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**Summary record of the 1383rd meeting**

Topic:  
**Most-favoured-nation clause**

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which would give a right of veto to a State that was the beneficiary of a most-favoured-nation clause.

58. Mr. USHAKOV observed that in fact Mr. Reuter's comments did not relate only to treaties containing a most-favoured-nation clause, but to treaties in general. It was indeed open to question whether the existence of a Customs union did not render impossible not only the execution of a treaty containing a most-favoured-nation clause, but also that of other treaties. The question of the effect of Customs unions on the execution of treaties in general was so important that it could become a separate item on the Commission's agenda. In his view, the Commission would come to a dead end if it entered on that difficult course and again attempted to determine whether membership of a Customs union could constitute an international delict.

59. The CHAIRMAN, speaking as a member of the Commission, said that he did not question article 30 of the draft articles on succession of States in respect of treaties; he fully accepted that provision.

60. Mr. BILGE said he had no definite opinion on the advisability of providing for an exception in favour of Customs unions and other similar groups. In a previous statement he had pointed out that the Special Rapporteur did not seem to have taken into consideration Customs unions concluded between developing countries.<sup>11</sup> At that time, he had intended to propose an exception in favour of those countries, but he had since noted that the Special Rapporteur had dealt with the problem in chapter II of his report. He would therefore revert to the matter at a later stage.

*The meeting rose at 12.55 p.m.*

<sup>11</sup> See 1380th meeting, para. 42.

### 1383rd MEETING

*Thursday, 3 June 1976, at 10.15 a.m.*

*Chairman:* Mr. Abdullah EL-ERIAN

*Members present:* Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangsoavina, Mr. Reuter, 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]

#### THE CUSTOMS-UNION ISSUE (*continued*)

1. Sir Francis VALLAT said that, in his introduction, the Special Rapporteur had maintained that there was no customary rule of international law that an exception

in favour of a Customs union was to be implied in a most-favoured-nation clause.<sup>1</sup>

2. Mr. Reuter, on the other hand, had advanced a cogent legal argument based on the analogy of the uniting of States<sup>2</sup> and had pointed out that the sovereignty of States in deciding their future could not be determined by the inclusion of a most-favoured-nation clause in a particular treaty. Mr. Hambro had adopted the middle course; he had agreed that no relevant rule of customary law existed, but he had endorsed the Customs-union exception.<sup>3</sup> Other members of the Commission had also agreed that no relevant rule existed, but while some considered that none should be incorporated in the articles, others felt that the draft should include a provision for the developing countries. It was apparent, therefore, that fairly general agreement had emerged on the proposition that there was no rule of customary international law that embodied the Customs-union exception.

3. The Commission, however, was endeavouring to prepare articles which would provide a useful standard for interpreting and applying the clause in the future. He was inclined to follow the course advocated by Mr. Hambro. He could not accept the view of Mr. Ushakov that, if the treatment granted to a third State were excluded from the operation of the clause, then the clause ceased to be a most-favoured-nation clause.<sup>4</sup> States frequently spoke of most-favoured-nation clauses even when they included exceptions *ratione personae*. Nevertheless, the point had been raised; it affected the scope and application of the articles and some clarification was indispensable if the present work was to progress, for its very foundations had, to some extent, been attacked.

4. Such clarification was indispensable because the draft, when adopted, would have considerable influence as a standard and would presumably be adopted in the form of articles incorporated in a Convention. The International Court of Justice repeatedly referred, for example, to the standard of the Vienna Convention on the Law of Treaties. But from the purely legal point of view, the articles would operate most effectively when incorporated in a convention.

5. He had thought, perhaps mistakenly, that the Commission was seeking to draft residual rules—rules which States could waive by agreement. It now seemed to be suggested that the articles should apply as peremptory rules, which were quite the opposite of residual rules. In that case, it had been suggested, the articles would operate exclusively in respect of a "pure" most-favoured-nation clause and their practical impact would be seriously limited. Parties to a convention containing such clauses would be prohibited from entering subsequently into any agreement containing a most-favoured-nation clause that excluded benefits granted to some third State. If that position was now being adopted, it should be

<sup>1</sup> 1381st meeting, para. 32. 1382nd meeting, para. 2.

<sup>2</sup> 1382nd meeting, para. 53.

<sup>3</sup> *Ibid.*, para. 18.

<sup>4</sup> *Ibid.*, para. 41.

reflected in the articles themselves. He could not accept the thesis of the "purity" of the clause, but the matter had to be clarified; otherwise, the Commission would be setting a trap for Governments in the same way as it appeared to have been setting a trap for itself.

6. It was possible to maintain that the Customs-union exception, although not embodied in law, was customary. A sufficient body of State practice—for instance, the 280 express exceptions found in treaties concluded between the two world wars and the exception provided for by article XXIV of GATT was there to justify the inclusion of the exception in the present articles. In any event, as in the case of frontier traffic, it would be prudent for the Commission to prepare a draft article and leave it to Governments to take what was, in the final analysis, a political decision on the question whether or not the article should be included. In his opinion, the present draft article could not properly be read as excluding future Customs-union exceptions in agreements between States. The Commission would damage its own reputation if it drafted articles which, on a strict interpretation, could be construed as preventing States from including such an exception in future agreements.

7. Mr. TSURUOKA said that a rule of implicit exception in favour of Customs unions or free-trade areas should not be included in the draft, for the reasons given by the Special Rapporteur. The Commission's purpose in preparing draft articles on the most-favoured-nation clause was to facilitate international co-operation and ensure the prosperity of the whole world. The concept of the most-favoured-nation clause had certain merits; it was based on ideas of free trade and universalism. The concept of a Customs union, on the other hand, was based on special arrangements for trade and regionalism.

8. The existence of a most-favoured-nation clause should not prevent the granting State from joining a Customs union, but neither should the beneficiary State be harmed by the fact that the granting State had become a member of a Customs union. In the latter case, the beneficiary State should receive fair and appropriate compensation. Renegotiation of the agreement between the granting State and the beneficiary State, as proposed by Mr. Reuter,<sup>5</sup> could be a solution, but he was not sure how such renegotiation would take place in practice. It could be expected that the beneficiary State would not refuse the offer of negotiation, but the question arose as to how far it should make concessions. Should it give up all or part of the advantages to which it was entitled under the most-favoured-nation clause? Whatever the answer to that question, it seemed essential that the beneficiary State should receive fair compensation.

9. In the final analysis, the important problem was how to draft the future convention so that it might protect the legitimate interests of all members of the international community. That involved philosophic, economic and legal considerations. In the legal sphere alone, with which the Commission was dealing, such fundamental principles were at stake that the Commission could not embark on any progressive development of international law. Those

principles included the *pacta sunt servanda* principle and the principle of compensation for injury to the interests of others. And those principles could not be infringed without strong justification. As there was no such justification in the present case, he agreed with the Special Rapporteur's conclusion.

10. It should be stated in the commentary that the Commission had considered at length the arguments for and against and had reached the conclusion that it would be better not to include the rule of implicit exception in the draft.

11. Mr. MARTÍNEZ MORENO said that the problem of Customs unions was highly complex. The position of the Central American region, as reflected in the legal instruments signed by the Central American countries and in the statements of Central American representatives in the Sixth Committee of the General Assembly, was that the present articles should embody the implicit exception. The Central American countries had concluded agreements containing unrestricted most-favoured-nation clauses long before a Central American Common Market had ever been envisaged. In keeping with the principle of *pacta sunt servanda*, the key instruments establishing the Central American Common Market had contained provisions instructing the States Parties to renegotiate treaties containing most-favoured-nation clauses which had been entered into before the formation of the Common Market, to terminate them, where possible, and not to enter into further trade agreements without inserting the Central American exception clause.

12. If circumstances were such that a Central American country could not extend to an extra-regional State the special treatment granted to the members of the Central American Common Market, would it be committing an international offence entailing international responsibility? The Special Rapporteur considered that, for reasons of distributive justice, if a State failed to grant to a country from outside the region the same benefits as those applicable to members of the economic association, it would be obliged to compensate that country because it had refused to grant equal opportunities and because the act of so doing was discriminatory. However, he wondered whether the act would constitute a material breach under the terms of article 60 of the Vienna Convention on the Law of Treaties.<sup>6</sup> The answer might be in the affirmative, for it was to some extent a violation of a provision essential to the accomplishment of the object or purpose of the treaty. On the other hand, there might, by analogy with penal law, be certain grounds under *jus gentium* for release from responsibility.

13. In the discussion on the topic of State responsibility he had raised the question whether, apart from the rules of *jus cogens*, there might not be other grounds for release from responsibility and other exceptions to the general rule,<sup>7</sup> and had referred specifically to the case of

<sup>6</sup> 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.

<sup>7</sup> See 1369th meeting, para. 19.

<sup>5</sup> *Ibid.*, para. 54.

the Central American countries which had concluded most-favoured-nation agreements before the formation of the Central American Common Market. Despite his conviction that the articles should embody an implicit exception, he was not opposed, at least in the first reading of the articles, to the view of the Special Rapporteur and of Mr. Sette Câmara that the exception should, for the moment, be regarded as conventional in the case of economic associations.

14. The reason was simply that there might be other equally important exceptions. For instance, a whole range of international instruments existed to govern the prices of certain commodities. He had in mind those instruments, concluded by many nations after lengthy negotiations between producers and consumers, which sought to establish a fair price for the producer without laying too great a burden on the consumer, such as the international agreements on coffee, sugar and wheat. The Special Rapporteur might consider the possible impact of commodity agreements on the most-favoured-nation clause.

15. It had been pointed out that the term "Customs unions" was being used to cover all types of economic associations. In fact, economic associations or groupings took various forms, such as free-trade areas, common markets, monetary unions or even combinations thereof, but the least common form was the Customs union. In Latin America, neither the Central American Common Market, nor the Latin American Free Trade Association nor the Cartagena Agreement (Andean Pact) constituted a genuine Customs union. Consequently it would be better, in the Commission's report, to speak of "economic associations".

16. Lastly, he fully endorsed the idea of inserting in the draft an exception in the case of developing countries. That was essential, for reasons of justice. The terms of trade between the industrialized and the developing countries were constantly deteriorating. The gap between the prices of manufactured goods and raw materials was continuing to grow wider, to the detriment of the poor nations. The Special Rapporteur fully recognized that situation and had realized the desirability of incorporating in the draft an appropriate provision in favour of developing countries.

17. Mr. Tabibi said that, in the Sixth Committee, the representatives of members of the European Economic Community had repeatedly argued for recognition of the Customs-union exception. At the same time, the representatives of the third world had forcefully argued that recognition of that exception, in the codification of the most-favoured-nation clause, would disrupt trade relations between Member States of the United Nations and discriminate against the economically weaker members of the world community. Many representatives had maintained that there was no customary rule of international law embodying the Customs-union exception and that the question did not relate to article 15 but should be studied in relation to article 7.<sup>8</sup>

<sup>8</sup> 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.

18. It was apparent from the debate in the Sixth Committee and also from the Commission's discussion that the legal position on the issue was that described in paragraph 53 of the Special Rapporteur's seventh report (A/CN.4/293 and Add.1). Most-favoured-nation clauses, unless explicitly agreed otherwise, did attract benefits granted within Customs unions or associations like EEC. The only way to deal with the situation, if complications arose, was by means of mutually acceptable arrangements. The experience of EEC demonstrated that its members had lived in harmony and prosperity, and that the possibility existed for making any arrangements deemed to be necessary. At a time when the world was endeavouring to eliminate trade barriers, to establish the exception as a rule would only create additional barriers.

19. The Commission should promote the law of development in favour of all of the members of the community of nations, particularly the weaker nations, rather than protect the strongest. Mr. Hambro's statement that, if the draft was to incorporate rules in favour of the developing countries, it should also embody a rule of progressive international law in favour of Customs unions,<sup>9</sup> was not acceptable. The problems facing the supporters of Customs unions were simply those of treatment of a minor ailment, while the problems of developing countries, which made up two thirds of the world community, were problems of poverty, disease, and starvation—problems of world concern.

20. Lastly, the arguments of advocates of Customs unions defended the economic interests of the members of such unions and conflicted with the interests of outsiders. In practice, they merely created further trade discrimination and further division based on political interests. It had been rightly observed that the purpose and the impact on world trade of an economic association like the Central American Common Market were entirely different from those of EEC.

21. He fully endorsed the position adopted by the Special Rapporteur and saw no need to include a rule on the Customs-union exception. Obviously, if a rule were inserted in the articles, the draft would be rejected by the great majority of States.

22. Mr. KEARNEY said that the experience of GATT demonstrated the great difficulties of deciding on the conditions that would justify a release from earlier commitments regarding most-favoured-nation treatment when a Customs union was formed and of determining compensation in such cases. If, in the light of that experience, the Commission were to uphold the thesis of an exception for Customs unions, could it in all conscience include a provision in the draft and proceed to ignore the whole range of problems that were bound to arise? For example, would a State entitled to most-favoured-nation treatment have the right to terminate the agreement or to require compensation? If so, would rules be drafted to govern the granting of compensation? Enormous technical knowledge would be required in order to deal with those problems.

<sup>9</sup> See 1382nd meeting, para. 14.

23. Again, as Mr. Martínez Moreno had pointed out, there were considerable differences in the types of economic associations. Customs unions were merely one form of such associations. The difficult problem would arise whether distinctions would have to be drawn. It was not possible to include a provision to the effect that any type of economic association, regardless of its nature, was entitled to an automatic exception for its members in respect of most-favoured-nation clauses.

24. For practical reasons, it would not be advisable to include a provision concerning exceptions for Customs unions or other types of economic associations and nothing more. On the other hand, for the purpose of focusing attention on the problem, it would be possible to follow Mr. Hambro's suggestion<sup>10</sup> to include a statement that the articles were not intended to determine the relationship of economic associations and most-favoured-nation clauses. The effect would be to relegate the problem to one of the application of the general law of treaties and, under the Vienna Convention on the Law of Treaties, the rules regarding successive treaties would operate. In that case, a State entering a Customs union would be under an obligation at least to provide some restitution to a prior partner under a most-favoured-nation clause.

25. In conclusion, he wished to point out that, if the European Economic Community became one State, the rules concerning State succession would apply, but the Commission should not concern itself with the result of the application of those rules at the present time, while EEC, or any other Customs union, still remained a group of independent States.

26. Mr. CALLE Y CALLE said that the Customs-union exception was a matter which had been mentioned by the Special Rapporteur in his earliest reports; it was one which the Commission could not ignore and leave in a kind of limbo of possible exclusions.

27. It was apparent from paragraph 45 of the Special Rapporteur's seventh report that the Sixth Committee had been divided in its views. At the present juncture, the question had been placed on the level of what might be termed the pure theory of the most-favoured-nation clause which held that it was a mechanism which admitted of no exceptions or even conditions. But there was a difference between the unconditionality of the clause and its application. The ultimate purpose of the clause was to place competitors on an equal footing; in other words, a third State was entitled to claim the treatment accorded to another third State. Clearly, if the member countries of the Andean Pact, which extended special treatment to one another, granted special treatment to the United States of America, which did not form part of that economic association, the Soviet Union, for example, could legitimately claim entitlement to the same treatment. The clause would place those two States on an equal footing.

28. However, nations formed associations for economic and political reasons, and to accelerate integrated devel-

opment. The Commission should ask itself if it was performing a service to States and accelerated integrated development, or if it was consecrating a clause which favoured equal competition. From a strictly logical standpoint, Mr. Ushakov was right. On the other hand, it was not possible to maintain that exceptions or limits lay outside the scope of the most-favoured-nation clause. The articles now being drafted did not relate exclusively to trade. States granted most-favoured-nation treatment in a number of areas, for instance the movement of individuals. Cases would arise in which the beneficiary State had to realize that special treatment could still be extended, despite the existence of an economic association or Customs union, but that other types of treatment would not be extended because, by their very nature, they lay outside the scope of the clause.

29. In his view, the commentary to article 15 should be strengthened to indicate that the exception could not be ruled out because of the absence of a customary rule. Sir Francis Vallat had pointed out that although the exception did not exist in the form of a rule of customary international law it was none the less very common, as could be seen from State practice. He had pointed out that 280 treaties concluded in the period between the two world wars had incorporated an express exception. Nevertheless, many other treaties, in which the exception was not expressly stipulated, would be interpreted in favour of the granting State, in view of the specific nature of the reciprocal treatment justifiably extended to partners in an economic association.

30. Mr. ŠAHOVIĆ said that, at the twenty-seventh session, in the discussion on the Special Rapporteur's earlier reports, he had supported the position taken by the Special Rapporteur that it was not necessary to adopt a general rule concerning the relationship between Customs unions and the most-favoured-nation clause.<sup>11</sup> At the same time, he had pointed out that the trend towards the establishment of Customs unions or economic associations in general was a fact which had to be taken into account in the draft articles. To-day, it was clear from the Commission's discussions and the views expressed by members of the Sixth Committee of the General Assembly, that the problem was still far from being solved. That did not mean that the views of the Special Rapporteur were not valid: on the contrary, at the present session he had succeeded in formulating still more forcefully than the previous year his basic idea that it was not necessary to include in the draft articles a special provision for economic associations.

31. The problem before the Commission was not new, but it had become broader. The discussions which had already taken place and the articles which still had to be considered showed that the basic problems had already been settled. The only outstanding problems were those relating to restrictions and exceptions—in other words, extra-judicial problems concerning the position of the draft articles in international law as a whole. The Commission therefore had two tasks to perform at the present session. It had to situate the draft articles in the general

<sup>10</sup> *Ibid.*, para. 21.

<sup>11</sup> *Yearbook*. . .1975, vol. I, p. 197, 1342nd meeting, para. 20.

context of international law and to take account of the political and economic problems which arose in the day-to-day life of the international community. Those extra-judicial factors were particularly important because of the present economic crisis, and the Commission should take those circumstances into account and endeavour to find solutions.

32. With regard to the specific phenomenon of economic unions, the first task was to determine the influence which it could have on the operation of the most-favoured-nation clause in international law. A possible definition of the legal character of economic associations or Customs unions might be that they were associations of subjects of international law resulting from the will of a limited number of States which had decided to join together to solve certain problems of common concern in their mutual interest. Such associations were quite legitimate, but the question which arose was how the special rules governing them effected the general régime of the most-favoured-nation clause.

33. With regard to the exceptions to the clause, first it should be noted that there was a certain hierarchy in exceptions. The international community as a whole accorded absolute priority to exceptions in favour of the developing countries, but States were not in agreement on the importance which should be attached to economic associations or Customs unions. Exceptions in favour of Customs unions could therefore not be placed on the same footing as exceptions in favour of developing countries, which was what the generalized system of preferences was based on. Preferences in favour of developing countries were an exception accepted by all members of the international community. The Special Rapporteur had therefore been right to devote a separate article to that exception. Exceptions in favour of Customs unions, on the other hand, should not be made the subject of a general rule. The Commission should respect the sovereignty of States and their right to establish Customs unions, but it should not treat members of such unions in the same way as developing countries.

34. The problem then was therefore essentially a practical one: should the draft articles include a special provision concerning Customs unions and, if so, how should it be formulated? The Special Rapporteur had made a number of suggestions, and the situation was already mentioned in a number of articles, particularly articles 14, 15 and D. On the basic question, which was that of the relationship between obligations deriving from agreements on Customs unions and those arising from other agreements, the Special Rapporteur had also supplied a number of answers, based on the law of treaties and general international law. The members of the Commission had said that positive international law enabled those problems to be solved without difficulty. Perhaps some indication to that effect might be given in the draft articles.

35. The most-favoured-nation clause had a place in present economic law, which attached great importance to it, but it was only one of the instruments upon which international relations should be based. Thus, the Commission, while respecting the value of the clause, should

endeavour to adapt the draft to the needs of international life, bearing in mind the large number of economic associations now being formed. The clause should apply not only between developed and developing countries, but also between capitalist and socialist countries; in other words, between countries with different economic and social systems. That would mean taking account of intermediate and transitory situations, if the draft was to be accepted by all States. Or course, the Commission could make no proposal at all and leave it to States to decide, but he thought that it ought to try to find a solution in order to situate its draft articles in the general context of the present economic order and of general international law.

36. Mr. QUENTIN-BAXTER said that he wished to explain his position in relation to a number of points which had been raised by other speakers in the course of the debate. He would deal first with the thesis put forward by Mr. Ushakov that the very inclusion of a clause on the Customs-union issue in a most-favoured-nation agreement would be sufficient to take it out of the category of agreements covered by the present draft.<sup>12</sup> On that point, he had already briefly stated his position during the discussion on article D<sup>13</sup> and he had not changed that position since. It would be fully recognized that States were free to contract in any way they wished; none of the rules in the present draft were intended to be of a peremptory character. Only a normative benefit was expected from the approach regarding exceptions of the kind now under discussion as not permitted by the scope of the present draft articles.

37. He did not believe that the view put forward by Mr. Ushakov was practicable. The notion of the most-favoured-nation clause was so well known in international practice that any attempt to align it differently could only lead to confusion among States and to a limitation of the practical application of the present set of draft articles. It was of the essence of the most-favoured-nation clause system not to limit the exclusions that States were entitled to make in their dealings with each other. What that system did was to control rigorously the impact upon third States of each agreement that they drew up. It therefore seemed to him that, if the Commission wished to avoid any confusion in its work it could not, without a new decision of principle, pursue the line suggested by Mr. Ushakov.

38. The present ambit of the draft articles was primarily defined in articles 1, 4 and 5. As he saw it, there was really no disagreement among members in their understanding of State practice in the matter of Customs unions. It was a well-known fact that, where States had pressing reasons of high policy for contracting special relations with each other, their need and their desire to do so would prevail to the extent necessary, even over general obligations that they had already contracted previously. State practice, however, also showed that, when such a situation arose, the State seeking to join the new system would regard itself—and should regard itself—as having

<sup>12</sup> See 1382nd meeting, para. 41.

<sup>13</sup> 1379th meeting, para. 27.

an obligation to adjust its relationship with the other States which are already bound.

39. It seemed to him that the only question facing the Commission was whether, in drawing up residual rules, it could safely presume that where an agreement was silent, the States parties to it did—or did not—reserve to themselves the right to make exclusions. Despite the excellent discussion which had taken place, he found the greatest difficulty in concluding that the Commission was entitled to come down on one side or the other on that argument.

40. As occurred in the general course of treaty relationships among States, new situations would undoubtedly cause changes to be made: a State had to take an initiative to release itself from obligations it had accepted and the other States with which it had formed arrangements would in almost all cases recognize the necessity of adapting themselves to the new situation. State practice also showed that the solutions adopted were sometimes not based on principles and that they would often be related to a code of conduct established by a body such as GATT.

41. In the present subject more than in any other, it was necessary not to assume that any rules the Commission drew up would themselves automatically dispose of the problems that would arise in the complexity of international life. That principle was one which was becoming increasingly familiar. There were rules governing the demarcation of continental shelves between adjacent States, but when all the rules had been applied, there was still a need, in some topographical situations, for the States concerned to determine the effect of the rules and the manner in which they should be applied.

42. In the present set of draft articles, when dealing with the concept of material reciprocity, the Commission was very clear about the general nature of that concept; it nevertheless fully realized that in its practical application at different times and in different contexts, there had been conventions or understandings—and sometimes quite arbitrary rules of thumb—as to how the concept would be applied. As he saw it, that was one of the reasons for the difficulty in drafting a suitable rule or exception to deal with the Customs-union issue.

43. The rule would need to strike a balance between the notion of a State's freedom to determine its own affairs and that of a duty to negotiate with, and perhaps compensate, the other State affected. The efforts to draw up such a rule would take the Commission beyond the bounds of the present subject and perhaps into the area of State responsibility, setting a problem that was as difficult as any so far encountered in the discussion of that topic. Viewed in another way, the problem could extend to a primary rule situation with which it was hardly the purpose of the present draft to deal.

44. Over and above all those considerations, there was the difficulty—referred to by several speakers during the debate—of defining new terms. The Commission would have to decide exactly what it meant by a "Customs union" or a "free-trade area" or again, by the various situations of generalized preferences which could and did arise. In doing so, the Commission would have to take

due account of the fact that the practice of the most-favoured-nation clause in multilateral negotiation was constantly evolving at the very time at which the Commission was discussing it.

45. For those reasons, he was somewhat dubious of the possibility of constructing a suitable draft, even as a method of placing the Customs-union issue before the General Assembly in order to obtain the reaction of States. He would not go so far as to say that he was opposed in principle to the preparation of such a draft; that would be unreasonably dogmatic. Moreover, the Commission was considering other possible exceptions and it was perhaps not wise to close any door that might in the end make it easier to arrive at a balanced and acceptable answer.

46. He feared that the excellent debate which had taken place did not provide the Special Rapporteur with any very clearly defined path for drawing up any sort of article dealing with the Customs-union issue. It would perhaps be unreasonable to ask the Special Rapporteur to undertake that task until the Commission was much more certain of the general direction in which it wished him to move and of the possibility of arriving at a result within the time-limit of the present session of the Commission.

47. Mr. YASSEEN said he still thought that what was involved was merely a residual rule, a rule to fill the gap left by the unexpressed intentions of the parties. The freedom of the parties must be recognized, but a presumption in favour of one solution or the other must also be established. That was the real problem. Mr. Reuter had put it on a different plane by invoking the right of States to associate with each other, even in the Customs sphere, and concluded in favour of the presumption of an exception restricting the scope of the most-favoured-nation clause in the case of a Customs union.<sup>14</sup>

48. It could be argued that States were entitled to join together in any way they wished and that that was a prerogative of their sovereignty, but in international law, the exercise of one right could not infringe another right, unless it was accepted that the new right was a superior right. The most-favoured-nation clause was established by an agreement based on the rule of *pacta sunt servanda*. The fact that a granting State which became a member of a Customs union refused to grant the beneficiary State most-favoured-nation treatment would run counter to the general character of the clause, which could not be limited by invoking an implicit intention. That was a case of pure responsibility—not moral, but legal responsibility—because it involved a derogation from an international obligation.

49. In its draft convention on the succession of States in respect of treaties, the Commission had acknowledged the right of States to unite, but it had not referred to the consequences of the exercise of that right and had reserved the question of responsibility. In the present case, therefore, the existence of State responsibility was conceivable; the State which had not made any reserva-

<sup>14</sup> See 1382nd meeting, para. 54.

tions and refused to grant most-favoured-nation treatment would be obliged to make reparation. The State might then not apply the treaty, but its responsibility would be entailed and it would have to accept the consequences. That was what happened when a State concluded a subsequent treaty which was incompatible with an earlier treaty.

50. Mitigating circumstances could perhaps be imagined, but they would not change the nature of the responsibility itself; they would, however, permit a solution to be reached by negotiation in good faith.

51. States had the right to unite, but if they exercised that right they must accept the consequences and not forget that there were other rights equally worthy of respect. Sir Francis Vallat had said that there was no rule in favour of an exception to the clause in the case of Customs unions, but that the exception was to be found in many treaties. The practice showed that States were generally in favour of such an exception. He therefore believed that, if the Commission wished to respect international practice, it should not establish a presumption in its draft articles in favour of an exception to the clause but leave States to make an exception if they so desired. It might perhaps emphasize that right by stressing the freedom of States in that matter. International practice required that States should be explicit if they wished to limit the scope of a most-favoured-nation clause. Thus, by not formulating any presumption, the Commission would be adopting a position that was more in conformity with practice.

*The meeting rose at 1 p.m.*

### 1384th MEETING

*Friday, 4 June 1976, at 10.15 a.m.*

*Chairman:* Mr. Abdullah EL-ERIAN

*Members present:* Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, 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, A/CN.4/L.242)

[Item 4 of the agenda]

#### **THE CUSTOMS-UNION ISSUE (concluded)**

1. Mr. USHAKOV said he wished to clarify certain points concerning the capacity of States to restrict the application of the most-favoured-nation clause by negotiation, in the case of a Customs union.

2. Clearly, *ratione materiae*, any limitation was possible, since the parties agreed on the subject-matter to be

covered by the clause. Thus a clause could apply to one matter only, without that limitation constituting an exception. *Ratione personae*, on the other hand, no limitation was possible. The granting State could not invoke its membership of a Customs union to deny the benefit of the most-favoured-nation clause to the beneficiary State, since the new situation created by the establishment of the Customs union in no way changed the pre-existing situation and the third State remained the third State. In his view, therefore, it was not possible to make an exception to the most-favoured-nation clause for Customs unions.

3. Mr. USTOR (Special Rapporteur), summing up the discussion, said it had shown that, subject to some reservations, there was virtual unanimity among members as to the position *de lege lata*: there was at present no general rule of customary international law that would exclude Customs-union benefits from the operation of the most-favoured-nation clause in the absence of an express stipulation in the treaty containing the clause. Some members, however, had drawn attention to the very many Customs-union exceptions contained in treaties and to the important exception embodied in article XXIV of GATT and had taken the view that those exceptions reflected the practice of States.

4. For his part he agreed with Mr. Yasseen that a general rule on the Customs-union exception could only be deduced from practice showing that States which had not stipulated an exception were prepared to admit the existence of an implied exception in regard to situations arising from a Customs union. Since no such practice existed, it was clear that the implied exception did not constitute a general rule of customary international law.

5. Approximately half the members of the Commission favoured the inclusion in the draft articles of a rule stating the implied Customs-union exception, but they agreed that it would be a rule *de lege ferenda*, so that its inclusion in the present draft would not constitute codification, but progressive development of international law.

6. The Statute of the Commission contained, in article 16, very detailed provisions on the progressive development of international law. Those provisions, which were of a procedural character, made the Commission's powers very much subject to the wishes of States. From the point of view of substance, however, the Statute did not place any limits on the powers of the Commission to propose changes in international law. With regard to such proposals, however, he agreed with Mr. Tammes that progressive development was desirable only if the proposed changes were in the direction of justice and of greater reliability of the law.

7. It had been suggested by some members, including Mr. Hambro, that since the Commission had been bold enough, in draft article 21, to accept considerable changes in the law for the benefit of the developing countries, it should be equally bold with regard to the Customs-union issue.<sup>1</sup> He could not accept that argument: the introduction of changes in the law to meet the needs of the

<sup>1</sup> See 1382nd meeting, para. 14.