

Document:-
A/CN.4/L.280

**Draft articles on most-favoured-nation clause. Texts adopted by the Drafting Committee:
title of the draft and articles 1-29 - reproduced in A/CN.4/SR.1521**

Topic:
Most-favoured-nation clause

Extract from the Yearbook of the International Law Commission:-
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oping country to another would be required to be in conformity with the relevant rules and procedures of the competent international organization and that, as such, the article would detract from the freedom accorded to developing countries by the draft articles as a whole.

38. Mr. SCHWEBEL (Chairman of the Drafting Committee), referring to the amendment proposed by Mr. Riphagen, suggested that it would be better to retain the wording he himself had proposed. If article 23 *bis* provided that, for the relevant rules and procedures of the competent international organization to apply, all three of the States concerned must be members of that organization, it might not be clear whether or not the developed beneficiary State was entitled to the preferential treatment in question; whereas, if the wording he had proposed were accepted, the exception provided for in article 23 *bis* would apply if either of the developing States concerned was a member of the competent international organization.

39. He also thought that the words "competent international organizations" in his amendment should be replaced by the words "a competent international organization".

40. Mr. PINTO said that he could accept article 23 *bis*, which appeared to be a step in the right direction. He nevertheless had doubts similar to the ones expressed by Mr. Francis and was not certain about the full implications of the first amendment proposed by Mr. Schwebel.

41. Mr. RIPHAGEN still thought that the international organization in question could be competent only if all three of the States concerned were members of it.

42. Mr. EL-ERIAN supported the text proposed by Mr. Njenga, as amended by Mr. Schwebel and Mr. Riphagen.

43. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that he could accept Mr. Riphagen's amendment to the text of article 23 *bis*, which would now read:

Article 23 bis. The most-favoured-nation clause in relation to arrangements between developing States

A developed beneficiary State is not entitled under a most-favoured-nation clause to any preferential treatment in the field of trade extended by a developing granting State to a developing third State in conformity with the relevant rules and procedures of a competent international organization of which the States concerned are members.

44. The CHAIRMAN said that, if there were no objection, he would take it that the Commission decided to adopt the title and the text of article 23 *bis*, as amended.

It was so agreed.

The meeting rose at 6.15 p.m.

1521st MEETING

Wednesday, 19 July 1978, at 10.05 a.m.

Chairman : Mr. José SETTE CÂMARA

Members present : Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

The most-favoured-nation clause (continued)
(A/CN.4/308 and Add.1 and Add.1/Corr.1 and Add.2, A/CN.4/309 and Add.1 and 2, A/CN.4/L.280)

[Item 1 of the agenda]

NEW ARTICLE 23 *bis* (The most-favoured-nation clause in relation to arrangements between developing States)¹ (concluded)

1. Mr. USHAKOV (Special Rapporteur) said that in the commentary to article 23 *bis* it would be essential to indicate that, even more than article 23, the article concerned the progressive development of international law, that it was based on article 21 of the Charter of Economic Rights and Duties of States² and that it would be very difficult to apply in the absence of any classification of countries into developed and developing countries from the point of view of international trade. On the last point, it should be made clear that the Commission had judged that responsibility for formulating proposals for the implementation of certain rules of the draft rested not with the Commission but with the organs competent to establish lists of developing countries or to determine the applicable criteria.

2. Mr. RIPHAGEN said that a foundation in the Charter of Economic Rights and Duties of States could be claimed not only for the further exception to the most-favoured-nation clause adopted by the Commission in article 23 *bis*, but also for other proposals for new draft articles on which the Drafting Committee had not agreed, particularly the proposals relating to treatment extended under commodities agreements and in connexion with customs unions, and the proposal concerning treatment extended in conformity with the Charter of Economic Rights and Duties of States. Hence, although the Commission had covered in its draft articles the subject-matter of articles 18 and 21 of the Charter of Economic Rights and Duties of States, it had not provided for that of articles 5 and 6, which concerned primary commodities, or for that of article 12, which concerned customs unions and similar groupings. The Commission

¹ For text, see 1520th meeting, para. 43.

² General Assembly resolution 3281 (XXIX).

should have looked into those two questions, for the most-favoured-nation clause must be adapted to contemporary trends in international trade, and particularly to the principles laid down in the Charter of Economic Rights and Duties of States. He greatly regretted that for reasons of time, the Commission had been unable to examine the proposals he had mentioned.

3. Mr. PINTO said that, if the only purpose of the condition expressed by the phrase "in conformity with the relevant rules and procedures of a competent international organization" was to remind the parties contemplated in article 23 *bis* that they must act in accordance with previous contractual obligations, the qualification seemed unnecessary, albeit harmless. He would find it unacceptable, however, if it meant that, in order to ensure the exclusion of a developed State from entitlement under a most-favoured-nation clause, it was necessary to belong to a "competent international organization". Many countries in Asia and Latin America were not members of GATT or any other such arrangement, and he thought it would be wrong to restrict the protection offered by the qualification to States that belonged to such bodies. Moreover, the article as drafted failed to make it clear whether such protection would be available only where all three States referred to were members of the same organization and had, as he supposed, consented in advance to the situation envisaged, or whether it would also exist where the members of the organization included only the two developing States or perhaps only one of them.

4. Some of those ambiguities might have been avoided by dividing the article into two sentences, with the qualification appearing in the second sentence. The latter sentence might have provided that, if the developing granting State and the developing third State were members of an international arrangement or organization competent in the sphere of trade, they would have to abide by the relevant rules and procedures of that arrangement or organization. It would then have been clear that the article meant what he interpreted it to mean, namely, that the requirement that relations between the developing granting State and the developing third State should be in conformity with the rules of an international organization would not apply—and in consequence would not restrict the freedom of developing countries to grant preferential treatment among themselves—unless both those States were members of that organization.

5. Mr. REUTER welcomed the adoption of article 23 *bis*, although it was far from coming up to his expectations. It seemed from the procedure which the Commission had had to follow at the previous meeting that the other articles proposed by members of the Commission, and in particular the two articles he had himself proposed, would not be examined. Generally speaking, the methods adopted in preparing the draft, both in the Commission and in the Drafting Committee, could hardly be a matter for satisfaction. The application of the most-favoured-

nation clause had indeed been carefully studied in the abstract, but the same was not true of its role in international trade; that aspect of the problem had been touched upon only incidentally, in connexion with frontier traffic, for example. It was not for lack of time or qualification that the Commission had not looked at the question from the angle of the new international order, but because it had not wished to do so. And it had been unwilling to look at the question from that angle because it had considered that it would not reach agreement. The modest article 23 *bis* that had been adopted was in fact of no great value, but it would be necessary to make do with it. It was nevertheless paradoxical that the Commission should be unable to submit to the General Assembly articles as fundamental and at least as far-reaching as certain provisions already adopted by the General Assembly and set forth in the Charter of Economic Rights and Duties of States.

6. Mr. SUCHARITKUL did not regard the amendment incorporated in the original text of article 23 *bis* on the proposal of Mr. Schwebel and Mr. Riphagen as in any way affecting the granting by one developing State to another, by way of an exception from the most-favoured-nation clause, of preferential treatment in the sphere of trade. He interpreted the phrase "in conformity with the relevant rules and procedures" as referring to a permissive and not a mandatory situation; the term "competent international organization" as meaning the United Nations; and the term "the States concerned" as meaning the developed beneficiary State, the developing granting State, and the developing third State.

7. When developing States Members of the United Nations concluded arrangements for preferential treatment between themselves in the form of a treaty, they were required by Article 102 of the United Nations Charter to register the instrument with the Secretariat of the Organization. Such registration in itself represented compliance with "the relevant rules and procedures of a competent international organization". He believed that all preferential treatment that had so far been granted by Members of the United Nations among themselves through regional, bilateral or other arrangements was in conformity with the "relevant rules and procedures" of the Organization as they currently existed. Otherwise, those arrangements would surely have been questioned when, as was the case each year, they were brought to the attention of the General Assembly in the part of the report of the Economic and Social Council that concerned the activities of the regional commissions of the United Nations.

8. Mr. VEROSTA remarked that the expression "international organization", in article 23 *bis*, did not cover the General Agreement on Tariffs and Trade. The wording of the article should be amended accordingly.

9. Mr. SCHWEBEL understood article 23 *bis* to mean that, if one developing State extended preferential treatment to another, a developed State that

was the beneficiary State under a most-favoured-nation clause would be prohibited from invoking that clause in order to obtain the same treatment only if the preferential treatment granted by the developing country was in conformity with the relevant rules and procedures of a competent international organization of which the States concerned were members. The fact that the article referred to "a" competent international organization indicated that the organization in question might be any organization in that category, a category that undoubtedly included GATT. He held that view not merely because he had understood the Drafting Committee to have had GATT in mind when it had drawn up article 23, in which it had employed the expression "a competent international organization" in the same context as in article 23 *bis*, but in particular because GATT was in fact generally treated, by reason of its objectives, structure, method of working and relations with the United Nations, as tantamount to a specialized agency of the United Nations. GATT had its special legal characteristics but, as a matter of fact, it was and operated as an international organization.

10. Mr. YANKOV said that, by permitting developing nations to establish special régimes among themselves, the article rightly made allowance for the particular economic, social or political problems such States might encounter. He therefore approved the general philosophy of the article and subscribed to much of what Mr. Pinto had said concerning its operation. He wished, however, to stress that, as he interpreted it, the article offered no basis whatsoever for political or other discrimination against any country that was a member of the group of developing nations, even if that country's gross national product happened to be higher than that of another country which was not a member of that group. To use the article for the purposes of such discrimination would be to use it for the opposite of what was intended.

11. Mr. QUENTIN-BAXTER was grateful to the members of the Drafting Committee who had spoken on article 23 *bis*, and particularly to the Special Rapporteur, for having dispelled all possibility of suspicion that, in setting aside certain of the proposals submitted to it, the Drafting Committee had acted perfunctorily or adopted a position different from that of the Commission. The current discussion showed that it was impossible to give an article such as article 23 *bis* the same measure of clarity and precision as the Drafting Committee had achieved in other articles. He hoped the Commission would be able to convey to the General Assembly the inevitability of a difference in quality between an abstract presentation of the most-favoured-nation clause and what the Commission could do to reflect current preoccupations. He also hoped the Commission would tell the General Assembly that the question of customs unions was an important one and must be taken into account if there were to be a possibility of convening a conference that would do justice to the very high quality of the work underlying the draft articles.

12. Mr. USHAKOV (Special Rapporteur), supported

by Mr. REUTER, said that in the French version of the article the words "les Etats en cause" should be replaced by the words "les Etats intéressés", so as to bring it into line with the English version.

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(continued)

ARTICLE 1³ (Scope of the present articles)

13. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 1:

Article 1. Scope of the present articles

The present articles apply to most-favoured-nation clauses contained in treaties between States.

14. The Committee had decided not to alter the title and text of article 1 as adopted by the Commission on first reading at its twenty-eighth session.⁴

Article 1 was approved.

15. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that, since article 2 contained definitions of terms, he would introduce it last.

ARTICLE 3⁵ (Clauses not within the scope of the present articles)

16. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 3:

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

The fact that the present articles do not apply to a clause on most-favoured treatment other than a most-favoured-nation clause referred to in article 4, shall not affect:

(a) the legal effect of such a clause;

(b) the application to it of any of the rules set forth in the present articles to which it would be subject under international law independently of the present articles.

17. The version of article 3 adopted in 1976 had dealt essentially with two kinds of international agreements containing clauses on most-favoured-nation treatment, namely, agreements concluded by States otherwise than in written form and agreements to which subjects of international law other than States were also parties. In considering the article, the Drafting Committee had borne in mind that members of the Commission had criticized the introductory wording of the original version of the article as being incomplete and that, as indicated in article 4, a most-favoured-nation clause was a provision

³ For consideration of the text initially examined by the Commission at the current session, see 1483rd-1485th meetings.

⁴ For the text of the articles adopted by the Commission on first reading, see *Yearbook... 1976*, vol. II (Part Two), pp. 11 *et seq.*, doc. A/31/10, chap. II, sect. C.

⁵ For consideration of the text initially examined by the Commission at its current session, see 1486th meeting, and 1487th meeting, paras. 7-27.

in a “treaty”, which was defined in article 2, paragraph 1, subparagraph (a), as an international agreement concluded between States “in written form”. The Committee had therefore decided to deal separately, in article 6, with the case of clauses on most-favoured-nation treatment contained in agreements to which other subjects of international law were also parties. For the sake of consistency, it had also dealt in article 6 with relations between States under clauses on most-favoured-nation treatment contained in international agreements to which subjects of international law other than States were also parties, a question that had been covered in subparagraph (c) of the former article 3.

18. The Drafting Committee had made use in the new article 3 of the expression “clause on most-favoured treatment”—as distinct from the expressions “clause on most-favoured-nation treatment”, which appeared in article 6, and “most-favoured-nation clause”, which appeared in numerous articles—in order to cover the wide variety of situations, such as those involving a most-favoured-international-organization clause or a most-favoured-free-city clause, in which either the grantor or the beneficiary, or both, were subjects of international law other than States. The Committee had abandoned the reference made in the 1976 version to “a clause on most-favoured-nation treatment contained in an international agreement between States not in written form”, since such clauses were virtually unknown in practice.

Article 3 was approved.

ARTICLE 4⁶ (Most-favoured-nation clause)

19. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 4:

Article 4. Most-favoured-nation clause

A most-favoured-nation clause is a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured-nation treatment in an agreed sphere of relations.

20. Article 4 substantially reproduced the text of the article adopted on first reading in 1976. However, in the light of comments made in the Commission, the Committee had decided to replace the word “means” by the word “is”, to avoid giving the article the appearance of a definition, and to stress the legal nature of the undertaking by one State towards another under a most-favoured-nation clause by adding the words “an obligation”.

Article 4 was approved.

ARTICLE 5⁷ (Most-favoured-nation treatment)

21. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 5:

Article 5. Most-favoured-nation treatment

Most-favoured-nation treatment is treatment accorded by the granting State to the beneficiary State, or to persons or things in

a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.

22. The text of article 5 was the same as that adopted on first reading, except that the word “means” had been replaced by the word “is” for the same reason as in article 4, and that at all appropriate points in the draft the words “a third State” had been amended, for the sake of precision, to read “that third State”.

23. It should also be noted that, in article 4 and elsewhere, the Committee had adhered to the practice followed in the articles adopted at the Commission’s twenty-eighth session by using the verb “to accord” when referring to the treatment applied by the granting State to the beneficiary State and the verb “to extend” when referring to the treatment applied by the granting State to a third State.

Article 5 was approved.

ARTICLE 6 (Clauses in international agreements between States to which other subjects of international law are also parties)

24. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 6:

Article 6. Clauses in international agreements between States to which other subjects of international law are also parties

Notwithstanding the provisions of articles 1, 2, 4 and 5, the present articles shall apply to the relations of States as between themselves under an international agreement containing a clause on most-favoured-nation treatment to which other subjects of international law are also parties.

25. The Committee proposed the new article for the reasons he had stated when introducing article 3.

26. Mr. TSURUOKA said that article 6 really concerned the scope of the draft and it would therefore be preferable to make it the second paragraph of article 1. Apart from its drafting aspect, that suggestion perhaps involved a matter of substance.

27. Referring to the English version of the article, he noted the use of the verbal form “shall apply” as opposed to the form “apply” employed in article 1. There seemed to be no difference of meaning between the two expressions. At most, the presence of the word “notwithstanding” at the beginning of article 6 might explain the form “shall apply”. If article 6 became paragraph 2 of article 1, the word “shall” could be omitted.

28. Mr. REUTER was prepared to accept article 6. However, like the corresponding article of the Vienna Convention on the Law of Treaties,⁸ it might lead to varying interpretations, according to whether or not obligations were considered divisible where they arose under a multilateral agreement to which sub-

⁶ *Ibid.*, 1487th meeting, paras. 28-46.

⁷ *Ibid.*

⁸ *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.

jects of international law other than States were parties.

29. The CHAIRMAN said that, if there were no other comments, he would take it that the Commission decided to approve the title and text of article 6 as proposed by the Drafting Committee.

Article 6 was approved.

ARTICLE 7⁹ (Legal basis of most-favoured-nation treatment)

30. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 7:

Article 7. Legal basis of most-favoured-nation treatment

Nothing in the present articles shall imply that a State is entitled to be accorded most-favoured-nation treatment by another State otherwise than on the basis of an international obligation undertaken by the latter State.

31. Article 7 corresponded to and had substantially the same form as the article 6 adopted by the Commission on first reading. However, the words "a legal obligation" had been replaced by the words "an international obligation undertaken by the latter State", in order to avoid any suggestion that the obligation in question might arise from agreements that were not international in character but were concluded between States and private persons.

Article 7 was approved.

ARTICLE 8¹⁰ (The source and scope of most-favoured-nation treatment)

32. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 8:

Article 8. The source and scope of most-favoured-nation treatment

1. The right of the beneficiary State to most-favoured-nation treatment arises only from the most-favoured-nation clause referred to in article 4, or from the clause on most-favoured-nation treatment referred to in article 6, in force between the granting State and the beneficiary State.

2. The most-favoured-nation treatment to which the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, is entitled under a clause referred to in paragraph 1 is determined by the treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.

33. Article 8 corresponded to and took substantially the same form as the article 7 adopted on first reading. Paragraph 1 of the article contained a specific reference to the two kinds of clauses with which the draft articles were concerned, namely, those mentioned in articles 4 and 6. By comparison with the

corresponding paragraphs of the former article, paragraph 1 of article 8 had been simplified by the deletion of certain words, and paragraph 9 had been made clearer by the addition of the words "for itself or for the benefit of persons or things in a determined relationship with it". Those words had also been added, for the same reason, in other draft articles.

Article 8 was approved.

ARTICLE 9¹¹ (Scope of rights under a most-favoured-nation clause)

34. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 9:

Article 9. Scope of rights under a most-favoured-nation clause

1. Under a most-favoured-nation clause the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject-matter of the clause.

2. The beneficiary State acquires the rights under paragraph 1 only in respect of persons or things which are specified in the clause or implied from its subject-matter.

35. Article 9 corresponded to and, apart from minor drafting changes, was identical with article 11 as adopted on first reading.

Article 9 was approved.

ARTICLE 10¹² (Acquisition of rights under a most-favoured-nation clause)

36. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 10:

Article 10. Acquisition of rights under a most-favoured-nation clause

1. Under a most-favoured-nation clause the beneficiary State acquires the right to most-favoured-nation treatment only if the granting State extends to a third State treatment within the limits of the subject-matter of the clause.

2. The beneficiary State acquires rights under paragraph 1 in respect of persons or things in a determined relationship with it only if they:

(a) belong to the same category of persons or things as those in a determined relationship with a third State which benefit from the treatment extended to them by the granting State and

(b) have the same relationship with the beneficiary State as the persons and things referred to in subparagraph (a) have with that third State."

37. Article 10 corresponded to and reproduced in substance the article 12 adopted on first reading. A number of drafting changes had been made for the sake of clarity, and in particular in order to spell out the relationship between the general rule concerning the acquisition by the beneficiary State of most-favoured-nation treatment, stated in paragraph 1, and the limits on such acquisition in respect of persons or

⁹ For consideration of the text initially examined by the Commission at the current session, see 1487th meeting, paras. 47 et seq., and 1488th meeting, paras. 1-4.

¹⁰ *Ibid.*, 1488th meeting, paras. 5-32.

¹¹ *Ibid.*, 1490th meeting, paras. 16-25.

¹² *Ibid.*

things in a determined relationship with the beneficiary State.

Article 10 was approved.

ARTICLE 11¹³ (Effect of a most-favoured-nation clause not made subject to compensation),

ARTICLE 12 (Effect of a most-favoured-nation clause made subject to compensation), *and*

ARTICLE 13¹⁴ (Effect of a most-favoured-nation clause made subject to reciprocal treatment)

38. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that he was introducing articles 11, 12 and 13 together because they were closely interconnected. The Committee proposed the following titles and texts for those articles:

Article 11. Effect of a most-favoured-nation clause not made subject to compensation

If a most-favoured-nation clause is not made subject to a condition of compensation, the beneficiary State acquires the right to most-favoured-nation treatment without the obligation to accord any compensation to the granting State.

Article 12. Effect of a most-favoured-nation clause made subject to compensation

If a most-favoured-nation clause is made subject to a condition of compensation, the beneficiary State acquires the right to most-favoured-nation treatment only upon according the agreed compensation to the granting State.

Article 13. Effect of a most-favoured-nation clause made subject to reciprocal treatment

If a most-favoured-nation clause is made subject to a condition of reciprocal treatment, the beneficiary State acquires the right to most-favoured-nation treatment only upon according the agreed reciprocal treatment to the granting State.

39. Of the corresponding articles in the 1976 draft, articles 8 and 9 had been the object of considerable criticism in the Commission. In the light of that criticism, the Drafting Committee had decided to reformulate the articles concerning conditional clauses so as to make it perfectly clear that the condition of material reciprocity was only one of the conditions to which the beneficiary State's right to most-favoured-nation treatment might be made subject.

40. The Committee had therefore dealt separately, in article 11, with the case of a most-favoured-nation clause not made subject to any conditions and had introduced for that purpose a new term, "condition of compensation"; as defined in article 2, paragraph 1, subparagraph (e), that was a generic term meaning a condition providing for compensation of any kind. Where the former article 9 had referred to "conditions" and "material reciprocity", article 11 referred to "a condition of compensation" and "any compensation" respectively. Otherwise, the texts of the two articles were the same. The Drafting Com-

mittee believed that the new phrase, "a condition of compensation", was a distinct improvement on the term previously used and would rapidly acquire authoritative currency.

41. Although the condition of material reciprocity, which had been the subject of article 10 in the 1976 draft, was now considered as only one of a number of types of conditions, it had traditionally been of importance and was therefore dealt with once again in a separate article, namely, article 13. In view of the criticism levelled against the term "material reciprocity" by members of the Commission, particularly on grounds of its obscurity, article 13 spoke of "a condition of reciprocal treatment", which was defined in article 2, paragraph 1, subparagraph (f), as "a condition of compensation providing for the same or, as the case may be, equivalent treatment by the beneficiary State of the granting State or of persons or things in a determined relationship with it as that extended by the granting State to a third State or to persons or things in the same relationship with that third State". The words "material reciprocity" had similarly been replaced by the words "reciprocal treatment" in the remainder of the draft. Subject to that amendment and a minor drafting change, the text of article 13 was the same as that of the former article 10.

42. To avoid leaving a gap in the draft as a result of the changes he had mentioned, the Committee had introduced a new provision, article 12, concerning the effect of a most-favoured-nation clause made subject to a condition of compensation.

43. Since the rule stated in the former article 8 had been incorporated in the new article 11, the Committee had seen no reason to retain the former article.

Articles 11, 12 and 13 were approved.

ARTICLE 14 (Compliance with agreed terms and conditions)

44. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 14:

Article 14. Compliance with agreed terms and conditions

The exercise of rights arising under a most-favoured-nation clause for the beneficiary State or for persons or things in a determined relationship with that State is subject to compliance with the relevant terms and conditions laid down in the treaty containing the clause or otherwise agreed between the granting State and the beneficiary State.

45. The Drafting Committee was proposing article 14—a new article—because its consideration, in the light of the Commission's debate, of the articles dealing with most-favoured-nation clauses made subject to conditions, had shown that there might be a gap in the draft unless provision were made not only for conditions of compensation and, more specifically, of reciprocal treatment, but also for conditions precedent to the exercise of rights under a most-favoured-nation clause. The Committee had realized that the word "conditions" was used in practice to cover not

¹³ *Ibid.*, 1488th meeting, paras. 33 *et seq.*, 1489th meeting, and 1490th meeting, paras. 3-15.

¹⁴ *Ibid.*

only conditions for the existence of a right under a clause, but also conditions for its exercise. Conditions of the latter kind might be either imposed by the internal law of the granting State or agreed between the granting and beneficiary States in the treaty containing the clause or otherwise. The first of those cases had been covered in the former article 20, which had now become article 22, concerning compliance with the laws and regulations of the granting State; the second was the subject of the article under discussion, which was modelled as closely as possible on the first sentence of article 22.

Article 14 was approved.

ARTICLE 15¹⁵ (Irrelevance of the fact that treatment is extended to a third State against compensation),

ARTICLE 16¹⁶ (Irrelevance of limitations agreed between the granting State and a third State),

ARTICLE 17¹⁷ (Irrelevance of the fact that treatment is extended to a third State under a bilateral or a multilateral agreement), *and*

ARTICLE 18¹⁸ (Irrelevance of the fact that treatment is extended to a third State as national treatment)

46. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following titles and texts for articles 15, 16, 17 and 18:

Article 15. Irrelevance of the fact that treatment is extended to a third State against compensation

The acquisition without compensation of rights by the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, under a most-favoured-nation clause not made subject to a condition of compensation is not affected by the mere fact that the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended against compensation.

Article 16. Irrelevance of limitations agreed between the granting State and a third State

The acquisition of rights by the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, under a most-favoured-nation clause is not affected by the mere fact that the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended under an international agreement between the granting State and the third State limiting the application of that treatment to relations between them.

Article 17. Irrelevance of the fact that treatment is extended to a third State under a bilateral or a multilateral agreement

The acquisition of rights by the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, under a most-favoured-nation clause is not affected by the mere fact that the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended under an international agreement, whether bilateral or multilateral.

¹⁵ *Ibid.*, 1490th meeting, paras. 26 *et seq.*, and 1491st meeting, paras. 1-37.

¹⁶ *Ibid.*, 1491st meeting, paras. 38-47.

¹⁷ *Ibid.*, 1491st meeting, paras. 48 *et seq.*, and 1492nd meeting, paras. 1-27.

¹⁸ *Ibid.*, 1492nd meeting, paras. 28-51.

Article 18. Irrelevance of the fact that treatment is extended to a third State as national treatment

The acquisition of rights by the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, under a most-favoured-nation clause is not affected by the mere fact that the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended as national treatment.

47. Articles 15, 16, 17 and 18 dealt with the irrelevance, for the purposes of the acquisition of rights by the beneficiary States under a most-favoured-nation clause, of various modalities of the extension of treatment by the granting State to a third State. All those modalities had been covered in articles 13, 14, 15 and 16 on the subject of irrelevance, adopted at the twenty-eighth session. As in the case of those earlier articles, the Committee had sought maximum uniformity in the drafting of the provisions it had adopted at the current session. The former article 13 having used the verb "to acquire", the Committee had referred in all four articles now proposed, as in the new article 10, to "acquisition of rights" rather than to "entitlement to treatment". The phrase "is not affected by the mere fact", which appeared in all the articles under discussion, was intended to emphasize as strongly as possible the irrelevance of the fact in question.

Articles 15, 16, 17 and 18 were approved.

ARTICLE 19¹⁹ (Most-favoured-nation treatment and national or other treatment with respect to the same subject-matter)

48. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 19:

Article 19. Most-favoured-nation treatment and national or other treatment with respect to the same subject-matter

1. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause is not affected by the mere fact that the granting State has agreed to accord as well to that beneficiary State national treatment or other treatment with respect to the same subject-matter as that of the most-favoured-nation clause.

2. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause is without prejudice to national treatment or other treatment which the granting State has accorded to that beneficiary State with respect to the same subject-matter as that of the most-favoured-nation clause.

49. Article 19 corresponded to, and retained the title of, the former article 17. In discussing the earlier article in the light of comments on it in the Commission, the Drafting Committee had come to the conclusion that the text was ambiguous, particularly the clause "the beneficiary State shall be entitled to whichever treatment it prefers in any particular case", was ambiguous. The Committee had generally agreed that a beneficiary State to which a granting

¹⁹ *Ibid.*, paras. 52 *et seq.*

State offered most-favoured-nation treatment and national or other treatment with respect to the same subject-matter did not necessarily have to choose exclusively between those treatments; it might be able to opt for the cumulative enjoyment of all, some, or parts of the various treatments concerned. To avoid restricting the potential range of choice, the Committee had decided to divide the article into two paragraphs. Paragraph 1 stated the general rule, namely, that agreement by the granting State to accord the beneficiary State other forms of favourable treatment was irrelevant to the enjoyment by the beneficiary State of a right to most-favoured-nation treatment. It therefore used the phrase "is not affected by the mere fact", employed in the preceding articles. The Committee had decided not to retain from the former article 17 the words "undertaken by treaty", because of the possibility that national or other treatment might be accorded in some other way. Paragraph 2 of article 19 offered, as it were, the other side of the coin, stipulating that the right of the beneficiary State to most-favoured-nation treatment was without prejudice to national or other treatment accorded to that State by the granting State with respect to the same subject-matter.

Article 19 was approved.

ARTICLE 20²⁰ (Arising of rights under a most-favoured-nation clause)

50. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 20:

Article 20. Arising of rights under a most-favoured-nation clause

1. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause not made subject to a condition of compensation arises at the moment when the relevant treatment is extended by the granting State to a third State or to persons or things in the same relationship with that third State.

2. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause made subject to a condition of compensation arises at the moment when the relevant treatment is extended by the granting State to a third State or to persons or things in the same relationship with that third State and the agreed compensation is accorded by the beneficiary State to the granting State.

3. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause made subject to a condition of reciprocal treatment arises at the moment when the relevant treatment is extended by the granting State to a third State or to persons or things in the same relationship with that third State and the agreed reciprocal treatment is accorded by the beneficiary State to the granting State.

51. Article 20 corresponded to article 18 of the 1976 draft. The earlier article had contained only two paragraphs, dealing respectively with most-favoured-nation clauses not made subject to the condition of

material reciprocity and with clauses made subject to that condition. Since the Committee had decided to introduce in its new articles 11 and 12 provisions dealing with clauses respectively not made or made subject to the wider condition of compensation, it had considered it necessary to divide article 20 into three paragraphs, the first two concerning respectively clauses not made and made subject to a condition of compensation, and the third covering the case of a clause made subject to a condition of reciprocal treatment. Paragraph 1 of the article was essentially the same as the corresponding paragraph of the former article 18, except that, as in the other paragraphs of article 20, the Committee had replaced the expressions "any treatment" and "at the time" by the more precise expressions "most-favoured-nation treatment" and "at the moment" respectively. Since the condition of reciprocal treatment was merely one type of condition of compensation, the rule stated in paragraph 3 of the article was similar to that stated in paragraph 2 and was expressed in similar language. In the opinion of the Drafting Committee, what was essential for the right of the beneficiary State to arise under the conditional clauses contemplated in paragraphs 2 and 3 was the moment of coexistence of the two elements involved, namely, the moment when the relevant treatment was extended and the moment when the agreed compensation or reciprocal treatment was accorded. The references made in paragraph 2 of the former article 18 to "the time of the communication" and "consent to accord" had therefore been dropped.

52. Mr. REUTER pointed out that, in the English version of article 20, the verbal from "is extended" appeared in both paragraphs 2 and 3, but in the French version it had been rendered by "est conféré" in paragraph 2 and by "a été conféré" in paragraph 3. To bring the French version into line with the English, the words "a été conféré" should be replaced by "est conféré" in paragraph 3. However, the French version of paragraphs 2 and 3 would not be altogether clear if it were drafted throughout in the present tense. It would be better, in both paragraphs, to replace the wording beginning "au moment où le traitement pertinent" by the words "à partir du moment où le traitement pertinent a été conféré par l'Etat concédant à un Etat tiers ou à des personnes ou à des choses se trouvant dans le même rapport avec cet Etat tiers et où l'Etat bénéficiaire a accordé à l'Etat concédant...". That would make it clear that two conditions must be met and that the critical moment was the moment when the second condition was fulfilled.

53. Mr. SCHWEBEL (Chairman of the Drafting Committee) regarded Mr. Reuter's suggestion as sound and was prepared to accept it.

54. Mr. YANKOV asked what effect acceptance of Mr. Reuter's amendment would have on the English version of the article.

55. Mr. SCHWEBEL (Chairman of the Drafting Committee) replied that, in paragraphs 2 and 3 of the

²⁰ *Ibid.*, 1493rd meeting, paras. 1-31.

English version, the words "is extended" would be amended to read "has been extended" and the words "is accorded" would be amended to read "has been accorded". That would not affect the substance of the paragraphs.

56. Mr. USHAKOV (Special Rapporteur) said that the Drafting Committee had discussed the question at length and come to the conclusion that the agreed compensation was not normally accorded to the granting State until the latter had extended the relevant treatment to a third State, but that sometimes the compensation was accorded before the relevant treatment was extended. That was why the Drafting Committee had opted for wording that left the matter vague.

57. Mr. RIPHAGEN said that, since the essential requirement in both paragraph 2 and paragraph 3 was that the two specified conditions should be fulfilled, he did not think it made any difference whether the present or the past tense were used.

58. Mr. USHAKOV (Special Rapporteur) said that if the Commission used the present tense in each case it would preserve the ambiguity desired by the Drafting Committee. On the other hand, if it used the past tense in the first case and the present tense in the second, one condition would have to be fulfilled before the other.

59. Mr. VEROSTA understood Mr. Reuter to have been mainly concerned about the successive use of the past and present tenses in the French version of paragraph 3. To maintain the necessary ambiguity, it would be sufficient to use the present tense throughout.

60. Mr. REUTER explained that he had first suggested bringing the French version into line with the English version by wording it entirely in the present tense, but had afterwards expressed a preference for the use of the past tense in each case, which would indicate more clearly that the decisive moment was the one when the second condition had been fulfilled. However, as his second suggestion had raised doubts among members of the Commission, he would withdraw it.

61. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to approve the title and text of article 20 as proposed by the Drafting Committee, subject to the words "a été conféré" being replaced by the words "est conféré" in the French version of paragraph 3.

Article 20 was approved.

ARTICLE 21²¹ (Termination or suspension of rights under a most-favoured-nation clause)

62. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 21:

Article 21. Termination or suspension of rights under a most-favoured-nation clause

1. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause is terminated or suspended at the moment when the extension of the relevant treatment by the granting State to a third State or to persons or things in the same relationship with that third State is terminated or suspended.

2. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause made subject to a condition of compensation is equally terminated or suspended at the moment of termination or suspension by the beneficiary State of the agreed compensation.

3. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause made subject to a condition of reciprocal treatment is equally terminated or suspended at the moment of termination or suspension by the beneficiary State of the agreed reciprocal treatment.

63. Basically, article 21 corresponded to article 19 of the 1976 draft. In that draft, articles 19 and 18, dealing with two symmetrical situations, had each contained two paragraphs. The same symmetry obtained between articles 20 and 21 of the current draft. Like article 20, and for the same reasons, article 21 was divided into three paragraphs. The Drafting Committee had made the same drafting changes, *mutatis mutandis*, in article 21 as in article 20. In addition, to avoid any possible confusion, the word "also" used in the English text of the 1976 draft had been replaced by the word "equally".

Article 21 was approved.

ARTICLE 22²² (Compliance with the laws and regulations of the granting State)

64. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 22:

Article 22. Compliance with the laws and regulations of the granting State

The exercise of rights arising under a most-favoured-nation clause for the beneficiary State or for persons or things in a determined relationship with that State is subject to compliance with the relevant laws and regulations of the granting State. Those laws and regulations, however, shall not be applied in such a manner that the treatment of the beneficiary State or of persons or things in a determined relationship with that State is less favourable than that of the third State or of persons or things in the same relationship with that third State.

65. Article 22 reproduced the title and text of article 20 of the 1976 draft with only minor drafting changes. In the title, the words "the exercise of rights arising under a most-favoured-nation clause and" had been deleted as being unnecessary. In the body of the article, the word "and" had been replaced by the word "or" between the words "beneficiary State" and the words "persons" and "things", in order to maintain consistency throughout the

²¹ *Ibid.*, paras. 32-37.

²² *Ibid.*, paras. 38-51.

draft. Finally, the English version had been aligned with the other language versions by the use of the expression “laws and regulations” instead of the word “laws” alone.

Article 22 was approved.

ARTICLE 23²³ (The most-favoured-nation clause in relation to treatment under a generalized system of preferences)

66. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 23:

Article 23. The most-favoured-nation clause in relation to treatment under a generalized system of preferences

A beneficiary State is not entitled under a most-favoured-nation clause to treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a scheme of generalized preferences established by that granting State, which conforms with a generalized system of preferences recognized by the international community of States as a whole or, for the States members of a competent international organization, adopted in accordance with its relevant rules and procedures.

67. In article 23, the Drafting Committee had basically retained the provision embodied in the former article 21. It had considered it appropriate, however, to make the text more explicit, in order to reflect more closely the actual operation and effects of the generalized system of preferences. It had therefore replaced the phrase “within a generalized system of preferences established by that granting State” by the words “within a scheme of generalized preferences established by that granting State, which conforms with a generalized system of preferences”.

68. In addition, with a view to alleviating some of the concern expressed in the debate on the article, the Drafting Committee had decided to qualify the reference to a generalized system of preferences by adding at the end of the article the words “recognized by the international community of States as a whole or, for the States members of a competent international organization, adopted in accordance with its relevant rules and procedures”. The purpose of the change was to take account of the current general acceptability and implementation of the generalized system of preferences, having regard to the number of States participating in international organizations or other arrangements concerned with the question.

69. Finally, in the English version, the word “any”, before the word “treatment”, in the original text had been deleted as inappropriate in a provision dealing with treatment extended under a generalized system of preferences.

70. Mr. REUTER proposed that, at the end of the French version, the word “décisions” should be replaced by the word “règles”, which was a better translation of the English word “rules”.

71. He pointed out that the word “generalized” sometimes qualified the preferences and sometimes

the system. He proposed that the words “generalized system of preferences” should be replaced by the words “general system of preferences”.

72. Mr. SCHWEBEL (Chairman of the Drafting Committee) thought the text should be left as it stood. If a change were to be made, it was in the phrase “a scheme of generalized preferences”, where the word “generalized” should be replaced by the word “general”, because the term “a generalized system of preferences” referred to a system recognized by the international community.

73. Mr. USHAKOV (Special Rapporteur) suggested that the Secretariat should ascertain the terminology normally used in United Nations documents and that the same terminology should be used in the article.

74. Mr. SCHWEBEL (Chairman of the Drafting Committee) took it that the words “which conforms with a generalized system of preferences” would be retained, and that the expression “a scheme of generalized preferences” would also be retained unless it were found not to be accepted United Nations terminology, in which case the words “generalized preferences” would be replaced by the words “general preferences”.

75. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to approve the title and text of article 23 proposed by the Drafting Committee, subject to the understanding expressed by the Committee’s Chairman.

Article 23 was approved.

ARTICLE 24²⁴ (The most-favoured-nation clause in relation to treatment extended to facilitate frontier traffic)

76. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 24:

Article 24. The most-favoured-nation clause in relation to treatment extended to facilitate frontier traffic

1. A beneficiary State other than a contiguous State is not entitled under a most-favoured-nation clause to the treatment extended by the granting State to a contiguous third State in order to facilitate frontier traffic.

2. A contiguous beneficiary State is entitled under a most-favoured-nation clause to treatment not less favourable than the treatment extended by the granting State to a contiguous third State in order to facilitate frontier traffic only if the subject-matter of the clause is the facilitation of frontier traffic.

77. Article 24 basically reproduced the text of article 22 of the 1976 draft. In both paragraphs the indefinite article “a” had been used instead of the definite article “the” before the words “most-favoured-nation clause”. The phrase at the end of paragraph 2. of the former text (“and relating to frontier traffic only if the most-favoured-nation clause relates especially to the field of frontier traffic”), which was not sufficiently clear, had been replaced by the phrase “in order to facilitate frontier traffic only if the sub-

²³ *Ibid.*, 1494th meeting—1497th meeting, paras. 1-20.

²⁴ *Ibid.*, 1497th meeting, paras. 21-32.

ject-matter of the clause is the facilitation of frontier traffic". In addition, to avoid difficulties of interpretation concerning the treatment involved, the Drafting Committee had thought it desirable to use the expression "treatment not less favourable than".

78. Mr. YANKOV assumed that article 23 *bis*, which had already been adopted, would become article 24 and that the existing article 24 would be renumbered 25.

79. The CHAIRMAN said that the Secretariat would renumber the articles later.

Article 24 was approved.

ARTICLE 25²⁵ (The most-favoured-nation clause in relation to rights and facilities extended to a land-locked third State)

80. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 25:

Article 25. The most-favoured-nation clause in relation to rights and facilities extended to a land-locked third State

1. A beneficiary State other than a land-locked State is not entitled under a most-favoured-nation clause to rights and facilities extended by the granting State to a land-locked third State in order to facilitate its access to and from the sea.

2. A land-locked beneficiary State is entitled under a most-favoured-nation clause to the rights and facilities extended by the granting State to a land-locked third State in order to facilitate its access to and from the sea only if the subject-matter of the clause is the facilitation of access to and from the sea.

81. Article 25 reproduced the text of the former article 23, with changes similar to those made to the preceding article. In contrast with its decision in respect of article 24, however, the Drafting Committee had not found it necessary, in paragraph 2 of article 25, to add the words "not less favourable than" (which related to "treatment"), as the article spoke of "rights and facilities", an expression widely used and understood in the context of access to and from the sea for land-locked States. As to the term "land-locked State", which had given rise to comments in the Commission, the Drafting Committee had believed it should be retained, as it had virtually become a term of art in contemporary international relations. Finally, for the sake of precision, the word "third" had been inserted between the words "land-locked" and "State" in the title of the article.

82. Mr. NJENGA suggested that the article should be so amended as to make it clear that its provisions would be applicable only to land-locked States situated in the same region or subregion as the granting State. That could be done by inserting the words "in the region or subregion" after the words "a land-locked State" at the beginning of paragraph 1.

83. Mr. USHAKOV (Special Rapporteur) pointed out that it was not a question of belonging to the same region or subregion, but of the physical possib-

ility of granting access to or from the sea. For example, it was physically impossible for the Soviet Union, because of its geographical position, to grant access to or from the sea to an African or American State.

84. Mr. DÍAZ GONZÁLES said that in the Spanish version the words "si la materia objeto de la cláusula es el facilitación del acceso al mar y desde el mar" should be replaced by the words "si tal es la materia objeto de la cláusula". The end of article 24 should be similarly amended.

85. Mr. TABIBI recalled that, when the question had been discussed by the Commission, he had pointed out (1497th meeting) that the term "land-locked" was incorrect but that it was a term of art and was always used. Countries termed "land-locked" were countries without a sea-coast; nevertheless, like all nations they had a share in the high seas. He suggested, therefore, that the article should have a foot-note referring to the 1965 Convention on Transit Trade of Land-Locked States, which contained a definition of land-locked States. Alternatively, a reference to the Convention could be made in the commentary to the article.

86. Mr. NJENGA took the view that the expression "rights and facilities" covered more than rights and facilities by railway, road or pipeline. It could cover facilities in ports and warehouses and the right of the beneficiary State to send its nationals to work in the ports of the granting State. Such rights and facilities should be restricted to countries in the region or subregion concerned. His proposal was consistent with the decision already taken in the matter by the Third United Nations Conference on the Law of the Sea.

87. Mr. RIPHAGEN pointed out that, under paragraph 1 of the article, a beneficiary State other than a land-locked State was not entitled to rights and facilities extended by the granting State to a land-locked third State. The insertion of the words "of the region or subregion" after the words "land-locked State" would therefore mean that a land-locked State not belonging to the region or subregion in question would be entitled to such rights. Consequently, he did not think the words suggested by Mr. Njenga should be inserted in paragraph 1. They might be inserted in paragraph 2, but, for the reasons explained by Mr. Ushakov, they were unnecessary. In any case, the notions of "region" and "subregion" were not always very clear. He therefore suggested that the paragraph remain as it stood.

88. Mr. EL-ERIAN, supported by the CHAIRMAN, speaking in his personal capacity, appealed to Mr. Njenga not to press his point.

89. Mr. NJENGA agreed not to press the point, provided the matter was mentioned in a foot-note or in the commentary to the article.

90. Referring to Mr. Riphagen's comments, he pointed out that "region" and "subregion" were important notions in the law of the sea.

91. The CHAIRMAN said that, if there were no objections, he would take it that the Commission de-

²⁵ *Ibid.*, Paras. 33 *et seq.*, and 1498th meeting, paras. 1-17.

cided to approve the title and text of article 25 referred to it by the Drafting Committee.

Article 25 was approved.

ARTICLE 26²⁶ (Cases of State succession, State responsibility and outbreak of hostilities)

92. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 26:

Article 26. Cases of State succession, State responsibility and outbreak of hostilities

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

93. The text of article 26 was the same as that of the former article 24 and followed the wording of article 73 of the Vienna Convention on the Law of Treaties.

Article 26 was approved.

ARTICLE 27²⁷ (Non-retroactivity of the present articles)

94. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 27:

Article 27. Non-retroactivity of the present articles

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

2. Without prejudice to the application of any rule set forth in the present articles to which clauses on most-favoured-nation treatment would be subject under international law independently of these articles, they apply to the relations of States as between themselves only under a clause on most-favoured-nation treatment contained in an international agreement which is concluded by States and other subjects of international law after the entry into force of the present articles with regard to such States.

95. The text of the former article 25 had been retained for paragraph 1 of article 27, with minor drafting changes. A paragraph 2 had been added in regard to clauses on most-favoured-nation treatment contained in international agreements to which subjects of international law other than States were also parties, and which were referred to in article 6 of the draft.

Article 27 was approved.

ARTICLE 28²⁸ (Provisions otherwise agreed)

96. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 28:

Article 28. Provisions otherwise agreed

The present articles are without prejudice to any provision on which the granting State and the beneficiary State may otherwise agree.

97. Article 28 corresponded to article 26 of the 1976 draft, entitled "Freedom of the parties to agree to different provisions". The words "regarding the application of the most-favoured-nation clause in the treaty containing the clause or otherwise" had been rendered unnecessary by the transfer of the word "otherwise" to its current position, and the words "the provisions" had been changed to read "any provision", which made the text more precise. In addition, the title had been simplified.

98. Mr. REUTER understood the word "may" ("peuvent" in the French text) to indicate a possibility in law.

Article 28 was approved.

ARTICLE 29²⁹ (New rules of international law in favour of developing countries)

99. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 29:

Article 29. New rules of international law in favour of developing countries

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

100. The text of article 29 reproduced without change that of the former article 27. However, the title had been simplified by the deletion of the words "the relationship of the present articles to".

101. Mr. REUTER pointed out that the draft articles did not contain all the rules currently existing in favour of developing countries, as the wording of article 29 might imply.

Article 29 was approved.

ARTICLE 30 (Use of terms)

102. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 2:

Article 2. Use of terms

1. For the purposes of the present articles:

(a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "granting State" means a State which has undertaken to accord most-favoured-nation treatment;

(c) "beneficiary State" means a State to which a granting State has undertaken to accord most-favoured-nation treatment;

(d) "third State" means any State other than the granting State or the beneficiary State;

²⁶ *Ibid.*, 1505th meeting, paras. 13-17.

²⁷ *Ibid.*, paras. 18-23.

²⁸ *Ibid.*, paras. 24-41.

²⁹ *Ibid.*, paras. 42-51.

³⁰ *Ibid.*, 1506th meeting, paras. 6-42.

(e) "condition of compensation" means a condition providing for compensation of any kind agreed between the granting State and the beneficiary State, in a treaty containing a most-favoured-nation clause or otherwise;

(f) "condition of reciprocal treatment" means a condition of compensation providing for the same or, as the case may be, equivalent treatment by the beneficiary State of the granting State or of persons or things in a determined relationship with it as that extended by the granting State to a third State or to persons or things in the same relationship with that third State;

(g) "persons or things" means any object of most-favoured-nation treatment.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

103. Article 2 of the 1976 draft had had one paragraph defining five terms used in the draft. The new text retained, in subparagraphs (a) to (d) of paragraph 1, the first four terms of the former text, with some drafting changes. In subparagraphs (b) and (c), which dealt with "granting State" and "beneficiary State" respectively, the verb "grant" had been replaced by the expression "has undertaken to accord", in order to conform to the terminology used in article 4, which defined a most-favoured-nation clause. The fifth term, "material reciprocity" (former subparagraph (e)), had been replaced by two new terms: "condition of compensation" (new subparagraph (e)) and "condition of reciprocal treatment" (new subparagraph (f)), the need for which he had explained when introducing articles 11, 12 and 13. In addition, a new term, "persons or things", had been defined in a subparagraph (g), to take account of the Commission's debate and because of its widespread use throughout the draft. Conscious of the almost insurmountable difficulties involved in drafting an abstract definition of persons and things, the Drafting Committee had agreed to define them by reference to the subject-matter of the draft articles.

104. Finally, a new paragraph 2 had been added, based on paragraph 2 of article 2 of the Vienna Convention on the Law of Treaties.

105. Mr. PINTO considered the definition in subparagraph (g) unsatisfactory, since the expression "persons or things" was used in the draft in meanings other than that given in the definition.

106. Mr. REUTER said that, in the French version of subparagraphs (b) and (c) of paragraph 1, the words "has undertaken to" would be better translated by the words "a consenti à" than by the words "s'est obligé à".

107. For subparagraph (g), the French version seemed clearer than the English version; however, if the latter were approved, the French version should be brought into line with it and the words "tout ce qui peut être l'objet" replaced by the words "tout objet".

108. Mr. YANKOV understood the term "granting State", in subparagraph (b), to mean a State that had already granted most-favoured-nation treatment as

well as a State that had undertaken to accord it. Similarly, he understood the words "beneficiary State", in subparagraph (c), to mean a State to which a granting State had already accorded most-favoured-nation treatment as well as one to which a granting State had undertaken to accord such treatment.

109. Mr. VEROSTA thought that, in view of Mr. Reuter's comment, the English version of subparagraph (g) might perhaps be brought into line with the French version.

110. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the Drafting Committee had purposely used the quite imprecise words "any object" and "tout ce qui peut être l'objet", because some objects of most-favoured-nation treatment might not be "things" in the physical sense. The Committee had thus adopted the broadest possible approach to the matter. It might be preferable to leave the English version as it stood.

111. Mr. NJENGA said that he did not understand the meaning of subparagraph (g).

112. Mr. DÍAZ GONZÁLES said that in Spanish it was strange to say that a person was an object.

113. Mr. RIPHAGEN suggested that the French version should be translated into English.

114. Mr. FRANCIS said that the definition had been a source of trouble to the Drafting Committee. If possible, the English text should be left as it stood. No improvement would be made by translating the French text into English.

115. Mr. USHAKOV (Special Rapporteur) pointed out that subparagraph (g) did not say that the expression "persons or things" meant objects—which would be difficult to accept—but that it meant any object of a certain treatment, which was very different.

116. Mr. DADZIE agreed with Mr. Francis. The definition was the best the Drafting Committee had been able to produce. A solution might be to replace the word "means" by the word "covers".

The meeting rose at 1.05 p.m.

1522nd MEETING

Thursday, 20 July 1978, at 10.50 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.
