Document:-

A/CN.4/SR.1340

Summary record of the 1340th meeting

Topic:

Most-favoured-nation clause

Extract from the Yearbook of the International Law Commission:-

1975, vol. I

43. He hoped the Special Rapporteur would try to improve the drafting of article 15 in order to clarify the legal rules deriving from the situations it described.

44. Mr. AGO said that he would confine his comments to paragraph 1 of article 15. The Special Rapporteur had distinguished, in that paragraph, between the validity of the most-favoured-nation clause and its effectiveness. Like any treaty rule, the clause entered into force at a certain time, but it might be at another time that it produced its practical effects, that was to say, that it brought into the relations between the granting State and the beneficiary State the treatment provided for in the the agreement between the granting State and the third State.

45. Those distinctions raised some terminological problems. For instance, the words "commences to function" well expressed the fact that the functioning of the clause began at a certain moment, but it was open to question whether the French expression "*prend effet*" was equally clear. Similarly, it was not appropriate to speak of the treatment "specified" in the clause, because a most-favoured-nation clause was characterized precisely by the fact that it did not itself specify a particular treatment, but merely referred to treatment which would be "specified" in an agreement between the granting State and a third State.

46. The rule set out in paragraph 1 of article 15 was well founded, but the drafting could be improved.

47. Mr. USTOR (Special Rapporteur) said he wished to thank Mr. Kearney for his valuable drafting suggestions; they would be duly taken into consideration by the Drafting Committee.

48. The verb "to accord" had been used in article 15 in the sense of the legal commitment to grant a right, not of actual or physical performance. The relevant point in time was the point at which the entitlement to the right arose.

49. Similar considerations applied to the use of the word "established", in paragraph 2 of article 15. The reference was to an agreement between the granting State and the beneficiary State; it was that agreement which "established" a clear situation and fulfilled the condition of material reciprocity specified in paragraph 2 for the entitlement to most-favoured-nation treatment.

THE CASE OF CUSTOMS UNIONS AND SIMILAR ASSOCIATIONS OF STATES

50. The CHAIRMAN said that a member wished to raise a point arising out of the discussion at an earlier meeting.

51. Mr.HAMBRO said that during the discussion on articles 8 and 8 *bis*, the Special Rapporteur had said that he hoped to introduce, later, an exception applying to international trade associations of developing countries. [5] That was an outcome of the interesting study in chapter IV (The most-favoured-nation clause and the different levels of States' economic development) of his sixth report (A/CN.4/286).

52. The Special Rapporteur's sixth report also contained a chapter III entitled "The case of customs unions and similar associations of States", which contained much valuable material. He had read that chapter carefully, but thought that matters were perhaps not as simple as was suggested in its concluding paragraphs. He thought that the subject of customs unions and similar associations of States should be discussed by the Commission at some stage.

53. Mr. USTOR (Special Rapporteur) said that the ideas which he had put forward at some length in chapter III of his sixth report were connected with his proposed article 8 *bis*, dealing with the relationship between the most-favoured-nation clause and multilateral agreements. During the debates on articles 8 and 8 *bis*, that subject had not been discussed very thoroughly. His own view on the matter, following his study of State practice, was that there was no basis for drafting a rule of international law on the relationship between the most-favoured-nation clause and customs unions, either as codification or as progressive development. The fact that the granting State had entered into a customs or economic union could not have the effect of terminating the validity of that State's pledge to grant most-favoured-nation treatment.

54. Of course, problems arose in regard to the impact of economic groups on the most-favoured-nation clause; but any conflicts that arose had to be settled by negotiation or other means of peaceful settlement. In practice, such matters were dealt with in the agreements relating to existing economic unions, which contained provisions requiring their members to take steps lawfully to terminate their most-favoured-nation obligations.

55. He had thus reached the conclusion that it was not desirable to draft an article on the subject. A State which was faced with conflicting obligations arising out of a most-favoured-nation clause and membership of an economic union should take steps to terminate one or the other set of obligations in the proper manner.

The meeting rose at 12.50 p.m.

1340th MEETING

Monday, 30 June 1975, at 3.10 p.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

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[5] See 1334th meeting, para. 44.

Most-favoured-nation clause

(A/CN.4/266;[1] A/CN.4/280;[2] A/CN.4/286)

[Item 3 of the agenda]

(*continued*)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 15 (The commencement of the functioning of a most-favoured-nation clause) and

ARTICLE 16 (Termination or suspension of the functioning of a most-favoured-nation clause) (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of articles 15 and 16 in the Special Rapporteur's fifth report (A/CN.4/280).

2. Mr. USTOR (Special Rapporteur) said that in the light of the discussion at the previous meeting, he had redrafted the two articles to read as follows:

Article 15

The commencement of the functioning of a most-favoured-nation clause

1. An unconditional most-favoured-nation clause commences to function at the time of its entry into force provided that at that time a favourable [favoured] treatment has been accorded by the granting State to a third State. If that treatment is accorded later, the clause commences to function at the time of the according of that treatment.

2. A most-favoured-nation clause subject to material reciprocity commences to function at the time defined in paragraph 1 provided that at that time material reciprocity has been established between the granting State and the beneficiary State. If that reciprocity is established later, the clause commences to function at the time of the establishment of that reciprocity.

Article 16

Termination or suspension of the functioning of a most-favoured-nation clause

1. The functioning of an unconditional most-favoured-nation clause terminates or is suspended [even if the clause or the treaty containing it remains in force] at the time when a favourable [favoured] treatment accorded by the granting State to the third State terminates or is suspended.

2. The functioning of a most-favoured-nation clause subject to material reciprocity terminates or is suspended also at the time when that reciprocity is terminated or suspended between the granting State and the beneficiary State.

3. In both articles he had replaced the phrase "the treatment specified in the clause", which had attracted some criticism during the discussion, by the alternative expressions "a favourable treatment" and "a favoured treatment", leaving the choice between them to subsequent discussion. The use of one of those two expressions would indicate more adequately the treatment which was extended to the third State and to which the beneficiary State laid claim under the most-favoured-nation clause.

4. In paragraph 1 of article 16, he had placed the words "even if the clause or the treaty containing it remains in force" in square brackets, because Mr. Ushakov had pointed out, in connexion with article 15, that it was not necessary to refer to the entry into force of the most-favoured-nation clause, since the draft articles could only apply to clauses that were in force.[3] If the words in square brackets were dropped, there would be no reference to entry into force in article 16. He had not found it possible, however, to avoid such a reference in article 15.

5. There had been some discussion about the meaning of the word "accorded". The commentary to article 15 explained that, in the case of an unconditional most-favoured-nation clause, the right of the beneficiary State accrued, without any request on its part, immediately upon the third State becoming entitled to favoured treatment. The question arose, however, whether the application of the most-favoured-nation clause would begin automatically as soon as favoured treatment was extended, irrespective of whether any commitment was subscribed by the granting State. His own view on that point was that favoured treatment should be deemed to be "accorded" whenever the third State received favoured treatment in law or in fact; the entitlement of the beneficiary State would then follow automatically. That point would be explained in the commentary.

6. The question of material reciprocity did not arise in connexion with such matters as customs duties; the beneficiary State was simply concerned to have equal treatment with its competitors in the granting State's market, and the question of reciprocity was irrelevant. Material reciprocity was of significance, however, in such matters as consular privileges: a State was interested in securing for its consuls in another country the same advantages as it was prepared to grant to that country's consuls.

7. The functioning of a most-favoured-nation clause subject to material reciprocity was not automatic. The beneficiary State had to establish that reciprocity existed; that process could require an exchange of letters or some other formality in the relations between the two States concerned. Paragraph 2 of article 15 accordingly referred to material reciprocity having been "established between the granting State and the beneficiary State".

8. The text of article 16 had been shortened. Paragraph 1 referred to the case of an unconditional most-favoured-nation clause which was valid and in effect, but which did not function because the favoured treatment accorded by the granting State to the third State had terminated or had been suspended. Paragraph 2 stated that the functioning of a most-favoured-nation clause which was subject to material reciprocity terminated or was suspended whenever that reciprocity itself terminated or was suspended between the granting State and the beneficiary State.

9. Mr. ELIAS said the Special Rapporteur deserved the Commission's thanks for having simplified the wording of articles 15 and 16. After the present discussion, those articles would have to be carefully examined to see whether the essential ideas embodied in them could be presented even more clearly.

10. In drafting article 15, five essential elements had to be borne in mind. The first was that the rule stated in

[1] *Yearbook ... 1973*, vol. II, pp. 97-116.

[2] *Yearbook ... 1974*, vol. II, Part One, pp. 117-134.

[3] See previous meeting, para. 42.

it was intended to provide guidance where the wording of a most-favoured-nation clause did not give sufficient details about the "functioning" of the clause—to use the terminology of articles 15 and 16. He himself was not persuaded of the wisdom of departing from the language used in the Vienna Convention on the Law of Treaties, which referred to the "operation" of a treaty or of a treaty provision. [4] The Drafting Committee should consider that point.

11. The second element was the statement of the three conditions for the operation of the most-favoured-nation clause: the entry into force of the treaty containing the clause; the extension to a third State of favoured treatment by the granting State; and, in the case of a clause subject to material reciprocity, the existence of such reciprocity.

12. The third element was the right of the beneficiary State to invoke the clause as soon as the agreement between the granting State and the third State came into force; it was not necessary for the third State to claim the favoured treatment and begin to enjoy it. In paragraph (6) of the commentary to article 15 that view was mentioned as being the one upheld in State practice by, among others, the United Kingdom and by the United States. Special attention should be paid to that point in connexion with the reference to favoured treatment being "accorded" by the granting State. Care should be taken to choose the right wording to express that central idea.

13. The fourth element was that the rights to which the beneficiary State would be entitled covered all benefits granted to the third State, both before and after the entry into force of the most-favoured-nation clause.

14. The fifth element was that the most-favoured-nation clause came into operation regardless of the manner in which the favoured treatment was accorded to the third State. It did not matter whether the treatment in question was granted under a treaty or by means of internal legislation in the granting State.

15. In both articles 15 and 16, he preferred the expression "favoured treatment" to "favourable treatment".

16. Article 16 should embody two essential ideas. The first was that whether the treaty containing the most-favoured-nation clause was in force or not, the clause itself terminated or was suspended as soon as the treatment extended by the granting State to the third State terminated or was suspended. The second idea was that where the clause was subject to material reciprocity, its operation would terminate or be suspended if reciprocity terminated or was suspended. The rule embodied in article 16 was a simple one and operated regardless of the causes that brought about the termination or suspension; that point should perhaps be stressed.

17. In conclusion, he urged that an effort should be made to formulate the rules in articles 15 and 16 even more briefly and simply, by focussing attention on the essential elements rather than on the great variety of particular situations that could arise.

18. Mr. PINTO said he noted the Special Rapporteur's explanation that the reference in articles 15 and 16 to favoured treatment having been "accorded by the granting State" meant accorded in law or in fact. If the intention was to cover cases in which the third State had been granted a favour in law, even if not implemented, that point should be made clear. The term "accorded" could be taken to mean either of two things: an undertaking by the granting State to extend a certain favour, regardless of implementation; or favoured treatment of the third State in fact.

19. In paragraph 2 of article 15, the words "material reciprocity has been established" needed clarification. As he saw it, some express understanding between the granting State and the beneficiary State would be necessary, or some action between the two parties would have to take place, to establish the mutuality of obligations.

20. Paragraph (1) of the commentary to article 15 explained the reasons for applying the word "functioning" to the most-favoured-nation clause, instead of the word "operation". He found, however, that the idea of the entry into force of the clause was presented in articles 15 and 16 in a somewhat isolated fashion. The whole subject was approached as though it might be possible for the clause to survive the treaty which contained it; but the most-favoured-nation clause could not exist without the treaty of which it formed part, and the Drafting Committee would have to consider including some reference to that treaty in the articles. There were two levels of operation: that of the treaty itself, which could terminate or be suspended; and that of the most-favoured-nation clause, which entered into force apart from the treaty, and could also terminate or be suspended.

21. Article 16 gave the impression that the functioning of the most-favoured-nation clause was entirely dependent on the existence of the rights granted to the third State. There was no doubt a logical connexion between the operation of the clause and the rights of the third State, but paragraph (10) of the commentary to article 16 gave examples of the continuation of most-favoured-nation treatment after the expiry of the grant of benefits to the third State. In those cases, the most-favoured-nation clause took on a life of its own.

22. Another point which required careful consideration was the position of innocent parties who had acted on the strength of the most-favoured-nation treatment granted to the beneficiary State; the rights of those parties would have to be protected in the event of termination or suspension of the operation of the clause.

23. Lastly, since the operation of the clause went hand in hand with the rights granted to the third State in regard to termination and suspension, it would seem appropriate to make provision for the resurrection of most-favoured-nation treatment if and when those rights of the third State reappeared.

24. Mr. THIAM thanked the Special Rapporteur for having redrafted articles 15 and 16 in the light of the discussion at the previous meeting. Referring to a comment by Mr. Kearney, he said that the word "accorded", as used in those two provisions, could apply both to a right granted to a third State by a treaty and to the imple-

[4] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5) p. 295, part V.

mentation of that right; hence it referred both to the legal and to the practical aspect of the problem. To overcome the difficulty it would probably be advisable, as the Special Rapporteur had suggested, to explain in the commentary how the word "accorded" was to be understood. It was, indeed, quite possible for a most-favoured-nation clause to enter into force solely by reason of the fact that a State had received a certain advantage, without its being stipulated in a treaty.

25. With regard more particularly to article 16, he thought the drafting had been improved, and that the expression "favoured treatment" was preferable to "favourable treatment".

26. Mr. AGO said the Special Rapporteur was to be commended for his efforts to draft a clearer and more comprehensible text for the two articles, but they could still be improved in some respects. For instance, the expression "commences to function" might be translated into French simply by "*commence à fonctionner*", rather than by "*prend effet*". Again, the phrase "provided that ... a favourable [favoured] treatment has been accorded by the granting State to a third State" raised the question of the meaning of the qualification "favourable". There were, in fact, two possible cases. In the first, the granting State had not yet granted to any third State a treatment which could bring the most-favoured-nation clause into effect; it was only at the moment when it did grant such treatment to a third State that the clause would begin to function. That case was covered by the second sentence of paragraph 1 of article 15. In the second case, the granting State had already accorded the treatment in question to a third State and the clause began to function immediately. If the granting State had accorded several different treatments to third States, it was naturally the most favourable treatment that must be applied.

27. In practice, it not infrequently happened that the purpose of a treaty was to accord a certain treatment to a State and that, by means of a most-favoured-nation clause, the granting State undertook to improve that treatment as soon as it accorded more favourable treatment to a third State. Consequently, for the most-favoured-nation clause to begin to function, it was not sufficient for the granting State to accord favourable treatment to a third State; the treatment must be more favourable than that accorded to the beneficiary State. The complexity of such a situation could give rise to difficulties in applying article 15 if it was worded as proposed.

28. The phrase "A most-favoured-nation clause subject to material reciprocity", at the beginning of paragraph 2 of article 15, was more precise in the French version than in English. The rest of that provision was less happily worded; it provided that material reciprocity must have been "established" between the granting State and the beneficiary State at the time when the clause commenced to function. But material reciprocity was established at the time when the granting State concluded the most-favoured-nation clause. In fact, the rule stated in paragraph 2 of article 15 was subject to the condition that the beneficiary State must actually accord material reciprocity to the granting State. He therefore suggested that the relevant part of the first sentence of paragraph 2 be amended to read: "provided that at that time material reciprocity has been [is] accorded by the beneficiary State to the granting State".

29. With regard to article 16, he suggested that the word "functioning" be translated by the word "*fonctionnement*", rather than the word "*effet*". He drew attention to the fact that in the French translation the phrase "at the time when a favourable treatment" had been rendered by "*à la date à laquelle le traitement favorable*".

30. In paragraph 2 of article 16, the reference to suspension of "reciprocity ... between the granting State and the beneficiary State" might not be clear to anyone who was not perfectly familiar with the subject. In fact, it was the reciprocal advantages the beneficiary State should accord which were suspended.

31. Mr. TSURUOKA said that he approved of the substance of articles 15 and 16. In view of the content of article 15, paragraph 2, however, he felt bound to repeat an observation he had made before concerning the general structure of the draft. Every time the Drafting Committee had dealt with the conditional most-favoured-nation clause, it had considered only the condition of material reciprocity. He doubted that attitude was right, particularly as article 6, as provisionally adopted by the Drafting Committee, read: "A most-favoured-nation clause in a treaty is unconditional unless that treaty otherwise provides or the parties otherwise agree." [5] It should be made clear, either in an article or in the commentary, that a most-favoured-nation clause could be conditional on something other than material reciprocity if the treaty so provided or the parties so agreed.

32. Mr. KEARNEY said it was highly desirable to define more clearly the meaning attached to the term "accorded" in paragraph 1 of article 15 and paragraph 1 of article 16. The same was true of the term "established" in paragraph 2 of article 15. In view of the uncertainty of the meaning of those words in the context in which they were used, their definition could not be relegated to a commentary, which was by its very nature ephemeral. For the first of those two terms, an explanation on the following lines might be appropriate: "Most-favoured-nation treatment is accorded to a State when the granting State is obliged under a treaty to provide that treatment or in any other fashion does provide that treatment".

33. With regard to the use of the term "establish" in connexion with the functioning of a most-favoured-nation clause subject to material reciprocity, he would welcome an explanation by the Special Rapporteur of the respective rights of the granting State and the beneficiary State.

34. Mr. USTOR (Special Rapporteur) said that in the case of a clause subject to material reciprocity, if the granting State gave favoured treatment to a third State, the beneficiary State could, in principle, claim the same treatment; the granting State, however, could retort that it wished to have from the beneficiary State the same reciprocal favours as it had received from the third

[5] See 1352nd meeting, para. 1.

State. It would thus be for the beneficiary State to decide whether it was prepared to give that undertaking of reciprocal treatment. Situations of that kind never occurred with regard to customs agreements, but were very common in the operation of consular agreements and establishment treaties.

35. Mr. KEARNEY said he understood from that explanation that the beneficiary State under a clause subject to material reciprocity had, in effect, a veto over the operation of the most-favoured-nation clause. That subtle point was not made clear merely by the use of the word "establish".

36. An interesting point had been raised by Mr. Pinto when he had pointed out that articles 15 and 16 seemed to deal with the most-favoured-nation clause in a vacuum. The question of the legality of the action taken by the granting State in relation to the third State could not be ignored. If, for example, the granting State illegally terminated, after three years, a five-year treaty with the third State, it would not seem unreasonable to conclude that the rights of the beneficiary State under the most-favoured-nation clause, if terminated, were also illegally terminated. There would seem to be room for a saving clause such as "Without prejudice to the legal rights of the parties".

37. He suggested that the Drafting Committee should make an effort to clarify the effects of the provisions of paragraphs 1 and 2 of article 16. Taken in conjunction, those two sets of provisions appeared to suggest two possibilities. The first was that the granting State, under paragraph 1, might terminate the effect of the grant of most-favoured-nation treatment by terminating or suspending the operation of the favoured treatment extended by it to the third State; the second was that the beneficiary State, under paragraph 2, might terminate the effect of the most-favoured-nation clause by terminating reciprocity, without the granting State having terminated the favour it extended to the third State.

38. Mr. SETTE CÂMARA said that the new versions of articles 15 and 16 submitted by the Special Rapporteur were a considerable improvement. Mr. Elias had made an accurate analysis of the five principles underlying those articles, with the substance of which he was in complete agreement.

39. He agreed with Mr. Ago's comment on the use of the word "favourable" in paragraph 1 of article 15. There were, of course, different degrees of favoured treatment, but since the article was intended to refer to most-favoured-nation treatment, that must be clearly stated, even if it entailed repetition. On the other hand, the wording of paragraph 1 of article 16 was too categorical, for it excluded the possibility, admitted in the Vienna Convention on the Law of Treaties, that the functioning of a most-favoured-nation clause could be terminated by consent of the parties. [6]

40. Sir Francis VALLAT said he merely wished to comment on a few points that had arisen as a result of the illuminating discussion on articles 15 and 16. He found the new versions of those articles an improvement, and the supporting explanations given by the Special Rapporteur excellent. He hoped that the material in the commentary, especially that concerning article 15, would be included in the Commission's report. His remarks related to two specific questions: the meaning of the word "accorded" and the scope of articles 15 and 16.

41. First, he agreed that it would be desirable to clarify, in the commentary, the meaning of the word "accorded" as used in the articles; but that word was of such crucial importance, particularly in article 15, that he thought a definition should be included in the body of the draft. The same verb had been used in other draft articles, including articles 3, 4 and 6, possibly with slightly different meanings, and if it proved impossible to find a single definition which would cover all those cases, it might be advisable to replace the word in some of the earlier articles.

42. Secondly, articles 15 and 16 dealt with the functioning of the most-favoured-nation clause as a whole. It was a fact that in many, and possibly in most cases, at the moment when a treaty containing a most-favoured-nation clause was concluded, there was some treatment on the basis of which the clause would operate. For example, in the case of a clause concerning the treatment of consuls, there was bound to be some existing treatment which would entail the immediate functioning of the clause. Article 15 did not, however, indicate what would happen if the scope of the treatment accorded by the granting State to the third State was extended. It was clear from the article that, if the consuls of all States enjoyed limited immunity from criminal proceedings and the consuls of some States were subsequently granted full immunity from such proceedings, the clause would come into operation. It was not clear, however, what would be the situation if a new right then arose, as it would if certain consuls were granted immunity from civil proceedings. The Special Rapporteur should therefore include in the draft articles some provision concerning the commencement and suspension of the right to favoured treatment under the clause.

43. Mr. HAMBRO said the Commission should bear in mind that a detailed discussion of definitions at the present stage would delay its progress. The articles should be referred to the Drafting Committee, which already had an enormous amount of material to work on. He agreed with Sir Francis Vallat on the need to clarify the meaning of the word "accorded", but if the word was used in a different sense in earlier articles, it would be inappropriate for the Drafting Committee to introduce a definition applying only to articles 15 and 16. He hoped the word would be changed in the earlier articles.

44. Mr. QUENTIN-BAXTER said he could not help feeling that the articles might have been drafted in a way too closely analogous to the provisions usually found in treaties concerning their entry into force and termination. There were, of course, many situations in which a most-favoured-nation agreement was thought of in the same way as agreements between the granting State and third States, and it was in that rather formal context that most of the problems he had in mind arose.

[6] See article 54 of the Vienna Convention.

45. Like Sir Francis Vallat, he wondered whether it was generally true to say that a clause concerning most-favoured-nation treatment did not begin to function until it could be brought within the scope of a particular agreement between the granting State and a third State. The earliest and simplest forms of most-favoured-nation agreement had been quite unrelated to any knowledge or expectation of the granting of a particular type of treatment to any third State; they had been no more than an assurance that the beneficiary State would not receive treatment worse than that accorded to any other State. For example, an early form of most-favoured-nation clause concerning the treatment of aliens had stated that nationals of the beneficiary State would not be treated any worse within the territory of the granting State than any other foreigners. Since a granting State inevitably had dealings of some kind with nationals of a third State, the condition for the operation of such a clause was fulfilled from the outset. The idea that a most-favoured-nation clause came into operation later than the treaty containing it was therefore somewhat artificial.

46. Furthermore, the analogy to which he had referred hardly provided for the variety of situations that might arise. For example, the thing relied on might change, the rights granted to the third State might become more liberal, or, more simply, the practice of the granting State might change to the point where new norms were established. To refer simply to the termination or suspension of the clause, as in article 16, was to refer only to two extremes.

47. Judging from the material provided by the Special Rapporteur and from State practice, the criterion for the treatment of the beneficiary State was both the treatment which a third State actually received and that which it was entitled to receive. If that was indeed the case, the right of the beneficiary State to a particular kind of treatment would not be affected by the situation to which Mr. Kearney and others had referred, namely, that in which the granting State unwarrantedly withheld the same treatment from a third State. Might it not be said that a most-favoured-nation clause never began to function at any time other than that of the entry into force of the treaty containing it and never terminated at any time other than that of the termination of that treaty?

48. Mr. USHAKOV said that, as he understood it, the word "accorded" meant "accorded in law", not "accorded in fact", since it was only if the granting State had legally accorded certain treatment to a third State that the beneficiary State was entitled to the same treatment.

49. Mr. AGO, referring to article 16, paragraph 1, said that where the termination or suspension of the favourable treatment accorded by the granting State to a third State occurred before the termination or suspension of the application of the most-favoured-nation clause, it was only the particular treatment accorded to that particular third State which terminated or was suspended: the clause itself was in no way terminated or suspended in its effects, since other favourable treatment might be accorded to another third State.

50. Mr. USTOR (Special Rapporteur) said he was grateful to members for their constructive comments, which had shown that articles 15 and 16 could be further improved. Perhaps the articles should speak, not of the beginning or ending of the operation of the most-favoured-nation clause, but of the beginning of the rights of the beneficiary State and of the way in which those rights would change with a change in the situation between the granting State and a third State.

51. It was evident that, where some form of the verb "to accord" appeared in conjunction with the phrase "most-favoured-nation treatment", the reference was to the conclusion of a treaty containing a most-favoured-nation clause, whereas the "according" of benefits by the granting State to a third State was not necessarily tied to the conclusion of a treaty. It was also quite obvious that, if the granting State incurred a legal obligation in favour of a third State, that was equivalent to the "according" of benefits to that State, but whether the expression included anything else was a question which required very careful thought.

52. Mr. Pinto had raised the problem of a beneficiary State which, being dependent on the operation of the clause, found itself in a serious situation when the granting State ceased to accord favoured treatment to a third State. His own view was that the risk that such a situation might arise was inherent in the operation of the most-favoured-nation clause. A State requiring a firm commitment would be advised to avoid the clause and to enter into a direct agreement with its potential benefactor.

53. Referring to a comment by Mr. Ago, he said that the meaning of the English phrase "material reciprocity" in article 15, paragraph 2, was not accurately conveyed by the French words "*avantages réciproques*"; the Drafting Committee preferred the terms "*réciprocité matérielle*" or "*réciprocité trait pour trait*", the latter being an expression used in private international law. The requirement of "material reciprocity" was never found in agreements on customs duties, but was often included in most-favoured-nation clauses and, whatever the difficulties of interpretation involved, it must be taken into account.

54. With regard to Mr. Tsuruoka's comments, he observed that all the draft articles on the most-favoured-nation clause were dispositive rules and could therefore begin with a phrase such as "Unless otherwise agreed". The Commission could make provision for the possibility that States would resume the use of the type of conditional most-favoured-nation clause no longer found, by indicating clearly in the commentary that while it did not dispute the right of States to conclude such agreements as they wished, it had based its draft on current practice.

55. With regard to the operation of the most-favoured-nation clause, if one believed that the beneficiary State acquired the same rights as the third State, it was hard to dispute Mr. Quentin-Baxter's contention that the right of the beneficiary State would not be affected if the granting State illegally terminated its favoured treatment of the third State. While he agreed with Mr. Quentin-Baxter that it was generally the case that a granting State already accorded to a third State the type of treatment to be covered by a given most-favoured-nation clause, that was

not always the case. For example, two States might conclude an agreement concerning favoured treatment of each other's consuls before the granting State had established consular relations with any third State.

56. Mr. Sette Câmara's objection that article 16 did not at present allow for termination of a most-favoured-nation clause by negotiation would be covered by the redrafting of articles 15 and 16 on the lines suggested by Sir Francis Vallat.

57. The CHAIRMAN suggested that articles 15 and 16 be referred to the Drafting Committee.

It was so agreed. [7]

The meeting rose at 6 p.m.

[7] For resumption of the discussion see 1352nd meeting, para. 89.

1341st MEETING

Tuesday, 1 July 1975, at 10.15 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Most-favoured-nation clause

(A/CN.4/266; [1] A/CN.4/280; [2] A/CN.4/286; A/CN.4/L.228)

[Item 3 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE O

1. The CHAIRMAN invited the Special Rapporteur to introduce article 0 (A/CN.4/L.228), which read:

Article O

Treatment consisting of trade advantages accorded to developing States on a non-reciprocal basis by a developed State within a generalized system of preferences established by the latter cannot be claimed by another developed State as beneficiary of a most-favoured-nation clause.

2. Mr. USTOR (Special Rapporteur) said that the apparent contradiction between the two earlier decisions of the Commission, to the effect that in studying the most-favoured-nation clause it would confine itself to matters within its own sphere of competence, and that it would devote special attention to the manner in which the need of developing countries for preferences in the form of exceptions to the clause in international trade could be given expression in legal rules, [3] could be resolved if it were borne in mind that the most important task now facing the international community was to change the present situation by helping the developing countries to reach the standard of living of the developed countries. While rapid progress towards that goal could be achieved only through direct measures such as disarmament, which would have world-wide economic effects and allow attention to be focussed on the central task, much could be done in the field of international trade. As a result of developments relating to that field in various United Nations bodies, including UNCTAD and the General Assembly, he believed that certain rules of international law were already discernible.

3. In its work on the most-favoured-nation clause, the Commission had so far been concerned with codifying, for the guidance of States, rules which had developed by custom over a long period of time. In discussing preferential treatment for developing countries, it was dealing with a kind of international law which had developed over a relatively short period in specialized United Nations organs. The Commission was not equipped to continue the discussions which had taken place in those organs, but it should take cognizance of the rules they had developed and incorporate them in the draft articles as a progressive element of international law. The direction in which the Commission should seek to move was, he thought, clearly defined by the quotation from General Principle Eight of annex A.I.1. of the recommendations adopted by UNCTAD at its first session, given in the Commission's report on the work of its twenty-fifth session. [4]

4. He was aware that he had perhaps not proceeded in a very orderly fashion in taking up the question of exceptions for developing countries in his sixth report (A/CN.4/286, chapter IV) before the Commission had completed its study of the general articles, but he had considered that it would be helpful to make a beginning in the vast field of international trade.

5. Article 0 was a modest beginning; it put forward a rule which had been accepted by practically all the members of UNCTAD, and thus by the great majority of States Members of the United Nations. The background to the emergence of that rule was traced in paragraphs 65 to 75 of his sixth report. The most important factor had been the agreement reached by the UNCTAD Special Committee on Preferences on a generalized system of preferences, to which he referred in paragraph 66 of the report. Under that system, States had the right, and perhaps the duty, to establish régimes under which they would grant the greatest possible preferences to the greatest possible preferences to the greatest possible number of developing countries. Preferences granted under the system were non-reciprocal, but the preference-giving countries were able to invoke certain safeguard mechanisms and to apply the principle of self-election in the choice of beneficiaries, due attention being given to the special situation of the least developed among the developing countries. The system, scheduled to apply for an initial period of ten years, also contained provisions relating to rules of origin and institutional arrangements.

[1] *Yearbook ... 1973*, vol. II, pp. 97-116.

[2] *Yearbook ... 1974*, vol. II, Part One, pp. 117-134.

[3] *Yearbook ... 1973*, vol. II, p. 211, para. 114.

[4] *Ibid.*, p. 212, para. 121.