222. The Special Rapporteur maintains therefore that the possible exclusion of certain unions from the effects of the clause is a special question which has no direct relevance to article 15.

223. Moreover, he still maintains that article 15 has not in itself given rise to any comments, and he suggests that it should be retained in its present form.

224. He also considers that the additional arguments and proposals regarding the exclusion of "customs unions" from the effects of the clause in no way refute the arguments he has advanced⁹⁴ concerning the inadvisability of attempting to formulate *de lege ferenda* provisions to deal with such exemptions.

225. Even if this aim is to be pursued *de lege ferenda*, it must unfortunately be noted that the article 16 *bis* proposed by EEC⁹⁵ will be of no assistance whatsoever.

226. The proposed article in fact refers to the fact that the draft articles under consideration do not deal with the reciprocal rights and responsibilities of the member States of certain economic unions. This is irrelevant to the proposed article 16 *bis*, for the draft articles do not affect those rights and responsibilities.

227. Draft article 16 *bis* does not deal with the question of the rights of the beneficiary State when the granting State is a member of such an economic union, the other members of which are third States.

228. The draft of the new article refers to rights and obligations which are established within entities in the sense of article 2, i.e. in the sense of the supplement to article 2 proposed by the Community,⁹⁶ under which entities exercising powers generally exercised by States would be treated in the same way as States (for the purposes of all the draft articles). In other words, it applies to entities which have supranational powers. Yet, with one obvious exception, the economic unions to which the article could apply do not have such powers.

229. As before, it would be necessary, in order to draft an exception, to determine to which economic unions that exception would apply and to give a precise legal definition of each such entity. In the opinion of the Special Rapporteur, such a task would require enormous efforts, without holding out any great chance of success.

Article 16. Right to national treatment under a most-favoured-nation clause

Comments of States

Oral comments

230. Some representatives speaking in the Sixth Committee in 1976 (para. 58 of the report) supported in general the provisions of article 16. Other representatives made comments on the article. It was said that the title and text of the article did not seem to be completely in harmony. The article was unclear as the term "national treatment" had not been defined in the draft. It was suggested that the words "unless the parties otherwise agree" should be inserted at the beginning of the article. It was stated that article 16 gave much too broad a scope to the most-favoured-nation clause and would not, in its present form, be in the interest of the vast majority of developing countries. It was said that the article assimilated the standards of national and most-favoured-nation treatment, but that the national treatment standard was invariably the highest order of treatment.⁹⁷

*Written comments*⁹⁸

231. *Luxembourg*. The Government of Luxembourg is of the view that, given the difference in nature between national treatment and most-favoured-nation treatment, it would be preferable not to confuse these two sorts of questions and to delete articles 16 and 17.

OPINION OF THE SPECIAL RAPPORTEUR.

232. Article 16 expresses an indisputable truth which, in principle, should follow directly from the substance of the clause as defined in article 5.

⁹⁶ *Ibid.*, para. 71.

⁹⁷ *Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 106, document A/31/370, para. 58.*

⁹⁸ See foot-note 20 above.

⁹⁴ See paras. 200 to 221 above.

⁹⁵ *Ibid.*, para. 199.

233. The question of the advisability or inadvisability of developing a relationship with another State in one sphere of relations or another on the basis of most-favoured-nation treatment can be solved only in specific cases by a State in the light of existing circumstances. One can speak of standards of national treatment, since national treatment is specific and direct: it is established by the national legislation of a given State. However, no standards of most-favoured-nation treatment exist. This treatment depends on being directly extended to a third State. National treatment may also be granted directly.

234. A third State may, by agreement, be directly granted certain advantages which are more substantial than those provided under national treatment. It is therefore impossible to assess in the abstract the relative advantages of the two kinds of treatment.

235. What the parties may agree upon other than what is set out in article 16 is directly laid down in article 26. There is therefore no need to add a corresponding reference in article 16.

236. The Special Rapporteur feels it would be advisable to retain article 16 in its present form.

237. The question of the definition of the term "national treatment" should obviously be decided in the context of article 2.

*Written comments*⁹⁹

238. *Guyana*. In the view of the Government of Guyana, article 16 assimilates the standard of national treatment to the standard of most-favoured-nation treatment. However, the redefinition of the trading concepts and relationships, which has been so much the preoccupation of all countries for a number of years, has not played a part in the formulation of this article. It would be beneficial to the development of the new law of international economic relations if the article reflected that preoccupation of States.

Comments of international organizations

239. *EEC*.¹⁰⁰ The community considers that article 16 would extend to third countries the mutual non-discriminatory commitments granted to each other by States members of a customs union.

OPINION OF THE SPECIAL RAPPORTEUR

240. It is unfortunately not clear to the Special Rapporteur what is the drift of the above opinions concerning article 16.¹⁰¹ In particular, it is not clear to him how the provisions of article 16 would affect the mutual non-discriminatory commitments made by members of economic unions.

⁹⁹ *Ibid.*

¹⁰⁰ See *Yearbook ... 1978*, vol. II (Part Two), p. 179, document A/33/10, annex, sect. C, subsect. 6.

¹⁰¹ Paras. 238–239.

241. He considers that it would be advisable to retain article 16 in its present form.

Article 17. Most-favoured-nation treatment and national or other treatment with respect to the same subject-matter

Comments of States

Oral comments

242. According to the 1976 report of the Sixth Committee, some representatives considered in general acceptable the provisions of articles 17, 18 and 19. With reference to article 17, the view was expressed that the article was based on the assumption that national and most-favoured-nation treatment went beyond the beneficiary State's entitlement under the international minimum standard.¹⁰²

Written comments

243. *Luxembourg*, as noted above,¹⁰³ suggests that article 17, as well as article 16, should be deleted.

OPINION OF THE SPECIAL RAPPORTEUR

244. The Special Rapporteur feels that it would be advisable to retain article 17 in its present form.

Article 18. Commencement of enjoyment of rights under a most-favoured-nation clause

*Written comments*¹⁰⁴

245. *Luxembourg*. Articles 18 and 19 invite no comment, except with regard to the concept of "material reciprocity" discussed earlier in the comments of the Government of Luxembourg concerning articles 2, 8 and 9.

OPINION OF THE SPECIAL RAPPORTEUR

246. The Special Rapporteur suggests that article 18 should be retained in its present form.

Article 19. Termination or suspension of enjoyment of rights under a most-favoured-nation clause

Comments of States

Oral comments

247. According to the 1976 report of the Sixth Committee, it was suggested that the words "to a

¹⁰² *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 59.

¹⁰³ Para. 231.

¹⁰⁴ See foot-note 20 above.

third State" should be inserted after the word "State" in paragraph 1, for reasons of clarity, in order to bring it into line with article 18, paragraph 1.¹⁰⁵

*Written comments*¹⁰⁶

248. *Luxembourg* observed that the question arises whether the suspension of the treatment extended to the third State can be applied to the beneficiary State when it results from a breach of the law.

OPINION OF THE SPECIAL RAPPORTEUR

249. The Special Rapporteur considers that the question referred to above relates only to the interpretation or application of article 19. That question in turn raises another question, namely, whether a beneficiary State can, in a specific case, question the legitimacy of the conduct of the granting State or of a third State in their relations with each other.

250. The Special Rapporteur suggests that article 19 should be retained, with the drafting change proposed.

Article 20. *The exercise of rights arising under a most-favoured-nation clause and compliance with the laws of the granting State*

Comments of States

Oral comments

251. In the Sixth Committee in 1976, article 20 was supported in general by some representatives. It was said that the article protected the beneficiary State against any abuses on the part of the granting State and that its provisions constituted a prerequisite for the proper development of economic relations as a whole.¹⁰⁷

*Written comments*¹⁰⁸

252. *Luxembourg*. The Government of Luxembourg feels that article 20 is contrary to a general principle of international law, according to which a State may not invoke its internal legislation in order to restrict the scope of an international obligation or to release itself from it. It should at least be stated in this article that the national laws of the granting State may not be applied to the beneficiary State except when their observation has been expressly stipulated in relations with the third State.

¹⁰⁵ *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 59.

¹⁰⁶ See foot-note 20 above.

¹⁰⁷ *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 60.

¹⁰⁸ See foot-note 20 above.

OPINION OF THE SPECIAL RAPPORTEUR

253. The Special Rapporteur would like to emphasize once again that the clause does not contain any established right of a beneficiary State to any specific treatment which might be contrary to the internal legislation of the granting State. The beneficiary State is entitled to claim only treatment no less favourable than the treatment of a third State, which is in conformity with the present case and is reflected in the second sentence of the article.

254. The Special Rapporteur suggests that article 20 should be retained in its present form.

Article 21. *The most-favoured-nation clause in relation to treatment under a generalized system of preferences*

Oral comments

255. According to the 1976 report of the Sixth Committee, a number of representatives supported article 21 in its present form as being in conformity with the efforts made by the international community to relieve the flagrant imbalance between developed and developing countries.¹⁰⁹

256. Some representatives were of the opinion that it was not possible to include in the draft, at the present time, any rules other than those contained in article 21 in favour of the developing countries.¹¹⁰

257. Many of the representatives who supported article 21 did so because the objective of the system of generalized non-reciprocal non-discriminatory preferences was to give developing countries access to markets of developed countries for their manufactured and semi-manufactured products and to promote their economic development.¹¹¹

258. A number of considerations were put forward to the effect that the wording required further study, since it was not quite clear how generalized the system of preferences should be in order to qualify for the exception provided in article 21.¹¹²

259. With regard to the preferential treatment given to developing countries by developed countries other than within the generalized system of preferences, it was recalled that the Tokyo Declaration¹¹³ had set forth the basis for the multilateral trade negotiations consecrating a new principle to secure additional advantages for the developing countries: the principle of differentiated or more favourable treatment. In that connexion, a suggestion was made to amend article 21 to read:

¹⁰⁹ *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 62.

¹¹⁰ *Ibid.*, para. 63.

¹¹¹ *Ibid.*, para. 65.

¹¹² *Ibid.*, para. 64.

¹¹³ Declaration of Ministers, adopted on 14 September 1973. For text, see GATT, *Basic Instruments and Selected Documents, Twentieth Supplement* (Sales No. GATT/1974-1), p. 19.

"A beneficiary State is not entitled under a most-favoured-nation clause to any treatment of a preferential or differentiated nature extended by a developed granting State to a developing third State."¹¹⁴

260. It was felt that the Commission, in view of its role to promote the progressive development of international law, should take into account the broad consensus which existed on the development of trade among developing countries. Many representatives agreed that article 21 should be expanded or a supplementary article should be formulated to except from the operation of the most-favoured-nation clause any preferences or favours which developing countries granted to one another.¹¹⁵

261. In the framework of preferences granted by developing countries to one another, the view was expressed that the necessary additional provision should deal in particular with preferences granted by developing countries to each other as members of a customs union, free-trade area or other similar association, since economic or customs unions as such would not justify the inclusion of such an exception in the draft. Although that exception might not be recognized as implied under customary international law, it ought to be acknowledged in cases where the paramount objective was the economic development of developing countries.¹¹⁶

262. In the Sixth Committee, in 1977, it was stressed that, in its second reading of article 21, the Commission should make provision for safeguarding the interests of developing countries according to their degree of development and should codify the differential treatment referred to in the Tokyo Declaration not only with regard to tariffs but also in broader areas of co-operation between industrialized and developing countries.¹¹⁷

*Written comments*¹¹⁸

263. The *Byelorussian SSR* and the *USSR* approve the provisions of article 21.

264. *Luxembourg*. The Government of Luxembourg approves the substance of articles 21, 22 and 23, which are based on the same principle, namely, that the clause may not be used to extend the benefit of advantages accorded by the granting State in a context alien to the normal context of most-favoured-nation treatment, such as development assistance, frontier traffic and special facilities extended to land-locked States.

265. The *German Democratic Republic* supports the provisions of article 21 and feels that the proposal that exceptions should be made for mutual prefer-

ences granted in relations between developing countries deserves special consideration, especially in the light of article 21 of the Charter of Economic Rights and Duties of States.¹¹⁹

266. *Sweden*. In the opinion of the Swedish Government, the generalized systems of preferences are of a temporary character. They should no longer be applied when the developing countries have reached a stage of development which allows them to assume more of the obligations resulting from rules of international trade. While accepting the generalized systems of preferences as a temporary measure, the Swedish Government does not consider it desirable to grant to those systems a special legal status by including a specific article on those preferences in the draft articles.

267. *Hungary*, the *Ukrainian SSR* and *Czechoslovakia* consider the exceptions contained in article 21 to be justified.

268. *Guyana*. The Government of Guyana believes that it is right to include article 21 in the draft articles. The article gives recognition to the system of generalized non-reciprocal, non-discriminatory preferences as an instrument for ensuring access by developing countries to the markets of developed countries for their goods.

269. The article secures the position of a developed country vis-à-vis another developed country in the matter of granting preferences.

270. Trading between developing countries is a recent phenomenon; such co-operation among developing countries could no doubt benefit from the inclusion of a provision similar to draft article 21, which would enable developing countries to secure their positions vis-à-vis one another.

271. The *United States of America* feels that article 21 presents a material problem.

272. The effect of article 21 is to except from all future most-favoured-nation clauses generalized preferences granted to developing countries, whether or not such preferences come within an exception or waiver, such as the current waiver from the most-favoured-nation provisions of the General Agreement on Tariffs and Trade.¹²⁰ Article 21 would deny to a non-beneficiary of generalized preferences any basis for questioning, on most-favoured-nation grounds, the effect of the extension of preferential direct treatment to a developing third State. The article thus embodies a major departure from existing rules.

273. The GATT waiver, which currently excepts generalized preferences from the most-favoured-nation clause, was drafted deliberately to afford some measure of protection to third States beneficiaries of that clause. It contains a notification and consultation requirement and provides that any contracting party which considers that "any benefit accruing to it under the General Agreement may be or

¹¹⁴ *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 67.

¹¹⁵ *Ibid.*, para. 68.

¹¹⁶ *Ibid.*, para. 69.

¹¹⁷ *Ibid.*, *Thirty-second Session, Annexes*, agenda item 112, document A/32/433, para. 190.

¹¹⁸ See foot-note 20 above.

¹¹⁹ General Assembly resolution 3281 (XXIX).

¹²⁰ For reference, see foot-note 86 above.

is being impaired ... may bring the matter before the Contracting Parties" for review and recommendation.¹²¹ Article 21 of the Commission's draft does not provide such protection. In the view of the United States, the Commission's draft is deficient in not providing for some such mechanism for determination of the applicability of generalized preferences in a given case.

274. The legal basis for differential and more favourable treatment benefiting developing countries (including trade preferences) is under negotiation in the multilateral trade negotiations. For this reason, and because of the deficiency noted above, the United States at this juncture wishes to reserve its position on article 21, particularly in order to determine whether changes in that article should be made on the basis of the results of the negotiations. At the same time, the United States is open to appropriate possibilities of future agreement on modifications of most-favoured-nation principles for the benefit of developing countries. It notes that article 27 of the Commission's draft has been prepared with such possibilities in view.

275. *Colombia*. The Government of Colombia proposes the insertion of the word "developed" before the words "beneficiary State" at the beginning of the text of the article. By specifying in this way the treatment extended within a generalized system of preferences, it will be possible to prevent the improper application of the clause in the field of economic relations. It should not have the effect of upsetting the balance of international trade and giving certain countries unfair and non-reciprocal advantages.

276. The article could also be supplemented by a provision stating that extension of most-favoured-nation treatment within a generalized system of preferences does not imply discrimination and is not detrimental to other developing countries.

Comments of international organizations

277. The *GATT secretariat*¹²² considers that the Tokyo Declaration, which launched the multilateral trade negotiations in GATT, recognizes the importance of maintaining and improving the GSP and of special and more favourable treatment for developing countries in both the tariff and the non-tariff fields. The responsibility for supervising and guiding these negotiations rests with the Trade Negotiations Committee, which, at present, is composed of representatives of 98 countries. The Committee has established a number of groups and subgroups to deal with the various areas of the negotiations. One of the groups, which has come to be known as Group "Framework", is to consider improvements in the legal framework for the conduct of world trade. One

of the items on the provisional agenda of the group is:

The legal framework for differential and more favourable treatment for developing countries in relation to GATT provisions, in particular, the most-favoured-nation clause.

278. *ECWA*.¹²³ The Economic Commission for Western Asia considers that it would be advisable to change article 21, either by making it more general (without any specific mention of the generalized system of preferences) or by expanding it to include other forms of preferential treatment for developing countries. In particular, the article neglects to mention preferences which are granted among developing countries (i.e. a beneficiary State is not entitled under a most-favoured-nation clause to any treatment granted by a granting developing State to a developing third State in the context of preferential trade agreements).

279. *EEC*.¹²⁴ The Community shares the concern expressed by the Commission concerning the specific interests of developing countries in their relations with industrialized countries. It most commonly grants preferential treatment in agreements based on article 238 of the Treaty of Rome.¹²⁵ In such agreements, it does not grant most-favoured-nation status but rather a more favourable arrangement.

280. In order to take into account not only the granting by the industrialized countries of generalized preferences to developing countries, but also the special links resulting from preferential agreements concluded or to be concluded by industrialized States, and in particular the Community, with developing countries, the Community suggests that draft article 21 should be amended to read as follows:

"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 under a preferential régime established by that granting State."

OPINION OF THE SPECIAL RAPPORTEUR

281. The Special Rapporteur feels that, with the exception of the view that there is no need to retain article 21 in the draft, all other comments refer not to the article itself but to the question of adding to the draft new provisions relating to exceptions in favour of developing countries. The Special Rapporteur suggests, therefore, that it would be advisable to retain article 21 in its present form.

282. In the view of the Special Rapporteur, proposals concerning the addition to the draft of new provisions relating to exceptions to the most-favoured-nation clause in favour of developing countries touch on two questions: (a) the so-called

¹²¹ GATT, *Basic Instruments and Selected Documents*, Eighteenth Supplement (Sales No. GATT/1972-1), p. 26.

¹²² See *Yearbook ... 1978*, vol. II (Part Two), p. 178, document A/33/10, annex, sect. C, subsect. 3.

¹²³ *Ibid.*, p. 175, sect. B.

¹²⁴ *Ibid.*, sect. C, subsect. 6.

¹²⁵ For reference, see foot-note 36 above.

differentiated treatment established by a developed State in favour of a developing country; (b) preferences and favours which developing countries grant to each other in their mutual relations.

283. It appears to the Special Rapporteur, in the light of the reply of the GATT secretariat,¹²⁶ that a draft relating to the legal status of the differentiated system of preferences (similar to the GSP) is being prepared in the framework of GATT and will be established by the developed granting countries in favour of the developing countries. The treatment which will be granted to the developing countries on a non-reciprocal basis under this system is subject to an exception to the operation of the most-favoured-nation clause in the GATT system.

284. If this impression of the Special Rapporteur is correct, he would be in favour of drafting an appropriate article, similar to article 21, for inclusion in the draft. Unfortunately, at the present time, this is hardly possible since the work being carried out within the framework of GATT is far from completed and the draft has not yet taken legal form. However, the Special Rapporteur feels that, when this legal instrument materializes, the existing draft articles could easily be supplemented with the appropriate provisions.

285. The Special Rapporteur is in complete sympathy with the general thesis that developing countries should not extend to developed countries, even under the most-favoured-nation clause, those preferences and favours which they grant each other to promote economic development. The Special Rapporteur sincerely wishes to take full account of the interests of the developing countries. However, it is unfortunately not clear to him what specifically is meant by the expression "preferences which are granted among developing countries", that is to say, what existing or possible system of preferences is involved. The Special Rapporteur will try to explain the main reasons for his doubts.

286. The ECWA communication¹²⁷ concerning the "preferences which are granted among developing countries" gave the text of the proposed article. While the Special Rapporteur is extremely grateful to ECWA for its willingness to cast its proposal in a clear legal form, he would like to draw attention to the fact that the proposed draft article reads as follows:

"A beneficiary State is not entitled under a most-favoured-nation clause to any treatment granted by a granting developing State to a developing third State in the context of preferential trade agreements."

287. What is involved in the proposed text? In the view of the Special Rapporteur, the following situations are described. Developing State A has concluded an agreement on trade preferences with developing State B. No beneficiary State, either de-

veloped or developing, may claim those preferences on the basis of the clause. The question arises as to why that should be so. If the above-mentioned "trade agreement" (bilateral or multilateral) in fact establishes a customs union, a free-trade area or, for instance, an integration community of developing countries, then the problem is reduced to the case of customs unions and similar associations of States, which has already been considered in the context of article 15.¹²⁸ The problem is in no way simplified by the fact that only economic unions of developing countries are involved.

288. In principle, the text proposed by ECWA could be modified by beginning it with the words "a developed beneficiary State". However, even then, all the doubts mentioned above remain. Furthermore, there is the additional and more complicated problem of establishing the criteria for dividing States into developed and developing for the purposes, in particular, of international trade relations.

289. The Special Rapporteur would like to draw attention to the fact that this problem did not arise in the case of the existing article 21, as a generalized system of preferences is established by a given developed State, which itself determines also the group of developing countries to which the preferences are extended.

290. The Special Rapporteur feels that it is important first to work out some kind of general system of preferences among developing countries and the conditions for its application among those countries, in order to be able to consider and decide the question of the non-extension of such a system to developed countries under the clause. Unfortunately, in the oral and written comments which were available to the Special Rapporteur, nothing is said of such systems.

291. The Special Rapporteur hopes that sufficient light will be thrown on this question during the second reading of the draft articles at the Commission's thirtieth session.

292. The Special Rapporteur fully shares the concern of the United States¹²⁹ with regard to the possible deficiencies of article 21 as compared, for instance, to the more advanced provisions of GATT on this subject. He believes, however, that, for contracting parties to GATT, any conditions for the operation of a generalized system of preferences which have been established under GATT or may be established in the future will remain valid notwithstanding the present draft article. At the same time, article 21 would allow granting States which are not parties to GATT to use a generalized system of preferences in their trade relations with developing countries. In other words, article 21 relates to certain interests of the developing countries, and in that sense it is useful.

293. The Special Rapporteur also fully shares the desire of EEC¹³⁰ to improve the wording of ar-

¹²⁶ See para. 277 above.

¹²⁷ See para. 278 above.

¹²⁸ *Ibid.*, paras. 200 *et seq.*

¹²⁹ *Ibid.*, paras. 271-274.

¹³⁰ *Ibid.*, paras. 279-280.

ticle 21, taking into account the specific interests of the developing countries.

294. The proposed draft differs from the original in substituting the phrase "under a preferential régime" for "within a generalized system of preferences", which, naturally, fundamentally alters the nature of the regulation.

295. The Special Rapporteur is not convinced, however, that the proposed change is fully justified. The concept of a "generalized system of preferences" is now fairly clearly established within UNCTAD and GATT and in other cases. It is far from clear, however, what should be understood by the expression "preferential régime" (established by a developed granting State). The Special Rapporteur believes that the latter concept could be used in article 21 only if it were specially defined on the basis of a fairly widespread use of such a procedure by States. However, he feels it would be extremely difficult to give such a definition.

296. With regard to the inclusion in the draft of additional provisions to take into account the interests of developing countries, the Special Rapporteur has already expressed his opinion.¹³¹

297. With regard to the comments of the Government of Colombia,¹³² the Special Rapporteur wishes to state that the provisions of draft article 21 stem from the basic assumption that it is the granting State itself that decides not only which specific preferences it is prepared to extend to developing countries on a non-reciprocal and non-discriminatory basis within the system of preferences it has itself established, but also which developing countries can benefit from such preferences. In any case, no beneficiary State, whether developed or developing, can claim such preferences under the clause.

298. In other words, a generalized system of preferences for the benefit of the developing countries is a *direct system*, which cannot be extended by virtue of this clause. The addition of the word "developed" at the beginning of article 21 would radically change the substance of this article.

299. The Special Rapporteur therefore feels that article 21 should be retained in its present form.

Article 22. The most-favoured-nation clause in relation to treatment extended to facilitate frontier traffic

Comments of States

Oral comments

300. In the Sixth Committee in 1976, many representatives supported the exceptions embodied in article 22, which took account of the special situation

of States having a common frontier and which were based on State practice.¹³³

*Written comments*¹³⁴

301. The *Byelorussian SSR*, the *German Democratic Republic*, *Luxembourg* and the *USSR* support article 22.

302. *Hungary* and the *Ukrainian SSR* also agree with the provisions of article 22.

303. *Czechoslovakia* agrees with the substance of articles 22 and 23. However, it doubts the advisability of retaining the limitation in the sense of paragraph 2 of each article.

OPINION OF THE SPECIAL RAPPORTEUR

304. The Special Rapporteur believes that the conditions set out in article 22, paragraph 2, are fully justified, and suggests that the article should be retained in its present form.

Article 23. The most-favoured-nation clause in relation to rights and facilities extended to a land-locked State

Comments of States

Oral comments

305. In the Sixth Committee in 1976, many representatives agreed with the exception provided for in the article regarding special benefits accorded to land-locked countries on account of their geographical situation.¹³⁵

306. It was said that the principle dealt with in the article had been embodied in instruments such as the 1958 Convention on the High Seas¹³⁶ and the 1965 Convention on Transit Trade of Land-locked States.¹³⁷ It was also said that the article was based to some extent on principle VII adopted by the United Nations Conference on Trade and Development at its first session,¹³⁸ and was in line with the special measures for land-locked countries adopted at the Fifth Conference of Heads of State or Government of Non-Aligned Countries (Colombo, 1976) in its resolution 31.¹³⁹

¹³³ *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 71.

¹³⁴ See foot-note 20 above.

¹³⁵ *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, paras. 72-77.

¹³⁶ United Nations, *Treaty Series*, vol. 450, p. 11.

¹³⁷ *Ibid.*, vol. 597, p. 3.

¹³⁸ *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No. 64.II.B.11), p. 25.

¹³⁹ See A/31/197, annex IV.

¹³¹ *Ibid.*, paras. 282-291.

¹³² *Ibid.*, paras. 275-276.

*Written comments*¹⁴⁰

307. The *Byelorussian SSR*, the *German Democratic Republic*, *Luxembourg* and the *USSR* approve of article 23.

308. *Hungary* and the *Ukrainian SSR* also agree with the provisions of article 23.

309. *Czechoslovakia* agrees with the substance of article 23, but doubts the advisability of retaining the limitation in the sense of paragraph 2 of the article.

310. It also thinks it would be expedient to take into account in the final wording of article 23 the corresponding outcome of the Third United Nations Conference on the Law of the Sea.

OPINION OF THE SPECIAL RAPPORTEUR

311. The Special Rapporteur believes that the conditions laid down in article 23, paragraph 2, are fully justified, and suggests that article 23 should be retained in its present form.

312. He also considers that it would be useful to take into account the corresponding outcome of the Third United Nations Conference on the Law of the Sea.

Article 24. Cases of State succession, State responsibility and outbreak of hostilities*Comments of States**Oral comments*

313. According to the 1976 report of the Sixth Committee, some representatives agreed with the inclusion of draft article 24, which reproduced the text of article 73 of the Vienna Convention, since the draft articles were autonomous. Other representatives expressed doubts as to the need for the article but did not oppose its retention.¹⁴¹

OPINION OF THE SPECIAL RAPPORTEUR

314. The Special Rapporteur suggests that article 24 should be retained in its present form.

Article 25. Non-retroactivity of the present articles*Comments of States**Oral comments*

315. According to the 1976 report of the Sixth Committee, some representatives approved of the

adoption of article 25. Other representatives questioned the usefulness of the article in view of the general rule in article 28 of the Vienna Convention, but they did not insist on its deletion.¹⁴²

OPINION OF THE SPECIAL RAPPORTEUR

316. The Special Rapporteur suggests that article 25 should be retained in its present form.

Article 26. Freedom of the parties to agree to different provisions*Comments of States**Oral comments*

317. According to the 1976 report of the Sixth Committee, many representatives expressed support for article 26, which underlined the residual character of the provisions contained in the draft. It was said that the provisions of article 26 would certainly be of value in interpreting clauses even in the circumstances provided for in the article.¹⁴³

318. The view was expressed that article 26 should be modified to ensure that it was not used as a pretext for discrimination.¹⁴⁴

OPINION OF THE SPECIAL RAPPORTEUR

319. The Special Rapporteur suggests that article 26 should be retained in its present form.

Article 27. The relationship of the present articles to new rules of international law in favour of developing countries*Comments of States**Oral comments*

320. According to the 1976 report of the Sixth Committee, many representatives expressed satisfaction that article 27 had been added to the draft articles.¹⁴⁵

321. Some representatives considered that it was possible to improve the wording of article 27 and to supplement it by guarantees in favour of developing countries.¹⁴⁶

322. The opinion was also expressed that article 27 should be amplified by the addition of a second paragraph restating General Principle Eight adopted by

¹⁴⁰ See foot-note 20 above.

¹⁴¹ *Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 106, document A/31/370, para. 78.*

¹⁴² *Ibid.*, para. 79.

¹⁴³ *Ibid.*, para. 80.

¹⁴⁴ *Ibid.*, para. 81.

¹⁴⁵ *Ibid.*, para. 82.

¹⁴⁶ *Ibid.*, para. 84.

the United Nations Conference on Trade and Development at its first session.^{147, 148}

OPINION OF THE SPECIAL RAPPORTEUR

323. The Special Rapporteur considers it advisable to retain article 27 in its present form.

IV. The problem of the procedure for the settlement of disputes relating to the interpretation and application of a convention based on the draft articles

324. According to the 1976 report of the Sixth Committee, some representatives considered that the draft should contain an article on the settlement of disputes. In support of this position, it was said that, in the absence of legal precedents, the implementation and interpretation of a future convention creating new rights and duties would inevitably give rise to disputes. A State should not be the sole interpreter of the rules concerning the most-favoured-nation clause; without a uniform interpretation and the establishment of settlement procedures, the application of the rules might lead to the disintegration of carefully negotiated compromises designed to give balanced protection to competing rights and interests.¹⁴⁹

325. The view was also expressed that arrangements with regard to the settlement of disputes could concern only disputes arising from the application of the future convention and not disputes which might arise between parties to an agreement containing the most-favoured-nation clause.¹⁵⁰

326. Other representatives agreed with the Commission that it was not useful, at the present stage, to include a provision on the settlement of disputes and with its decision to refer the question to the General Assembly and Member States and eventually, to the body entrusted with the task of finalizing the draft articles.¹⁵¹

¹⁴⁷ *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No. 64.II.B.11), p. 20.

¹⁴⁸ *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 84.

¹⁴⁹ *Ibid.*, para. 29.

¹⁵⁰ *Ibid.*, para. 30.

¹⁵¹ *Ibid.*, para. 31.

*Written comments*¹⁵²

327. The *German Democratic Republic* considers that the Commission should not formulate an article on the settlement of disputes. Most-favoured-nation clauses appear in specific treaties. They are an integral part of those treaties. Problems arising from the interpretation of such most-favoured-nation clauses should therefore be regulated under the procedures laid down in the treaties in question for the settlement of disputes.

328. *Luxembourg*. The Government of Luxembourg considers that the sole purpose of the provisions of the draft is the establishment of *rules of interpretation* or presumptions, intended to establish the meaning of the most-favoured-nation clause in default of stipulations to the contrary.

OPINION OF THE SPECIAL RAPPORTEUR

329. The Special Rapporteur would first of all like to point out that the matter is being considered in connexion with a possible future convention based on the Commission's draft articles.

330. Such a convention would, however, have a somewhat secondary character. It would set down, as the Government of Luxembourg has rightly pointed out, the rules for interpreting clauses or that which should be presumed in the interpretation and application of clauses if they themselves do not contain other rules.

331. In other words, the convention cannot be applied except in connexion with specific clauses. It can serve (a) as a source of information on the substance and legal consequences of clauses for bodies engaged in negotiations on the conclusion of clauses or which are called upon to apply them, and (b) as an auxiliary instrument for the settlement of disputes on the interpretation or application of a specific clause, if the parties to the dispute are parties to the convention or have agreed in some other way to apply it. The existence of a dispute with regard to the convention itself would signify a twofold dispute and would clearly lead to an impasse.

332. The Special Rapporteur suggests, therefore, that it is hardly advisable to provide for a procedure for the settlement of disputes relating to the interpretation and application of a possible future convention.

¹⁵² See foot-note 20 above.