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Summary record of the 1487th meeting

Topic:
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Francis Vallat on certain points, but thought that the Commission had been right to model article 3 on article 3 of the Vienna Convention on the Law of Treaties, because the draft articles under discussion raised the same problems as the Vienna Convention. Article 3 was one that restricted the scope of the draft and did not set out to resolve all the problems raised in international life by the most-favoured-nation clause. The Commission could deal in its commentary with the specific problems referred to by Sir Francis Vallat.

24. He was therefore in favour of retaining article 3 as it stood, for it reflected the importance that certain members of the Commission attached to the practical problems arising in the case of treaties between States and ineternational organizations and, at the same time, allowed States to resolve those problems, which were at the root of the draft articles, by applying the rules of the Vienna Convention or the rules of customary international law as sources for international law as mentioned in article 3, paragraph (*b*). He wondered whether it would not be possible to employ the same solution in the case of the clause contained in treaties between international organizations.

25. Mr. SCHWEBEL said that one possible way of dealing with the problem would be to amend paragraph (*b*) of article 3 by replacing the words "independently of the articles" by the words: "either independently of the articles or by the decision of the parties to an internatinal agreement referred to in this article to apply these articles to such an agreement". He agreed that the effect of paragraph (*b*) as drafted was to permit the application to any agreement of the rules set forth in the draft articles in so far as those rules were applicable under customary internatinal law. The purpose of his suggestion, therefore, was to introduce the idea that the parties—by which he meant an international organization or some subject of international law other than a State, on the one hand, and a State, on the other—might decide to apply those rules by agreement among themselves. That was perhaps self-evident, but it might be worth while to spell it out.

26. Further, in item (2) of the introductory part of article 3, he would suggest that the word "other" be added between the word "any" and the words "subject of international law".

27. Mr. JAGOTA said that the words "do not apply", at the beginning of the introductory part of article 3, made it clear that it was a saving clause, in other words, that the draft articles applied only to most-favoured-nation clauses in treaties between States, as defined in draft article 1, and not to the clauses referred to in items (1), (2) and (3) of the introductory part of article 3. Paragraph (*a*) provided that the fact that the articles did not apply to the clauses referred to in items (1), (2) and (3) did not affect the legal effect of those clauses. The question then arose: under what law would they be valid if they were not valid under the draft articles? Paragraphs (*b*) and (*c*) referred, in that context, to "international law", which he interpreted to mean both conventional and customary international law. If that were so, any most-favoured-nation clause contained in an agreement between, say, India and EEC would still be valid even though it did not fall within the scope of the draft articles; and the law governing its validity would be either that the agreement itself or customary international law. It effect, therefore, the article invited the parties to an agreement other than an agreement between States to decide themselves how the most-favoured-nation clause was to be implemented. They could do that either by repeating in the agreement the provisions of the draft or simply by including a reference to those provisions. They could also remain silent, in which case the clause would be interpreted and applied in accordance with customary international law.

28. Paragraph (*c*) provided that the articles would apply to relations between States *inter se* under a clause contained in an agreement between a State and another subject of international law. The position of EEC was that competence had been transferred to it, so that it alone could be a party to a most-favoured-nation clause, and not its constituent members. The effect of paragraph (*c*), however, was that, in the case of a trade or other agreement to which a most-favoured-nation clause was appended, not only EEC but also its constituent members would be bound by the clause and the rights and obligations arising thereunder.

29. His view, therefore, was that article 3 was sufficiently comprehensive, save in one respect: it did not cover the case of a most-favoured-nation clause in an agreement between two subjects of international law other than a State, for example, between EEC and some other grouping. The Commission might wish to deal with that point in order to make the matter quite clear. It could then ask the Drafting Committee to find an appropriate wording.

The meeting rose at 1 p.m.

1487th MEETING

Friday, 26 May 1978, at 10.05 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Calle y Calle, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Fourteenth session of the Seminar on International Law

1. The CHAIRMAN invited Mr. Raton, Senior Legal Officer in charge of the Seminar on International Law, to address the Commission.

2. Mr. RATON (Secretariat) said that the fourteenth session of the Seminar would open on Monday, 29 May 1978. In order to ensure a broad geographical representation, the Selection Committee had unfortunately been obliged to refuse a number of candidates who met all the required conditions and had finally chosen only 21 out of a total of more than 70 applicants. So far, 286 persons from 91 different countries had taken part in sessions of the Seminar. For 1978, the Selection Committee had tried to find candidates from States that had not been represented before, so that Burundi, Peru, Sierra Leone, Spain, Sri Lanka, the Yemen Arab Republic and Zambia would now be represented for the first time.

3. With regard to the lecturers, a special appeal had been made in 1978 to members of the Commission who had not yet had an opportunity to address the Seminar, and he was very grateful to those who had agreed to give up part of their time for that purpose.

4. The Seminar's funds, which in 1978 amounted to $25,000, were always very limited. As a result, two participants had received only partial fellowships, enough to cover their subsistence in Geneva but not their travel expenses. In addition to Denmark, the Federal Republic of Germany, Finland, the Netherlands, Norway and Sweden, whose generosity had made it possible to award fellowhips in past years, Austria had made a contribution for the current year as well. He wished to thank those governments but hoped others would help them to raise an additional sum of at least $2,000 to $3,000.

5. Lastly, he wished to thank Sir Francis Vallat, the Chairman of the Commission at its twenty-ninth session, for having so admirably defended the interests of the Seminar at the thirty-second session of the General Assembly.

6. The CHAIRMAN thanked Mr. Raton for his report and for his efforts over the years, without which the International Law Seminar would have long since ceased to take place. The Commission was likewise indebted to Miss Sandwell for her assistance.

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

[Item 1 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 3 (Clauses not within the scope of the present articles)[1] (*concluded*)

7. The CHAIRMAN expressed concern about the Commission's slow progress. The second reading of the draft articles should be completed by 9 June 1978, to give the Special Rapporteur time to draft the commentary. He therefore urged members to be as succinct as possible in their statements.

8. Mr. FRANCIS said that the second reading of any text was necessarily a delicate matter. The Commission was under a duty to maintain the premise on which the draft articles were based and, after taking account of the comments of governments and international organizations, to engage in what was essentially a tidying-up process. A new member, like himself, was under an obligation to have due regard to the existing structure as well as to any consensus that had developed, while assisting in achieving as wide a consensus as possible on any point of difficulty. Further, although members served in their personal capacity inasmuch as they did not have to seek instructions from their governments, they did not operate in a vacuum, for they were also under a duty to bring to the notice of the Commission any developments of a local or regional character that had a bearing on its work. It was in that context that he had entered certain reservations to article 1 and now felt bound to state his position on article 3, without however seeking to disturb any consensus that had been reached.

9. The historical background to the Caribbean Community began with the disintegration of the Federation of the West Indies in the year from 1957 to 1961, following which the Caribbean Free Trade Association had been established. By the early 1970s, the Caribbean Community had come into being, based on the idea of a common market and increased regionalization and integration. It was a slow process and one that had caused some impatience among certain leaders. That background would perhaps assist in an understanding of the comments submitted by the Secretariat of the Caribbean Community (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 5) and Guyana (*ibid.*, sect. A) regarding customs unions and other similar forms of association.

10. He could not altogether agree that supranationalism was the sole criterion for determining the position of institutions such as the Caribbean Community in relation to most-favoured-nation clauses. Supranationalism involved two elements: the automatic application of legislative decisions to the constituent members of the institution, and the monolithic character of the institution as far as such application was concerned. In his view, a more important consideration was whether the organization had a mandate from its constituent members to act on their behalf in certain areas, for instance, to conclude a treaty involving most-favoured-nation treatment.

11. It was important to ensure that no essential element was omitted from article 3 for, if the Commission were to err, it would be difficult to interfere with the text later. A feature of most United Nations documents was that they were open to more than one interpretation, and in that respect the article ran true to form. Only one interpretation, however, could be given to the omission of any reference to clauses in treaties between international organizations, in view of the limited scope of the draft as defined in article 1.[2] At its twenty-eighth session, the Commission

[1] For text, see 1486th meeting, para. 4.

[2] See 1483rd meeting, foot-note 1.

had decided to omit such a reference because it was "not aware of such clauses having arisen in practice, though hypothetically it is not impossible".[3] He was confident that the Commission would now reverse its decision since, when dealing in 1977 with reservations to treaties between international organizations, it must have seen the wisdom of providing for such an eventuality. He was firmly of the opinion that article 3 should be recast to repair that omission for, as it stood, it meant that in the future a treaty concluded between two international organizations would have no legal effect. For those reasons, the text should be referred to the Drafting Committee.

12. Mr. TABIBI said that, while he maintained the view that the article should be limited to most-favoured-natin clauses in treaties between States and agreed that article 3 should be retained in its existing form, he also thought that the Commission should not shut its eyes to the fact of international organizations and their significance in the modern world. The way should be left open to accommodate the viewpoint of those who contended that organizations such as EEC should be catered for in the draft, because of their impact not only on their own members but also on smaller nations. The Drafting Committee should therefore seek some way of meeting that viewpoint either in the commentary or in the body of the draft, without however jeopardizing the basic principles evolved over the years. His impression was that that, in fact, was the Special Rapporteur's intention. It might be helpful, too, if Mr. Tsuruoka would apprise the Commission of the ideas he proposed to put before the Drafting Committee.

13. Mr. THIAM thought that, in the interests of calm discussion, it would be preferable not to refer specifically to any given international organization, so as not to give the impression that the Commission was laying down rules in favour of or against a particular organization. But contemporary reality must be taken into account; and that was only partially done in article 3, which applied solely to States, to the exclusion of other subjects of international law. The Special Rapporteur had attempted to make a distinction between States and supranational organizations that was very difficult to accept. Since a supranational organization was as much a subject of international law as a State, the Commission could not exclude supranational organizations from its current work of codification. Was the mere fact of not being a State enough to prevent a subject of international law from benefiting from a most-favoured-nation clause?

14. Since the Commission was at a rather late stage in its work, it could simply have indicated in the commentary that it was not systematically excluding from entitlement to the most-favoured-nation clause all subjects of international law other than States. But the existing wording of items (2) and (3) of the introductory part of article 3 made that difficult. Consequently, the Commission should be slightly more flexible both on the principle and on the wording, so that what now definitely seemed to be the general consensus could be reflected in the text of the article.

15. Mr. NJENGA thanked Sir Francis Vallat for the details he had supplied at the previous meeting about the administration of EEC; he now had a much clearer understanding of EEC's role.

16. He thought that Mr. Schwebel's proposal[4] might provide at least a partial solution to the Commission's problem regarding EEC. In a work of codification such as that undertaken by the Commission, it was important not to go too far, but, equally, not to preclude a situation where the parties concerned agreed to apply the draft articles as an exception.

17. He failed to understand why paragraph (*a*) departed from the language of the Vienna Convention on the Law of Treaties[5] which, in (*a*), spoke of "legal force" rather than "legal effect". The latter term could be misleading, since the intent was to provide that the fact that certain clauses were not covered by the draft articles would not prejudice their validity. He would therefore suggest, to clarify the text, that the words "shall not affect: (*a*) the legal effect..." be replaced by "shall not prejudice (or "shall not affect"): (*a*) the legal force...". Perhaps the Drafting Committee could attend to that point.

18. Further, he did not see why the words "in written form" had been included in paragraph (*c*) of the article, when they did not appear in the corresponding provision—article 3, paragraph (*c*)—of the Vienna Convention. He had noted the explanation given in paragraph (4) of the commentary to article 3, but none the less considered that the inclusion of those words could given the impression that special importance was attached to treaties not in written form. If, as he understood, that was not the case, then the Commission might wish to revert to the language of the Vienna Convention on that point.

19. Mr. TSURUOKA, introducing the amendments that he intended to submit to the Drafting Committee, noted first that item (1) of the introductory part of article 3 referred to a case that rarely, if ever, occurred: that of a most-favoured-nation clause contained in an oral agreement between States. Not only did he question the desirability of providing for such a case; he also considered that it was difficult to speak of a "clause" in an oral agreement. It would therefore be better to replace the words "to a clause on most-favoured-nation treatment contained in an international agreement between States not in written form" by the words "to an internaitonal agreement not in written form whereby a party undertakes to accord to another party most-favoured-nation treatment or treatment not less favourable than that extended to any subject of international law". In that

[3] *Yearbook... 1976*, vol. II (Part Two), p. 13, doc. A/31/10, chap. II, sect. C, art. 3, para. (3) of the commentary.

[4] 1486th meeting, para. 25.

[5] See 1483rd meeting, foot-note 2.

formulation, the words "most-favoured-nation treatment" were to be distinguished from the words "treatment not less favourable than that extended to any subject of international law". The definition of "most-favoured-nation treatment" contained in article 5 in fact applied only to the treatment accorded by the granting State to the beneficiary State; it did not apply to subjects of international law other than States. In order to cover such other subjects of international law, whether they granted or benefited from the clause, it would be necessary to introduce the wording he had proposed.

20. It was obvious that items (2) and (3) dit not cover every conceivable situation, including the case of an internaional agreement by which a subject of international law other than a State undertook to accord to another subject of international law other than a State treatment not less favourable than that extended to any subject of international law, as well as the case of an international agreement to which a subject of international law other than a State was a party and by which a State undertook to accord most-favoured-nation treatment to another State. There was no reason why those cases should not be covered in article 3, which would thus be a genuine saving clause. To avoid having to list each of those four cases, a general formula, which would replace items (2) and (3) of the article, might be worked out along the following lines:

> "to a clause contained in an international agreement in written form to which one or more subjects of internatinal law other than States are parties whereby a party undertakes to accord to another party most-favoured-nation treatment or treatment not less favourable than that extended to any subject of international law."

Such a formula whould offer the added advantage of clearly indicating the cases covered by article 3.

21. Paragraph (*b*) of the article did not expressly safeguard the application of the rules set forth in the draft articles, independently of those articles, to clauses contained in international agreements concluded between States and other subjects of international law. If the parties to such an agreement considered that a particular rule of the draft was a rule of customary international law, there would be no problem in applying it, but the situation would be more complicated if they considered that the rule was merely one of progressive development, for then the words "under international law" would not help. In paragraph (*b*), therefore, a distinction should be made between the application of the rules of the draft by virtue of the fact that those rules were established principles of international law, and their application by virtue of a specific agreement reached for that purpose by the parties concerned.

22. Mr. SCHWEBEL said he would be glad if Mr. Tsuruoka would come to the Drafting Committee's meeting and explain his very constructive proposals.

23. Bearing in mind the term of article 1, he would suggest, to emphasize that the rules set forth in the draft articles could well be applied in other cases, that the word "specifically" be inserted between the words "do not" and "apply", at the beginning of the article, as amended by Mr. Tsuruoka's proposals.

24. Mr. USHAKOV (Special Rapporteur), summing up the discussion on article 3, said he was sure that the many drafting suggestions put forward would be very useful to the Drafting Committee. The Commission had already spent a great deal of time on article 3. Its difficulties arose from the fact that it was trying to do two things at once. In the introductory part of the article, it was dealing with two different problems: that of the types of treaties to which the draft articles did not apply, such as oral treaties or treaties to which the draft articles did not apply, such as oral treaties or treaties to which subjects of international law other than States were parties, and that of the different types of clauses that could be contained in such treaties, such as most-favoured-nation, -State or -organization (whether international or supranational) clauses, and clauses for any other most-favoured subjects of international law. In the corresponding article of the Vienna Convention on the Law of Treaties, the latter problem had not arisen, for all that had been needed was to distinguish between certain types of treaties. Despite the current difficulties, however, he had no doubt that the Drafting Committee would in the end find the most suitable wording for the article. In any event, all the members of the Commission seemed to consider that article 3 was justified and should be kept.

25. Mr JAGOTA said that if the Commission agreed that the articles applied to States in their relations with one another, but could apply to other cases provided certain conditions were fulfilled, the Drafting Committee might consider the desirability of inserting, in the opening paragraph of article 3, before the final words "shall not affect", an item (4) which would read:

> "or (4) to a similar clause contained in an international agreement by which a subject of international law other than a State undertakes to accord most-favoured treatment to other such subjects of international law."

He had deliberately avoided the use of the word "nation" in the expression "most favoured treatment", but had qualified the word "clause" by the word "similar", thus obviating the need to define "most-favoured treatment", because the Commission was in fact donfining itself to the scope of article 1, namely, "most-favoured-nation clauses contained in treaties between States".

26. The suggestion by Mr. Tsuruoka concerning subparagraph (*b*) was helpful. It would probably cover the case of EEC and similar organizations. Nevertheless, it would be advisable to continue to use the expression "clause contained in an international agreement" and to refrain from speaking simply of "international agreement". The draft articles were concerned throughout with most-favoured-nation clauses contained in international agreements, and the Com-

mission should not now draw a distinction between a clause contained in an international agreement and the international agreement itself.

27. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 3 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[6]

ARTICLE 4 (Most-favoured-nation clause) *and* ARTICLE 5 (Most-favoured-nation treatment)

28. The CHAIRMAN invited the Special Rapporteur to introduce articles 4 and 5, which read:

Article 4. Most-favoured-nation clause

"Most-favoured-nation clause" means a treaty provision whereby a State undertakes to accord most-favoured-nation treatment to another State in an agreed sphere of relations."

Article 5. Most-favoured-nation treatment

"Most-favoured-nation treatment" means treatment accorded by the granting State to the beneficiary State or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with a third State.

29. Mr. USHAKOV (Special Rapporteur) said that articles 4 and 5 lay at the heart of the draft and established the basis for it. Article 4, which defined the most-favoured-nation clause, was perhaps something more than a simple definition, for it also had a bearing on the scope of the draft articles. The Commission had retained the expressions "most-favoured-nation clause" and "most-favoured-nation treatment", using the word "nation" instead of the word "State", for, as it had indicated in paragraph (2) of its commentary to article 4, those were standard expressions sanctioned by custom and the practice of international law.

30. In defining the most-favoured-nation clause as "a treaty provision", the Commission had once again used the concept of a treaty, already contained in article 1. As the Commission had stated in its commentary to article 4,

Article 4 expresses the idea that a most-favoured-nation pledge is an international, i.e. inter-State, undertaking. ...only through the [beneficiary] State do the persons in a particular relatinship with that State, usually its nationals, enjoy the treatment stipulated by the granting State.[7]

Thus it was only the beneficiary State, in its capacity as a State, that could claim most-favoured-nation tratment for persons or things in a particular relationship with it; those persons or things could not claim anything themselves.

31. In paragraph (16) of its commentary to article 4, the Commission had indicated, without claiming to give an exhaustive list, a number of "agreed spheres of relations" in which most-favoured-nation clauses were used. It had stated that those spheres were "extremely varied", and had referred not only to the international regulation of trade and payments but also to such other spheres as transport, the establishment of foreign physical and juridical persons, the establishment of diplomatic, consular and other missions, intellectual property and the administration of justice. It had explained that a most-favoured-nation clause could apply to one or more of those spheres and had stressed that:

"The important point is that the clause always applies to a determined sphere of relations agreed upon by the parties to the treaty concerned."[8]

It must therefore be borne in mind that most-favoured-nation clauses existed not only in the sphere of international trade, as was often believed, but that they could also exist in any other sphere of international relations, provided it was a determined sphere agreed upon by the parties to the treaty.

32. Since article 4 defined the most-favoured-nation clause in terms of "most-favoured-nation treatment", that expression had to be defined in article 5. As the Commission had stated in its commentary to that article,

The clause embodied in the treaty between the granting and the beneficiary State has to determine the persons or things to whom and to which the most-favoured-nation treatment is applicable and this determination has to include, obviously, the link between the beneficiary State and the persons and things concerned.[9]

that link was, for example, the nationality or citizenship of persons, or the State of origin of products. The relationship between the persons or things in question and the beneficiary State was therefore determined by the clause itself or, in other words, by the treaty.

33. In another passage of its commentary, the Commission had explained why it had chosen the term "not less favourable" instead of the adjective "equal" to denote the relationship between the terms of the treatment enjoyed by a third State and those promised by the granting State to the beneficiary State. It had shown that, although a most-favoured-nation pledge did not oblige the granting State to accord to the beneficiary State treatment more favourable than that extended to the third State, it did not exclude the possibility that the granting State might accord to the beneficiary State additional advantages beyond those conceded to the most-favoured third State. It had also stressed the fact that:

If, as is the usual case, the clause itself does not provide otherwise, the clause begins to operate... if the third State... has actually been granted the favours which constitute the treatment.[10]"

It should be noted, then, that the most-favoured-nation clause was applicable only if there was a direct relationship between the granting State and the third State.

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[6] For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 16-18.

[7] *Yearbook... 1976*, vol. II (Part Two), p. 15, doc. A/31/10, chapt. II, sect. C, art. 4, para. (11) of the commentary.

[8] *Ibid.*, pp. 15 and 16, art. 4, para. (16) of the commentary.

[9] *Ibid.*, p. 18, art. 5, para. (3) of the commentary.

[10] *Ibid.*, p. 18, para. (5) of the commentary.

34. In the oral comments they had made in the Sixth Committee in 1976, several representatives had expressed the view that article 4 should state explicitly that the essential issue was the relationship between States deriving from the valid terms of a treaty in force, because many treaties had been concluded in historical circumstances that no longer prevailed (A/CN.4/309 and Add.1 and 2, para. 102). His own view was that it was unnecessary to introduce that clarification in article 4, since article 7 made it clear that it dealt with "the most-favoured-nation clause in force between the granting State and the beneficiary State".

35. Some representatives in the Sixth Committee had also stated that articles 4 and 5 should be combined in a single article and that their provisions should be incorporated in article 2 so as not to detract from the traditional importance of definitions (*ibid.*). That was also the opinion of the Government of Luxembourg, which had stated that the provisions of article 4 would be more suitably included among the definitions in article 2 (A/CN.4/308 and Add.1 and Add.2/Corr.1, sect.A). He did not share that view, for he considered that article 4 was much more than a simple definition. He noted that, as indicated in paragraph (1) of the commentary to article 4, the Commission had decided to keep articles 4 and 5 separate from the article on the use of terms because the importance of the terms "most-favoured-nation clause" and "most-favoured-nation treatment", which were the cornerstones of the draft.

36. With regard to article 5, some representatives in the Sixth Committee had expressed the view that that article, as well as article 7, should be reviewed to take account of the fact that a beneficiary State should not automatically be entitled, under a most-favoured-nation clause, to all the privileges enjoyed by the third State when, owing to the existence of a special relationship between the granting and third States, the extension of those privileges to a third State in a particular area was something more than an act of commerce (A/CN.4/309 and Add.1 and 2, para. 112). The Government of Guyana had expressed the same opinion in its written comments, stating that, where there was a special relationship which influenced

> the granting of most-favoured-nation treatment in a certain area, making it more than an act of mere commerce... the potential beneficiary State should at least be in a position of equivalence with the third State before it should properly claim all the benefits enjoyed by that third State under a most-favoured-nation clause (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A).

He agreed that, in exceptional cases in which special historical privileges had been accorded by one State to another State (for example, in the case of the diplomatic relations between France and Quebec), most-favoured-nation treatment could be granted on some basis other than a treaty provision. However, those were very rare cases which, should they occur, would normally be regarded as exceptions to the most-favoured-nation clause. He therefore did not think it necessary to devote a special provision of the draft articles to them.

37. In its written comments (*ibid.*), the Government of Luxembourg had expressed doubt as to whether it was possible to establish a general definition of most-favoured-nation treatment. In its opinion, it was particularly difficult to explain the meaning of the terms "persons" or "things" who or which were in a "determined relationship" with a given State, particularly in the case of economic enterprises and material values such as intellectual property rights. In that connexion he pointed out that it was impossible to provide an abstract definition of the persons or things to where or to which most-favoured-nation treatment was to apply, because the real meaning of the terms "persons" or "things" in a "determined relationship" with a given State could be defined only in the context of a specific clause. It was in the clause itself that the States concerned must indicate to what juridical or physical persons and to what objects, material or otherwise, most-favoured-nation treatment was accorded. It was therefore impossible to indicate in the draft who or what such persons or things were.

38. In reply to a comment by the Government of the Netherlands, which had questioned whether the definition of most-favoured-nation treatment as "not less favourable than treatment extended by the granting State to a third State" was not too broad or at least too vague (*ibid.*), he said that the Commission's task was to draft general rules, which always had to be interpreted in specific cases. There again, it was a matter for interpretation.

39. Referring to the words "same relationship", which the Government of the Netherlands considered likely to be interpreted in too restrictive a manner (*ibid.*), he said that the Commission had clearly explained the meaning of those words and the reasons why it had retained them in paragraph (3) of its commentary to article 5. They could not be defined in the abstract, since they were understandable only in terms of a specific clause, and the Commission's task was to define the most-favoured-nation clause and most-favoured-nation treatment in general terms.

40. In conclusion, he thought articles 4 and 5 should be retained, subject to amendments of a drafting nature that were a matter for the Drafting Committee.

41. Mr. CALLE y CALLE said that articles 4 and 5 undoubtedly took the form of definitions. They were not, however, simple definitions of terms, but definitions of the legal institutions of the most-favoured-nation clause and most-favoured-nation treatment. For that reason, they were appropriately placed in the general structure of the draft.

42. Mr. ŠAHOVIĆ proposed that articles 4 and 5 be referred to the Drafting Committee, for the only problems they presented were drafting problems. The Commission had clearly shown in the commentary why it had presented the definitions of the most-

favoured-nation clause and most-favoured-nation treatment in the form of two separate articles instead of incorporating them in article 2, and the Special Rapporteur had been right to say that article 4 was certainly more than a simple definition. The Drafting Committee should review the wording of articles 4 and 5, which were now drafted in the form of simple definitions, in order to bring out clearly that they were not merely definitions and that their content justified their retention as separate articles.

43. Mr. VEROSTA associated himself with Mr. Šahović's proposal that articles 4 and 5 be referred to the Drafting Committee.

44. Mr. SCHWEBEL noted that the commentary to article 4 included, in a passage devoted to the General Agreement on Tariffs and Trade, the following statement:

> Each member granting a concession is directly bound to grant the same concession to all other members in their own right...[11]

He had been informed by persons well acquainted with the operation of the most-favoured-nation clause that that statement should more accurately read:

> Each granting a concession in the most-favoured-nation part of its GATT schedule is generally directly bound to apply that concession to the products of all members in their own right...

It was not his intention to take up the time of the Commission in elaborating on the reasoning underlying that view; he simply wished to offer it for the consideration of the Special Rapporteur.

45. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer articles 4 and 5 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[12]

46. Sir Francis VALLAT agreed that the two articles should be referred to the Drafting Committee. Purely as a matter of working technique, however, he thought it advisable to reserve his right to refer to those articles later, inasmuch as they consisted of definitions, if such a course seemed desirable in the light of the discussion of the remainder of the draft.

ARTICLE 6 (Legal basis of most-favoured-nation treatment)

47. The CHAIRMAN invited the Special Rapporteur to introduce article 6, which read:

> ***Article 6. Legal basis of most-favoured-nation treatment***
>
> **Nothing in the present articles shall imply that a State is entitled to be accorded most-favoured-nation treatment by another State otherwise than on the ground of a legal obligation.**

48. Mr. USHAKOV (Special Rapporteur) said that article 6 was a saving clause based on the principle of the sovereignty and liberty of action of States, which reserved the right of a State to grant special favours to another State without third States being able to claim the same treatment in the absence of a legal obligation to that effect on the part of the granting State, usually in the form of a most-favoured-nation clause.

49. Unlike the Government of Luxembourg and the Government of the Netherlands (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A), he was of the opinion that article 6 was not superfluous, and he porposed that it be retained as it stood.

50. Mr. JAGOTA said that it was difficult to grasp fully the meaning of article 6 unless it was read in conjunction with the commentary. In view of the terms of article 1, it would appear at first glance that the legal obligation referred to in article 6 was a legal obligation arising from a treaty. If, however, the legal obligation did not necessarily arise from a treaty, the article should be redrafted to make that point clear.

The meeting rose at 1 p.m.

1488th MEETING

Monday, 29 May 1978, at 3.05 p.m.

Chairman: Mr. José SETTE CÂMARA

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

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

[Item 1 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 6 (Legal basis of most-favoured-nation treatment)[1] (*concluded*)

1. Mr. TSURUOKA said that, from the legal standpoint, article 6 was not indispensable, but from the political standpoint, it definitely had a place in the draft. In its existing form, the article seemed to be directed both to the beneficiary State and to the granting State, since it referred both to a State's entitlement to be accorded most-favoured-nation treatment and to the legal obligation of a State to extend such treatment. Since the concept of a legal obligation was the basis for the article, it might be preferable to lay the emphasis on the granting State by changing the

[11] *Ibid.*, p. 14, art. 4, para. (10) of the commentary.

[12] For consideration of the texts proposed by the Drafting Committee, see 1521st meeting, paras. 19 and 20, and paras. 21-23.

[1] For text, see 1487th meeting, para. 47.