Document:-
A/CN.4/SR.1488

Summary record of the 1488th meeting

Topic:
Most-favoured-nation clause

Extract from the Yearbook of the International Law Commission:-
1978, vol. I

Downloaded from the web site of the International Law Commission
(http://www.un.org/law/ilc/index.htm)

Copyright © United Nations

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.

words "is entitled to be accorded most-favoured-nation treatment by" to the words "is required to accord most-favoured-nation treatment to".

2. Mr. TABIBI said that article 6 was an important saving clause and, like article 3,[2] served a very useful purpose. If the Commission were to confine itself to most-favoured-nation treatment extended by States to one another under the terms of a written treaty, it might lose sight of the fact that such treatment could also be claimed by a State by law, custom or historical right. In some instances, a legal obligation might transcend the terms of a treaty. In the *Right of Passage over Indian Territory* case,[3] for example, the International Court of Justice had founded its decision not on the Portuguese-Marathas treaty but on customary law. To take another example, in Afghanistan large numbers of nomads travelled across the country to reach the Indian subcontinent and, by custom, had always been granted grazing rights for their animals. Article 6 should certainly be retained, therefore, thus making provision in the draft for oral agreements, customary law (including regional customary law) and claims to most-favoured-nation treatment based on resolutions of international organizations or legally binding unilateral acts by States.

3. Mr. USHAKOV (Special Rapporteur) said that members seemed to be agreed on the value of article 6. The time appeared to have come, therefore, to refer it to the Drafting Committee.

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

It was so agreed.[4]

ARTICLE 7 (The source and scope of most-favoured-nation treatment)

5. The CHAIRMAN invited the Special Rapporteur to introduce article 7, which read:

Article 7. The source and scope of most-favoured-nation treatment

1. The right of the beneficiary State to obtain from the granting State treatment extended by the latter to a third State or the persons or things in a determined relationship with a third State arises from the most-favoured-nation clause in force between the granting State and the beneficiary State.

2. The treatment to which the beneficiary State is entitled under that clause is determined by the treatment extended by the granting State to the third State or to persons or things in the determined relationship with the latter State.

6. Mr. USHAKOV (Special Rapporteur) pointed out that article 7 showed that the source of most-favoured-nation treatment was the most-favoured-nation clause in force between a granting State and a beneficiary State, but that such treatment was determined by the treatment extended by the granting State to a third State or to persons or things in a determined relationship with that third State. The Commission had dealt at length with those two ideas in its commentary to the article. It had emphasized that the right of the beneficiary State to receive most-favoured-nation treatment from the granting State was anchored in the most-favoured-nation clause and that such treatment—in other words, the extent of benefits to which the beneficiary State could lay claim for itself or for persons or things in a determined relationship with it—depended upon the treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State. The existence of a certain treatment extended directly by the granting State to a third State determined only the operation of the most-favoured-nation clause and the extent of the treatment to be accorded by the granting State to the beneficiary State.

7. In its commentary to article 7, the Commission had indicated that the real source of most-favoured-nation treatment had sometimes given rise to misunderstandings. It had been claimed that the source lay in the treatment granted to the third State. In actual fact, it was not the agreement between the granting State and the third State that served as a basis for the operation of the most-favoured-nation clause; in accordance with the rule *pacta tertiis nec nocent nec prosunt,* the sole source of most-favoured-nation treatment was the most-favoured-nation clause. It followed that the right of a beneficiary State to a certain treatment did not arise from the treaty between the granting State and the third State. As the Commission had pointed out in its commentary, that provision reflected the view that the basic act ("acte règle") was the agreement between the granting State and the beneficiary State; that agreement took the form of a most-favoured-nation clause. The agreement between the granting State and the third State was nothing more than an act creating a condition ("acte condition").[5] If there was no treaty or other agreement between the granting State and the third State, the rule stated in the article became even more evident. The root of the right of the beneficiary State was obviously the treaty containing the most-favoured-nation clause. The extent of the favours to which the beneficiary of that clause might lay claim would be determined by the actual favours extended by the granting State to the third State. It should also be noted that it was possible to include restrictions in the most-favoured-nation clause and, accordingly, to limit the favours to which the beneficiary State could lay claim. Thus a condition could be imposed, as provided in articles 8 and 10.

8. In his opinion, the oral comments made in the Sixth Committee in 1976 with respect to articles 5

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

[3] Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, *I.C.J. Reports 1960,* p. 6.

[4] For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 30 and 31.

[5] See *Yearbook... 1976,* vol. II (Part Two), p. 22, doc. A/31/10, chap. II, sect. C, art. 7, para. (5) of the commentary.

and 7, as contained in the report of the Sixth Committee to the General Assembly,[6] did not in fact apply to article 7.

9. Written comments on article 7 had been submitted by Luxembourg, Colombia and the Netherlands. The Government of Luxembourg had questioned whether the argument underlying article 7—based on the distinction between the "arising" of the rights granted by the clause and their "determination"—was entirely relevant. It had noted that the clause in fact created only a conditional obligation, the condition depending upon the favours that might subsequently be extended to a third State, and that it might therefore be going too far to say, as the Commission had stated in its commentary, that the clause was the "exclusive" source of the beneficiary State's right (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A).

10. The Government of Colombia had noted that, according to article 7, the basis of the beneficiary State's right to most-favoured-nation treatment was the "most-favoured-nation clause in force between the granting State and the beneficiary State". Logically, however, the words "in force" used in the article defined neither the prerequisites nor the effects of the rule in question. If a treaty between the granting State and the beneficiary State regulated the content and scope of application of the most-favoured-nation clause, there would be no grounds whatever for referring to a relationship between the granting State and the third State. The Government of Colombia had stated that that view was confirmed by article 18 of the draft, under which the right of the beneficiary State to any treatment under a most-favoured-nation clause not made subject to the condition of material reciprocity "arises at the time when the relevant treatment is extended by the granting State to a third State". Yet there was no direct reference in the article to the basic treaty as the source of the right, the substance of which was defined by the treatment accorded by the granting State to a third State. Consequently, the Government of Colombia had proposed that the words "in force" in article 7, paragraph 1, should be replaced by the word "agreed". If, however, the words "in force" were to be retained, the end of paragraph 1 might be drafted to read; "... the most-favoured-nation clause in force between the granting State and the third State" (*ibid.*).

11. The Government of the Netherlands had pointed out that paragraph 1 referred to persons or things "in a determined relationship with a third State", while what the Commission had had in mind was persons or things "in the same kind of relationship with a third State as the relationship determined by the conditions of the most-favoured-nation clause". The same problem arose at the end of paragraph 2: "the determined relationship with the latter State" (namely the third State) did not exist (*ibid.*).

12. Those comments by the Government of the Netherlands had been based on the commentary to articles 8, 9 and 10, in which the Commission had explained that the meaning of material reciprocity, as indicated in paragraph (*e*) of article 2, was "equivalent" treatment, namely, treatment of the same kind and of the same measures.[7] However, the clause referred to in article 7 was not a most-favoured-nation clause conditional on material reciprocity; it was a simple most-favoured-nation clause.

13. With regard to the comments by the Government of Luxembourg, he fully shared the view expressed by the Commission in its commentary, namely, that article 7 set out the basic structure of the operation of the most-favoured-nation clause. Paragraph 1 stated that the right of the beneficiary State to obtain most-favoured-nation treatment arose solely and exclusively from the clause in force, in other words, from the agreement in force in which it was contained. The Commission obviously did not have to deal with questions of the validity of clauses or of the agreements containing them, since those were dealt with by the Vienna Convention on the Law of Treaties.[8] The right to a treatment was not conditional; it arose naturally from any clause in force. It was the treatment to which a State could lay claim under the clause that was conditional, or rather, variable, because it was determined by the treatment extended to the third State or to persons or things in a determined relationship with that State, as explained in article 7, paragraph 2. Consequently, he proposed that the word "only" be inserted in paragraph 1, between the word "arises" and the words "from the", in order to indicate clearly that the clause was the only source of the right of the beneficiary State. The Commission would then be not merely describing a situation; it would be stating a rule of international law.

14. As to the comments by the Government of Colombia, he considered that article 7, paragraph 1, very clearly indicated that the sole source of the right of the beneficiary State to most-favoured-nation treatment was the most-favoured-nation clause in force between the beneficiary State and the granting State. That obviously presupposed that the clause, which was by definition a treaty provision, was in force, since the treaty containing it was also in force. The clause could also operate if there was a direct relationship, within the scope of the clause, between the granting State and a third State. That was also reflected in article 7. Consequently, there was no need for the amendments to article 7, paragraph 1, proposed by the Government of Colombia.

15. Mr. VEROSTA supported the views of the Special Rapporteur. Referring to the titles of articles 6 and 7 ("Legal basis of most-favoured-nation treatment" and "The source and scope of most-favoured-nation treatment"), he wondered whether the Com-

[6] *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, doc. A/31/370, para. 39.

[7] *Yearbook... 1976*, vol.II (Part Two), p. 28, doc. A/31/10, chap. II, sect. C, arts. 8, 9 and 10, para. (41) of the commentary.

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

mission had intended to make a distinction between the "legal basis" of most-favoured-nation treatment and its "source". Article 17 of the draft articles on State responsibility[9] referred to "the origin" of an international obligation. The Drafting Committee should try to standardize the terms used. In the title of article 7, it might delete the word "source", which was rather too vague. It might also formulate the rule in paragraph 1 in negative form, by providing that "the right of the beneficiary State... arises only...".

16. Mr. CALLE y CALLE said that article 7 was one of the most important articles of the entire draft, for it dealt with the basic mechanism of the operation of the most-favoured-nation clause. In stating that the right to most-favoured-nation treatment arose from a clause in force between the granting State and the beneficiary State, paragraph 1 left aside the possibility that a treaty might exist between the granting State and a third State. In that case, the basic treaty from which the right to most-favoured-nation treatment arose would not be the treaty between the granting State and the third State but the pre-existing treaty between the granting State and the beneficiary State, as could be seen from the decision reached by the International Court of Justice in the *Anglo-Iranian Oil Company* case.[10] Now that the Commission was engaged on its second reading of the draft, that point should be made even clearer in the commentary to the article, for some confusion might arise between a "third State" in the context of "granting State" and "beneficiary State" in paragraph 1 of the article, and a third State that might in fact be a beneficiary State as a result of the provisions of a traty between the granting State and the third State. In other words, there would be two kinds of third State, one that fell within the scope of the draft and another that, technically, was governed by the general law of treaties.

17. As had been pointed out by Mr. Verosta, further clarity was required even in the title of the article, which spoke of the "source and scope of most-favoured-nation treatment". Was the Commission referring to the source of the treatment or to the moment at which the obligation to accord equal treatment arose? Logic would suggest that that moment arose when such treatment was extended to a third State. In the Spanish version of paragraph 1, the word "dimana" should be replaced by "surge" or "se origina", since the paragraph related to the very source of the obligation to extend most-favoured-nation treatment. On the other hand, he could not support the Special Rapporteur's proposal to insert the word "only" after the word "arises", since he doubted whether the Commission could exclude other elements that formed part of the obligation arising to grant the treatment; to introduce the word "only" would make the paragraph too restrictive.

18. The proposal by the Government of Colombia to reword the last part of paragraph 1 to read: "... the most-favoured-nation clause in force between the granting State and the third State" revealed a basic error of approach. If it were adopted, the meaning of the paragraph would be precisely the opposite of what was intended.

19. Mr. ŠAHOVIĆ said that none of the members of the Commission seemed to question the principles enunciated in the two paragraphs of article 7, and that the only problems were drafting problems. Articles 4 to 7 referred to concepts and situations that were very similar, and all formed part of the introduction to the draft. He wondered what had induced the Commission to deal in a single article with the two separate questions of the source and the scope of most-favoured-nation treatment. Not only ought the Drafting Committee to consider the possibility of devoting two separate articles to those questions, but it should also examine article 7 and the three articles that preceded it from a general standpoint.

20. Mr. EL-ERIAN said that the Special Rapporteur's conclusions and suggestions for drafting changes were acceptable, but the points raised by Mr. Šahović and Mr. Calle y Calle should be carefully considered by the Drafting Committee.

21. Mr. USHAKOV (Special Rapporteur) said that article 6 dealt with the substance of the most-favoured-nation clause and not necessarily with the most-favoured-nation clause contained in a treaty in written form. According to the definition of "most-favoured-nation clause" given in article 4, such a clause was "a treaty provision", in other words, a written provision. If the reference in article 6 had been to a "most-favoured-nation clause", it would have had to be a reference to a clause in a written treaty. However, that article also covered non-written clauses, which accordingly could not be designated as "most-favoured-nation clauses". In paragraph (4) of the commentary to article 6, the Commission had referred to the resolutions of international organizations and to legally binding unilateral acts as possible bases for most-favoured-nation treatment.

22. That was the cause of the difficulties raised by the titles and wording of articles 6 and 7. If the Commission provided in article 7, paragraph 1, that the right of the beneficiary State "arises only from the most-favoured-nation clause", it would be difficult to know how to interpret article 6, since that provision referred to another source of most-favoured-nation treatment—a source that could not be called a "most-favoured-nation clause". He himself had no wording to propose and doubted whether the Drafting Committee could find a satisfactory answer.

23. Lastly, he noted that the French version of articles 6 and 7 referred to the "droit" to be accorded, or to obtain, most-favoured-nation treatment, whereas in the English version the word "right" appeared only in article 7; in article 6, the words "a le droit" had been rendered by the words "is entitled".

[9] *Yearbook... 1977*, vol. II (Part Two), pp. 11 *et seq.*, doc. A/32/10, chap. II, sect. B, 1.

[10] Anglio-Iranian Oil Co. (jurisdiction), Judgment of 22 July 1952, *I.C.J. Raports 1952*, p. 93.

24. Mr. JNENGA agreed with the Special Rapporteur that the draft dealt with most-favoured-nation clause contiined in treaties in written form. However, article 6 was expressed in such categorical terms that it might conflict with the saving clause contained in article 3. The Drafting Committee should consider including in the text of the article some reference to article 3.

25. Mr. JAGOTA said it was plain that, since article 6 was a saving clause, it must be drafted in general terms. That was why it contained no reference to the most-favoured-nation clause or to the right of a beneficiary State. Article 7, paragraph 1, however, was directly concerned with the right of the beneficiary State and the source of that right. Adoption of the Special Rapporteur's suggestion to insert the word "only" after the word "arises" in that paragraph might create difficulties by blurring the distinction between article 6 and article 7, paragraph 1. If the Drafting Committee decided that it would be worth while to adopt that suggestion, it might consider inserting a reference in the title of article 7 to the source of most-favoured-nation treatment in relation to the right of the beneficiary State. In that way, the word "only" would be confined to the application of that right, and would not be confused with the general saving clause contained in article 6.

26. Mr. VEROSTA shared Mr. Jagota's opinion, but suggested that the word "source" be replaced by "origin" or "legal basis", since the word "source" was normally used to denote the conventional or customary origin of an obligation, and was not sufficiently precise in the existing context.

27. Mr. DÍAZ GONZÁLEZ said that, in the Spanish version of paragraph 1, there would be no difference in meaning between the word "dimana" and the phrase "no nace sino exclusivamente de", or a similar formulation. However, the word "dimana" might with advantage be replaced either by the word "surge", or, following the terms of the title of the article, by the words "tiene su fuente en".

28. Mr. EL-ERIAN said that, throughbut the discussion, reference had been made to written treaties as the source of the obligation to extend most-favoured-nation treatment. Admittedly, under article 2 of the Vienna Convention on the Law of Treaties, a treaty meant an international agreement concluded between States "in written form", but that definition had been drawn up precisely for the purposes of that Convention. In his opinion, the Commission should not exclude in all situations the possibility of a treaty not in written form.

29. Mr. USHAKOV (Special Rapporteur) wondered whether Mr. El-Erian really wanted to introduce into the draft a meaning of the term "treaty" other than that defined in article 2, paragraph (*a*), and which had been used in the Vienna Convention on the Law of Treaties.

30. Mr. EL-ERIAN fully recognized that the draft under consideraion might be viewed as an outcrop of the Convention on the Law of Treaties and that the Commission should of course follow certain methods. He had simply wished to point out that, as in the case of the Vienna Convention, the legal situation regarding treaties not in written form should be governed by the general principles of international law.

31. Mr. AGO considered that, although treaties other than written treaties existed, the Commission must confine itself to written treaties. Indeed, the draft articles on the most-favoured-nation clause had been designed as a complement to the Vienna Convention on the Law of Treaties; any broader definition of the term "treaty" might therefore be a source of confusion. In addition, it was difficult to see how a non-written treaty could contain a most-favoured-nation clause, since the wording of clauses of that kind required great precision.

32. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 7 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[11]

ARTICLE 8 (Unconditionality of most-favoured-nation clauses),

ARTICLE 9 (Effect of an unconditional most-favoured-nation clause), *and*

ARTICLE 10 (Effect of a most-favoured-nation clause conditional on material reciprocity)

33. The CHAIRMAN invited the Special Rapporteur to introduce articles 8, 9 and 10, which read:

Article 8. Unconditionality of most-favoured-nation clauses

A most-favoured-nation clause in a treaty is unconditional unless that treaty otherwise provides or the parties otherwise agree.

Article 9. Effect of an unconditional most-favoured-nation clause

If a most-favoured-nation clause is not made subject to conditions, the beneficiary State acquires the right to most-favoured-nation treatment without the obligation to accord material reciprocity to the granting State.

Article 10. Effect of a most-favoured-nation clause conditional on material reciprocity

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

34. Mr. USHAKOV (Special Rapporteur) said that articles 8, 9 and 10 took into consideration only two categories of clauses: unconditional clauses and clauses conditional on material reciprocity. The commentary to those articles stated that so-called "conditional" most-favoured-nation clauses had existed in the eighteenth and nineteenth centuries and even in

[11] For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 32 and 33.

the early twentieth century, but that they had since completely disappeared in theory and in practice; that was why the only two categories of clauses dealt with in the draft articles were unconditional clauses and clauses conditional on material reciprocity. The former were usually to be found in treaties of commerce. The latter could be used only in certain spheres, such as consular immunities and functions, matters of private international law and matters dealt with by establishment treaties. They could not apply in commercial matters, because they would presuppose trade between two States in the same products on the same terms, something that never occurred in practice.

35. With regard to the comments on draft articles 8, 9 and 10, he noted that, in 1976, the Sixth Committee had expressed doubts as to the reservation provided for in article 8 whereby the parties might agree to make the application of the most-favoured-nation clause subject to certain conditions. It was obvious that States were free to include in their clauses any conditions they pleased, but such conditions might or might not be within the scope of the draft. It had been stressed that clauses made conditional upon material reciprocity were not conducive to the unification and simplification of international relations. The view had also been expressed, in connexion with paragraph (24) of the commentary to articles 8, 9 and 10, that, by acknowledging the necessity of establishing equivalence, the draft articles would offer the most disadvantages countries an invaluable asset in their negotiations with their more developed counterparts.

36. Governments had not submitted any written comments on article 8. The whole concept of the draft, and of articles 8, 9 and 10 in particular, was based on the fact that there were now two types of clauses: those that were not conditional upon material reciprocity and those that were. The latter could apply and be used only in certain spheres of relations; in other, such as trade, they were quite simply impossible. He proposed that article 8 be retained as it stood.

37. There had not been any oral or written comments on article 9, and he proposed that it be retained as it stood.

38. Article 10 had been the subject of written comments. The Government of Luxembourg had recommended its deletion and had expressed doubts about the advisability of introducing the idea of "reciprocity", which it considered ambiguous. In its view, article 10 dealt less with a question of reciprocity than with one of "compensation" or material "equivalent" (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A). The Governments of the Hungarian People's Republic and the Ukrainian SSR had submitted comments on the concept of "material reciprocity" (*ibid.*), while the Government of the Netherlands had referred in its comments to the proposal for a new article 10 *bis* made by EEC (*ibid.*, sect. C, 6, para. 15).

39. With regard to the term "material reciprocity", he would draw attention to the comments he had made in connexion with article 2, paragraph (*e*) (A/CN.4/309 and Add.1 and 2, paras. 91-96). In his opinion, that expression was not satisfactory, but he was unable to suggest a better one and would welcome any proposal to improve it. The main thing was to define it in article 2, for the definition was more important than the term itself. The Commission had already stated that it was in favour of article 10. He was therefore of the opinion that the article should be retained as it stood, subject to amendment of the expression "material reciprocity" during the consideration of article 2. For the time being, it would be desirable that the Commission agree that articles 8, 9 and 10 were relevant and should be retained in the draft.

40. Mr. CALLE y CALLE supported the substance of articles 8, 9 and 10, but if article 10 was intended as the logical counterpart to article 9, then he would suggest that the words "the condition" be altered to "conditions", the plural form being essential, as in article 9. There was also a slight discrepancy between article 10 and article 18 (Commencement of enjoyment of rights under a most-favoured-nation clause) which, in his view, should be corrected. Under the second part of paragraph 2 of article 18, the actual treatment would follow communication of the consent, whereas under article 10 the two would automatically coincide.

41. The broad basis on which LAFTA rested was the application of the most-favoured-nation clause. That was provided for in article 18 of the Montevideo Treaty,[12] which was very similar to the most-favoured-nation clause in the General Agreement on Tariffs and Trade. As was explained in the summary and conclusions of LAFTA's plan of action for the application of the clause (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 8, annex I), the unconditional character of the most-favoured-nation clause had initially predominated. Subsequently, however, the legal validity and relevance of that approach had been called into question, for it conflicted in practice with another basic principle of the Treaty, namely, that of reciprocity, which some countries regarded as the cornerstone of the system. It had been recognized that application of the clause should be based upon equitable and reasonable reciprocity, and the need to grant equivalent compensation had implicitly established the supremacy of the principle of reciprocity over that of the most-favoured-nation clause.

42. He mentioned those facts simply to show that material reciprocity was not the only criterion in the application of the most-favoured-nation clause; there were others too, such as reasonable and equitable conditions and virtually equivalent compensation. That, in his view, was a concept that should be

[12] Treaty establishing a free-trade area instituting LAFTA, signed at Montevideo on 18 February 1960. See *Official Records of the Economic and Social Council, Thirtieth Session, Supplement No. 4*, annex II.

brought out clearly in the commentary, even if it were believed to be covered by article 8, which allowed the parties a measure of freedom to contract, or by article 26 (Freedom of the parties to agree to different provisions). In their existing wording, articles 8, 9 and 10 referred solely to the concept of material reciprocity.

43. Mr. SCHWEBEL said he found the dismissal of the conditional most-favoured-nation clause, in the commentary to articles 8, 9 and 10 somewhat premature. A few such clauses still survived in treaties between the United States of America and other States. Consequently, while paragraph (31) of the commentary was accurate in stating that the conditional clause had "virtually disappeared", he considered that paragraphs (10) and (11) tended to overstate the case. He therefore suggested that, in paragraph (19), the word "almost" be added before the word "completely" and that, in paragraph (11), the word "largely" be added after the word "now".[13]

44. He would be interested to hear the Special Rapporteur's views, as well as those of the other members of the Commission on the EEC proposals regarding reciprocity (A/CN.4/308 and Add.1 and Add.1/Cil.1, sect. C, 6, para. 15).

45. Mr. TSURUOKA said that, at the next meeting, he intended to submit a number of amendments to articles 8, 9 and 10.

46. Mr. RIPHAGEN said he found it difficult to discuss articles 8, 9 and 10 without reference to the new article 10 *bis* proposed by EEC (*ibid.*) and referred to in the Netherlands Government's comment (*ibid.*, sect. A). It would be helpful if the Commission could take the proposed article into account during its discussion, since it dealt with the question of the effect of a most-favoured-nation clause made subject not to material reciprocity but to other conditions.

47. Mr. JAGOTA said his impression was that, while the distinction between conditional and unconditional clauses, as they applied to most-favoured-nation treatment, had held good in the past, the same could not be said of the future.

48. In prescribing rules of general application, certain major trends had to be borne in mind. One such trend was the proliferation of associations formed for the purpose of promoting various aspects of trade and commerce and of development in general. Such associations were of two kinds. On the one hand, there were associations such as EEC, which had the capacity to enter into agreements containing a most-favoured-nation clause and which, it had been agreed, fell outside the scope of the draft articles. On the other, there were associations formed by developing countries for the purpose of negotiating special benefits in the interests of development. The latter generally had to be reconciled within the context of the operation of the most-favoured-nation clause and, in so far as they did not have a separate legal personality, the draft articles would apply.

49. A country might join a number of associations or groupings, under each of which special but differing benefits in the sphere of commerce and trade were negotiated and a special régime established. India, for example, had concluded a tripartite agreement with Yugoslavia and Egypt for the establishment of a mutually beneficial arrangement in regard to customs and other matters, for which no special machinery having a separate legal personality existed. It was likewise party to the Bangkok Agreement,[14] which again involved an arrangement for the granting of mutual benefits. In all such cases, the question arose as to which of the benefits granted by a country to a group of others in the same association would apply under the most-favoured-nation clause, by virtue of the draft articles, to the members of another association. That situation was not covered by article 21 (The most-favoured-nation clause in relation to treatment under a generalized system of preferences). It was in that respect that the element of conditionality might arise, and the Commission should consider whether that condition should be expressed in terms of material reciprocity or in some other form. For example, if India agreed to accord the same privileges to the members of one group as it gave to those of another, but only in so far as it was able to do so or subject to its best endeavours, that would amount to a condition in regard to the application of the most-favoured-nation clause to the other beneficiaries to which it had also granted benefits. His question, therefore, was whether that type of problem should be regarded as involving conditions of reciprocity or of the application of the most-favoured-nation clause, or whether it should be regarded as falling within the scope of rights under the most-favoured-nation clause.

50. He also wondered whether it was accurate to talk of only two types of most-favoured-nation clause, conditional and unconditional, the sole condition being that of material reciprocity, or whether there might not also be an intermediate position. If so, that should be anticipated in the drafting of articles 8, 9 and 10; if not, the situation was perhaps covered by article 11.

The meeting rose at 6 p.m.

[13] See *Yearbook... 1976*, vol. II (Part Two), pp. 24 and 27, doc. A/31/10, chap. II, sect. C, commentary to articles 8, 9 and 10.

[14] First agreement on trade negotiations among developing member countries of ESCAP. For text, see TD/B609/Add.1 (vol. V), pp. 177-187.

1489th MEETING

Tuesday, 30 May 1978, at 10.05 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis,