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Summary record of the 1379th meeting

Topic:
Most-favoured-nation clause

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articles would have a direct effect upon determining, or "prejudging", what the correct legal position was with regard to the claims of the States concerned. Unfortunately, it was somewhat dangerous to propose any alternatives to the form of words used in the Vienna Convention.

51. Mr. ŠAHOVIĆ, referring to paragraph 2 of the commentary to article B (A/CN.4/293 and Add.1), concerning the case of uniting of the granting State and the third State, said he would prefer the rule applicable to be stated in the commentary rather than in a separate article, because that particular situation was covered by article 19.

52. With regard to the effect of the outbreak of hostilities on the operation of the clause, which was discussed in paragraph 4 of the commentary, the first two sentences of that paragraph gave the impression that the Special Rapporteur was not inclined to mention the question in the article, but the next sentence contained reasons for doing so. The Special Rapporteur should develop those reasons further, for they were not sufficiently convincing as they stood.

53. Mr. AGO welcomed the inclusion of article B in the draft, particularly as it reserved the question of the international responsibility of States. He did not see how the Commission could depart from the wording of the 1969 Vienna Convention without giving the impression that it wished to derogate from the system provided for in that instrument. To provide that the system of the Vienna Convention applied to treaties in general and that a different system applied to treaties containing most-favoured-nation clauses or to such clauses themselves, would introduce complications.

54. The commentary should explain that the saving clause concerning State responsibility applied not only to the violation of a most-favoured-nation clause, but to any breach of an obligation which might result in the non-application of a most-favoured-nation clause. In the case of a breach of an important international obligation for which sanctions could be applied, suspension of the application of most-favoured-nation treatment was one of the forms which sanctions could take. In the case of a breach of a less important international obligation, on the other hand, only a claim for reparation could be made. Nevertheless, it was a well-established principle that if the guilty State refused to make reparation, sanctions could be taken against it, which often included suspension of the application of a most-favoured-nation clause. The international responsibility referred to in article B thus covered both responsibility arising from the fact that an obligation deriving from the most-favoured-nation clause had been breached, and responsibility arising from the breach of another international obligation which had provoked the reaction of suspension of the application of a most-favoured-nation clause.

55. Mr. USTOR (Special Rapporteur) said that he fully appreciated the point raised by Mr. Kearney, whose comments were applicable not only to the draft, but also to the Vienna Convention itself. A treaty might to some extent prejudice questions of responsibility, for it could contain provisions specifying the consequences of a

breach of the treaty by one of the parties to it. But it would be extremely difficult to suggest language different from that employed in the Vienna Convention. The problem could be explained in the commentary and, at a later stage, the observations of Governments might prove to be of some assistance.

56. With regard to sanctions, paragraph 26 of the report referred to certain special cases that had arisen in connexion with the most-favoured-nation clause, including the case of sanctions applied under Chapter VII of the United Nations Charter. It was not possible to deal in detail in the draft with every conceivable situation, and he thought the Commission would have done its duty if article B followed the wording used in the 1969 Convention and recognized that questions of international responsibility formed a separate subject. The problem of sanctions could be further elaborated in the commentary.

57. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer article B to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹⁰

The meeting rose at 12.50 p.m.

¹⁰ For the consideration of the text proposed by the Drafting Committee, see 1404th meeting, paras. 37-39.

1379th MEETING

Friday, 28 May 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN

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

Most-favoured-nation clause (*continued*)

(A/CN.4/293 and Add.1)

[Item 4 of the agenda]

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

ARTICLE C (Non-retroactivity of the present draft articles)

1. The CHAIRMAN invited the Special Rapporteur to introduce article C of his draft (A/CN.4/293 and Add.1), which read:

Article C. Non-retroactivity of the present draft articles

Without prejudice to the application of any rule set forth in the present articles to which most-favoured-nation clauses would be subject under international law independently of the articles, the articles apply only to most-favoured-nation clauses embodied in

treaties which are concluded by States after the entry into force of the present articles with regard to such States.

2. Mr. USTOR (Special Rapporteur) said that article C was closely modelled on article 4 of the Vienna Convention on the Law of Treaties.¹ The idea of incorporating such an article had been suggested at the twenty-seventh session by Mr. Tsuruoka, as a possible remedy in connexion with articles relating to the problems of Customs unions and of exceptions.²

3. Mr. USHAKOV observed that the phrase "the articles apply only to most-favoured-nation clauses embodied in treaties" was not perhaps the most appropriate, for the question arose of the consequences of the application of those clauses. It would be preferable to employ some such wording as "the articles apply only to situations arising in connexion with most-favoured-nation clauses embodied in treaties".

4. Sir Francis VALLAT noted that in the Vienna Convention article 28 (Non-retroactivity of treaties) stipulated that

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

He wondered to what extent, if any, article C would displace that principle. Great care should be taken not to raise doubts because of differences in the language employed.

5. Mr. USTOR (Special Rapporteur) said that if article C, which closely followed article 4 of the Vienna Convention, was adopted, it might be useful to include in the draft an article on the lines of article 28 of that Convention.

6. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article C to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*³

ARTICLE D (Freedom of the parties to draft the clause and restrict its operation)

7. The CHAIRMAN invited the Special Rapporteur to introduce article D of his draft which read:

Article D. Freedom of the parties to draft the clause and restrict its operation

The present draft articles are in general without prejudice to the provisions which the granting State and the beneficiary State may agree to in the treaty containing the most-favoured-nation clause or otherwise. Such provisions or agreements may in particular withhold from the beneficiary State right to treatment extended by the granting

State to a specified third State or States, or to persons and things in a determined relationship with such States, or to most-favoured-nation treatment in respect of a specified subject-matter.

8. Mr. USTOR (Special Rapporteur) said that, as pointed out in the Commission's report on its twenty-seventh session,⁴ most-favoured-nation clauses could be drafted in the most diverse ways. States were entirely free to extend or restrict the clause to particular matters and to impose different conditions and time-limits. Obviously, the present draft was not intended to change that situation. At the twenty-seventh session, he had been requested to consider whether the draft should embody a general proviso stating that the present articles did not limit the freedom of the parties, or whether it would be advisable to examine each article in turn and, where necessary, introduce it with the words: "Unless the treaty otherwise provides or it is otherwise agreed". The latter method would be rather cumbersome and he had concluded that the best approach was to include a general proviso, like that in the first sentence of article D, indicating that the articles were not intended to limit the contractual freedom of the granting State or the beneficiary State.

9. In 1975, Mr. Pinto had suggested that it would be helpful to draw the attention of persons drafting treaties to the fact that they were completely free to extend, or more commonly to restrict, the scope of the most-favoured-nation clause—a course that might be of interest to developing countries when they were undertaking to grant most-favoured-nation treatment.⁵ The second sentence of article D adopted that basic idea of Mr. Pinto's tentative proposal and, in doing so, elaborated upon the first sentence of the article.

10. Mr. YASSEEN said that article D was entirely justified because it embodied a residuary rule. Since the draft did not seem to contain any peremptory rules, the contractual freedom of the parties was in no way restricted. States remained free to choose the arrangements they wished and, in particular, to give the most-favoured-nation clause the scope they agreed on *ratione personae* or *ratione materiae*.

11. It might be thought that article D stated something obvious and was therefore unnecessary. The first sentence affirmed a general principle, while the second provided examples. Those examples could have not only an educative character, but also a psychological effect calculated to facilitate the negotiation of most-favoured-nation clauses. In that respect, article D was not without value. Within the international community there were nuclei of close solidarity due to various factors: ethnic, cultural, economic, ideological, etc. It was natural that a State should wish to reserve a special treatment for States with which it had special bonds of solidarity. Similarly, a special régime for developing countries could be provided for. Mention of those possibilities in an article could only facilitate the negotiation of most-favoured-nation clauses, though it might perhaps be

¹ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

² See *Yearbook... 1975*, vol. I, p. 204, 1343rd meeting, para. 35.

³ For consideration of the text proposed by the Drafting Committee, see 1404th meeting, paras. 40-46.

⁴ *Yearbook... 1975*, vol. II, pp. 119-120, document A/10010/Rev.1, para. 117.

⁵ See *Yearbook... 1975*, vol. I, p. 174, 1337th meeting, para. 38.

advisable to stress the bonds of solidarity which could exist between the granting State and third States and to give more examples.

12. Mr. SETTE CÂMARA said that the article was important and should be retained. The first sentence established in very general terms the freedom of the parties in stipulating a most-favoured-nation clause. The second sentence, however, referred to only one of an enormous number of possible examples. It was not wise to establish a broad rule and then proceed to give merely a single example. While it would, of course, be possible to insert a separate article on conditions and exclusions, he thought it would be sufficient to delete the second sentence and deal with those matters in the commentary.

13. Mr. USHAKOV pointed out that States could organize their economic relations in general, and their trade or consular relations in particular, without recourse to most-favoured-nation clauses. At all events, they did not resort to such a clause when they agreed that the beneficiary State could not invoke the treatment applied by the granting State to a specific third State or States. An arrangement of that kind did not come within the meaning of the most-favoured-nation clause as defined in the draft articles. According to the draft, there were only two kinds of most-favoured-nation clause: unconditional clauses and clauses conditional on material reciprocity. Any other clause was not a most-favoured-nation clause, particularly if it provided that the treatment extended to a certain group of States could not be invoked, whereas that extended to other States could be. An arrangement of that nature was no doubt possible, but the Commission was not concerned with it, unless it wished to establish an additional category of most-favoured-nation clauses.

14. Mr. USTOR (Special Rapporteur) said it might be right to suggest that the drafting of article D should be improved or that articles 4 and 5⁶ should be made subject to the provisions of article D. The point to be remembered, however, was that in the vast majority of cases most-favoured-nation clauses were not unlimited or unrestricted. They were usually subject to one of two kinds of exceptions: exceptions *ratione personae* and exceptions *ratione materiae*.

15. In the case of exceptions *ratione personae*, the granting State accorded most-favoured-nation treatment, but specified that in determining what constituted most-favoured-nation treatment it did not have to take account of the treatment that it extended, for example, to neighbouring countries. In the case of exceptions *ratione materiae*, most-favoured-nation treatment was accorded in a particular trade, e.g. shipping, but the granting State could nonetheless specify that cabotage, for instance, formed an exception.

16. Such exceptions did not alter the nature of the clause: it remained a most-favoured-nation clause. Mr. Ushakov's objections might be met by redrafting

articles 4 and 5, which defined the notions of most-favoured-nation clause and most-favoured-nation treatment. On the other hand, the Commission should bear in mind that most-favoured-nation clauses involved exceptions, and it was not possible to affirm that, for that reason, they were no longer most-favoured-nation clauses.

17. Mr. USHAKOV said that he was only half convinced. Exclusions *ratione materiae* did not in fact constitute restrictions on the application of a most-favoured-nation clause, but delimited its field of application. When two States agreed that a most-favoured-nation clause would apply to intercontinental shipping, to the exclusion of cabotage, they did not restrict the application of the clause, but delimited its field of application. An exception in favour of frontier traffic was not a real exception, but rather an adaptation of the clause which took into account the special situation of neighbouring countries. That adaptation was widely accepted by the international community. But article D did not relate to a generally accepted practice; it permitted any and every restriction on the choice of third States or persons or subject-matter to be taken into consideration.

18. Mr. USTOR (Special Rapporteur) noted that Mr. Ushakov recognized that there might be exceptions *ratione materiae*. Frontier traffic was an exception *ratione materiae*, but cases existed in which it might also be an exception *ratione personae*. For example, if a most-favoured-nation clause stipulated that the treatment granted by a State which had only one neighbouring country would not apply to frontier traffic with the neighbouring country, only one neighbouring country was involved and the exception was both *ratione materiae* and *ratione personae*. Nevertheless, many clauses excluded preferences granted to certain countries. The granting State declared that the treatment to be granted in a certain sphere would be the same as that granted to any third State, with the exception of the treatment it extended to a neighbouring country with which it formed a Customs union. In most cases, the clause involved exceptions *ratione personae*. If the draft could be interpreted as meaning that, because of such exceptions, the clause was no longer a most-favoured-nation clause, the draft would have to be amended.

19. Mr. USHAKOV emphasized that States could organize their trade relations both on the basis of most-favoured-nation clauses, possibly subject to exceptions, and on other bases. When they made an exception in favour of a Customs union, they were acting, precisely, on another basis. If the Commission wished to include those other bases within the concept of the most-favoured-nation clause, it would have to broaden the definition of that clause. It was not possible to retain in the draft articles a provision which was incompatible with their strict definition of a most-favoured-nation clause.

20. Mr. RAMANGASOAVINA said he had no difficulty in accepting article D and was inclined to share the views expressed by Mr. Yasseen. The principle of the complete contractual freedom of the parties, which was referred to in the first sentence of the article, was a general principle which might seem to be already established by the preceding articles. The second sentence

⁶ For the text of the articles already adopted by the Commission, see *Yearbook... 1975*, vol. II, p. 120, document A/10010/Rev.1, chap. IV, sect. B.

confirmed and illustrated the first. Obviously, the Commission could not draft provisions applicable to all eventualities, however great its desire to formulate an exhaustive text. The future convention could only be a framework, and the Special Rapporteur had been perfectly right not to regard it as a sacrosanct model admitting of no variant. The subject-matter of a most-favoured-nation clause and the particular relations that might exist between the granting State and the beneficiary State or third States might justify special arrangements. For example, the States in question might maintain special trade relations or have established between them a special régime in regard to the right of establishment or exemption from giving surety as a defendant (*cautio judicatum solvi*) or from the requirement of an *exequatur* in order to enforce a foreign judgment. There was, therefore, some point in indicating in a provision that a most-favoured-nation clause could be adapted to all kinds of special situations.

21. Mr. Ushakov's concern was perhaps due to the wording of article D, which would no doubt be improved by the Drafting Committee. In particular, the expression "withhold from the beneficiary State", used in the second sentence, was too strong; it would seem to imply an idea of contention or even discrimination, whereas the idea was simply that the beneficiary State would be excluded from a certain treatment or that restrictions would be placed on the granting of a particular treatment. Those words might be replaced by wording such as "not include certain advantages granted by reason of their nature to certain third States".

22. Mr. KEARNEY said that article D served a useful purpose. The first sentence should state its rule emphatically, however, and the words "in general" should be deleted, for they made the rule somewhat uncertain. Again the meaning of the words "or otherwise" should be clarified.

23. The second sentence of the article did not deal solely with one exception, but with different aspects of the whole problem under discussion. On the other hand it was dangerous, in giving examples of a very general rule, to use the words "in particular", which could give rise to application of the *ejusdem generis* rule. The Drafting Committee might consider replacing those words by "for example".

24. Mr. ROSSIDES said that, although some drafting changes might be required, there could be no basic objection to the first sentence of article D. Nevertheless, it would be advisable, for the sake of extra caution, to insert the proviso: "Subject to the provisions of article 53 of the Vienna Convention on the Law of Treaties".

25. In addition, the article would be much improved by the deletion of the second sentence. For if agreements might in particular withhold the right to treatment extended to a specified third State or States or to persons and things in a determined relationship with such States, it would be entirely illogical to maintain that the clause was a most-favoured-nation clause. It might well have become the custom to employ the expression without reference to its essential meaning, but the expression was in the superlative and the word "most" was an

absolute qualification. The parties were free to insert specific provisions in a treaty, but that matter could not be covered by the article itself.

26. Mr. QUENTIN-BAXTER said that he fully endorsed the idea underlying article D. Like Mr. Yasseen, he believed that it was of psychological value; and it might also assist the Commission in clarifying its idea of the scope of the draft.

27. He had had some doubts about the implications of the first sentence, but they had led him to draw conclusions that were perhaps the opposite of those reached by Mr. Ushakov. Quite obviously, freedom of contract was unlimited, and nothing in the draft should attempt to restrict the right of States to enter into agreements as they saw fit. When States made agreements, it would be necessary to determine, by reference to the content, whether they contained a most-favoured-nation clause. Unfortunately, the first sentence of article D almost reversed that sequence: in other words, it almost seemed to suggest that States must first refer to the draft in order to determine what they might do.

28. The general provisions, particularly articles 1, 4 and 5, determined whether a treaty fell within the scope of the draft. In effect, the first sentence of article D sought to affirm that a treaty containing a most-favoured-nation clause did not lose its character as a treaty of that type because the States parties exercised their contractual freedom in any particular way. States could, and customarily did, specify that they would accord most-favoured-nation treatment in a given area, but they could exclude the treatment extended to a particular State. That did not involve any derogation from the principle of the most-favoured-nation clause. There could be no restrictions on the rights of State A and State B in their dealings. The point was that State C could not be deprived of its existing rights.

29. Nothing in either sentence of article D should be regarded as an exception to the rules laid down, nor should it be supposed that, because the second sentence reflected Mr. Pinto's proposal at the twenty-seventh session, any concession was being made to the developing countries. The Commission was tracing logically the real nature of the clause. If the result was beneficial, it would be beneficial to those States which were interested in extending the use of the clause as widely as possible. But, if the result was that treaties containing the clause were placed outside the scope of the draft, the value of the draft itself would be destroyed and a means would be provided—one which did not exist in present law—of escaping the true consequences of the most-favoured-nation clause.

30. Consequently, the first sentence called for some redrafting, but he fully endorsed the purpose of the article and its place in the draft.

31. Mr. USHAKOV said that, in his opinion, it was not possible to permit all kinds of exceptions to the most-favoured-nation clause, for nothing would then remain of it. If it was accepted that any State could be excluded from the benefit of the clause, it would no longer justify the name "most-favoured-nation clause". It was true that

there could be exceptions to the most-favoured-nation clause, but those exceptions must be clearly determined and generally accepted. It was quite certain, for instance, that the treatment reserved to members of a Customs union could not be claimed by a third State under a most-favoured-nation clause. Similarly, the treatment accorded by a State to neighbouring States in regard to frontier traffic could not be claimed by a State which was not a neighbouring State. Again, under article 21, a developed State was “not entitled under a most-favoured-nation clause to any treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a generalized system of preferences established by that granting State”.

32. Those were well established and generally accepted exceptions; but it was not possible to permit any and every kind of provision restricting the application of the clause to a certain group of States, for in that case it could no longer be called a “most-favoured-nation clause”. Thus, if the Soviet Union accorded to a non-socialist State the same treatment as to socialist countries, the clause in question would be not a most-favoured-nation clause, but a most-favoured-socialist-nation clause. It must therefore be made quite clear in the draft articles that the exceptions to the clause must be clearly defined exceptions.

33. Sir Francis VALLAT said that Mr. Ushakov was apparently seeking a form of absolute purity, and absolute purity was rarely fruitful. In the most-favoured-nation clause were to be defined according to the very strict interpretation given by Mr. Ushakov, very few States would be likely to accept the draft articles as a convention. The Commission would thus be accomplishing very pure, but unfortunately altogether fruitless work.

34. The present discussion had in fact shown quite clearly that article D in some form was essential to the viability of the draft. The absence of such a provision would suggest that, as between parties to the future convention, the draft articles would apply to all most-favoured-nation clauses, regardless of any contractual provision to the contrary. Such a proposition would be unacceptable to any trading State. It was essential to preserve the freedom of States to contract out of the draft articles by means of specific provisions in their commercial or other treaties.

35. The fact that the Commission had adopted a definition of most-favoured-nation treatment in article 5 of the draft did not make the articles that followed into rules of *jus cogens* from which no derogation was possible.

36. He was in favour of including article D not simply because of its educative or psychological value, but because a provision on these lines was necessary in the draft.

37. Mr. TSURUOKA said that he appreciated Mr. Ushakov's concern, but did not entirely agree with his views on article D. The Commission had already expressed the same concern at its twenty-seventh session. In its report on that session, it had stated that “the draft articles are in general without prejudice to the provisions which the parties may agree to in the treaty con-

taining the clause or otherwise”, and had added that “This residual character can be emphasized by introducing in each individual article, as appropriate, an opening clause” and that “It can also be expressly recognized in an article of general application to all those provisions which are of the same nature”.⁷

38. In proposing article D, the Special Rapporteur had opted for the second solution. That article started from the principle of the autonomy of contractual will: the two contracting parties could agree that there should be a most-favoured-nation clause, but could at the same time limit the sphere of application of that clause. In his opinion, it should still be called a “most-favoured-nation clause”, even if certain limitations were imposed on its application. By way of example, he pointed out that Japan had concluded, with a country belonging to a Customs union, a treaty which contained a most-favoured-nation clause, but had restricted the application of that clause.

39. Mr. CALLE Y CALLE said that, as pointed out by the previous speaker, the Commission, in its 1975 report, had expressed its intention of adopting a provision on the freedom of the parties to draft most-favoured-nation clauses and to restrict their operation. The problem which had now arisen was whether the draft articles should remain within the strict limits of the most-favoured nation clause in all its legal purity, or whether they should have a wider scope.

40. If the broader approach was adopted, the draft articles would cover those aspects of the law of treaties involving most-favoured-nation treatment and its operation as between States. It would then be appropriate to indicate, in a provision such as article D, that there were cases in which the effects of the most-favoured-nation clause could be curtailed or suspended, and that in certain situations the mechanical and perhaps blind application of the clause should be excluded.

41. With regard to the position of article D in the draft, one possibility would be for it to follow article 6 (Legal basis of most-favoured-nation treatment). That article stressed that entitlement to most-favoured-nation treatment was based on a legal obligation of the granting State and it would be appropriate for article D to follow, because it dealt with certain possible limitations upon, or exclusions from that legal obligation. Another possibility would be to place article D immediately after article 7, which dealt with the source and scope of most-favoured-nation treatment.

42. A question on which he wished to have the Special Rapporteur's views was whether there was any relationship between the provisions of article D and those of article 15 (Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement). It was his impression that limitations such as those contemplated in article D were particularly necessary in regard to bilateral agreements. When a most-favoured-

⁷ *Yearbook... 1975*, vol. II, pp. 119-120, document A/10010/Rev.1, para. 117.

nation clause was included in a bilateral agreement, it was often necessary to specify certain conditions or restrictions in order to prevent the clause from becoming applicable to numerous other States which had concluded bilateral agreements with the granting State, thus giving the clause a virtually multilateral effect. In that connexion, it should be stressed that the most-favoured-nation clause, although apparently bilateral in character, involved a triangular relationship, between the granting State, the beneficiary State and the third State.

43. The provisions of article D were of great interest to the developing countries in connexion with the exceptions being made in their favour in the situation contemplated in article 21 (Most-favoured-nation clauses in relation to treatment under a generalized system of preferences) or under arrangements to accord favourable treatment for the purpose of meeting development needs. Article D thus served an eminently practical purpose.

44. Where multilateral treaties were concerned, the extensive commentary to article 15 adopted by the Commission in 1975⁸ drew a distinction between certain economic multilateral conventions of restricted scope and multilateral treaties in general. In that commentary, attention was drawn to the proceedings of the World Monetary and Economic Conference held in London in 1933⁹ and to the resolution adopted at Brussels in 1936 by the Institute of International Law, which stated that the most-favoured-nation clause did not confer the right "to the treatment resulting from the provisions of conventions open for signature by all States whose purpose is to facilitate and stimulate international trade and economic relations by a systematic reduction of customs duties".¹⁰

45. In another passage of the same commentary, reference was made to the proposal by a Japanese writer that a distinction should be made in the field of international trade and customs tariffs between "collective treaties of special interest" and "collective treaties of general interest".¹¹ Elsewhere, the commentary gave an example of the type of situation envisaged in draft article D when it quoted article 5 of a 1965 Trade Agreement between the USSR and Australia. That article stated two exceptions to the application of the most-favoured-nation clause contained in the Agreement, namely:

(a) preferences or advantages accorded by the Union of Soviet Socialist Republics to countries immediately adjacent to the Union of Soviet Socialist Republics;

(b) preferences or advantages accorded by the Commonwealth of Australia within the framework of the Commonwealth of Nations or to Ireland.¹²

46. Draft article D served to show that it was possible to restrict the framework of the application of the most-

favoured-nation clause, as the USSR and Australia had done. He found the article desirable and necessary, inasmuch as it stipulated that the draft articles were without prejudice to any provisions agreed upon by the parties in the treaty containing the most-favoured-nation clause. Article D was equally necessary for multilateral relationships in which there were many possible beneficiaries and many possible third States.

47. Mr. USHAKOV said he agreed with Mr. Calle y Calle that it was always possible to derogate from a most-favoured-nation clause by agreement, but that did not mean that the clause remained a most-favoured-nation clause, whatever derogation was made from it. There could be exceptions to the most-favoured-nation clause, but they must be clearly determined. There could, for example, be an exception in regard to developing countries, but not in regard to just any country.

48. Mr. USTOR (Special Rapporteur) said that there was certainly much logic in Mr. Ushakov's remarks concerning a most-favoured-nation clause to which an exception was attached excluding from its operation the favours extended to a certain category of States; the clause to which such a condition was attached could be said not to constitute a most-favoured-nation clause in the strictest sense of the term.

49. In fact, of course, such exceptions *ratione personae* were quite common, and in legal literature most-favoured-nation clauses containing them were none the less termed "most-favoured-nation" clauses. That terminology might not be very precise from the scientific point of view, but he had not seen any legal writing in which it was argued that an exception *ratione personae* precluded a clause from being called a "most-favoured-nation" clause, despite the semantic difficulties created by the use of the superlative "most". As he saw it, the Commission, in its draft on the most-favoured-nation clause, had to deal with that clause in its generally accepted sense and could not avoid laying down rules on exceptions.

50. Mr. Ushakov had referred to the provisions of article 21, but that article dealt with a rather different matter, namely the treatment extended to developing States under a generalized system of preferences. The purpose of article 21 was to state that, under a practice now emerging, those preferences did not count as most-favoured-nation treatment for purposes of bringing a most-favoured-nation clause into operation. The purpose of article D was to deal with exceptions which were expressly written into most-favoured-nation clauses.

51. Despite the logic of Mr. Ushakov's reasoning, he believed that it would not be appropriate to say that a most-favoured-nation clause ceased to deserve its name if an exception was made in regard to the benefits extended to a certain category of States. The Commission should not interpret its task in a narrow sense, and should deal in its draft with the problem of most-favoured-nation clauses modified by a condition or an exception.

⁸ *Ibid.*, pp. 138 *et seq.*, document A/10010/Rev.1, chap. IV, sect. B, sub-sect. 2.

⁹ *Ibid.*, pp. 139-140, para. 4 of the commentary to article 15.

¹⁰ *Ibid.*, p. 140, para. 7 of the commentary.

¹¹ *Ibid.*, para. 8 of the commentary.

¹² *Ibid.*, p. 144, para. 28 of the commentary.

The meeting rose at 1.00 p.m.